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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

EPICOR SOFTWARE CORPORATION,

Plaintiff and Respondent,

v.

LINEAR CONTROLS, INC.,

Defendant and Appellant.

G043141

(Super. Ct. No. 30-2008-00112474)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Affirmed.

Radford & Edwards, Michael J. Radford and Anthony W. Silvia for Defendant and Appellant.

Grobaty & Pitet, Michael J. Grobaty and Shannon R. Wolf for Plaintiff and Respondent.

* * *

The trial court granted plaintiff Epicor Software Corporation's motion for summary judgment on its breach of contract action against defendant Linear Controls, Inc. Defendant appeals from the ensuing judgment, contending triable issues of material fact existed and the court erred in finding its rescission defense without merit. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Defendant, a manufacturing company, purchased software from plaintiff, a software provider, under a written agreement. A disagreement arose about whether the terms of the agreement included certain implementation services owed by plaintiff and defendant refused to pay the balance owed.

Plaintiff sued defendant for breach of contract and common counts. Defendant answered, asserting among other things the affirmative defenses of rescission and fraud, and cross-complained for rescission and common counts for the return of the deposit.

Plaintiff moved for summary judgment on the ground it was entitled to payment after delivering the software. The trial court granted the motion, concluding there was "no triable issue as to any material fact regarding whether plaintiff performed under the software contract, whether defendant paid the full contract price, and whether . . . plaintiff provided or was willing to provide all services in the companion consulting agreement. [It] further f[ound], as a matter of law, that there is no merit as to any affirmative defense as to any cause of action"

Subsequently, the court granted plaintiff's unopposed motion for summary judgment on defendant's cross-complaint. It then entered a final judgment in plaintiff's favor in the amount of \$72,759.25.

Additional relevant facts are set forth below.

DISCUSSION

1. Summary Judgment Principles

We review the grant of summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) Summary judgment is proper when all papers filed in favor of or in opposition to the motion show there is no triable issue of material fact and “the moving party is entitled to judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) A “[p]laintiff’s *initial* burden of proof in moving for summary judgment . . . [does] not include disproving any affirmative defenses asserted by defendants. . . . Code of Civil Procedure section 437c, subdivision (p)(1) provides a plaintiff meets the burden of showing there is no defense to a cause of action ‘if that party has proved each element of the cause of action.’ Upon meeting that burden, the burden shifts to the defendant ‘to show that a triable issue of one or more material facts exists as to that cause of action *or a defense thereto.*’ [Citations.]” (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 564-565.)

2. Breach of Contract

To establish a breach of contract claim, plaintiff had to prove: “(1) existence of the contract; (2) plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach; and (4) damages to plaintiff as a result of the breach. [Citation.]” (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239.) On these elements, plaintiff presented, and the trial court found undisputed, the following separate statements of fact: “1. [Plaintiff] and [defendant] contracted through a written, integrated agreement, for [plaintiff’s] software products, including maintenance and educational services. [¶] 2. [Plaintiff] licensed and delivered software contracted to [defendant]. [¶] 3. The licensed software was delivered as promised. [¶] 4. The maintenance and education subscriptions were activated as promised. 6. [sic]

[Defendant] paid [plaintiff] \$20,672.97 toward the purchase of the software and services. ¶ 7. [Defendant] failed to pay the balance for the software and services in the amount of \$72,759.25. ¶ 8. The [C]ompanion Consulting Agreement does not provide for [o]n-[s]ite [e]ducational [s]ervices. ¶ 9. [Defendant] was willing to provide all services set forth in the Companion Consulting Agreement's Statement of Work ¶ 10. [Defendant] has not paid the contract balance of \$72,759.25, [e]xclusive of legal interest and costs."

These facts were supported by excerpts and exhibit 3 from the deposition of Dawn M. Quibodeaux, defendant's Chief Financial Officer, and the declaration of Mary Stevens, plaintiff's Director of Credit and Collections. Exhibit 3 to Quibodeaux's deposition was the order form for licenses to plaintiff's product and related services, which Quibodeaux acknowledged initialing and signing on defendant's behalf. Although she testified defendant decided not to pay because it wanted on-site training and a business-process review, she conceded that "all software that was contracted for was delivered," the statement of work did not include on-site education, she did not know of "any unwillingness" by "defendant to deliver any of the services as contained in th[e] Statement of Work," and plaintiff had billed only for "the software maintenance and online education." In her declaration, Stevens attested that "[b]ased on her review of the business records related to [the] sale, all software was licensed and shipped and received[.]" and the Statement of Work "provides for consulting services, if any, incurred by a customer" Based on this evidence, plaintiff met its burden to establish the elements for breach of contract.

To defeat summary judgment, defendant was required to "make an independent showing by a proper declaration or by reference to a deposition or another discovery product that there is sufficient proof of the matters alleged to raise a triable question of fact if the moving party's evidence, standing alone, is sufficient to entitle the party to judgment. [Citations.]" (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003))

106 Cal.App.4th 1, 10-11.) Where the opposition is merely supported by assertions that are “conclusionary, argumentative or based on conjecture and speculation,” it is not sufficient to preclude summary judgment. (*Id.* at p. 11.)

In its opposition defendant argued it rescinded the contracts and returned the software because plaintiff had agreed to provide on-site training and a business process review but reneged on those promises after the software was delivered. It disputed the fact the parties entered into a written agreement, stating, “Whether the integration clause covers the Companion Consulting Agreement depends on the intent of the parties. The Licensing Agreement and Companion [C]onsulting [A]greement were part of a package proposal. Furthermore, the integration clause states that the contract is the entire agreement with respect to the software only—it specifically leaves out integration as to education, maintenance and support.” But none of this controverts the stated fact of the existence of a written agreement.

As to whether “[t]he licensed software was delivered” and “[t]he maintenance and education subscriptions were activated as promised,” defendant conceded that was done but nevertheless disputed those statements, claiming that “inherent in the agreement was a promise that [plaintiff] would provide on-site, in-person training, including a business process review.” Additionally, while not contesting it paid over \$20,000 toward the purchase of the software and services, defendant challenged whether it had failed to pay the balance, asserting “[t]he [c]ontract has been rescinded, the software has been returned, and there remains no balance due” These assertions do not contravene the stated facts that the software and subscriptions were delivered and activated and that defendant had not paid the balance under the contract.

To contest whether the consulting agreement provided for on-site educational services, defendant asserted that in the deposition testimony cited to support that statement “[i]t is not clear which contract . . . Quibodeaux is being questioned about” We disagree. Quibodeaux was asked if she would agree “[t]he contract

[she] signed on . . . August 7th, 2008 . . . does not provide for on-site training,” and she responded, “No, it does not provide for on-site training.” Whether she was being asked about the Licensing Agreement or the Companion Consulting Agreement is immaterial given that Quibodeaux initialed and signed both and neither offers such training. Moreover, Quibodeaux clarified later in her deposition that they were talking about the Consulting Agreement’s Statement of Work.

In a similar vein, defendant claimed Quibodeaux was asked in her deposition about “on-site training” and “process review on site,” not “[o]n-[s]ite [e]ducational [s]ervices.” But it does not explain how that distinction makes a difference, particularly given that the terms on-site education and on-site training were used interchangeably in Quibodeaux’s deposition. Additionally, although Quibodeaux testified she did not know if the contract she signed on August 7 provides for process review on site, she later admitted she knew of no unwillingness by defendant “to deliver any of the services as contained in th[e] Statement of Work.” Defendant nevertheless argued plaintiff did not present evidence establishing it was willing to provide all services. But that is the sole undisputed inference to be made from the evidence. Summary judgment may be granted based on the evidence “and all inferences reasonably deducible from the evidence,” except “if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.” (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 856.) Defendant presented nothing to contradict the evidence and inference that plaintiff was willing to provide the contracted-for services.

Defendant maintained the Consulting Agreement provided for on-site training, citing Quibodeaux’s declaration in which she described how she did not want online training and thought “[she had] negotiated a discount [with Jesse Smith, a manager for plaintiff,] in the software price to offset the online training charges and had negotiated some additional days on site for training.” Shortly after, plaintiff’s employee Tom Bristow called Quibodeaux to describe the online program, which Quibodeaux did not

want. “Bristow told [her] that on-site training was not in the contract and that [defendant] did not need it.” Quibodeaux stated that is what she wanted and expected from her conversations with Smith, and Bristow said he would speak to Smith about the apparent misunderstanding. Bristow also told her the “on-site days scheduled in the contract were for a kickoff meeting and not a business process review.”

In a follow-up email, Bristow explained to Quibodeaux that Smith had “‘generically referred to the consulting estimate as including both product training and implementation consulting’ and ‘his representation of on-site training is appropriate in that consulting services emphasizes the transfer of knowledge as part of the implementation process.’ [She] did not [originally] understand, and still [did] not understand, how . . . Smith’s promise of on-site training of end users really meant something other than in person, on-site training of [defendant’s] end user employees on the system as installed at [defendant company]. [Bristow] then purported to [deal] with [her] concerns by having someone come to [defendant’s] place of business and do a three[-]day product ‘Knowledge Camp’ using a laptop computer, before the software was installed or implemented.” Upon discovering that “was apparently all that they were going to receive for the three days added to the contract after [Quibodeaux’s] negotiations with . . . Smith—an unnecessary three[-]day laptop demonstration rather than a professional process review and end-user training,” defendant rescinded the contracts.

Contrary to defendant’s claim, Quibodeaux’s declaration confirms the consulting agreement did not provide on-site training, a fact defendant appears to concede in its opening brief when it states “the [c]onsulting [a]greement does not provide for on-site training.” Based on our analysis of defendant’s separate statement, we reject its contention the court erred in finding plaintiff’s facts 1, 3, 4, and 7 through 10 undisputed.

3. Rescission Based on Fraud and Unilateral Mistake

Defendant contends summary judgment was improper because it submitted evidence demonstrating a valid claim for rescission. It gave written notice of rescission and returned the unopened software to plaintiff as required by Civil Code section 1691. Additionally, Civil Code section 1689 authorized the rescission based on the evidence of unilateral mistake and fraud it presented. (Civ. Code, § 1689, subd. (b)(1) [party may rescind contract if consent “given by mistake, or obtained through duress, menace, fraud, or undue influence”].) We conclude the evidence was barred by the parol evidence rule.

“The parol evidence rule . . . generally prohibits the introduction of extrinsic evidence, including evidence of any prior or contemporaneous oral agreement, to vary, alter or add to the terms of an integrated written instrument. [Citation.]” (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2011) 191 Cal.App.4th 611, 616, fn. omitted (*Riverisland*)). “The rule derives from the concept of an integrated contract, and is based on the principle that when the parties to an agreement incorporate the complete and final terms of the agreement in a writing, such an “integration” in fact becomes the complete and final contract between the parties, which may not be contradicted by evidence of purportedly collateral agreements.” (*Ibid.*)

The parties agree the contracts here were integrated. Thus, unless an exception pertains, the parol evidence rule bars extrinsic evidence varying or adding to the contract.

One such exception is where extrinsic evidence is offered to show a party was fraudulently induced to enter the contract. (Code Civ. Proc., § 1856, subd. (g); *Simmons v. Ratterree Land Co.* (1932) 217 Cal. 201, 204 [“Fraud in the inducement of a contract vitiates the entire agreement and destroys that consent which is essential to the existence of a valid contract”].) For this exception to apply, the parol evidence “must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise

directly at variance with the promise of the writing.” (*Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263.) Misrepresenting contract terms to induce the other party to execute the agreement “constitutes ‘fraud in the procurement of the instrument’ [citation], which [has been] recognized as an appropriate circumstance for application of the fraud exception” (*Riverisland, supra*, 191 Cal.App.4th at pp. 624-625.) “Relief based on this type of fraud . . . would be available only when one party made a false statement about the terms contained in the contract after the written contract was prepared, and the other party reasonably relied on that statement and was thereby induced to sign the written contract without discovering that the actual provisions were not as represented.” (*Id.* at p. 625.)

In *Riverisland*, the plaintiffs (the parties opposing summary judgment) alleged the defendant had promised “to forbear from collection for two years if plaintiffs would pledge two orchards as additional security.” (*Riverisland, supra*, 191 Cal.App.4th at pp. 614-615.) At the time the agreement was signed, the defendant affirmatively represented that it contained only the above terms, and not the plaintiffs’ residence or truck yard. The plaintiffs did not read the agreement and instead signed in reliance on the defendant’s representations. *Riverisland* declined to apply the *Pendergrass* limit “where the party seeking admission of the parol evidence has alleged that the other party misrepresented the content of the written contract and thereby induced execution of the contract.” (*Id.* at p. 625.) It concluded the extrinsic evidence of the alleged misrepresentations should have been admitted in opposition to the defendant’s summary judgment motion and created a triable issue of material fact. (*Ibid.*)

Here, in contrast to the plaintiff in *Riverisland*, Quibodeaux read the contract before she signed it. She declared that upon receiving the proposed contract that she ultimately signed on August 7, she compared it with the prior version “side by side and noted the differences in the dollar amounts and days. I then spoke with . . . Smith by telephone and said: ‘I see my days are increasing here. I am assuming this is for the

training and everything I asked for' or words to that effect. He responded: 'Yes, it is.' I then signed the contract forms"

Smith's verbal agreement with Quibodeaux's question whether the contract contained "everything she asked for' or words to that effect" is too vague a statement to be actionable. Because Quibodeaux read the contract before executing it and Smith never affirmatively stated the contract included on-site training or a business process review, it cannot be said she was induced by Smith's representation. The fraud exception thus does not apply and defendant's purported extrinsic evidence of fraud and unilateral mistake are barred by the parol evidence rule.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.

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Epicor Software Corporation v. Linear Controls, Inc.

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