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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RODILYN ALMUETE, Plaintiff and Respondent, v. EILEEN W. CAMBE, Defendant and Appellant.	B265678 (Los Angeles County Super. Ct. No. BC519451)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Farrell, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Offices of Edgardo M. Lopez and Edgardo M. Lopez for Defendant and Appellant.

Law Offices of Jayne T. Kaplan and Jayne T. Kaplan for Plaintiff and Respondent.

INTRODUCTION

Defendant Eileen W. Cambe appeals from a judgment for plaintiff Rodilyn Almuete following a bench trial on Almuete's claim that Cambe breached a promissory note obligation to repay money that Almuete loaned her. Cambe argues that there is insufficient evidence to support the trial court's findings of breach and resulting damages. Cambe also argues that the doctrine of judicial estoppel precludes Almuete from asserting her claim in this litigation because she failed to disclose the unrepaid loans as an asset in a federal bankruptcy petition that she filed before suing Cambe. Cambe's arguments lack merit. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The circumstances surrounding the making of the loans at issue in this case are somewhat murky. From what we have gleaned from the record, Almuete and Cambe were not well-acquainted with each other. They met through a mutual friend. Not long after they were introduced, Cambe came to Almuete's office, asked to borrow money, and offered to pay 20 percent interest on the money she borrowed.

During 2007 and 2008, Almuete contends that she made a series of loans to Cambe that added up to $477,000. Almuete identified 12 loans in the following amounts: $32,000, $10,000, $35,000, $54,000, $65,000, $20,000, $25,000, $10,000, $25,000, $20,000, $65,000, and $100,000. These loans add up to $461,000. Almuete also contends that she loaned Cambe the proceeds of a

payroll check and money she received from a wire transfer. The amount of these additional loans is uncertain.

According to Almuete, when she made the loans to Cambe in 2007 and 2008, she and Cambe would together count the money in Almuete's office, and Cambe would, right then and there, sign a promissory note. Inee Cendana, Almuete's business partner, testified that she was present when some of the loans were made. Cendana stated that she saw Almuete give money to Cambe, following which Cambe would execute promissory notes.

The promissory notes that Cambe allegedly executed upon receipt of money from Almuete are not in the record. Almuete testified that she gave these notes to her accountant, who did not return them to her. Almuete did introduce into the record "renewal notes," which she described as documents that Cambe signed after the original notes became due. There were 12 renewal notes. The amounts stated on the renewal notes add up to $461,000.

Cambe made some interest payments on the loans in person at Almuete's office, and Almuete therefore continued to loan her money. Almuete subsequently realized, however, that Cambe was making the interest payments with the money Almuete was loaning her. Furthermore, at some point, Cambe stopped coming into Almuete's office altogether. Almuete surmised that Cambe was hiding from her. Almuete located Cambe on February 28, 2009.

On April 15, 2009, Cambe executed a promissory note in the amount of $477,000; the note stated an interest rate of 5 percent and was to be repaid on August 31, 2009. At some point after this promissory note was executed, Cambe gave Almuete a check for $477,000. That check was returned for insufficient

funds. Subsequently, Cambe gave Almuete a second check for $477,000. That check was dishonored because the account on which it was drawn had been closed.

Almuete filed for federal bankruptcy protection in January 2013. In her bankruptcy petition, Almuete did not list as an asset the money that Cambe allegedly owed her.

On August 27, 2013, Almuete sued Cambe in Los Angeles County Superior Court, asserting two claims. The first claim was described in the caption of the complaint as a claim for "Breach of Contract." On the complaint's next page, it was described in the heading as a claim for "Breach of Promissory Note." The allegations supporting the first claim refer to the April 15, 2009 promissory note for $477,000. The second claim alleged that Cambe was indebted to Almuete on an "open book account," based on the April 15, 2009 promissory note. For relief, the complaint sought "compensatory damages in the amount of $477,000, together with prejudgment interest . . . of 5[percent] per annum from April 15, 2009."

The trial court conducted a bench trial on May 28, 2015. Almuete called two witnesses: herself and Cendana. Cambe did not call any witnesses. At the end of the trial, the court announced that it was ruling in Almuete's favor, finding that Cambe had breached an obligation to repay loans that Almuete had made to her. The court directed Almuete to prepare the judgment. Almuete asked whether the judgment should be made out for $477,000, which was the amount of the April 15, 2009 promissory note. The court told Almuete to leave the judgment amount blank, because it would calculate the amount itself by adding up the principal of the loans. On May 29, 2015, the court entered judgment for Almuete in the amount of $461,000. The

court declined to award Almuete any interest on the ground that the rate was "usurious."

DISCUSSION

A. *Substantial Evidence Supports the Trial Court's Breach and Damages Findings*

Cambe challenges the trial court's findings that she breached an obligation to repay loans that Almuete made to her and that Almuete incurred damages as a result. Our review of Cambe's challenge is limited. So long as the findings are supported by substantial evidence, we will not disturb them on appeal, even if we would have evaluated the evidence differently and reached a contrary result had we presided over the proceedings below. (*Driscoll v. Graniterock Co.* (2016) 6 Cal.App.5th 215, 221.) In determining whether the findings are supported by substantial evidence, we view the record in the light most favorable to the prevailing party, giving that party the benefit of reasonable inferences from the evidence, and we neither reweigh the evidence nor make credibility determinations. (*Barickman v. Mercury Casualty Co.* (2016) 2 Cal.App.5th 508, 516.) Applying that deferential standard here, we conclude that substantial evidence supports the trial court's breach and damages findings.

1. *Breach*

Before turning to the sufficiency of the evidence underlying the trial court's breach finding, we must determine what it is that Cambe allegedly breached.

Almuete's first claim is styled as breach of contract on the complaint's caption, but then as breach of a promissory note in the heading for the first claim on the next page of the complaint. Our resolution of this discrepancy is governed by two related principles. First, "'the caption of the complaint constitutes no part of the statement of the cause of action.'" (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829, fn. omitted.) Second, it is instead "the allegations in the body of the complaint" that govern the proper denomination of a claim. (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 418.) Here, the allegations supporting the first claim refer to Cambe's execution of the April 15, 2009 promissory note for $477,000. Thus, we will treat the first claim as a claim for breach of a promissory note.[1]

A promissory note is a type of loan contract. (White et al., Uniform Commercial Code (6th ed. 2016) § 17:1.) Under the Uniform Commercial Code, a promissory note is a form of negotiable instrument. It memorializes an unconditional promise to pay a fixed amount of money, but no other undertaking; is executed by the promisor; and is payable on demand or at a particular time to the bearer or holder of the note. (Cal. U. Com. Code, § 3104, subds. (a), (e); see also *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1132.) Cambe argues that she signed no document satisfying the requirements of a promissory note; therefore, she could not possibly have

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[1] The allegations supporting the second claim, which is for an open book account, also refer to the April 15, 2009 promissory note.

breached an obligation in a promissory note and the trial court's breach finding has no grounding in the evidence.[2]

Cambe is incorrect. A document in the record, dated April 15, 2009, has the heading "PROMISSORY NOTE" at the top and was signed by Cambe.[3] This document meets the criteria for a promissory note. It recites Cambe's unconditional promise to pay a certain amount of money, $477,000, by a specified date, August 31, 2009. The document recites no other undertaking and it is payable to Almuete, as either bearer or holder of the note.

The testimony of Almuete and her business partner Cendana indicates that the April 15, 2009 promissory note replaced the renewal notes as the memorialization that Almuete had loaned money to Cambe. Cambe wrote two checks to Almuete for $477,000, the amount of the promissory note. The first check bounced for insufficient funds in Cambe's account and the second check was dishonored because Cambe's account had been closed. Almuete testified that Cambe never paid back the loans. Cambe offered no evidence to counter that testimony. The evidence thus supports the trial court's finding that Cambe breached the repayment obligation the promissory note imposed on her.

As a remedy, the trial court awarded Almuete $461,000, which is the amount of the principal of the renewal notes, not the

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[2] Cambe contends that the documents "establish[] that there was an agreement" between the parties such that would support "a breach of contract cause of action," but they do not confirm "the theory of breach of promissory note as alleged in the complaint."

[3] Cambe admitted in discovery that she signed the document.

amount of the principal of the April 15, 2009 promissory note.[4] The renewal notes were described as "promissory notes" in the parties' joint exhibit list. The renewal notes are not in the record on appeal; thus, we cannot determine if they actually qualify as promissory notes within the meaning of the Uniform Commercial Code. The trial court's judgment refers to "promissory notes," plural, which suggests that the trial court perhaps believed that the renewal notes were themselves promissory notes that Cambe breached.

On the other hand, Almuete sued for breach of the April 15, 2009 promissory note, not the renewal notes, and the trial court entered judgment for her on that claim. Because we must give Almuete, as the prevailing party, the benefit of reasonable inferences that can be drawn from the record (*Barickman v. Mercury Casualty Co.*, *supra*, 2 Cal.App.5th at p. 516), it is possible that the trial court simply considered the renewal notes to be support for Almuete's claim, but not the basis of her claim. On that view of the record, the renewal notes constituted evidence that the April 15, 2009 promissory note memorialized the loans that previously had been memorialized in the renewal notes, which had substituted for original promissory notes executed when the loans had been made but that Almuete no longer had in her possession.

The promissory note and the renewal notes were "admitted into evidence for the limited purpose of supporting the testimony given by witnesses." Cambe is mistaken in asserting that this limitation renders the documents incapable of proving the

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[4] Cambe makes no argument about this discrepancy, and thus we need not resolve it.

"existence" of a promissory note. The documents support the testimony that Cambe executed a promissory note.[5]

2. *Damages*

Cambe argues that Almuete's failure to introduce into evidence any checks or receipts to support her allegation that she gave money to Cambe proves, as a matter of law, that Almuete suffered no damages, an essential element of her claim for breach of a promissory note.[6] The premise of Cambe's argument is flawed. The introduction of checks or receipts would have been helpful to Almuete's case. But they were not absolutely necessary: Almuete was entitled to prove her claim through testimony alone. (*Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1376 [the plaintiff's "testimony about damages was sufficient regardless of whether he submitted any documentation

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[5] The trial court declined to award Almuete any interest, on the ground that it would violate usury laws to do so. Here, the trial court presumably was referring to the 20 percent interest rate that Cambe originally offered to pay on the loans, not the 5 percent interest rate recited in the April 15, 2009 promissory note. The renewal notes apparently recited the original 20 percent interest rate. The trial court simply may have overlooked the 5 percent rate recited in the promissory note. While depriving Almuete of recovery of non-usurious interest on the promissory note, this error does not call into question the trial court's breach finding.

[6] Cambe's characterization of the issue as relating to damages is somewhat inapt. The notion that no money changed hands actually is more akin to an argument that the required element of consideration for the agreement was lacking. (Rest.2d, Contracts, § 71.)

to support what he said"]. Almuete testified that she repeatedly gave money to Cambe; this was corroborated by Cendana. Their testimony on this point was unrefuted. The trial court apparently credited Almuete and Cendana and concluded that money did change hands. We do not revisit that credibility determination on appeal.

Furthermore, Cambe's damages argument ignores the evidence that she wrote two checks to Almuete for $477,000, the amount of the promissory note, both of which were returned. It was reasonable for the trial court to surmise that Cambe wrote those checks precisely because Almuete had given her money that she was obligated to repay, just as Almuete claimed.

B. *The Doctrine of Judicial Estoppel Does Not Preclude Almuete's Suit*

When Almuete filed for bankruptcy protection in January 2013, she was required by the Bankruptcy Code to disclose as an asset her claim against Cambe for the unrepaid loans. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 133 ["'[T]he Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims. . . . ". . . [A] debtor is required to disclose all potential causes of action." . . . "'The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed.'" . . . "Any claim with potential must be disclosed, even if it is 'contingent, dependent, or conditional'"'], italics omitted (*Gottlieb*).) At trial, Almuete acknowledged on cross-examination that she failed to disclose the

claim against Cambe in her bankruptcy petition. As a result, Cambe asserts, the doctrine of judicial estoppel precludes Almuete from bringing the claim in this lawsuit. We disagree.

The doctrine of judicial estoppel "'"'prevents a party from 'asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. . . .'"'" (*Gottlieb*, *supra*, 141 Cal.App.4th at pp. 130-131.) Judicial estoppel is, however, an "'"'extraordinary remed[y]'"'"; it applies only when "'"'a miscarriage of justice'"'" would result from the inconsistent assertions. (*Ibid*.) The party invoking judicial estoppel bears the burden of proving that the doctrine applies. (See *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1467.) We consider the following five factors in determining whether to apply it: "'"'(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" [Citations.]" (*Gottlieb*, *supra*, 141 Cal.App.4th at p. 131.) All five factors generally must be present for judicial estoppel to apply. (*Id*. at p. 138.)

The first, second, and fourth judicial estoppel factors are present here. The position that Almuete took in the bankruptcy proceeding in 2013 regarding the claim against Cambe for unrepaid loans is totally inconsistent with the position she took on the claim in this subsequently-filed litigation. In the bankruptcy proceeding, she did not assert the claim; by contrast, she is asserting the claim in this proceeding. Our conclusion as to the presence of the first, second, and fourth factors mirrors the

court's conclusion regarding those factors in *Gottlieb*, which, like this case, involved a party's non-assertion of a claim in a bankruptcy proceeding followed by the same party's assertion of a claim in subsequent litigation. (*Gottlieb*, *supra*, 141 Cal.App.4th at p. 137 ["'assertion [in a civil action] of legal claims not disclosed in earlier bankruptcy proceedings constitutes an assumption of inconsistent positions'"].)

Cambe failed, however, to carry her burden of showing that the third factor, successful assertion of the prior position, is present. *Gottlieb* is instructive as to the meaning of the third factor in the bankruptcy context. "[S]uccess" in a prior bankruptcy proceeding, *Gottlieb* explained, is the bankruptcy court's acceptance of the debtor's position in the confirmation of a bankruptcy plan regarding the treatment of the debtor's assets. In *Gottlieb* itself, "the bankruptcy case was dismissed without confirmation of a plan of reorganization." (*Gottlieb*, *supra*, 141 Cal.App.4th at p. 137.) Thus, the "success" factor was not met there, and the court declined to apply judicial estoppel. (*Id*. at pp. 137-138, 141-142.)

We are persuaded by *Gottlieb* and adhere to its definition of "success" in the bankruptcy setting. Applying that definition here, Cambe presented no evidence that the bankruptcy court accepted Almuete's prior position on the claim for unrepaid loans and granted relief to her on that basis in a bankruptcy plan.[7]

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[7] *Gottlieb* held that neither an automatic stay nor stipulated order in a bankruptcy proceeding constitutes success. (*Gottlieb*, *supra*, 141 Cal.App.4th at pp. 137, 141-142.) In any event, there is nothing in the record here as to whether the bankruptcy court issued an automatic stay or a stipulated order in acting on Almuete's petition.

Accordingly, the doctrine of judicial estoppel does not bar Almuete's claim in this case.[8]

Cambe states that it was incumbent on Almuete to show the non-confirmation of a plan and hence a lack of success in the bankruptcy proceeding. This misapprehends the burden of proof. Cambe was required to demonstrate that Almuete was successful in the bankruptcy proceeding; Almuete was not required to demonstrate that she was unsuccessful.[9]

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[8] Because we conclude that the third judicial estoppel factor was not present, we do not address the fifth factor, whether Almuete's inconsistent positions were the product of ignorance, fraud, or mistake. (*Gottlieb*, *supra*, 141 Cal.App.4th at p. 138, fn. 3 [declining to address fifth factor after concluding that third factor was not met].)

[9] Almuete filed a request for judicial notice that purported to describe what happened in the bankruptcy proceeding, but we denied the request on the ground that it failed to comply with applicable rules.

DISPOSITION

The judgment is affirmed. Almuete is awarded her costs on appeal.

SMALL, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.