Filed 8/31/05

CERTIFIED FOR PARTIAL PUBLICATION*

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

DELL MERK, INC., Plaintiff, v. DONALD C. FRANZIA, as Trustee etc., Defendant and Respondent; PACIFIC STATE BANK, Intervener and Appellant.	C046171 (Super. Ct. No. CV012208)
DELL MERK, INC., Plaintiff, v. DONALD C. FRANZIA, as Trustee etc., Defendant and Respondent; PACIFIC STATE BANK, Intervener and Appellant.	C043539 (Super. Ct. No. CV012208)

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part I of the Discussion.

APPEAL from a judgment of the Superior Court of San Joaquin County, K. Peter Saiers, J. Affirmed.

No appearance for Plaintiff.

Law Office of Downey Brand, Kevin M. Seibert, Frank R. Perrott, and Cassandra M. Ferrannini for Defendant and Respondent.

Freeman, D'Aiuto, Pierce, Gurev, Keeling & Wolf, Arnold J. Wolf and Coren D. Wong for Intervener and Appellant.

Pacific State Bank (Bank) intervened in an action between Dell Merk, Inc., a corporation to which it had provided commercial financing, and the Donald C. Franzia 1992 Revocable Trust, Donald C. Franzia, trustee (Franzia). The underlying litigation between Dell Merk and Franzia involved a construction contract dispute. As a secured party, Bank sought payment from Franzia of amounts previously paid by Franzia to Dell Merk as well as monies allegedly still owed and payable by Franzia to Dell Merk.[1] The trial court granted Franzia's motions in limine to exclude all evidence on Bank's two causes of action and entered judgment against Bank. The trial court later granted Franzia attorney fees and costs and entered an amended judgment against Bank including an award of $212,726 in fees and costs.

Bank appeals the judgment and amended judgment entered against it contending the trial court erred in granting Franzia's motion in limine to exclude all evidence on its first cause of action and in ordering Bank to pay attorney fees. Bank

[1] Bank also alleged causes of action for fraud and negligent misrepresentation, but demurrers to such causes of action were sustained without leave to amend.

claims: 1.) Franzia breached its obligation to pay by not making the first progress payment jointly payable to Bank and Dell Merk; 2.) because Dell Merk defaulted on the loan prior to June 2000, Bank was entitled to all the proceeds from the first progress payment; and 3.) Bank was entitled to any proceeds Franzia still owed to Dell Merk on the construction contract. We shall affirm the judgment.

FACTUAL BACKGROUND

On March 28, 2000, Dell Merk, Inc., doing business as Uprite Construction, through its sole owner and president Chris Dell Aringa (Dell Merk), entered into a written, design-build, construction contract with Bobcat Central, through its agent and representative Donald C. Franzia, for a project known as Bobcat Central - New Facility Newton Road, a heavy equipment showroom (project). A short time later, on April 14, 2000, Dell Merk entered into a new written construction contract for the project, which purported to “void out the cost plus contract” of March 28, 2000, and substitute a stipulated price for the project. The April 14 contract also changed the name of the owner of the project from Bobcat Central to Franzia. Neither the March 28 nor the April 14 construction contract contained an attorney fees provision.

On April 20, 2000, Dell Merk obtained a $150,000 line of credit (loan) from Bank. To obtain the loan, Dell Merk executed a promissory note (note), a commercial security agreement

(security agreement), and a business loan agreement.[2] Dell Merk had previously obtained loans from Bank in 1999, including two previous line of credit loans for $150,000 and one equipment purchase loan for $32,075.

The April 2000 note provided for monthly interest-only payments and then a single balloon payment on April 20, 2001, of the principal amount of the loan plus any accrued interest not yet paid. The note allowed prepayment of all or a portion of the amount owed without penalty. The note was secured, according to its terms, by a security agreement "and an assignment of proceeds in that certain contract dated March 28, 2000 by and between Bobcat Central and Dell Merk[.]" The note included a provision requiring Dell Merk to pay attorney fees and costs incurred by Bank in any collection action upon default.

In the referenced security agreement, Dell Merk granted Bank a security interest in the "collateral to secure the indebtedness." The "collateral" was defined to include "the following specifically described property: ASSIGNMENT OF PROCEEDS IN THAT CERTAIN CONTRACT DATED MARCH 28, 2000 BY AND BETWEEN BOBCAT CENTRAL AND DELL MERK[.]" In addition, the

---

[2] Franzia objects to the use of loan documents appearing in the clerk's transcript attached to Bank's opposition to its motion in limine to exclude all evidence regarding Bank's first cause of action, as never being properly authenticated in the trial court. Franzia did not raise this objection orally at the argument regarding its motion after the filing of such opposition. Therefore, the objection has been forfeited.

collateral included “all replacements of and substitutions for any property described above.”

Under the security agreement, the parties agreed Dell Merk could collect any of the accounts included in the collateral “[u]ntil otherwise notified by [Bank.]” However, the Bank could “[a]t any time and even though no Event of Default exists” exercise its rights to collect the accounts and “to notify account debtors to make payments directly to [Bank] for application to the indebtedness.” By this language Dell Merk and Bank agreed Bank could exercise its statutory right of collection authorized by former section 9502, subdivision (1), of the California Uniform Commercial Code (UCC)[3] prior to any default of Dell Merk.

The security agreement also included a provision requiring Dell Merk to pay all of Bank’s costs and expenses, including attorney fees “incurred in connection with the enforcement of th[e] Agreement.”

Bank exercised its right to notify account debtors to make payments directly to Bank by issuing a notice of security

---

[3] Former section 9502 of the California UCC was repealed by Statutes 1999, chapter 991, section 34, operative July 1, 2001. The former section provided in relevant part: “*When so agreed* and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him or her whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he or she is entitled under Section 9306.” (Stats. 1998, ch. 932, § 26, Cal. UCC former § 9502, subd. (1), italics added; see now Cal. UCC, § 9607.)

interest (notice) to “Bobcat Central.” The notice informed Bobcat Central of Bank’s security interest in the contract between Bobcat Central and Dell Merk. The notice stated that as a condition of release of its security interest, all proceeds of such contract were to be paid jointly to Bank and Dell Merk. The proceeds were to be delivered or mailed to Bank. The notice was signed by Mr. Dell Aringa on behalf of Dell Merk acknowledging disbursements were to be made jointly to it and Bank. Donald Franzia “acknowledge[d] receipt of this Notice to Buyer” on behalf of Bobcat Central on April 20, 2000. Bank alleged it required Bobcat Central to execute such written notice as one of the conditions precedent to approval of Dell Merk’s loan.

According to Bank, it gave final approval to the April 2000 loan and filed a financing statement with the California Secretary of State regarding its security interest on April 24, 2000. From May 8, 2000, through October 17, 2000, Dell Merk made monthly interest payments to Bank on the April 2000 note and loan.

On June 14, 2000, Franzia made a first progress payment to Dell Merk in the amount of $274,062.46 for the construction work completed up to that time. On June 15, 2000, Dell Merk made a $20,000 principal only payment to Bank on the April 2000 loan.

Subsequent to the first progress payment, Franzia asked for proof of Dell Merk’s payment of subcontractors listed on the first progress payment application. Dell Merk was unable to provide the documentation and Franzia began to receive

preliminary notices and stop notices from a number of the subcontractors who had not been paid. Franzia also discovered extensive cracking in the showroom floor and other possible construction defects in the project. Franzia terminated Dell Merk as the general contractor for the project in August 2000.

Approximately two months after Franzia terminated Dell Merk, Dell Merk defaulted on its payment obligation to Bank on October 20, 2000. The principal balance Dell Merk owed to Bank on the April 2000 loan was $130,000. Subsequently, Bank alleged it discovered the March 28, 2000 contract between Bobcat Central and Dell Merk had been voided and replaced with the April 14, 2000 contract between Franzia and Dell Merk. Bank also alleged it subsequently learned of the June 14, 2000 progress payment made by Franzia to Dell Merk.

PROCEDURAL BACKGROUND

On November 1, 2000, Dell Merk filed a complaint against Franzia. On December 20, 2000, Franzia filed a cross-complaint against Dell Merk.

In January 2001, Bank filed a motion for leave to intervene in the action between Dell Merk and Franzia, alleging it was entitled to amounts still due Dell Merk under the contract based on “its perfected status as an assignee of the proceeds of the subject contract” and entitled to repayment from Franzia of the entire amount of the first progress payment because the check had not been made jointly payable to Bank and Dell Merk. Bank’s motion for leave to intervene was granted and on February 22, 2001, Bank filed its complaint in intervention. In its first

cause of action Bank alleged Franzia failed to pay Bank in breach of its obligation under former section 9318, subdivision (3), of the California UCC[4] and in its second cause of action, Bank requested declaratory relief. In its prayer for relief, Bank asked for, among other things, damages "in an amount exceeding $130,000" "[f]or costs of suit" and "such other relief as the court may deem just and proper." Bank did not expressly request attorney fees.

Shortly before the trial, set to begin in January 2003, Bank, Franzia, and Dell Merk exchanged a number of motions in limine. Franzia included, along with its opposition to Bank's motion in limine, its own in limine motion to exclude all evidence on Bank's first cause of action, breach of the obligation to pay, because it failed to state a cause of action. Essentially, Franzia argued Bank had no damages from any failure of Franzia to make the first progress payment jointly payable to Dell Merk and Bank. Franzia argued at the time of the progress payment, Dell Merk was current on its required, monthly interest payments on the April 2000 loan and Bank had no entitlement to any additional amounts. Franzia also moved in limine to exclude all evidence relating to Bank's second cause of action for

---

[4] Former section 9318 of the California UCC was repealed by Statutes 1999, chapter 991, section 34, operative July 1, 2001. Subdivision (3) of the former section provided in relevant part: "The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee." (Stats. 1988, ch. 1368, § 11, Cal. UCC former § 9318, subd. (3); see now Cal. UCC, § 9406.)

declaratory relief and to exclude evidence of Dell Merk's pre-2000 loans with Bank.

Trial began on January 6, 2003. Bank stipulated its potential right to damages from Franzia was limited to that portion of the first progress payment representing payment to Dell Merk, specifically, $144,642 minus 10 percent retention. In light of the stipulation, Bank agreed the trial court should grant Franzia's motion in limine to exclude evidence of Dell Merk's other loans. The trial court ruled Bank's second cause of action for declaratory relief was also "out" given the stipulation.[5] The trial court allowed time for Bank to file a written response to Franzia's motion in limine to exclude all evidence on its first cause of action, breach of the obligation to pay, since such motion had first been raised in Franzia's opposition to Bank's in limine motion. The court tentatively indicated it agreed with Franzia's position. After the filing of Bank's response and further argument, the trial court granted Franzia's dispositive motion to exclude all evidence regarding Bank's first cause of action. Judgment was entered against Bank on its complaint in intervention. Bank filed a notice of appeal.

Franzia filed a motion for attorney fees and a memorandum of costs requesting a total of $295,240.67 from Bank. Franzia contended it was entitled to attorney fees from Bank under the reciprocity provision of Civil Code section 1717 (section 1717)

---

[5] Bank does not challenge this ruling on appeal.

because, based on Bank's security agreement with Dell Merk, Bank would have been entitled to its fees if Bank had prevailed in the litigation against Franzia. Bank opposed the fee motion and moved to strike and tax costs. The trial court granted Franzia's motion for attorney fees and denied the motion to tax costs. It ordered Franzia to provide a breakdown of costs and fees between the Dell Merk case and the Bank case. On January 7, 2004, an amended judgment was entered against Bank, awarding Franzia its attorney fees and costs in the reduced amount of $212,726. Bank filed a second notice of appeal and its appeals were consolidated upon stipulation by this court.

DISCUSSION

I.

The Trial Court's Ruling on Franzia's Motion To Exclude all Evidence on Bank's First Cause of Action

Bank contends the trial court erroneously dismissed its cause of action for breach of the obligation to pay the first progress payment jointly. Bank claims its entitlement to the first progress payment proceeds was not limited to the monthly interest payments due under the note as determined by the trial court. The trial court reached such conclusion, according to Bank, by a misinterpretation of unambiguous terms of the loan documents. Specifically, Bank claims the trial court's ruling was "based on an interpretation of the term 'indebtedness' which is at odds with the definition in the loan documents" and ignores Bank's right to take control of proceeds under former section 9502, subdivision (1) of the California UCC even if

there is no default. Bank emphasizes the collateral was security for the entire loan, not just the interest payments.

Bank also claims Dell Merk's misrepresentation in the loan documents, regarding the existence of the March 28, 2000 contract when it had been voided by the April 14, 2000 contract, was a false statement amounting to a default under the security agreement at the time of the first progress payment, entitling Bank to accelerate the due date for the principal.[6]

Franzia argues the trial court's interpretation is actually consistent with the note, construed together with the security agreement. Franzia insists under the terms of the note and the security agreement, Bank could only apply predefault collections to amounts currently due to Bank. Franzia disagrees there was any default at the time of the first progress payment. Alternatively, Franzia argues the security agreement did not give Bank the right to apply any contract proceeds prior to a default. Or, if Bank's interpretation of the security agreement and note is correct, Bank was not damaged by Franzia's failure to make the first progress payment jointly payable, because in receiving the $20,000 principal payment from Dell Merk, Bank

---

[6] Although this clearly appears to be a separate argument, Bank fails to set it forth under a separate heading in violation of rule 14(a)(1)(B) of the California Rules of Court. We may disregard arguments not properly presented under appropriate headings (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1346), but exercise our discretion in this case to address the issue.

received more than it was entitled to receive from the first progress payment.[7]

We disagree with Bank's proposed interpretation of the note and security agreement and argument of default by misrepresentation, agree with Franzia's contention regarding Bank's right to apply collections only to amounts due at the time, and therefore need not reach Franzia's alternative arguments.

A. Standard of Review

Motions in limine are ordinarily directed at particular items of evidence rather than at a plaintiff's entire case. Here, Franzia's motion was not directed to particular items, but instead sought to exclude all evidence regarding Bank's first cause of action.

"[A]n 'objection to all evidence' is essentially the same as a general demurrer or motion for judgment on the pleadings seeking to end the trial without the introduction of evidence. Such an objection is properly sustained where even if the plaintiff's allegations were proven, they would not establish a

---

[7] Bank has filed a motion to augment the record on appeal to include a portion of the deposition testimony of Donald Franzia as well as exhibit 11 to his deposition to support Bank's reply brief responding to this argument. Franzia has filed written opposition asserting the motion is untimely and the materials lack foundation and are not material to the appeal. Bank has been allowed to file a reply to the opposition. We question the value of such a volume of argument and expenditure of fees over a relatively routine motion to augment. Bank's motion to augment is granted. Since we do not reach Franzia's alternative arguments, we do not need to consider the augmented materials.

cause of action." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26 (*Edwards*).) Alternatively, where the trial court grants such a motion in limine at the outset of trial with reference to evidence already produced in discovery, the motion may be viewed as the functional equivalent of an order sustaining a demurrer to the evidence or a nonsuit. (*Id.* at p. 27; *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 676-677.)

Either way, the scope of a trial court's inquiry is limited. "[A] demurrer and a motion for judgment on the pleadings accept as true all material factual allegations of the challenged pleading, unless contrary to law or to facts of which a court may take judicial notice. The sole issue is whether the complaint, as it stands, states a cause of action as a matter of law." (*Edwards, supra,* 53 Cal.App.4th at p. 27.) "A motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is *no* substantial evidence to support a judgment in the plaintiff's favor." (*Id.* at pp. 27-28.)

The reviewing court is bound by the same rules as the trial court. (*Edwards, supra,* 53 Cal.App.4th at p. 28.) Therefore, in this case, we must consider whether, accepting the material allegations of the complaint as true, the complaint states a

cause of action as a matter of law. (*Id.* at p. 27.) To the extent there is any evidence outside the complaint, "we must view the evidence most favorably to [Bank], resolving all presumptions, inferences and doubts in [its] favor, and uphold the judgment for [Franzia] only if it was required as a matter of law." (*Id.* at pp. 27-28; see *Mechanical Contractors Assn. v. Greater Bay Area Assn., supra,* 66 Cal.App.4th at p. 677.) Under either standard, resolution of this case turns primarily on a question of law regarding the interpretation of the note and security agreement. (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 635.)

B. Analysis of the Note and Security Agreement

The rules of contract interpretation are well settled. The contract must be interpreted so as "to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title." (Civ. Code, § 1639.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." (Civ. Code, § 1642.)

Here, Bank extended a $150,000 loan to Dell Merk in April 2000 and in connection with such loan Dell Merk executed a note, security agreement, and business loan agreement. The language in the security agreement very broadly defines the term "indebtedness" to include not only the debt evidenced by the April 2000 promissory note, "including *all principal and interest,*" but "*all other indebtedness* and costs and expenses for which [Dell Merk] . . . is responsible under this Agreement *or under any of the Related Documents*." (Italics added.) In addition, indebtedness includes "*all other obligations, debts and liabilities, plus interest thereon*, of [Dell Merk] to [Bank], as well as *all claims* by [Bank] against [Dell Merk] or any one or more of them, whether existing now or later; whether they are voluntary or involuntary, *due or not due*, direct or indirect, absolute or contingent, liquidated or unliquidated; whether [Dell Merk] may be liable individually or jointly with others; whether [Dell Merk] may be obligated as guarantor, surety, accommodation party or otherwise; whether recovery upon such indebtedness may be or hereafter may become barred by any statute of limitations; and whether such indebtedness may be or hereafter may become otherwise unenforceable." (Italics added.)

Pointing to this language, as well as similar language in the business loan agreement, Bank claims the trial court's ruling on Franzia's motion in limine improperly limited the term "indebtedness" to monthly interest payments currently due on the April 2000 loan and therefore, the trial court erroneously concluded Bank could not prove damages on its first cause of

action because Dell Merk was current on its monthly interest payments to Bank at the time Franzia made the first progress payment.

To the contrary, the trial court's ruling is supported by the language of the security agreement when it is construed together with the note. "'Where two or more written instruments are executed contemporaneously, with reference to the other, for the purpose of attaining a preconceived object, they must all be construed together, and effect given if possible to the purpose intended to be accomplished.' [Citations.]" (*People v. Ganahl Lumber Co.* (1938) 10 Cal.2d 501, 507, quoting *Burnett v. Piercy* (1906) 149 Cal. 178, 189; see *Nevin v. Salk* (1975) 45 Cal.App.3d 331, 338; Civ. Code, § 1642.)

The security agreement and the business loan agreement do expansively define indebtedness and it is clear the parties intended Dell Merk's total debt, due to Bank, be broadly inclusive of all Dell Merk's obligations to Bank. The collateral, the underlying construction contract between Dell Merk and Franzia, was intended as security for the entire indebtedness. However, the question before the trial court, and so before us, is what the parties intended with regard to the payment of such debt, if Bank exercised its predefault right to notify account debtors (Franzia) to make payments of proceeds of the collateral, including periodic progress payments, directly to Bank. (Former Cal. UCC, § 9502(1), repealed effective in 2001, Stats. 1999, ch. 991, § 34; Commercial Security Agreement, Grantor's Right to Possession and to Collect Accounts, p. 3.)

To answer this question the trial court properly looked to the payment provisions of the note, which provided for monthly interest payments and a single balloon principal payment at the end of the term. That is, the note contemplated a gradual repayment of the loan by relatively small interest payments followed by a final repayment of the total principal and remaining interest. Earlier prepayment of principal was allowed, without penalty, but not required. Thus, by the terms of the note, at the time of the first progress payment in June 2000, Dell Merk was only required to pay interest payments on its debt to Bank. If Bank collected proceeds from the collateral, pursuant to its predefault rights under the security agreement, those proceeds should be applied to Dell Merk's total indebtedness consistent with the provisions of the note. The proceeds then should be applied to any interest payments due. After all, the note was not a "demand" note. There was no predefault provision in the note allowing Bank to insist on early payment of additional amounts of the indebtedness. There was no provision allowing Bank to apply additional amounts of collected proceeds of collateral to Dell Merk's total indebtedness without declaring a default.[8] Since it was

---

[8] If Bank determined it was insufficiently protected by the remaining collateral upon distribution of a progress payment, it could declare a default under the provisions of the security agreement allowing it to do so if it believes the prospect of payment is impaired or if, in good faith, it deems itself insecure. (Commercial Security Agreement, Events of Default, p. 4.) Then Bank could apply additional amounts of the proceeds

undisputed Dell Merk was current in its required interest payments to Bank in June 2000, the trial court correctly concluded, as a matter of law, Bank suffered no damages from the alleged failure of Franzia to make the first progress payment jointly payable to Bank and Dell Merk.

This conclusion is buttressed by a comparison of the terms of the security agreement regarding collection of collateral predefault with those related to postdefault collections. The security agreement allows Bank "[a]t any time and even though no Event of Default exists," to notify account debtors (Franzia) to make payments of proceeds of the collateral directly to Bank "for application to the indebtedness." (Commercial Security Agreement, Grantor's Right to Possession and to Collect Accounts, p. 3.) The same agreement provides "[i]f an Event of Default occurs under this Agreement, at any time thereafter," Bank may accelerate the "*entire indebtedness*" and/or may collect payments from the collateral and "*apply it to payment of the indebtedness* in such order of preference *as [Bank] may determine*" and/or "may . . . collect . . . on the Collateral as [Bank] may determine, *whether or not indebtedness or Collateral is then due.*" (Commercial Security Agreement, Rights and Remedies on Default, p. 4, italics added.) To allow Bank predefault to collect *and apply* proceeds from collateral to Dell Merk's *entire indebtedness* or to *indebtedness not then due* would eliminate the distinction between the clauses. A contract must

---

to the indebtedness. (Commercial Security Agreement, Rights and Remedies on Default, Collect Revenues, Apply Accounts, p. 4.)

be construed if possible "so as to give effect to every part[.]" (Civ. Code, § 1641.) "Courts must interpret contractual language in a manner which gives force and effect to *every* provision, and not in a way which renders some clauses nugatory, inoperative or meaningless." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473.)

To require the application of predefault collections of collateral only to amounts then due does not change the contract's definition of indebtedness, but construes indebtedness in context with the note and the clauses regarding Bank's rights pre and postdefault. Dell Merk remained liable for all of its debt to Bank. The collateral remained security for all of Dell Merk's debt to the extent there were additional proceeds from the Dell Merk/Franzia contract.

C. Bank's Claim of Default Based on Misrepresentation

During the course of the hearing before the trial court on Franzia's motion in limine to exclude all evidence regarding Bank's first cause of action, Bank asserted in two brief sentences that there was actually a default by Dell Merk at the time of the first progress payment. Counsel stated: "There was a default. Not in the payment, there was a default in the misrepresentation to the Bank of [the] existence of that March 20th [*sic*] contract." Bank did not develop this argument any further in the trial court.

On appeal, however, Bank now claims it was additionally entitled to all of the proceeds from the first progress payment, because there was a default as of June 2000, entitling it to

postdefault remedies. Bank claims Dell Merk made a "false statement" when it obtained the April 20, 2000 loan, because Dell Merk represented the March 28, 2000 contract between it and Bobcat Central was still available as collateral. In fact, the March 28 contract had been voided by the April 14 contract between Dell Merk and Franzia.

Franzia argues Bank is bound by its factual admission in its second amended complaint that the date of Dell Merk's default was October 20, 2000, not, as Bank now claims, June 2000.[9] Franzia also contends we need not consider the issue because Bank has failed to cite any evidence in the record supporting a refutation of the October default date. We agree with neither party.

We are required to review the trial court's ruling as equivalent to an order sustaining a demurrer or granting a nonsuit. We conclude Bank did not sufficiently plead or prove it would have declared a default had it known of the different contract by the time of the June 2000, first progress payment.

The security agreement states the following constitutes one of the possible events of default: "False Statements. Any warranty, representation or statement made or furnished to

---

[9] A well-pleaded material allegation of fact in a pleading is treated, under the doctrine of "'conclusiveness of pleadings,'" as a "'judicial admission'" of the truth of the matter admitted. (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 413, pp. 510-511.) Franzia claims Bank's allegation that Dell Merk "defaulted on its payment obligation to Bank on October 20, 2000," is such a judicial admission.

[Bank] by or on behalf of [Dell Merk] under this Agreement, the Note or the Related Documents [that] is false or misleading in any *material respect*, either now or at the time made or furnished." (Commercial Security Agreement, Events of Default, p. 3, italics added.) On the occurrence of any event of default, Bank may, but does not have to, exercise any one or more of its statutory or contractual rights and remedies. (Commercial Security Agreement, Rights and Remedies On Default, p. 4.)

The security agreement also defines all "collateral" to include "all replacements of and substitutions for any property described above." (Commercial Security Agreement, Collateral, p. 1.) So although the collateral specifically described in the security agreement is the March 28 contract, the security agreement expressly defines all collateral to include any replacement or substitution for that property, i.e., the April 14 contract. Thus, Bank still held a security interest in the contract for the project even though a different construction contract between Dell Merk and Franzia, regarding the same project, was referenced in the note, security agreement and notice.

Bank alleged in its complaint in intervention the March and April contracts were "virtually identical in all material respects with the following two exceptions": (1) the change in the name of the "Owner" from Bobcat Central to Franzia, and (2) the change in the contract price from an unspecified amount to be calculated on a cost plus basis to a stipulated sum of

$3,027,886. Thus, Bank did allege the differences noted were "material" changes. However, Bank did not allege in its complaint the differences impaired its security in the contract. Bank did not allege it would have declared a default on the loan based on such differences if it had learned about the substitution of contracts earlier. The only specific default alleged by Bank in its complaint was the payment default by Dell Merk on October 20, 2000.[10]

In its opposition to Franzia's motion in limine to exclude all evidence on its first cause of action, Bank did not argue any default by misrepresentation at the time of the first progress payment. Bank only argued its interpretation of the loan documents to allow application of the proceeds of the progress payment to Dell Merk's "indebtedness." Bank did not follow up on the two brief sentences by its counsel regarding a default existing at the time of the first progress payment, at the hearing on the motion in limine. Nor did Bank offer to amend its complaint to add allegations regarding such a default. Bank did not submit any evidence to support a finding that Bank would have declared a default and exercised its default rights and remedies had it known in June 2000 the April contract and not the March contract was operative.

---

[10] Bank's complaint alleged "among other acts and/or omissions, [Dell Merk] failed to pay Bank the outstanding principal and interest thereon when it came fully due and payable on October 20, 2000. [Dell Merk] defaulted on its payment obligation to Bank on October 20, 2000." Bank never specified to which "other acts and/or omissions" this allegation referred.

In the absence of more specific pleadings and supporting evidence, Bank has not adequately alleged or shown it was entitled to exercise postdefault remedies as to the first progress payment made in June 2000 and therefore, that its damages from Franzia's failure to joint pay exceeded the amount of any monthly interest due at the time.

As Bank could not prove any damages, the trial court properly granted Franzia's motion in limine to exclude all evidence regarding Bank's first cause of action.

II.

The Trial Court's Award of Attorney Fees

"On appeal this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law." (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.)

We start with the basic proposition that each party to a lawsuit must pay its own attorney fees except where a statute or contract provides otherwise. (Code Civ. Proc., § 1021.) Where there is a contractual attorney fees provision, section 1717, subdivision (a) provides, "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Section 1717 was enacted to “avoid the perceived unfairness of one-sided attorney fee provisions . . . .” (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1182.) “Its purposes require section 1717 be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney’s fees should he prevail in enforcing the contractual obligation against the defendant.” (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.)

In this case, neither the March nor the April construction contract, between Dell Merk and Franzia (Bobcat Central), contained an attorney fees clause. However, both the note and the security agreement executed by Dell Merk for the loan from Bank contain an attorney fees clause. The note requires Dell Merk to pay attorney fees incurred by Bank in any collection upon default. The security agreement required Dell Merk to pay Bank any attorney fees it “incurred in connection with the enforcement of th[e] Agreement.”

After judgment was entered against Bank, Franzia, a nonsignatory to both the note and security agreement, filed a motion for attorney fees contending it was entitled to fees from Bank under the reciprocity provision of section 1717 because Bank would have been entitled to its fees if it had prevailed in the litigation against Franzia. The trial court granted Franzia its attorney fees and costs in the amount of $212,726.

We conclude Franzia was entitled to attorney fees and costs for its defense of Bank's claim of breach of the obligation to pay for failure to make the first progress payment jointly payable to Dell Merk and Bank. Since Bank only challenges Franzia's entitlement to its fees and not the amount of the award and since it appears the trial court reduced the originally requested fees to eliminate fees solely attributable to Franzia's action against Dell Merk, we shall affirm the amended judgment.

"[I]n cases involving nonsignatories to a contract with an attorney fee provision, the following rule may be distilled from the applicable cases: A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed." (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382 [involving a nonsignatory plaintiff suing a signatory defendant in an action on the contract].) That is, Franzia is entitled to recover its attorney fees only if it would have been liable for Bank's attorney fees if Bank had prevailed. This requires an examination of the claims made by Bank in its complaint in intervention.

A review of the record reflects Bank intervened in the action between Dell Merk and Franzia in order to assert two claims against Franzia. Bank claimed it was entitled to repayment from Franzia of the entire amount of the first progress payment because 1.) Franzia failed to make the payment

jointly payable to Bank and Dell Merk after it received notification from Bank to do so, and 2.) Bank was entitled to any amounts still due Dell Merk under the Dell Merk/Franzia contract based on "its perfected status as an assignee of the proceeds of the subject contract."

A. Franzia's Defense of Bank's Claim as an Assignee To the Construction Contract Between Franzia and Dell Merk

In asserting its claim to any amounts still due Dell Merk under the Dell Merk/Franzia contract, Bank, as the assignee, stepped into the shoes of Dell Merk based on its security interest/assignment in the proceeds of that contract. The case of *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598 (*California Wholesale*) is instructive.

In *California Wholesale* a materials supplier (plaintiff) took a security interest in the accounts receivable of a drywall subcontractor. After the subcontractor defaulted on its obligation to plaintiff, plaintiff sought to have the subcontractor's general contractor (defendant) pay directly to it any money the defendant still owed to the subcontractor. When the defendant did not do so, plaintiff sued the defendant alleging a cause of action for damages for breach of California UCC former section 9502. Judgment was entered against plaintiff after it was determined defendant had properly paid the amount still due the subcontractor to the subcontractor's bank lender, who had a prior perfected security interest in the subcontractor's accounts receivable. The trial court denied

defendant's motion for attorney fees. (96 Cal.App.4th at pp. 601-603.)

The appellate court reversed the trial court's denial of attorney fees. (*California Wholesale, supra,* 96 Cal.App.4th at p. 611.) The court found the issue litigated by the parties in this action was which party had the right to payment of the money earned by the subcontractor under the subcontract with defendant. Plaintiff "sought in its complaint to enforce its *security interest* in [subcontractor's] accounts receivable and contract rights pursuant to the UCC, and as pled in the complaint, [plaintiff] was also the 'assignee' of [subcontractor's] accounts receivable and contract rights." (*Id.* at p. 605.) Irrespective of the fact plaintiff framed its complaint as an action under the UCC, the parties necessarily litigated the money due the subcontractor under the subcontract with defendant. The subcontractor's subcontract with the defendant contained an attorney fees provision. As the subcontractor's assignee, plaintiff stepped into the shoes of the subcontractor. As the prevailing party in the collection action, defendant was entitled to invoke the attorney fees provision in the subcontract against plaintiff. (*Id.* at pp. 605-606.) Plaintiff was liable for those fees even though it was a nonsignatory to the subcontract containing the fees provision. (*Id.* p. 608.)

Bank claims identical facts exist in this case and that *California Wholesale* stands for the proposition that "[a]n attorney's fee claim arising out of an action between an account

assignee (i.e., [Bank]) and an account debtor (i.e., [Franzia]) can be predicated only on an attorney's fee provision in the contract between the account assignor (i.e., Dell Merk) and the account debtor." Franzia responds that *California Wholesale* did not consider and does not hold a fee claim can only be brought against a secured party/assignee if the fee provision appears in the agreement between the account debtor and account assignor.

California Wholesale, supra, 96 Cal.App.4th 598, demonstrates the necessity for a careful assessment of the substantive nature of the action brought by the plaintiff. In *California Wholesale* the plaintiff, a secured party/assignee, sued the defendant, the account debtor, for proceeds due to the assignor, subcontractor. Even though the plaintiff framed its complaint under the California UCC, essentially plaintiff was suing on the subcontract between the account debtor and the assignor. The same is partially true here. One of the two reasons Bank intervened in the action between Dell Merk and Franzia was to assert its rights to any proceeds determined to be due to Dell Merk from Franzia. Such portion of Bank's action was based on the contract, as an assignee, between Dell Merk and Franzia. As there was no attorney fees provision in the contract between Dell Merk and Franzia, Bank was not entitled to claim attorney fees for its action on the Dell Merk/Franzia contract. And Bank is not liable for Franzia's fees in defending that portion of Bank's action. (*Ibid.*)

We agree with Franzia that *California Wholesale, supra,* 96 Cal.App.4th 598, did not consider what the effect would have

been of a fee provision in the security agreement between the plaintiff and the subcontractor, and so is not authority on such question. Franzia contends that under the principles of Civil Code section 1642, Bank's action against it for the proceeds from the Dell Merk/Franzia contract was also an action on the security agreement. However, under the principles of Civil Code section 1642, we disagree.

Civil Code section 1642 provides: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." That is, "several papers relating to the same subject matter and executed as parts of substantially one transaction, are to be construed together as one contract." (*Nevin v. Salk* (1975) 45 Cal.App.3d 331, 338; accord *BMP Property Development v. Melvin* (1988) 198 Cal.App.3d 526, 531.)

The construction contract for the project between Dell Merk and Franzia and the various documents comprising the loan contract and the security agreement between Dell Merk and Bank are not between the same parties and do not relate to the same subject matter pursuant to Civil Code section 1642. Nor do they comprise one transaction. Bank's action on the Dell Merk/Franzia construction contract as Dell Merk's assignee was not an action on the security agreement within the meaning of Civil Code section 1642.

Nor were fees authorized under the reasoning of *Saucedo v. Mercury Savings and Loan Assn.* (1980) 111 Cal.App.3d 309 (*Saucedo*) and *Wilhite v. Callihan* (1982) 135 Cal.App.3d 295

(*Wilhite*). These cases, involving a nonsignatory plaintiff, arise in the peculiar context of an action to prevent foreclosure for nonpayment of a real property promissory note, secured by a deed of trust. In such situation, there was a practical reason to apply section 1717 to the nonassuming grantee's action to enjoin foreclosure because a nonassuming grantee of the property wanting to protect his or her equity in the property would have to pay, despite no contractual liability, the beneficiary's fees as a condition of any redemption of the property. (*Saucedo, supra,* at pp. 314-315; *Wilhite, supra,* at pp. 301-302.) No similar situation is presented here.

We conclude Bank would not have been entitled to fees on the portion of its complaint in intervention, as an assignee seeking payment of any remaining proceeds due to Dell Merk from Franzia on the project contract. Therefore, Franzia is not entitled under the reciprocity provision of section 1717 to its fees in defending such claim on the contract between Dell Merk and Franzia.

B. Franzia's Defense of Bank's Claim Franzia Failed To Make the First Progress Payment Jointly Payable To Dell Merk and Bank

We now consider whether Franzia was entitled to attorney fees based on its defense of Bank's other claim seeking repayment of the first progress payment because Franzia failed to make the payment jointly payable to Bank and Dell Merk after it received notification from Bank to do so. This portion of

Bank's action was not based on the Dell Merk/Franzia contract,[11] but was a separate claim arising from Bank's exercise of its rights under the security agreement to notify Franzia to jointly pay Bank and Dell Merk. Bank alleged Franzia, although a nonsignatory to the security agreement, breached its obligation to pay Bank after such notification. Although it was pled as an action under the California UCC and Bank did not pray expressly for attorney fees,[12] the question is whether Franzia's failure to make the first progress payment jointly payable to Dell Merk and Bank was nevertheless an action "on the contract" for purposes of Section 1717. If Bank would have been legally entitled to fees if it had prevailed, Franzia would be entitled to its fees for defending Bank's action when Bank lost. (*Real Property Services Corp. v. City of Pasadena, supra,* 25 Cal.App.4th 375, 382.)

The Supreme court has concluded that Section 1717 provides a reciprocal remedy for a nonsignatory defendant, "sued on a

---

[11] *California Wholesale, supra,* 96 Cal.App.4th 598, does not limit the basis for an attorney fees claim to the contract between the account debtor and the assignor if the claim asserted by a secured party/assignee is not based on that contract.

[12] Bank's complaint, first amended complaint, and second amended complaint alleged, "Franzia failed and refused, and continues to fail and refuse, to make payment to Bank in breach of its obligation under Section 9318, subdivision (3), of Article 9 of the California Uniform Commercial Code." The original complaint alleged damages in excess of $130,000. The first amended complaint and second amended complaint sought increased damages in excess of $274,062. In none of the complaints did Bank pray for attorney fees.

contract as if he were a party to it," if the signatory would "clearly be entitled to attorneys' fees should he prevail in enforcing the contractual obligation against the [nonsignatory]." (*Reynolds Metals Co. v. Alperson, supra*, 25 Cal.3d 124.) Read literally, the requirements of *Reynolds* are met: Bank, in an action on a contract, sought damages from Franzia, a nonsignatory defendant. Had Bank established that Franzia was bound by the contract, it would have been entitled to attorneys' fees consistent with the terms of the security agreement. The fact that Bank did not request fees is inconsequential.[13]

The fact that Bank's contractual claim was baseless does not matter. It is nonetheless obligated, by virtue of Section 1717, to pay fees to the party that ultimately prevailed, Franzia.

Moreover, California courts liberally construe the term "'"on a contract"'" as used within section 1717. (*California Wholesale, supra,* 96 Cal.App.4th 598, 605.) As long as the action "involve[s]" a contract it is "on [the] contract" within the meaning of Section 1717. (*Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal.App.3d 701, 706; cf. *Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 378-379.)

---

[13] "It is now settled that a party is entitled to attorney fees under section 1717 'even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed.' [citations omitted]" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870.)

Former section 9318, subdivision (3), of the California UCC authorized an account debtor to continue paying the assignor until it received notification of the assignment and was told payments were to be made to the secured party/assignee. (Stats. 1988, ch. 1368, § 11, Cal. UCC former § 9318, subd. (3), repealed Stats. 1999, ch. 991, § 34; see now Cal. UCC, § 9406.) Former section 9502 of the California UCC authorized the secured party to give such notification to the account debtor "[w]hen so agreed and in any event on default." (Stats. 1998, ch. 932, § 26, Cal. UCC former § 9502, subd. (1), repealed Stats. 1999, ch. 991, § 34; see now Cal. UCC, § 9607.) Consequently, at the time of the security agreement involved here, the right to collect accounts receivable from an account debtor after default could be based on statute or could be based on both statute and contract. Prior to default, however, the right to collect accounts receivable existed only if contractually agreed upon by the parties. Bank and Dell Merk included such a contractual agreement in the security agreement in this case.[14] Bank exercised this contractual right to collect accounts receivable prior to default by obtaining a signed notice of security interest from Bobcat Central/Franzia, directing all proceeds be paid jointly to Dell Merk and Bank.

---

[14] "GRANTORS RIGHT TO POSSESSION AND TO COLLECT ACCOUNTS. [A]t any time and even though no Event of Default exists, Lender may exercise its rights to collect the accounts and to notify account debtors to make payments directly to Lender for application to the indebtedness."

Subsequently Bank sued Franzia for its failure to make the first progress payment jointly payable to Bank and Dell Merk. As Bank was only entitled to require joint payment of the progress payment predefault because of the security agreement containing the contractual agreement for such collection right, its action necessarily involved the security agreement containing such right.

Accordingly, Bank's complaint contained numerous allegations regarding the terms of its note, security agreement and business loan documents and the notice of security interest provided to Franzia. In resolving Bank's claims the terms of the note, security agreement, business loan and notice of security interest were necessarily interpreted, as discussed in section I.B. above. We conclude Bank's claim to repayment of the first progress payment was an action "on the contract," the security agreement, within the meaning of section 1717. Franzia was entitled to an award of attorney fees for successfully defending Bank's contractual claim regarding the first progress payment.

The record shows the trial court ordered Franzia to provide it a breakdown of its fees and costs between the Dell Merk case and the Bank's case. Thereafter, the trial court awarded a reduced amount of fees and costs. The natural inference is the trial court excluded amounts solely attributable to Franzia's prosecution and defense of the construction dispute with Dell Merk. Bank raises no challenge on appeal to the reduced amount of fees awarded by the trial court.

DISPOSITION

The judgment and amended judgment are affirmed. Costs on appeal are awarded to respondent. (Cal. Rules of Court, rule 27(a).)

CANTIL-SAKAUYE, J.

We concur:

RAYE, Acting P.J.

HULL, J.