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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

GARY HOFFMAN PRODUCTIONS, INC, Plaintiff and Appellant, v. FOX TELEVISION STUDIOS, INC., Defendant and Respondent.	B229149 (Los Angeles County Super. Ct. No. SC104254)

APPEAL from an order of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Reversed with directions.

Kawahito Shraga & Westrick and David R. Shraga for Plaintiff and Appellant.

Tantalo & Adler, Joel M. Tantalo and Michael S. Adler for Defendant and Respondent.

INTRODUCTION

Plaintiff Gary Hoffman Productions, Inc. (GHP) appeals from an order of dismissal entered after the demurrer of defendant Fox Television Studios, Inc. (Fox) was sustained without leave to amend. We reverse.

FACTS[1]

On June 6, 2003, GHP entered into a Distribution Rights Acquisition Agreement (Agreement) with Fox for the "National Lampoon Reunion Movie." Under the Agreement, Fox was granted distribution and exploitation rights to the movie. In exchange, Fox agreed to pay GHP a $750,000 acquisition price and 25 percent of the net profits from the movie. The parties later agreed to a reduced acquisition price of $675,000.

Net profits were to be calculated according to the "Television Definition of Net Profits" (Definition of Profits), a separate document attached to the Agreement as an exhibit, which set forth in detail the manner in which net profits were to be calculated. Section IV of the Definition of Profits defines "net profits" as "the amount of Gross Receipts remaining, if any, after first deducting from Gross Receipts, on a continuing and cumulative basis, the aggregate of the following items in the order of priority set forth below based upon financial data determined, recorded and computed as of the end of the particular Statement Period for which a periodic Participation Statement is being rendered . . . ."

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[1] On appeal from a judgment dismissing an action following the sustaining of a demurrer, we assume the truth of the allegations in the complaint but do not assume the truth of the contentions, deductions or conclusions of law. (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

One of the items to be deducted from Gross Receipts is "Negative Cost." (Section IV, para. G.) "Negative Cost" is defined as "[t]he sum of 'Direct Charges' and 'Fox Administrative Overhead Charge,'" which are also defined in the Definition of Profits. Also deducted from Gross Receipts is interest on "Negative Cost," which is defined in the Definition of Profits. (Section IV, para. F.)

The Definition of Profits also includes a section containing "General Accounting Provisions." These provide for Fox's issuance of statements and payments. Specifically, they provide: "Participant shall be furnished periodic Participation Statements showing, in summary form, Gross Receipts and permitted deductions therefrom, accompanied with payment of the amount, if any shown thereon to be due Participant . . . ." (Section VI, para. D.2.) Participation Statements were to be issued every 12 months. (*Ibid*.)

The General Accounting Provisions also provide: "Concurrently with the rendition of the first Participation Statement, . . . Participant shall be furnished an itemized summary of the Negative Cost of the Program without prejudice to the rendering of subsequent Negative Cost Statements for the purpose of revision and correction." (Section VI, para. D.1.)

In addition, the General Accounting Provisions contain an incontestability provision. This provides: "All transactions and items of information reflected within any Negative Cost Statement or Participation Statement . . . shall be deemed correct and shall be conclusive and binding upon Participant and Participant shall forever be barred from objecting for any reason or maintaining or instituting any action or proceeding which relates to any transactions or questions the accuracy of any item of information reflected therein, . . . unless a written objection specifying in detail the transactions or items of information to which Participant objects and the nature and reasons for such objection is delivered to Fox within the applicable Objection Period." (Section VI, para. H.)

The "Objection Period" is "(a) within 9 months following the expiration date for the right to examine the Negative Cost Statement or Participation Statement in which the transaction or item of information is first reflected as provided in Section VI, Paragraph G. if an audit of such Negative Cost Statement or Participation Statement . . . was

initiated and completed; or (b) within 33 months following the date of mailing of the Negative Cost Statement or Participation Statement in which the transaction or item of information is first reflected if an audit of such Negative Cost Statement or Participation Statement . . . was not initiated or was not completed. . . ." (Section VI, para. H.1.)

Finally, the General Accounting Provisions contain a Conclusive Incontestability provision, under which: "If Participant's objections are not resolved amicably, Participant's objections shall be deemed to have been waived unless Participant maintains or institutes an action or proceeding with respect thereto within 6 months after the expiration of the applicable Objection Period. . . ." (Section VI, para. H.2.)

Fox issued its first Participation Statement on May 19, 2005. It showed Net Receipts of negative $44,643; Negative Costs and Interest on Negative Costs in the amount of $915,781; and Net Profits in the amount of negative $960,424. Fox did not issue a Negative Cost Statement with the 2005 Participation Statement.

On March 31, 2006, Fox issued the second Participation Statement. It showed Net Receipts of $687,116 and Negative Costs and Interest on Negative Costs in the amount of $960,003, for Net Profits in the amount of negative $272,887. The statement did not identify what comprised the Negative Costs.

After receiving the 2006 Participation Statement, GHP requested information as to what costs were included in the Negative Costs. Fox did not provide a Negative Cost Statement.

Participation Statements issued on March 31, 2007, February 27, 2008 and February 27, 2009 reflected the same Negative Costs. None contained a Negative Cost Statement.

In July 2007, a Fox representative acknowledged including acquisition costs in Negative Costs, although the Definition of Profits did not specifically provide for this deduction. He claimed that such a deduction was nevertheless permitted. When GHP challenged the deduction, the representative indicated that Fox was taking it anyway.

Sometime in 2009, Fox gave GHP a breakdown of the Negative Costs they had deducted from Net Receipts. Some of the deductions were for costs which GHP and Fox

had agreed would not be deducted. Others were for costs Fox had agreed to bear or for costs about which there was no agreement. As a result of the excess Negative Costs deducted from Net Receipts, GHP did not receive the share of Net Profits to which it was entitled.

PROCEDURAL BACKGROUND

GHP filed this action on August 3, 2009, alleging causes of action for breach of contract, promissory fraud and declaratory relief. Fox demurred to GHP's operative third amended complaint on the ground the action was time-barred.[2] Specifically, it claimed that the breach of contract and declaratory relief causes of action were barred by the 39-month contractual limitations period and the four-year statute of limitations contained in Code of Civil Procedure section 337. Fox claimed the promissory fraud cause of action was barred by the three-year limitations period contained in Code of Civil Procedure section 338, subdivision (d).

GHP opposed the demurrer on several grounds, including delayed accrual of its causes of action, it was excused from complying with the requirements of the Conclusive Incontestability provision, and Fox engaged in continuing breaches of the parties' agreement. GHP also argued that it should be granted leave to amend if necessary.

The trial court sustained the demurrer without leave to amend on the grounds raised by Fox. It noted that GHP "has admitted that it received a Participation Statement in or about May 2005 which clearly indicated that [Fox] had deducted over $915,000.00 in Negative Costs (and interest thereon)[.] . . . That was notice of detriment incurred." At that time, "'GHP must have at least suspected that [Fox] was deducting the allegedly

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[2] It appears that Fox may have filed similar demurrers to the previous versions of GHP's complaint, as the minute order from the hearing on the demurrer to the third amended complaint noted that Fox "again demurs to Plaintiff GHP's three causes of action based on various time bars."

non-deductible expenses because GHP received a statement in May showing nearly $1 Million in Negative Costs & Interest, when GHP believed that [Fox] could not possibly have incurred any Negative Costs (or interest thereon) at all.'"

The trial court rejected GHP's claims as to why the contractual and statutory limitations periods did not apply. It noted that "[t]he running of the applicable statutes of limitations (and the 39-month contractual limitations period) do appear 'clearly and affirmatively' from the dates alleged in the complaint. [Citation.] This being the fourth iteration of the complaint and no basis for another iteration having been convincingly presented, it is appropriate that the [third amended complaint] be the last."

DISCUSSION

A. *Standard of Review*

A demurrer tests the sufficiency of the plaintiff's complaint, i.e., whether it states facts sufficient to constitute a cause of action upon which relief may be based. (Code Civ. Proc., § 430.10, subd. (e); *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 841-842.) In determining whether the complaint states facts sufficient to constitute a cause of action, the trial court may consider all material facts pleaded in the complaint and those arising by reasonable implication therefrom; it may not consider contentions, deductions or conclusions of fact or law. (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 638; *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

The court should not sustain a demurrer without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The demurrer should be sustained and leave to amend denied only "where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists. Obviously no amendment would change the result." (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 991, p. 402; accord, *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68

Cal.App.4th 445, 459.) The demurrer also may be sustained without leave to amend where the nature of the defects and previous unsuccessful attempts to plead render it probable plaintiff cannot state a cause of action. (*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 967; 5 Witkin, *op. cit. supra*, § 992, p. 403.)

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, we review the trial court's ruling de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law and applying the abuse of discretion standard in reviewing the trial court's denial of leave to amend. (*Montclair Parkowners Assn. v. City of Montclair*, *supra*, 76 Cal.App.4th at p. 790; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497-1498.) Plaintiff bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 68 Cal.App.4th at p. 459; *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020.)

The court properly may sustain a demurrer and deny leave to amend based on the expiration of the limitations period. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) "'"A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred. [Citation.]" [Citation.]' [Citation.]" (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.)

B. *Statute of Limitations*

1. Accrual of Cause of Action

GHP first contends that its breach of contract and declaratory relief causes of action are not barred by the four-year statute of limitations contained in Code of Civil Procedure section 337. It claims the trial court erred in finding its causes of action accrued in May 2005, "before there had been a breach or any cognizable damage." In

GHP's view, its cause of action did not accrue until there were Net Profits, of which it was entitled to a percentage. Fox's failure to issue a Negative Cost Statement in May 2005 was therefore not an actionable breach of contract. We disagree.

As a general rule, a cause of action for breach of contract includes a contract, plaintiff's performance or excuse for failure to perform, defendant's breach and damage to plaintiff resulting therefrom. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 515, p. 684.) A cause of action for breach of contract accrues at the time of breach, at which time the limitations period begins to run. (*Cochran v. Cochran* (1997) 56 Cal.App.4th 1115, 1120; *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 221.)

Courts have grappled with the question whether a cause of action for breach of contract accrues at the time of breach if the plaintiff has not suffered actual damages at that time. The Supreme Court long ago stated that "[f]or the breach of a contract an action lies, though no actual damages be sustained." (*McCarty v. Beach* (1858) 10 Cal. 461, 464.) Based on this principle, it has been held that "[a] plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him, [citation], since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages. The maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right. [Citation.] Accordingly, nominal damages, which are presumed as a matter of law to stem merely from the breach of a contract [citation], may properly be awarded for the violation of such a right. [Citation.]" (*Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632-633; accord, *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 576, disapproved on another ground in *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1265, fn. 4; *Sill Properties, Inc. v. CMAG, Inc.* (1963) 219 Cal.App.2d 42, 55.) This rule is set forth in Civil Code section 3360. (*Sweet, supra*, at p. 633; accord *Capell Associates, Inc. v. Central Valley Security Co.* (1968) 260 Cal.App.2d 773, 785.)

In *Tabachnik v. Ticor Title Ins. Co.* (1994) 24 Cal.App.4th 70, the court observed that "[w]hile incurring a loss has always been a prerequisite to accrual of a cause of

action in tort, it has never been a requirement in contract law." (*Id.* at p. 76.) Therefore, in the case before it, the court held that a cause of action for breach of a title insurance policy accrued when the plaintiff discovered a potential loss, that is, the loss that might be incurred if the title was not as represented in the policy. (*Id.* at p. 77.)

In support of its position, GHP relies on two cases, *Miller v. Bean* (1948) 87 Cal.App.2d 186 and *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805. In *April Enterprises*, April Enterprises entered into a contract with KTTV in 1965 for production of a television show. The contract provided that KTTV owned all videotapes of the show. Either April Enterprises or KTTV could initiate syndication of the show by a third party, and April Enterprises and KTTV would each be entitled to 50 percent of the net profits from syndication. Additionally, KTTV had the right to erase the videotapes. (*April Enterprises, Inc. v. KTTV*, *supra*, 147 Cal.App.3d at pp. 813-814.)

The parties thereafter entered into a new contract in 1968 which gave KTTV the exclusive right to initiate syndication for a limited period of time, but KTTV no longer had the right to erase the videotapes. The contract terminated automatically after five years. In 1969 and early 1970, while the contract was still in place, April Enterprises began negotiating syndication agreements with third parties and sought to purchase the videotapes from KTTV. In response, KTTV offered to buy the exclusive rights to the show for another two years under different terms. It warned that if April Enterprises did not accept the new terms, it would erase the videotapes. (*April Enterprises, Inc. v. KTTV*, *supra*, 147 Cal.App.3d at p. 814.)

In 1976, April Enterprises learned that the videotapes had been erased at some unknown time. It sued KTTV for breach of contract, breach of fiduciary duty, and intentional interference with prospective advantage. KTTV obtained a judgment on the pleadings, in part on the ground that the breach of contract action was barred by the statute of limitations. (*April Enterprises, Inc. v. KTTV*, *supra*, 147 Cal.App.3d at pp. 814-815.)

KTTV claimed that the breach of contract cause of action accrued in 1970, when it wrote to April Enterprises refusing to sell the videotapes and threatening to erase them.

The court noted, however, that the 1968 contract was still in effect, and April Enterprises, despite its efforts to arrange a syndication deal, had no right to syndicate the show; that was KTTV's exclusive right. (*April Enterprises, Inc. v. KTTV*, *supra*, 147 Cal.App.3d at pp. 821-822.) Since accrual of a cause of action is based on the owner's right to sue, and April Enterprises did not own the syndication right, its cause of action could not have accrued at that time. (*Id*. at pp. 822-823.)

However, once KTTV's exclusive syndication right under the 1968 agreement expired, April Enterprises had the right to pursue syndication deals. When KTTV erased the videotapes, April Enterprises was deprived of the opportunity to pursue future syndication deals. Thus, April Enterprises suffered appreciable harm, and its cause of action accrued, when KTTV erased the videotapes. (*April Enterprises, Inc. v. KTTV, supra*, 147 Cal.App.3d at p. 824.)

In *April Enterprises*, the plaintiff had not suffered actual monetary loss at the time its cause of action accrued. Rather, the cause of action accrued when the plaintiff learned of its potential loss, that is, when it learned it would be unable to syndicate the show because the videotapes had been destroyed. Thus, *April Enterprises* does not support GHP's claim that it had to have suffered actual financial loss for its cause of action to accrue.

GHP confuses *April Enterprises* with *Davies v. Krasna* (1975) 14 Cal.3d 502, which was discussed in *April Enterprises*. This discussion is not of assistance to GHP, however.

The court in *April Enterprises* noted that *Davies* "involved the unauthorized disclosure of the plaintiff-writer's story by his producer. Our high court held the statute of limitation began to run on plaintiff's cause of action for breach of confidence when the plaintiff first learned of his producer's unauthorized disclosures because that was the moment plaintiff first suffered 'appreciable harm.' Consequently, his suit, brought only after the story was transformed into a successful screenplay, was time barred. The court explained: 'Plaintiff's first argument, that Davies' cause of action did not arise until defendant publicly exhibited Davies' idea in 1958, confuses two different theories of

action. . . . [The] present cause of action for breach of confidence arises upon defendant's unauthorized disclosure of the confidential idea. . . . The first unauthorized disclosure . . . occurred before November 11, 1955; thus the statute of limitations on plaintiff's cause of action for breach of confidence began to run not later than that date.' ([*Davies v. Krasna, supra,* 14 Cal.3d] at pp. 511-512; citations and fn. omitted.)

"The reasoning of the court in *Davies* suggests that if the contract in that case had been one in which the parties agreed to share profits from any commercial exploitation of the plaintiff's story, appreciable harm would not have been suffered until after the play had been produced and profits earned. Since the parties agreed only that plaintiff's story would not be divulged to others, however, appreciable harm was suffered and the limitations period ran from the date of first disclosure." (*April Enterprises, Inc. v. KTTV, supra,* 147 Cal.App.3d at p. 823.)

A careful reading of GHP's third amended complaint reveals that GHP is not merely challenging Fox's failure to pay GHP its share of the profits from the movie. GHP alleged that Fox "breached the Agreement for the first time on or about March 31, 2006 by failing to pay GHP the amount of Net Profits that would have been payable under the 2006 Statement had [Fox] not actually deducted for the first time the Negative Costs and Interest thereon that it charged GHP. At that time [Fox] therefore withheld for the first time actual monies that were due GHP."

However, the majority of the Negative Costs deducted in March 2006 were the same as those deducted in May 2005. As additional allegations of the third amended complaint make clear, what GHP is actually challenging is Fox's failure to provide it with Negative Cost Statements from which it could have determined the items Fox was including in Negative Costs, allowing it to challenge any items improperly included: GHP alleged that after March 31, 2006, Fox "subsequently issued profit participation statements to GHP identifying the same line item for Negative Cost, without description, on the 2007, 2008, and 2009 Statements. [¶] . . . On each occasion when [Fox] issued the 2006, 2007, 2008, and 2009 Statements it failed to provide the contractually required Statement of Negative Costs in connection therewith."

GHP further alleged that it "was prevented and hindered from contesting the 2005, 2006, 2007, 2008, and 2009 Statements by virtue of [Fox's] failure to provide the Statement of Negative Costs as alleged hereinabove." Additionally, GHP "was unaware of the nature and accuracy of the line items [Fox] had reported on the 2005, 2006, 2007, 2008, and 2009 Statements and was delayed and hindered in its ability to determine that [Fox] was deducting the Acquisition Price and Other Charges because [Fox] failed to simultaneously provide the Statement of Negative Costs in connection with issuance of the profit statements, or in response to GHP's requests."

Since the alleged breaches of contract included not only the failure to pay Net Profits due but also the repeated failure to provide Negative Cost Statements, *Davies* does not support a claim that GHP's cause of action did not accrue until Fox failed to pay Net Profits due. (*April Enterprises, Inc. v. KTTV, supra,* 147 Cal.App.3d at p. 823.)

In the other case cited by GHP, *Miller v. Bean, supra,* 87 Cal.App.2d 186, the plaintiff purchased a promissory note secured by a trust deed in June 1946. The note had fallen due in October 1932. In August 1944, the county tax collector had given notice of an intended sale of the property for unpaid property taxes, and the property was sold in September 1944. In October 1946, the plaintiff sued the trustors for breach of the covenant in the trust deed to protect and preserve the property and its title. (*Id.* at pp. 187-188.)

The question on appeal was whether the trial court erred in sustaining the defendants' demurrer on the ground the action was barred by the statute of limitations. Assuming that breach of the trust deed occurred upon the failure to pay taxes or permitting the land to be sold to pay taxes, the action could not be based on either of these breaches. (*Miller v. Bean, supra*, 87 Cal.App.2d at p. 189.) The court added, "Of course, if the failure to pay the taxes when they fell due did give rise to a right of action for a technical breach of the covenant, the statute commenced to run when the taxes were allowed to become delinquent. A similar result would obtain if permitting the land to be sold and deeded to the state also constituted a breach of the covenant. However, even if timely actions had been brought, we are at a loss to see what manner of relief plaintiff

would have been entitled to in either case, unless it be merely nominal damages, for he sustained no detriment through the failure of the trustor to pay the taxes before delinquency, nor did he sustain such detriment merely through the debtor's failure to effect a redemption prior to the time when the land was deeded to the state." (*Ibid*.)

Even if the statute of limitations began to run at either of those times, "then during the entire statutory period in which an action could be brought, the plaintiff could have recovered at most only nominal damages. Such a result would in our opinion not only be unjust but would permit the use of the statute of limitations for a purpose never intended. [Citation.]" (*Miller v. Bean, supra,* 87 Cal.App.2d at p. 189.)

The court found it "clear that the entire damages which plaintiff seeks to recover were incurred when the title to the property was lost, thereby rendering valueless his security, for prior to that time he had sustained no actual injury." (*Miller v. Bean, supra,* 87 Cal.App.2d at p. 189.) Thus, "the statutory period for bringing an action based on the failure to protect the title could not have commenced to run until [title was lost], for only when the sale was completed was the breach complete." (*Id*. at pp. 189-190.) Analyzed another way, assuming "that the failure to pay the taxes when they fell due was a breach of the covenant, it was not the breach upon which the action is founded, and it did not bring about the result complained of." (*Id*. at p. 190.) Rather, "[t]he failure to redeem prior to the sale by the state was an independent breach which, alone, was the proximate cause of the loss of title. Manifestly, no cause of action for that loss arose until that breach occurred." (*Ibid*.)

Miller presents the same problem for GHP that *April Enterprises* does. GHP is not suing for the ultimate loss—here the lost share of Net Profits, in *Miller* the lost value of the security. GHP is suing for Fox's failure to provide it with Negative Cost Statements, which prevented it from contesting the Negative Costs listed on the Participation Statements. It is true that, as in *Miller*, GHP would have been able to recover only nominal damages, if any, had it sued at the time of the initial breach in 2005. The difference, here, however, is the incontestability provision, which required GHP to challenge Negative Cost and Participation Statements within a specified period of time,

and the Conclusive Incontestability provision, which required GHP to bring suit within six months after the expiration of the Objection Period." In other words, the Agreement itself required GHP to sue if it discovered a potential loss (*Tabachnik v. Ticor Title Ins. Co.*, *supra*, 24 Cal.App.4th at p. 77); GHP was not permitted to wait until it actually lost money and then sue for prior breaches of the agreement which ultimately led to the loss, as in *Miller*.[3]

2. Continuous Accrual

GHP further asserts that even if its cause of action accrued in 2005, its claims are not barred by the statute of limitations. "This is because a new breach of contract continuously occurred each successive time when Fox issued a new statement and failed to pay GHP's share of Net Profits that were payable. These subsequent breaches triggered the commencement of a new statute of limitations period each time a statement was issued." We agree.

As stated in *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, on which both parties rely, "Where there is a continuous wrong, . . . with periodic new injury to the plaintiff, the courts have applied . . . a 'theory of continuous accrual.' [Citations.]" (*Id*. at p. 1388.) Under this theory, "where performance of contractual obligations is severed into intervals, as in installment contracts, the courts have found that an action attacking the performance for any particular interval must be brought within the period of limitations after the particular performance was due. The situations in which this rule has been applied include not only installment contracts [citation], but also such diverse contractual arrangements as leases with periodic rental payments [citation], and contracts calling for periodic, pension-like payments on an obligation with no fixed and final amount [citation]." (*Ibid*.)

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[3] Moreover, as Fox points out, since interest accrued on Negative Costs, GHP was losing money as of May 2005.

Consistent with this principle, a new breach of contract occurred, and a new limitations period commenced, each time Fox breached the Agreement by failing to provide a Negative Cost Statement and/or failing to pay Net Profits due to GHP. Since some of these breaches occurred within the four-year limitations period, GHP's breach of contract and declaratory relief causes of action are not barred entirely by the statute of limitations. It follows that the trial court erred in sustaining Fox's demurrer on that basis. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors*, *supra*, 48 Cal.4th at p. 42; *E-Fab, Inc. v. Accountants, Inc. Services*, *supra*, 153 Cal.App.4th at pp. 1315-1316.)[4]

C. *Incontestability Provision*

GHP contends the trial court also erred in finding its causes of action barred by the conclusive incontestability provision. First, it claims that Fox's breach of the Agreement excused GHP's performance, i.e., Fox's failure to provide Negative Cost Statements excused GHP's "obligation to contest them." It also claims that it did not have to object based upon "mere supposition," that is, it did not have to object to the 2005 Participation Statement merely because it "'must have at least suspected that [Fox] was deducting the allegedly non-deductible expenses because GHP received a statement in May showing nearly $1 Million in Negative Costs & Interest, when GHP believed that [Fox] could not possibly have incurred any Negative Costs (or interest thereon) at all.'" We agree.

GHP relies on the principle that "'[p]erformance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party.' [Citation.]" (*Vineland Homes, Inc. v. Barish* (1956) 138 Cal.App.2d 747, 759.) Stated otherwise, "A person cannot take advantage of his or her own act or omission to escape

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[4] In light of this conclusion, we need not address GHP's contention regarding delayed discovery.

liability; if the person *prevents or makes impossible* the performance or happening of a condition precedent, the condition is excused." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 821, p. 910.)

GHP's performance of the Agreement is excused to the extent it was prevented by Fox. (See Civ. Code, § 1511, subd. 1; *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 490.) Fox's failure to provide GHP with Negative Cost Statements prevented GHP from objecting to the "transactions and items of information reflected" in the statements. Fox cannot take advantage of its failure to perform its obligations under the Agreement by enforcing the incontestability clause in the Agreement against GHP. GHP is excused from the obligation to object during the Objection Period to those "transactions and items of information reflected" in the Negative Cost Statements it did not receive when due.[5]

D. *Fraud Cause of Action*

Finally, GHP contends its cause of action for promissory fraud is adequately pleaded and not barred by the three-year statute of limitations (Code Civ. Proc., § 338, subd. (d)).

In this cause of action, GHP alleged that in negotiations, Fox and GHP agreed to a lower acquisition price on the understanding that the acquisition price would not be deducted from Net Receipts when calculating GHP's share of Net Profits. Fox intended to deduct the acquisition price from Net Receipts but falsely told GHP it did not in order to induce GHP to enter into the Agreement. GHP was induced to enter into the Agreement based on Fox's false promise. GHP "only discovered facts sufficient to create a suspicion regarding the falsity of [Fox's] promises in or about July 20, 2007." GHP

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[5] Out of an abundance of caution, GHP also addresses Fox's claim in the trial court that the incontestability provision reduced the limitations period to 39 months. Inasmuch as it does not appear that the trial court sustained Fox's demurrer on this basis, and resolution of this issue is not necessary to our decision, we need not address it.

had contacted Fox "[s]ubsequent to receiving the 2006 [Participation] Statement"[6] regarding its share of the Net Profits. In July 2007, Fox informed GHP that it was including the acquisition price in Negative Costs and deducting it from Net Receipts, even though the Agreement "did not specifically identify the Acquisition Price as an allowable deduction."

The allegations of the complaint show that GHP received a Participation Statement in May 2005 which showed that Fox had deducted over $915,000 in Negative Costs and Interest on Negative Costs, but there was no Negative Cost Statement. It may be that these facts would have made a reasonably prudent person aware of possible fraud, placing on GHP the duty to investigate the matter. (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 130.) But we are unable to reach this conclusion as a matter of law based solely on the allegations of the complaint. The trial court therefore erred in sustaining Fox's demurrer to GHP's promissory fraud cause of action on the ground it was barred by the statute of limitations.

DISPOSITION

The order is reversed. The trial court is directed to vacate its order sustaining Fox's demurrer without leave to amend and to enter a new order overruling the demurrer. GHP is to recover its costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J. ZELON, J.

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6 GHP did not specify when it contacted Fox.