Filed 5/22/12 Wertheim v. Currency Corp. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WERTHEIM, LLC, Plaintiff, Appellant and Respondent, v. CURRENCY CORPORATION et al., Defendants, Respondents and Appellants.	B218547 (Los Angeles County Super. Ct. No. BC328263)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert Hess, Judge. Affirmed.

Law Offices of Robert S. Besser, Robert S. Besser; Law Office of Anthony Kornarens and Anthony Kornarens for Plaintiff, Appellant and Respondent.

Law Offices of Alan S. Gutman, Alan S. Gutman; Benedon & Serlin, Douglas G. Benedon and Gerald M. Serlin for Defendants, Respondents and Appellants.

These are cross-appeals from a judgment and post-judgment award of attorney fees and costs. Defendant Currency Corporation, which is owned and operated by defendant Parviz Omidvar (collectively "Currency"), is a finance lender. Currency made numerous loans to Alfred Cleveland, the son of a successful songwriter, secured by assignments on royalty payments owed to Cleveland by third parties. When a dispute arose over the loans, Cleveland sued Currency and assigned his royalty rights and some of his claims against Currency to Wertheim, LLC, which joined the lawsuit. Cleveland then settled with Currency, and the matter proceeded to trial on Wertheim's claims. After several rounds of demurrer, a motion for judgment on the pleadings, and a bifurcated trial, the court entered judgment in favor of Wertheim and awarded it attorney fees.

Both Wertheim and Currency appeal from the judgment and award. Wertheim contends the trial court erred in sustaining in part Currency's demurrer, granting in part its motion for judgment on the pleadings, and limiting its recovery of attorney fees. Currency contends the trial court erred in *denying* in part its motion for judgment on the pleadings and in awarding Wertheim any attorney fees.

We affirm.

BACKGROUND

Cleveland's father was Alfred W. Cleveland (Cleveland Sr.), a successful songwriter on the Motown label who, as a result of his work, owned rights to royalty income of approximately $100,000 per year, payable primarily by the American Society of Composers, Authors and Publishers and The EMI Group (collectively ASCAP). From 1994 to 1996, Currency made loans to Cleveland Sr., secured by the royalty stream.

Cleveland inherited the royalty stream when Cleveland Sr. died in August 1996. On August 14, 1996 and December 11, 2001, Currency issued Cleveland lines of credit, each in the amount of $75,000. In both credit agreements, Currency agreed to advance funds to Cleveland on a revolving basis so long as it was satisfied "in its sole discretion of the value and liquidity of the" royalty stream. The credit agreements contained Cleveland's promise that the funds loaned would be used for commercial purposes only.

On September 25, 1998, Currency and Cleveland entered into a security agreement (the 1998 Security Agreement) pursuant to which Currency agreed to receive Cleveland's royalty payments directly from ASCAP, apply them to any outstanding loan balances, and redirect to Cleveland any amount that exceeded the balances.

Currency made almost 200 loans to Cleveland under the lines of credit, memorializing each with a separate promissory note denoted "Commercial Note." The promissory notes were materially identical. Cleveland promised to pay Currency principal sums ranging from $31 to $44,426, interest at a rate of 72 percent per year, plus a "processing fee" typically of 20 percent. The loans had terms of from 5 to 18 months. Each note set forth these terms of the loan and provided that "Any unpaid payments of . . . interest . . . shall bear interest from their respective maturities . . . ." The notes also provided, "In no event shall Borrower be obligated to pay interest at a rate in excess of the highest rate permitted by applicable law. . . ."

Disputes arose between Cleveland and Currency over the amount of interest charged, the fees assessed, and Currency's alleged practice of retaining more royalties than were necessary to cover loan balances. On February 3, 2005, Cleveland instituted this lawsuit, alleging causes of action for breach of contract, breach of fiduciary duty and violation of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.).

In April and August, 2005, Cleveland assigned his music library and any claims against Currency to entities controlled by David Pullman, Wertheim's sole owner. The assignment agreements granted Pullman complete control of any litigation not only of the assigned claims but also of Cleveland's nonassigned claims. The Pullman entities then reassigned the claims to Wertheim, which joined the lawsuit and filed a second amended complaint.

After two rounds of demurrer, plaintiffs asserted in a fourth amended complaint causes of action for violation of the UCL, fraud, conversion, breach of fiduciary duty, money had and received, and breach of contract, alleging Currency breached the promissory agreements by charging illegal fees and interest rates and deceived Cleveland by failing to disclose that its rates were usurious and that royalties exceeded loan

balances. In the eighth cause of action, plaintiffs alleged Currency breached 187 separate promissory notes entered into between August 16, 1996 and April 12, 2004. In the ninth through ninety-fourth causes of action plaintiffs itemized the breaches, alleging breach of 86 separate promissory notes entered into between August 16, 1996 and November 11, 2003. Plaintiffs sought restitution, damages, punitive damages, declaratory relief, and an accounting. Specifically under their UCL cause of action, plaintiffs sought "restitution of all principal, interest, charges or other recompense collected by Defendants as a result of the purported loans."

On May 11, 2006, Currency demurred to the fourth amended complaint. It argued any claim based on a transaction occurring more than four years before the complaint was filed (that is, before February 3, 2001), was time barred, the loans were not usurious, and even if they were, Currency had no duty to explain the legal effect of the loans to Cleveland.

In June 2006, Cleveland settled his claims against Currency for $18,000. In a recitation in the settlement agreement, Cleveland admitted the lawsuit against Currency had no factual basis, as he and Currency shared no fiduciary relationship, the loans were for commercial purposes only, and he understood the terms of each loan. He admitted Currency had never misrepresented the terms of any loan or retained more royalties than were due to it, and in the end had provided a full and satisfactory accounting.

On July 7, 2006, the trial court sustained Currency's demurrer in part without leave to amend. It found that any claim based on a transaction occurring before February 3, 2001 was time barred, and plaintiffs' fraud and conversion allegations failed to state a cause of action. (Wertheim expressly abandons any appeal regarding its cause of action for conversion.) The court overruled Currency's demurrer to the causes of action for breach of fiduciary duty. It also overruled Currency's demurrer to the causes of action for breach of contract and unfair practices insofar as they were predicated on transactions occurring after February 3, 2001.

On August 4, 2006, Cleveland dismissed his claims against Currency.

On August 23, 2006, Currency moved for judgment on the pleadings on the UCL and breach of fiduciary duty causes of action, arguing Cleveland's exit from the lawsuit left Wertheim without standing to proceed on them. Wertheim opposed the motion. The trial court granted the motion without leave to amend, explaining in a minute order that Cleveland's causes of action for unfair business practices and breach of fiduciary duty were nonassignable.

Before trial, the court held a hearing pursuant to Evidence Code section 402 on whether Currency's loans to Cleveland were commercial or consumer loans, and if commercial loans whether they were exempt from interest and fee limitations set forth in the California Finance Lenders' Law, Financial Code section 22000 et seq. Omidvar was the only witness called. He testified Currency made exclusively commercial loans, and citing the 1996 and 2001 credit agreements with Cleveland, testified Cleveland had warranted that the loans made to him were for commercial purposes. Although not all promissory notes referenced the credit agreements, all loans made to Cleveland were drawn against the lines of credit. Omidvar relied on Cleveland's representation regarding the commercial use of the funds and did not attempt to verify whether the representation was true.

The court found that all loans made to Cleveland were commercial loans, and those over $5,000 were exempt from interest and fee limitations set forth in the Financial Code while those under $5,000 were not exempt.

The matter proceeded to jury trial on Wertheim's breach of contract claims.[1] Currency conceded that it had charged illegal interest rates and administrative fees on approximately 44 notes in amounts under $5,000, disputing only the computation of damages. Wertheim's expert testified the damages were $102,007. Currency's expert testified Wertheim's damages were $38,554.48. The jury accepted Currency's evidence

[1] At the close of plaintiff's evidence the trial court granted Omidvar's unopposed motion for nonsuit, leaving Currency Corp. as the only defendant.

and rejected Wertheim's, finding by special verdict that Wertheim's damages were $38,554.48. Judgment was entered accordingly.

After trial, Wertheim and Currency both moved for an award of attorney fees as the prevailing party, Wertheim seeking $316,335. Wertheim argued it was the prevailing party because it received a net monetary recovery in the action. Currency argued it prevailed because Wertheim obtained no recovery on a majority of the promissory notes at issue in the litigation and the monetary recovery it achieved was only a fraction of what it had sought. The trial court found Wertheim was the prevailing party because "the basic premise of the contract claims—that the interest rates and/or administrative charges on many of the notes exceeded those permitted by law—was proven . . . ." But it took serious issue with Wertheim's quantification of its fees, finding no support for most of the work performed or for some of the rates requested. For example, the court explained that Wertheim sought attorney fees "for a period long before Wertheim ever asserted a contract-based claim which might entitle it to attorneys fees," and the legal fees were "materially increased by: (a) the existence of a variety of claims in the Third and Fourth Amended Complaints which had no legal merit; (b) the inclusion of claims against Mr. Omidvar personally which there was absolutely no attempt to prove at trial; and (c) the assertion of dollar amounts alleged to be owed which by any measure far exceeded a rational calculation of any damages potentially recoverable by Wertheim." The court also had "the distinct impression that animosity between the two sides—whether personal or as business rivalry—drove this litigation to a significant extent." It awarded Wertheim $142,000.

Wertheim and Currency appeal from the resulting judgment and order.

DISCUSSION

I. WERTHEIM'S APPEAL

Wertheim contends the trial court erred when it (1) found Cleveland's claims for breach of fiduciary duty and unfair business practices were nonassignable; (2) sustained Currency's demurrer to the fraud cause of action; (3) found that claims on contracts entered into more than four years before the case was filed were time barred; and

(4) found that loans in excess of $5,000 were not subject to consumer loan provisions of the Financial Code.

A. Assignability of UCL and Breach of Fiduciary Duty Causes of Action

Wertheim alleged that Currency's practice of making loans at illegal interest rates and charging illegal administrative fees violated the UCL. It also alleged that Omidvar and Currency Corp. had established a confidential relationship of trust with Cleveland and controlled his financial affairs, which created a fiduciary relationship. It alleged that "[a]s a regular course of its business, Currency Corp. ties up and directly collects the revenue and income to which the Borrowers would otherwise be entitled, but does not account to, or inform, the Borrowers of the amounts collected on their behalf . . . ." Instead, Currency Corp. breached its fiduciary duties by failing to disclose that the royalty income it had received from ASCAP exceeded outstanding loan balances, which forced Cleveland to seek loans from Currency. It also breached its fiduciary duties by making Cleveland loans that violated the Financial Code.

Currency moved for judgment on the pleadings on Wertheim's UCL and breach of fiduciary duty causes of action, arguing they were nonassignable. The trial court agreed, granting Currency's motion. We conclude that the causes of action were nonassignable.

1. Assignability of UCL Claims

"A thing in action is a right to recover money or other personal property by a judicial proceeding." (Civ. Code, § 953.) "A thing in action, arising out of the violation of a right of property . . . may be transferred by the owner." (Civ. Code, § 954.) "'[A]ssignability of things [in action] is now the rule; nonassignability, the exception . . . .' [Citations.]" (*Webb v. Pillsbury* (1943) 23 Cal.2d 324, 327.)

One exception to the general rule of assignability appears in Business and Professions Code section 17204, which provides that a UCL action may be prosecuted only "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.) A noninjured assignee thus has no standing to pursue the assignor's UCL claim. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1002.)

Wertheim argues the above rule applies only to representative actions under the UCL, not personal actions, and the assignee of an ownership interest in property unfairly obtained by a third party may bring a personal UCL action to recover restitution from that party. The argument lacks merit. Assuming such an assignee could be said to have been injured or "lost" money, any injury or loss arose out of its choice to give consideration for the assignment, not "as a result of" the third party's wrongful actions.

2. Breach of Fiduciary Duty

Another exception to the general rule of assignability is that causes of action founded upon wrongs of a purely personal nature are nonassignable. (*Essex Ins. Co. v. Five Star Dye House, Inc*. (2006) 38 Cal.4th 1252, 1263; *Webb v. Pillsbury*, *supra*, 23 Cal.2d at p. 327.) For example, a claim for legal malpractice may not be assigned because "the attorney-client relationship (although containing contractual elements) is unique and involves a highly personal and confidential relationship, making the relationship '. . . more analogous to a contract of a personal nature than to an ordinary commercial contract' [citation]." (*Kracht v. Perrin et al.* (1990) 219 Cal.App.3d 1019, 1023.) The issue is whether Currency's fiduciary relationship with Cleveland was so personal and confidential that Currency's breach of duties arising from such a relationship was of a purely personal nature. We conclude it was.

Absent special circumstances, the relationship between banks or lenders, and their loan customers, is not a fiduciary one. (E.g., *Oaks Management Corp. v. Superior Court* (2006) 145 Cal.App.4th 453, 466.) And "as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Nymark v. Heart Fed. Sav. & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096 [finding no lender duty of care in preparing a property appraisal].) But lenders may in some cases "affirmatively offer trust and other specifically fiduciary services, and as such are in a position to do great harm if the trust agreement is broken in bad faith." (*Copesky v. Superior Court* (1991) 229 Cal.App.3d 678, 691.) "It is the nature of the contract that is critical, whether it reflects . . . a fiduciary relationship in which the financial dependence or personal

security by the damaged party has been entrusted to the other." (*Mitsui Manufacturers Bank v. Superior Court* (1989) 212 Cal.App.3d 726, 731.)

Here, Wertheim alleged that on the day Cleveland Sr. died, "Omidvar told Cleveland that [Cleveland Sr.] had requested Omidvar to look after and take care of Cleveland and that Omidvar would do so." Omidvar "stated to Cleveland that Omidvar considered Cleveland 'to be like family'; that Omidvar considered Cleveland to be a 'son' to him and would treat him as a son; and that Omidvar should be trusted to protect Cleveland's financial interests." At least once a year, Omidvar "spoke to Cleveland's mother who was living alone and stated to her that she should and could trust Omidvar; that Omidvar considered Cleveland to be a son to him and would treat Cleveland like a son; that Omidvar was looking out for Cleveland's financial interests; and that they both (Cleveland and his mother) were part of his family and would be treated just like family. Omidvar made these statements for the purpose of inducing Cleveland's mother to trust Defendants so that she would tell Cleveland that he should trust Defendants." Cleveland believed Omidvar's representations, and a "trusting and confidential relationship" existed between them.

Although these allegations of special circumstances navigate the general rule that a lender and borrower do not share a fiduciary relationship, they fall afoul of the rule that claims founded upon wrongs of a purely personal nature are nonassignable. Wertheim does not attempt to explain how Omidvar's quasi father/son, trusting and confidential relationship with Cleveland was nonpersonal in nature. On the contrary, it implicitly disavows allegations of a special relationship between Omidvar and Cleveland and maintains that the relationship involved nothing more than "loans" and "property rights." (We note, however, that when Wertheim argues elsewhere in its brief for heightened duties of disclosure, it reemphasizes the personal nature of Omidvar's and Cleveland's relationship.) Assuming Wertheim wishes neither to abandon the breach of fiduciary duty cause of action nor engage in opportunism, we proceed to its only argument defending the cause, which is that "cases" confirm the "general rule that claims for breach of fiduciary duty are assignable."

Wertheim relies on one case for the purported general rule, *Certified Grocers of California v. San Gabriel Valley Bank* (1983) 150 Cal.App.3d 281 (*Certified Grocers*). There, a judgment creditor attempted to recover on the judgment debtor's breach of fiduciary duty cause of action against a bank that had permitted one of the debtor's officers to drain the debtor's accounts. The debtor alleged the bank colluded in the officer's appropriation and conversion "'to his own use and benefit monies of the judgment debtor on deposit.'" (*Id*. at p. 289.) In an opinion authored by Justice Lillie of this court, we held a judgment creditor may reach a debtor's cause of action insofar as it is assignable. The debtor's cause of action for breach of fiduciary duty in that case was assignable, we held, because the alleged conversion of money constituted a tort committed against property. On the other hand, we held the judgment debtor's claim for punitive damages was nonassignable. (*Ibid*.)

Certified Grocers is distinguishable. There, the assigned cause of action was against a nonfiduciary, the bank, that had colluded with a third party, the debtor's officer, to breach the third party's fiduciary duty to the debtor, resulting in conversion of the debtor's funds. The cause of action thus arose "out of the violation of a right of property," and was therefore assignable. Here, Wertheim alleges Currency breached its *own* fiduciary duty, the breach resulting not in conversion of funds (which Wertheim no longer alleges), but in the creation of financial ties that would not have been possible but for the trust Cleveland had put in Omidvar due to their close personal relationship. On this record, the cause of action was founded upon wrongs of a purely personal nature, and was nonassignable.

B. Demurrer to the Fraud Cause of Action

1. Proceedings Below

In its fraud cause of action, Wertheim alleged five acts of wrongful concealment and one false promise. It alleged Currency failed to disclose: (1) the terms and costs of the loans; (2) the illegality of interest and fees; (3) the compounding of interest; (4) "the fact that Defendants intended to charge, and would charge, interest rates and fees in excess of those permitted by California law"; and (5) the fact that Currency was

"'loaning' Plaintiffs their own money." Currency affirmatively misrepresented in the promissory notes that as a lender it would "collect[] only legal amounts of interest," when it "intended to collect, and did collect, the actual amount of administrative fees and interest stated in the Promissory Notes," which were illegal.

Copies of the promissory notes were attached as Exhibit D to the fourth amended complaint. Each note set forth the interest rate and "processing fee" to be charged and stated that "[i]n no event shall Borrower be obligated to pay interest at a rate in excess of the highest rate permitted by applicable law from time to time in effect."

Currency demurred to Wertheim's fraud cause of action, arguing it owed no duty to explain the legal effect of the loans or wisdom of entering into them.

Wertheim opposed the demurrer. It argued Currency and Cleveland had established a fiduciary relationship, which gave rise to a duty of affirmative disclosure. Currency breached the duty with "(i) constantly repeated false promises of honesty, protection and 'looking out for Cleveland's best interests'; (ii) written lies in all 240 of the Promissory Notes that falsely promised that only legal interest and fees would be collected; and (iii) active concealment of the entire scheme by failing to provide any accountings and thereby hiding from Plaintiffs the fact Plaintiff was literally borrowing his own money (the Royalty Income that Defendants collected prior to 'loaning' it to Plaintiffs) and was paying grossly illegal interest and fees to accomplish one very simple goal—the collection by Defendants of hundreds of thousands of dollars of Plaintiffs' money to which Defendants were not entitled." Wertheim stated it did not allege that Currency should explain the legal effect of the loans or wisdom of entering into them, only that it "lied in writing by stating that not more than legal interest would be collected." (Bold typeface and underlining omitted.) Wertheim did not request leave to amend in the event the court sustained the demurrer or indicate how it could amend successfully.

Commenting in a minute order that the fraud claim presented an "allegation of promis[ing] only legal interest rate," the trial court sustained Currency's demurrer without leave to amend.

On appeal, Wertheim argues the fraud consisted of (1) concealment of the fact that Currency was loaning Cleveland his own money, i.e., money received on his behalf from ASCAP, and (2) "written lies in all 240 Promissory Notes that falsely promised that only legal interest and fees would be collected."

2. General Principles

"One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." (Civ. Code, § 1709.) "A deceit, within the meaning of the last section, is . . . [t]he suppression of a fact, by one who is bound to disclose it . . . ." (Civ. Code, § 1710.) The elements of fraud are "'(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "The elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp*. (1992) 6 Cal.App.4th 603, 612-613.) A mere failure to disclose, absent a duty to disclose, does not constitute fraud. (*Crayton v. Superior Court* (1985) 165 Cal.App.3d 443, 451.)

"The function of a demurrer is to test the legal sufficiency of the challenged pleading by raising questions of law. The demurrer tests the pleading alone and not the evidence or other extrinsic matters. The demurrer lies only where the defects appear on the face of the pleading." (*Hayter Trucking, Inc. v. Shell Western E&P, Inc*. (1993) 18 Cal.App.4th 1, 17.) On review, "we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause

of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

3. Abandoned Allegations

Wertheim alleged in the complaint that Currency failed to disclose the rate of interest to be charged, the legality of that rate, the actual costs of the loans, and the compounding of interest. Wertheim abandoned these allegations on demurrer either expressly or by its silence, and disclaims them in its opening brief on appeal. In any event, the allegations failed to state a cause of action because they contradicted the promissory notes themselves, each of which disclosed the interest rate, the processing fee, and the compounding of interest. (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83 ["If the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits"].)

4. False Promise

Wertheim alleged below and argues on appeal that the provision in each promissory note that "[i]n no event shall Borrower be obligated to pay interest at a rate in excess of the highest rate permitted by applicable law" constituted a false promise by Currency to collect only legal interest from Cleveland. The promise was false because Currency always intended to charge and collect illegal interest. The argument is without merit.

A false promise is "[a] representation of the maker's own intention to do or not to do a particular thing" when the promissor "does not have that intention." (Rest.2d, Torts, § 530.) The rule "finds common application when the maker misrepresents his intention to perform an agreement made with the recipient. . . . Since a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such an intention is fraudulent and actionable in deceit . . . ." (*Id.* at com. (c); *Lazar v. Superior Court, supra,* 12 Cal.4th at p. 638.)

The interest limitation did not misrepresent Currency's intent because it did not constitute a promise by Currency to do or not do a particular thing, but instead set forth the parties' agreement on the scope of *Cleveland's* promise to pay interest. It may be that Currency concealed its intent not to *accept* the limitation on Cleveland's promise, but one party's false acceptance of another party's promise is not itself a false promise. Neither could Currency's false acceptance of the interest limitation injure Cleveland, because it put Cleveland under no obligation to pay illegal interest. The demurrer to Wertheim's cause of action for promissory fraud was therefore properly sustained.

5. Failure to Disclose the Source of Funds

Wertheim alleged Currency concealed that it had collected royalty income beyond that necessary to pay off Cleveland's outstanding loans, i.e., that Cleveland had a positive balance on account. It concealed that future loans were therefore unnecessary—that it was loaning Cleveland "his own money." We do not understand Wertheim to contend Currency literally loaned Cleveland his own money, i.e., identifiable dollars collected from ASCAP. The allegation is that pursuant to the 1998 Security Agreement, Currency promised to make advances on royalties not yet collected, remit to Cleveland any royalties that exceeded outstanding loan balances, and keep an account of what had been collected and how much was owed. Currency breached the agreement by concealing that royalties exceeded balances on outstanding loans and by failing to remit excess funds to Cleveland. Had it fulfilled its obligations under the 1998 Security Agreement, Cleveland would not have sought unneeded loans.

The parties do not dispute that such a practice, if proven, would be wrongful. The questions are whether damages caused by the practice are recoverable in tort and, if they are, whether Wertheim has standing to pursue them.

"A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. Instead, '"[c]ourts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies."' [Citation.]" (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 643, superseded by statute on another

ground as stated in *Rosen v. State Farm General Ins. Co*. (2003) 30 Cal.4th 1070, 1079-1080.)

Despite Wertheim's use of fraud terminology, the alleged misconduct by Currency—breach of its agreement to account for the money it collected on Cleveland's behalf, pay off his loans, and remit the overage—describes, at most, a breach of the 1998 Security Agreement or breach of fiduciary duty. To the extent the misconduct constitutes breach of the security agreement, Wertheim's fraud claim "is an improper attempt to recast a breach of contract cause of action as a tort claim. Nor is there any social policy that would demand resort to tort remedies." (*BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc*. (2004) 119 Cal.App.4th 848, 853.) To the extent Wertheim describes a breach of fiduciary duty, as discussed above, the cause of action is personal to Cleveland and may not be assigned.

6. Conclusion

Currency's demurrer to Wertheim's fraud cause of action was properly sustained. Because Wertheim offered no indication that it could successfully amend the fourth amended complaint, leave to amend was properly denied.

C. Demurrer: Breach of Contract Limitations Period

In its causes of action for breach of contract, Wertheim alleged Currency made 187 loans to Cleveland, memorializing the loan agreements with promissory notes, many of which were attached to the complaint as Exhibit D. Each note set forth the interest rate and processing fee and stated the interest and fee would accrue "from the date the proceeds of the loan . . . are disbursed." Wertheim alleged the processing fees "were in fact interest."

The ninth through fifty-eighth causes of action pertained to loans made between August 30, 1996 and November 13, 2000. The fifty-ninth through ninety-fourth causes of action pertained to loans made from February 16, 2001 to November 11, 2003. As discussed above, each promissory note provided that "[i]n no event shall Borrower be obligated to pay interest at a rate in excess of the highest rate permitted by applicable law." Currency breached this provision by "charging" more in interest and

administrative fees than permitted by law. Wertheim sought repayment of all principal, interest and other charges collected by Currency; damages for breach of contract, including for all illegal fees and interest collected; and a declaration that the promissory notes were unconscionable.

Wertheim alleged the breaches were not discovered until 2005. Cleveland filed his initial complaint on February 3, 2005.

Currency demurred to the ninth through fifty-eighth causes of action on the ground that the loans to which they pertained were made more than four years before the complaint was filed, rendering claims on those loans time barred. The court sustained the demurrer.

"A cause of action for breach of contract requires pleading of a contract, plaintiff's performance or excuse for failure to perform, defendant's breach and damage to plaintiff resulting therefrom." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489.) The limitations period for a cause of action for breach of written contract is four years. (Code Civ. Proc., § 337(1).) The cause of action "ordinarily accrues at the time of breach even though the injured party is unaware of his right to sue [citation]." (*Donahue v. United Artists Corp.* (1969) 2 Cal.App.3d 794, 802.) A pleading that on its face is barred by the applicable statute of limitations does not state a viable cause of action. (*McMahon v. Republic Van & Storage Co*. (1963) 59 Cal.2d 871, 874; *Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 440.)

The ninth through fifty-eighth causes of action pertained to loans made more than four years before the complaint was filed. The demurrer to those causes of action was therefore properly sustained.

Wertheim argues that an action for recovery of usurious interest accrues on the date the interest is paid, not the date it is charged. That is correct: A debtor's action to recover usurious interest "does not accrue until the usury has been actually paid either in money, or money's equivalent. . . . Hence under this rule the [usury] statute begins to run only after the lawful debt has been actually paid, and not from the time of the agreement to pay usury." (*Westman v. Dye* (1931) 214 Cal. 28, 38-39; *In re Vehm Engineering*

Corp. (9th Cir. 1975) 521 F.2d 186, 189; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 546, p. 697 ["An odd rule of delayed accrual governs actions to recover usurious interest paid on a note. The excess over legal interest is treated as a payment on the principal; hence, no usury is deemed paid until the entire debt is satisfied, and the statute begins to run only at that time"].) However, Wertheim did not bring a usury cause of action for recovery of illegal interest, but a breach of contract cause of action for recovery of principal, interest, fees, damages, and declaratory relief. A cause of action for breach of contract accrues at the time of breach.

Wertheim argues breach of each promissory note occurred when Currency *collected* illegal fees and interest, not when the illegal fees and interest were charged to Cleveland's account. It further argues that the breach of contract causes of action could not accrue on the date fees and interest were charged because Cleveland did not suffer any injury until he paid the excess fees and interest. The arguments are meritless for several reasons.

First, the argument that breach occurred when illegal interest was collected contravenes the complaint itself, in which Wertheim alleges Currency breached the promissory notes by *charging* excess interest. In any event, it is not true that Cleveland suffered no damages until he paid the illegal fees and interest. He suffered at least nominal damages by virtue of having incurred an unjust debt on account due to the processing fee on each unnecessary loan. (Civ. Code, § 3360 ["When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages"].) He was also injured when Currency withheld Cleveland's funds to pay illegal fees and usurious interest charged on prior loans. As Wertheim alleged, "if only legal interest and fees had been charged and collected on the loans, [Cleveland] would not have had to borrow from [Currency.]"

Even if Currency did not breach any promissory note until illegal fees and interest were collected, nor Cleveland sustain any injury until then, the ninth through fifty-eighth causes of action would still be time barred because Wertheim alleged that the interest and fees on all loans identified in those causes of action were actually paid—or Cleveland's

line of credit depleted—more than four years before the complaint was filed. We will explain.

The gravamen of the complaint was that most of the loans Currency made to Cleveland were unnecessary because the royalties Currency had already collected exceeded not only outstanding loan balances, but also the amount of each new loan. In other words, Currency already had a sufficient amount of Cleveland's money on account to cover each new loan when it was made, plus the accompanying processing fee. Instead of turning this money over to Cleveland outright, as it was obligated to do under the 1998 Security Agreement, or at least provide an accounting, as it was also obligated to do, Currency concealed the existence of the positive balance so that it could persuade Cleveland to take out more loans and pay substantial fees.

These allegations were supported by an account attached as Exhibit K to the complaint, which set forth the date of each loan, the principal amount, the processing fee charged, and the "Computed Payoff" date. The Computed Payoff date was the date when sufficient royalties existed in Cleveland's account to pay off the loan. According to Exhibit K, the Computed Payoff date for every loan made after mid-1999 *preceded the loan date*. In other words, for each loan made from mid-1999 on, royalties Currency had already collected exceeded not only the balances due on all outstanding loans but also the combined principal and administrative fee due on each new loan.

For example, all loans made in 2000 were offset by the royalties Currency had already collected from ASCAP in 1999 and early 2000. The principal and the 20 percent processing fee for each loan were either paid off from Cleveland's existing positive balance immediately, or Cleveland's line of credit was reduced by that amount. To narrow the example to a $300 loan made on November 13, 2000, the last loan made more than four years before the complaint was filed, the $300 principal and $60 fee were paid off (or Cleveland's line of credit was reduced) that same day with funds Currency had received from ASCAP in 1999.

Thus Cleveland was injured on the day the loan was made. This holds true for all loans alleged in the ninth through fifty-eighth causes of action.

In sum, Wertheim alleged that Currency breached the promissory notes by charging excess interest and fees. That interest and those fees were charged beginning " the date the proceeds of the loan . . . [we]re disbursed." It is undisputed that funds were disbursed when the notes were signed. Furthermore, Wertheim alleged that Currency's account carried a positive balance that was sufficient to cover any loan made after mid-1999, which made all loans after mid-1999 unnecessary. It follows that for every loan made after mid-1999, the loan agreement was breached and Cleveland suffered damage when the loan was made. Therefore, any cause of action on a loan made more than four years before the complaint was filed is time barred.

D. Commercial Loans

The Finance Lenders Law sets forth interest rate and fee limitations on certain consumer loans. (Fin. Code, §§ 22303, 22304.) These limitations do not apply to commercial loans. (Fin. Code, § 22001, subds. (b) & (c).) A consumer loan is any loan "the proceeds of which are intended by the borrower for use primarily for personal, family, or household purposes" (Fin. Code, § 22203) or any loan under $5,000, "the proceeds of which are intended by the borrower for use primarily for *other than* personal, family, or household purposes" (Fin. Code, § 22204, subd. (a), italics added). A commercial loan is one in the amount of $5,000 or more, or any loan under an open-end credit program, the proceeds of which are intended "for other than personal, family or household purposes." (Fin. Code, § 22502.)

At the Evidence Code section 402 hearing held before trial, the trial court found all the loans were intended for commercial purposes, and any note in the amount of $5,000 or more was exempt from interest and fee limitations. Wertheim contends the trial court's finding was unsupported by substantial evidence. We disagree.

To determine whether a loan is a commercial or consumer loan, "the lender may rely on any written statement of intended purposes signed by the borrower. The statement may be a separate statement signed by the borrower or may be contained in a loan application or other document signed by the borrower. The lender shall not be

required to ascertain that the proceeds of the loan are used in accordance with the statement of intended purposes." (Fin. Code, § 22203.)

Here, each promissory note was entitled "Commercial Note," and in each line of credit pursuant to which the notes were issued, Cleveland represented that he was "using [the] financing for commercial purposes only" and understood that Currency did "not provide funding for [personal] use." Omidvar testified at the hearing that he relied on Cleveland's representations when making the loans.

Pursuant to Financial Code section 22203, Currency was entitled to rely on Cleveland's representation, and was not required to investigate Cleveland's actual use of the funds he received. Substantial evidence therefore supported the trial court's finding that the loans were intended for commercial purposes.

II. CURRENCY'S APPEAL

A. Exempt Loans Less than $5,000

The trial court found that although loans for less than $5,000 were intended for commercial purposes, they were not exempt from interest and fee limitations set forth in the Finance Lenders Law. Currency contends this was error because the loans came within an exemption provided by Financial Code section 22551 for loans made pursuant to an open-ended loan agreement or similar agreement giving the borrower the right to draw upon all or any part of the line of credit.[2] We conclude the loans did not come within this exemption.

A loan of less than $5,000 will be deemed to be a loan of $5,000 or more for certain purposes if it is made "pursuant to a revolving or open-end loan agreement or similar agreement between a borrower and a licensed finance lender which gives the borrower the right to draw upon all or any part of the line of credit." (Fin. Code, § 22551, subd. (b).) The trial court found the loans to Currency did not fall within this exception in part because "there was in fact no firm credit line, because any advance could be refused for insufficient collateral as determined by" Currency.

---

[2] Currency assigns no other error to the trial court's ruling on this issue.

We agree. Here, the credit lines expressly made each loan dependent on Currency's "satisfaction in its sole discretion of the value and liquidity of the" royalty stream. Though there is evidence that Cleveland was never denied a loan because of a disruption in the royalty stream or for any other reason, Cleveland had no contractual right to draw upon "all or any part of" the credit line. He was permitted to draw upon only such amounts as Currency decided, in its sole discretion, would be covered by the royalty stream. The trial court was thus correct in finding that loans under $5,000 did not come within the exemption provided by Financial Code section 22551.

B. Attorney Fees

Currency contends the trial court's award of attorney fees to Wertheim was in error because Currency, not Wertheim, was the prevailing party because it defeated most of Wertheim's claims. We disagree.

Pursuant to Code of Civil Procedure section 1032, subdivision (a)(4), the term "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." If a party achieves only an incomplete victory on its claims, it is within the trial court's discretion to determine which is the prevailing party "or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.) In exercising its discretion, the trial court must "'compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.' [Citation.]" (*Ibid.*)

Wertheim prevailed on several contract causes of action and received a net monetary award. The trial court compared the relief awarded with the parties' overall litigation objectives and reasoned that although Wertheim recovered only a fraction of what it sought, it established its basic premise, which was that Currency charged more in interest and fees than was permitted by law. It was therefore within the court's discretion to find Wertheim to be the prevailing party.

C. Wertheim's Standing

Finally, Currency contends Wertheim had no standing to bring this action because the assignments from Cleveland under which its standing was derived were void.

Cleveland made two assignments to Pullman entities, in April and August, 2005. The Pullman entities later assigned Cleveland's rights to Wertheim. The April assignment granted the Pullman Group, LLC "full control over the [Currency] litigation, including the right to substitute and/or associate counsel of Pullman's choice to represent [Cleveland] in the [Currency] litigation." Pullman and Cleveland were to "share all proceeds of the [Currency] litigation equally on a 50/50 basis, after deduction by Pullman of all costs and attorney fees, including contingency fees and any and all future attorney fees, accounting fees, other professional fees and any and all other costs as estimated by Pullman at Pullman's sole discretion."

The August assignment granted Structured Asset Sales, LLC (SAS), another Pullman entity, "all of Cleveland's . . . claims, causes of action and right to seek damages, past, present or future (the "Assigned Claims"), against [Currency], . . . arising from or relating to loans or other financial transactions by or between Cleveland and one or more of the Currency Corp. Parties. The Assigned Claims include[d], but [were] not limited to, any and all contract claims, tort claims, statutory violation claims, and breach of fiduciary duty claims and include[d] the right to collect all damages arising therefrom . . . ." SAS was "granted the right to settle any or all of the Assigned Claims and grant full releases to any or all of the Currency Corp. Parties in the sole discretion of SAS without the knowledge or consent of Cleveland." It was further granted "full right and authority to pursue all legal remedies, including the filing of litigation, in its own name [or] Cleveland's name . . . ." The assignment was "binding on Cleveland in perpetuity," and he agreed that he would not "take any action that would affect or interfere with the right or ability of SAS to pursue the Assigned Claims." Cleveland "irrevocably grant[ed] David Pullman full power of attorney to issue instructions, retain and/or discharge attorneys to pursue litigation, sign any agreement on behalf of Cleveland . . . , and to do any other act whatsoever that is necessary, in David Pullman's sole discretion, to pursue

and/or settle the Assigned Claims." The Assignment applied to "any and all claims of Cleveland . . . against the Currency Corp. Parties."

In a prior appeal between these parties involving similar assignments, *Wertheim v. Omidvar* (Oct. 5, 2011, B218021) [nonpub opn.], we held that certain provisions of those assignments were void, but the void provisions were severable. We grant Currency's request for judicial notice of that opinion and conclude similarly here that although the assignments contained void provisions, those provisions are severable. Cleveland effectively assigned the contract claims that Wertheim ultimately brought to trial.

1. Assigned Claims

Currency does not contest Cleveland's ability to assign his contract rights, nor could it. (Civ. Code, § 1458 [a contract right may be transferred]; *Farmland Irrigation Co. v. Dopplmaier* (1957) 48 Cal.2d 208, 222 ["The statutes in this state clearly manifest a policy in favor of the free transferability of all types of property, including rights under contracts"].) A cause of action for breach of contract may also be assigned. (*Baum v. Duckor, Spradling & Metzger* (1999) 72 Cal.App.4th 54, 64-65.) Here, the only claims brought to trial were for breach of contract, which Wertheim was permitted to bring as Cleveland's assignee.

Instead, Currency contends the assignments were void due to illegality attending *nonassignable* claims, i.e., Cleveland's claims for violation of the UCL and breach of fiduciary duty. As we held in *Wertheim v. Omidvar*, these provisions are void because they (1) authorize Wertheim to practice law without a license; (2) commercialize the practice of law; and (3) grant Wertheim the power to veto settlement. But the provisions are severable because they were collateral to the central purpose of the contracts and at any rate moot because ultimately the lawsuit was litigated only on assignable claims.

2. Authorization of the Practice of Law Without a License

"No person shall practice law in California unless that person is an active member of the State Bar." (Bus. & Prof. Code, § 6125.) The term "practice of law," though not defined by Business and Professions Code section 6125, has long been defined by our Supreme Court as including, among other acts, the giving of "'legal advice and counsel

and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.'" (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535; *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128.) To give "legal advice and counsel" regarding a loan means, at minimum, to gather facts surrounding the loan (for example, its terms, any disclosures or representations made by the lender, and the lender's post-disbursement servicing practices), evaluate the legal import of those facts in light of pertinent contract and finance law, recommend a course of action to the borrower (litigation, for example), and periodically reevaluate the action through its various stages.

Here, the assignments granted Pullman (and ultimately Wertheim) "full control over the [Currency] litigation, including the right to substitute and/or associate counsel of Pullman's choice to represent [Cleveland] in the [Currency] litigation." They also granted SAS (and Wertheim) "the right to settle any or all of the Assigned Claims and grant full releases to any or all of the Currency Corp. Parties in the sole discretion of SAS without the knowledge or consent of Cleveland." The assignments further granted "full right and authority to pursue all legal remedies, including the filing of litigation, in its own name [or] Cleveland's name . . . ." There can be no question that in ceding to Wertheim the authority unilaterally to pursue (or not pursue) all legal remedies concerning his nonassignable claims and to control completely not only any litigation but also any settlement, Cleveland granted it the authority to give him legal advice and counsel. It makes no difference that Wertheim hired an attorney to prepare legal instruments or conduct any actual litigation—Wertheim retained the power to control the attorney's conduct of the litigation.

Pursuit and control of litigation constitutes the practice of law. To the extent that the assignments granted Wertheim the authority to control litigation of Cleveland's nonassignable claims, they are illegal and void. (*Estate of Butler* (1947) 29 Cal.2d 644, 651.)

3. Commercialization of the Practice of Law

In a similar vein, the provisions granting Wertheim control of nonassignable claims are void because they commercialized the practice of law. A nonlawyer may not intervene for profit in the conduct of legal proceedings. (*Estate of Butler*, *supra*, 29 Cal.2d at p. 647.) Any agreement that on its face or in effect authorizes him or her to do so is contrary to public policy and void ab initio and in its entirety. (*Id*. at pp. 647-648; *Estate of Molino* (2008) 165 Cal.App.4th 913, 922.)

Here, insofar as they pertained to nonassignable claims, the litigation control provisions authorized Wertheim and Pullman to intervene for profit in litigation to which they were otherwise strangers. Though Wertheim presented its own claims in the same litigation, Cleveland's nonassignable claims were his alone, as was any litigation on them.

4. The Power to Prevent Settlement

Even had Cleveland not ceded to Wertheim control of the *litigation* of nonassignable claims, the prohibition against *settlement* of those claims without Wertheim's permission was void. "An open-ended veto provision conflicts with the public policy which favors the full settlement of litigation and may frequently result in unnecessary trials." (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 883; see *Hall v. Orloff* (1920) 49 Cal.App. 745, 748 ["'a clause prohibiting the client from making a settlement of his litigation without the consent of his attorney is void as against public policy. [Citations.]'".) A client's "'lawsuit is his own. He may drop it when he will. Even an express agreement to pay damages for dropping it without his lawyer's consent would be against public policy and void." (49 Cal.App. at p. 749, citation omitted.) A settlement occurs only when two interested parties agree on the amount which ought to be realized from litigation. It would be an abrogation of their right to control their own property, and a misuse of the legal process, to prolong litigation for the sole purpose of permitting a stranger to dictate how much a defendant should pay to obtain peace. For this reason, the provision prohibiting settlement without Wertheim's permission is void.

5. Severability

We conclude, however, that the void provisions in the assignments are severable.

"In deciding whether severance is available, . . . '[t]he overarching inquiry is whether "'the interests of justice . . . would be furthered'" by severance.' [Citation.] 'Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.' [Citations.]" (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 996.) "If the court is unable to distinguish between the lawful and unlawful parts of the agreement, 'the illegality taints the entire contract, and the entire transaction is illegal and unenforceable.' [Citation.]" (*Birbrower, Montalbano, Condon & Frank v. Superior Court, supra*, 17 Cal.4th at p. 138.)

Here, the central purpose of the assignments was to transfer Cleveland's claims against Currency to Wertheim. Although the assignments improperly gave Wertheim control of nonassignable claims and purported to prevent Cleveland from settling them, those objectives were collateral and, in the end, nugatory. At trial, Wertheim presented only claims for breach of contract, causes of action that may be assigned and the assignee may control. We accordingly hold that to the extent the assignments gave Wertheim control of nonassignable claims, those provisions are severable from the assignments of Cleveland's contract claims. The provisions of the assignments remain effective and properly bestow standing on Wertheim to conduct this litigation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.