

Not Reported in Cal.Rptr.3d, 2009 WL 1478100 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
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Court of Appeal, Fourth District, Division 3, California.

James MULLEN et al., Plaintiffs and Appellants,
 v.

Steven RICE, Defendant and Respondent.

No. G039927.
(Super.Ct.No. 07CC04615).

May 26, 2009.

Appeal from a judgment of the Superior Court of Orange County, [Andrew P. Banks](#), Judge. Reversed with directions.

Grobaty & Pitet and [Christopher L. Pitet](#) for Plaintiffs and Appellants.

No appearance for Defendant and Respondent.

OPINION

[ARONSON](#), J.

*1 Plaintiffs James and Elizabeth Mullen ^{FN1} filed an action against defendants Steven Rice and Gold Coast Marketing, LLC (Gold Coast) for breach of a promissory note and promissory fraud. Defendants failed to appear in the case. The trial court entered a default judgment against Gold Coast, but found in favor of Rice on the promissory fraud case of action. Plaintiffs contend the court erred in failing to hold Rice individually liable for fraudulent misrepresentations. We agree with plaintiffs and therefore reverse the judgment with directions.

^{FN1}. Elizabeth Mullen instituted the suit as executor of her mother's estate, Ann, who died on February 2, 2007. ([Code Civ. Proc.](#), [§ 377.30](#).) Plaintiffs reside out of state. Rice allegedly resides in Orange County, California.

I

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this action in April 2007. The operative first amended complaint alleged defendant Rice, in April 2003, signed two promissory notes on behalf of Gold Coast, in the amounts of \$75,000 and \$5,000. Ostensibly Rice borrowed the funds to purchase a water bottling plant in Palm Springs. The notes provided for 10 percent simple interest, repayment in June 2003, and promised to issue plaintiffs common stock in a company called VentureNet Capital Group, Inc. Rice signed one note "Steve Rice, President/CEO, Gold Coast Marketing, LLC." He signed the other "Steve Rice, Managing Member, Borrower [Gold Coast Marketing]."

Defendants did not repay the loans when due, but Rice mollified plaintiffs with various explanations and excuses, and repeatedly assured them over the next three years that defendants would repay the money. During this period, Mullen toured the bottling plant with Rice, who explained he put the loan proceeds into other capital investments for the company. At one point, Rice showed Mullen stock shares from his safe. Plaintiffs never received repayment or any stock, however, and alleged that defendants never intended to honor the promissory notes.

The complaint alleged breach of both promissory notes and promissory fraud. Plaintiffs demanded compensatory damages of \$100,000 (James) and \$40,000 (Elizabeth), punitive damages, ^{FN2} prejudgment interest, attorney fees as to Elizabeth, and costs.

^{FN2}. Plaintiffs served defendants in April 2007 with a statement of punitive damages seeking \$500,000.

The caption of the complaint referenced Gold Coast as a "purported limited liability company." Plaintiffs alleged on information and belief that Gold Coast was a limited liability company, but noted they had "been unable to find a record of Gold Coast's exist-

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tence as a limited liability company in a search of public records. As such, [p]laintiffs allege [it] may be a front for defendant Rice's illegal business activities."

The complaint also alleged that Rice and Gold Coast were alter egos of one another and "as such should each be held liable and responsible for the wrongful acts and/or omissions of the other.... Plaintiffs believe that Rice, the purported owner and director of Gold Coast, used the corporate form of Gold Coast for his own personal benefit, in conscious disregard for its corporate separateness, and did so at the expense of creditors such as Plaintiffs. As such, it would be inequitable not to hold ... Rice accountable for any and all of the wrongful acts [etc.] of ... Gold Coast [and vice versa]."

*2 Neither defendant responded to the complaint. In June and July 2007, the superior court clerk entered defaults.

On October 1, 2007, plaintiffs filed requests for court judgment on the amended complaint. Plaintiffs filed a "Summary of Case in Support of Request for Court Default Judgment," a declaration from James Mullen recapitulating the facts stated in the complaint, and a declaration from the Mullens' lawyer, Sommer Salam, explaining how she calculated damages.

On October 23, plaintiffs filed a notice of plaintiffs' counsel's intent to introduce additional evidence at the October 29 default prove-up hearing. An accompanying memorandum referenced an October 18 "invitation" by the court to draft a judgment in favor of plaintiffs against Gold Coast, but in favor of Steven Rice. Plaintiffs objected to judgment in favor of Rice. Our record contains no minute order or transcript of a hearing on October 18.

Plaintiffs also filed a new declaration from plaintiff's attorney, Christopher **Pitet**, stating he and Salam had conducted a diligent search for evidence Gold Coast existed, but found no record of its existence. Their search included the California Secretary of State's website. Plaintiffs argued based on "Rice's affirmative misrepresentations, the promissory notes drafted and signed by Rice, and the fact that Gold Coast LLC does not even exist (and did not exist at the time Rice entered into the notes), it is virtually indisputable that

Rice is liable for breach of promissory note, fraud, and promissory fraud, both in his individual capacity and under a theory of alter-ego liability."

At hearings on October 29 and November 1, the trial court refused to consider the **Pitet** declaration because it was untimely and concluded Rice had signed the notes but was not personally liable because he acted as an agent of an LLC. The court explained that Rice acted in the course and scope of his employment and plaintiffs failed to show Rice's misrepresentation personally benefitted him. The court concluded there was no "evidence here as to what is Gold Coast...." The court suggested plaintiffs should have scoured the records of 50 states to demonstrate that Gold Coast did not exist as a legal entity.

The court issued a minute order on November 1 finding "Judgment by Court by Default in favor of plaintiff JAMES MULLEN in the amount of \$79,777.00 against defendant GOLD COAST MARKETING LLC and for plaintiff ELIZABETH MULLEN acting as the personal representative for ANN MULLEN for \$24,733.00 against defendant GOLD COAST MARKETING LLC. Judgment for defendant STEVEN RICE as against both plaintiffs. Counsel for plaintiff to prepare and submit proposed Judgment by Court by Default for Court's consideration." Plaintiff prepared a judgment accordingly, which the court signed and filed December 2. The judgment does not specify the causes of action found against Gold Coast.

Plaintiffs filed a new trial motion, complaining the court had erroneously refused to consider **Pitet's** declaration containing evidence that Gold Coast did not exist. They also submitted a declaration from a private investigator who had investigated Gold Coast and found no evidence it had existed as a business entity anywhere within the United States.

*3 Following the trial court's denial of their motion, plaintiffs appeal the judgment in favor of Rice.

II

DISCUSSION

Plaintiffs contend the trial court erred in concluding the allegations and supporting declarations failed to support individual liability for Rice. They argue the

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evidence conclusively established Rice's liability either on a theory of alter ego or as an individual tortfeasor. We agree with plaintiffs on the latter point.

After entry of a defendant's default, a plaintiff "may apply to the court for the *relief* demanded in the complaint; and the court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff's favor for that relief, ... as appears by the evidence to be just." ([Code Civ. Proc., § 585](#), subd. (b), italics added.) In other words, the plaintiff must provide evidence of damages to support entry of a default judgment. Plaintiff's evidence may take the form of live testimony at a prove-up hearing or, in the court's discretion, affidavits or declarations. ([§ 585](#), subd. (b).) The plaintiff need only establish a prima facie case to prevail, but the damages awarded may not exceed those prayed for in the complaint. ([Johnson v. Stranhiser \(1999\) 72 Cal.App.4th 357, 361-362 \(Johnson\)](#).)

Similar proof is not required on the issue of a defaulting defendant's liability because the default admits the truth of the allegations in the complaint. ([Sporn v. Home Depot USA, Inc. \(2005\) 126 Cal.App.4th 1294, 1303; Johnson, supra, 72 Cal.App.4th at p. 361; Bristol Convalescent Hospital v. Stone \(1968\) 258 Cal.App.2d 848, 859](#) [defaulting defendant admits all the allegations of the complaint "giving rise to liability"].) The California Supreme Court aptly summarized the rule more than 100 years ago: "The default of the defendant in an ordinary action ... admits, so far as such defaulting defendant is concerned, the absolute verity of all the allegations of the complaint. No amount of evidence could establish the facts more effectually for the purpose of rendering the judgment, as against such defendant." ([City of Los Angeles v. Los Angeles Farming and Milling Co. \(1907\) 150 Cal. 647, 649.](#)) Thus, a plaintiff at a prove-up hearing is not required to prove liability because the default admits all the material allegations in the complaint.

A plaintiff, however, may not recover damages if his or her complaint fails to state a cause of action. ([Falahati v. Kondo \(2005\) 127 Cal.App.4th 823, 829.](#)) As Witkin explains, "[i]f the complaint fails to state a cause of action or the allegations do not support the demand for relief, the plaintiff is no more entitled to that relief by default judgment than if the defendant

had expressly admitted all the allegations. Such a default judgment is erroneous, and will be reversed on appeal." ([6 Witkin, Cal. Procedure \(5th ed.2008\) Proceedings Without Trial, § 183, p. 622.](#))

Here plaintiffs alleged Rice engaged in promissory fraud by falsely representing the loans would be repaid with interest. "Promissory fraud" is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.] [¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." ([Lazar v. Superior Court \(1996\) 12 Cal.4th 631, 638.](#)) The elements of promissory fraud giving rise to a tort action for deceit are: (1) a false representation; (2) knowledge the representation was false; (3) intent to induce reliance; (4) plaintiff reasonably relied on the promise; and (5) resulting damage. (*Ibid.*)

*4 Plaintiffs adequately pleaded a promissory fraud cause of action. They alleged Rice falsely promised the loans would be repaid, but never intended to honor his promise. The complaint alleged Rice and Gold Coast failed to repay the loans or offer partial payments, despite Rice's repeated assurances over the course of three years repayment would be forthcoming. (See [Tenzer v. Suprescope, Inc. \(1985\) 39 Cal.3d 18, 30-31](#) [fraudulent intent inferred from defendant's "failure even to attempt performance, or his continued assurances after it was clear he would not perform"].) The complaint also adequately alleged Rice intended to induce reliance by promising to pay the full loan amount plus interest and delivering shares of common stock in VentureNet Capital Group. Unaware of Rice's fraudulent scheme, plaintiffs reasonably relied on Rice's promises and thereafter suffered damages. These allegations establish a viable cause of action for promissory fraud.

The trial court rejected plaintiffs' promissory fraud cause of action because it found Rice acted as Gold Coast's agent. To hold Rice personally liable as an agent, the court explained plaintiffs had to show Rice personally gained from his intentional misrepresentation. Because plaintiffs did not make this showing, the court concluded Rice was not liable because his

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intentional misrepresentation occurred within the course and scope of his employment as Gold Coast's agent. Plaintiffs' counsel argued Rice was personally liable for his intentional misrepresentation. The court responded: "If it's in the course and scope, no. I think it's still his principal [who is liable]. He would have to have committed fraud for his own benefit. And there's no showing that this money went to him for his own benefit, as opposed to whatever this business entity was...." We agree with plaintiffs the trial court's conclusion constituted reversible error.

It is well-settled that "[a]n agent or employee is always liable for his or her own torts, whether the principal is liable or not, and in spite of the fact that the agent acts in accordance with the principal's directions." (3 Witkin, Summary of Cal. Law (10th ed. 2008) Agency and Employment, § 199, p. 252; [Civ.Code, § 2343](#), subd. 3.) An agent making an intentional misrepresentation is personally liable for fraud. ([McNeil v. State Farm Life Ins. Co. \(2004\) 116 Cal.App.4th 597, 603.](#)) This is true whether or not the agent acted with actual authority, with apparent authority, or within the scope of employment. (Rest.3d Agency, § 7.01, com.b.) Whether an agent suffers personal liability for fraudulent misrepresentation does not turn on whether the agent stood to gain from the transaction. "It is consistent with encouraging responsible conduct by individuals to impose individual liability on an agent for the agent's torts although the agent's conduct may also subject the principal to liability. Moreover, an individual agent, when liable to a third party, may be available as a source of recovery when the principal on whose behalf the agent acted is not." (*Ibid.*) Thus, an agent is responsible for his or her fraudulent conduct, regardless whether the agent acted for profit or spite. Based on these principles, we conclude the trial court erred in failing to find Rice personally liable for promissory fraud. Consequently, we need not consider plaintiffs' alter ego allegations raised as an alternative basis to impose individual liability on Rice.

III

DISPOSITION

*5 The judgment is reversed. The trial court is directed to find defendant Steven Rice individually liable on the promissory fraud cause of action and to

hear the remaining issues concerning damages, attorney fees, and costs.

WE CONCUR: [SILLS](#), P.J., and [IKOLA](#), J.
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