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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

Court of Appeal - Sixth App. Dist.
FILED
SEP 11 2008
MICHAEL J. YERLY, Clerk
By ________ DEPUTY

SALLY E. NACIANCENO,

Plaintiff and Respondent,

v.

BEN LOZADA et al.,

Defendants and Appellants.

H029612
(Santa Clara County
Super. Ct. No. CV815117)

Plaintiff Sally Nacianceno lent $85,000 to defendant Ben Lozada (Ben) at an interest rate that was illegally usurious. When Ben failed to repay the loan, Nacianceno filed a lawsuit against him in which she alleged breach of contract and common count for money lent claims. Following trial on these two claims, the jury found in favor of Nacianceno and awarded damages in the amount of $118,400.40. Nacianceno also sought to set aside the fraudulent transfer of real property from Ben to his then wife Caroline Lozada (Caroline).[1] This equitable issue was tried by the court. The court found in favor of Nacianceno, and ordered that the interspousal transfer and grant deeds on the Lozadas' residence be set aside. The trial court also awarded attorney's fees in the amount of $111,685 to Nacianceno.

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[1] We refer to defendants by their first names for purposes of clarity and not out of disrespect. We have also granted Ben's application for leave to continue this appeal, after Caroline's death, on behalf of Caroline's estate.

On appeal, Ben contends: (1) Nacianceno was not entitled to recover interest as damages after the maturity of the debt; (2) Nacianceno's acceptance of payments extended the maturity date; (3) he was entitled to a set-off of treble the amount of illegal interest paid; (4) Nacianceno's claims are barred by the statute of limitations; (5) there was insufficient evidence to support the judgment; (6) one of the exhibits incorrectly credited Ben's payments first to interest and then to principal; (7) Nacianceno was not entitled to attorney's fees, because the jury's verdict did not indicate that she prevailed on her theory of breach of a written contract; and (8) Nacianceno cannot collaterally attack a bankruptcy court order in a state court proceeding. We find no error and affirm the judgment.

I. Statement of Facts

Ben introduced himself to Nacianceno as an insurance broker and financial advisor, and they became close friends. Ben asked Nacianceno to lend him $85,000. She told him that she had $40,000 immediately available and that she would review her accounts to determine if she could lend him the balance. Ben then drafted a promissory note, dated October 17, 1992, in which he agreed to repay $40,000 by January 16, 1993. The note also contained an option to extend the maturity date to July 16, 1993. The note stated an interest rate of 24 percent per year, which the parties agreed prior to trial was illegally usurious, and allocated all payments first to accrued interest and then to principal. On October 17, 1992, Nacianceno gave Ben a check for $40,000. Between October 30, 1992 and December 3, 1992, Nacianceno gave Ben another $45,000.

Though the note stated that it was secured by a deed of trust, the loan was never secured by a deed of trust. Nacianceno relied on Ben's statements about the deed of trust, because they were friends.

Prior to July 16, 1993, Ben made one payment of $1,700. He then made 26 payments of $1,700 and one payment of $3,400. There were also three months in which

Ben made three separate payments of $1,000 and $700 for a total of $5,100. The total amount of the payments was $54,400. Nacianceno received the last payment on October 3, 1998.

Meanwhile, on January 19, 1996, Caroline filed for divorce from Ben. On March 11, 1996, Caroline recorded an interspousal transfer deed in which Ben and Caroline transferred the couple's principal residence in Woodside to Caroline as her separate property. At that time, the fair market value of the residence was $1.5 million. Shortly thereafter, on March 25, 1996, Ben filed his first Chapter 13 bankruptcy petition.

On May 13, 1996, Ben and Caroline entered into a property settlement agreement in which Caroline received over 98 percent of the net value of the marital assets and Ben received less than two percent of these assets.

On January 17, 1997, Ben's first bankruptcy petition was dismissed. According to Ben, the petition was dismissed, because "there were creditors saying that [he] got business assets."

On January 28, 1997, Ben filed his second Chapter 13 bankruptcy petition. Ben failed to list Nacianceno as a creditor in this petition, and thus his debt to her was not discharged.

On April 24, 1997, Caroline filed a Chapter 7 bankruptcy petition. Prior to the filing of this petition, Patelco Credit Union (Patelco) had obtained judgments in the amounts of $30,674.11 and $28,785.15 against Caroline. Patelco objected to the confirmation of Ben's Chapter 13 plan that had been filed on May 6, 1997, and filed a motion to consolidate Ben and Caroline's bankruptcies. Patelco and Caroline then entered into an agreement in which Patelco obtained a trust deed lien on the Woodside property.

In July 1997, the bankruptcy court issued an order in Caroline's case, which states in relevant part: "Caroline Lozada shall immediately execute a promissory note in favor of Patelco, in the sum of $27,500.00, and shall execute a deed of trust in favor of Patelco

to secure repayment of said note. Ben Lozada shall immediately execute a quit claim of any interest he has in the Woodside Property. . . . [¶] . . . the automatic stay in Ben Lozada's bankruptcy, no. 97-30391, and the Caroline bankruptcy, no. 97-31897 shall be vacated and extinguished effective June 12, 1997, in order to allow for the granting of the aforesaid note, deed of trust, and quit claim deed, and to allow for Patelco to foreclose on its security interest and thereafter take possession of the property in the event that Caroline Lozada does not make all required payments in a timely fashion, or in the event that the senior lienor commences foreclosure due to nonpayment by Caroline Lozada under a senior lienor's deed of trust." The bankruptcy court also ordered Ben to notify all his creditors that he was releasing any interest he might have in the Woodside property. Ben did not notify Nacianceno that he had transferred his interest in the Woodside property.

On February 25, 2002, Nacianceno prepared an agreement for Ben to sign, which read: "I acknowledge and admit that I owe Sally Nacianceno, M.D. the sum of $85,000, plus 12% interest." Before signing the document, Ben added in his own handwriting, "This will be negotiated again."

On February 28, 2003, Nacianceno filed suit against Ben for breach of contract, common count for money lent, and fraud claims. On November 1, 2004, the trial court granted Nacianceno's application for an order granting leave to amend the complaint. The amendment added a fourth cause of action to set aside the fraudulent transfer of the Woodside property. After Caroline was joined to the present action, the final judgment of dissolution was entered on March 7, 2005.

On August 4, 2005, a jury trial was held on the breach of contract and money lent claims. The jury returned a general verdict in favor of Nacianceno and awarded her $118,400.40.

Following trial, the court decided the equitable issue regarding the fraudulent transfer of the Woodside property in favor of Nacianceno. The trial court found that Ben

fraudulently transferred his interest in the Woodside property to Caroline. The trial court then set aside and declared void the interspousal transfer deed, dated October 20, 1995, and the grant deed, dated August 8, 1997. The trial court also restored the Woodside property to Ben and Caroline as joint tenants, and restrained them from "encumbering, selling, transferring, conveying, or otherwise disposing of the Woodside" property.

The trial court later awarded Nacianceno $111,685 in attorney's fees.

II. Discussion

A. Effect of Usurious Interest Provision of Note

Relying primarily on Usury Law, section 2[2] and *Blodgett v. Rheinschild* (1922) 56 Cal.App. 728 (*Blodgett*), Ben contends that Nacianceno was not entitled to recover interest that accrued after the maturity of the debt.

Section 2 of the Usury Law states in relevant part: "No person . . . shall directly or indirectly take or receive . . . any greater sum . . . for the loan . . . of money . . . than at the rate of twelve dollars upon one hundred dollars for one year[.] . . . Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed."

In *Blodgett*, the contract charged more than 12 percent per year on the amount that had been loaned. (*Blodgett*, *supra*, 56 Cal.App. at p. 735.) Assuming that the contract was usurious, the plaintiff argued that he was entitled to the legal rate of interest after the debt matured. (*Blodgett*, at pp. 735-736.) In rejecting this argument, the *Blodgett* court focused on the language of section 2 of the Usury Law. (*Blodgett*, at p. 734.) The

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2 The Usury Law is an initiative measure that has not been codified. It appears in West's Annotated Civil Code (1985 ed.) foll. § 1916.12, p. 178 and Deering's Annotated Uncodified Measures 1919-1 (1973 ed.) p. 78.

Blodgett court reasoned: "We think it is clearly the intent of this initiative measure that there shall be *no recovery of any interest* whatever, and that the loss of all interest, *whether accruing before or after the maturity of the debt*, is one of the penalties contemplated by the act. When the initiative measure declares that if the contract be usurious 'no action at law to recover interest *in any sum* shall be maintained,' it ought to be understood to mean exactly what it says, namely, that if any person shall contract for a usurious rate of interest he shall not recover interest 'in any sum.' If only interest before the maturity of the debt were intended to be banned, such intent could have been accomplished by that provision of the act which declares that the usurious contract shall be null and void 'as to any agreement . . . therein to pay interest.' For if the act contained only that provision, then the usurious contract would have to be read as though it had made no mention of any interest whatever, in which case there might be ground for the claim that the debt should draw interest at the legal rate after its maturity. It obviously was for the purpose of preventing any such benefit to accrue to one who lends money at a usurious rate that the provision which nullifies the agreement as to interest is followed by the other provision which declares that such lender shall not recover 'interest in any sum.'" (*Blodgett*, at pp. 735-736, italics added.)[3]

However, in *Epstein v. Frank* (1981) 125 Cal.App.3d 111 (*Epstein*), the reviewing court focused on the borrowers' wrongful retention of the principal amount of the notes

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3 Ben claims that the California Supreme Court has also "curtly dismissed the theory of obtaining post-maturity interest at the legal rate after having forfeited the usurious interest. . . ." However, Ben has quoted the court's comments out of context, and thus misinterpreted them. In *Haines v. Commercial Mortgage Co.* (1927) 200 Cal. 609 (*Haines*), disapproved on another ground in *Heald v. Friis-Hansen* (1959) 52 Cal.2d 834), the court stated: "A second set of *amici curiae* contend that as long as the limit of the rate of interest is maintained at twelve per cent per annum, the compounding of interest, if not paid at the time provided for, should be allowed. This contention is in the teeth of the statute itself and cannot be maintained." (*Haines*, at pp. 624-625.) *The Haines* court was referring to "the compounding of interest," not post-maturity interest as damages.

and reached a contrary result. The *Epstein* court began its analysis by observing that when a note includes a usurious interest provision, the obligation to pay interest is void, and that the lender may recover the amount of the principal when it is due. (*Epstein*, at pp. 122-123.) The court then reasoned: "The payee of a noninterest-bearing note is entitled to interest at the legal rate from the date the note matures until the date of judgment. (*Puppo v. Larosa* (1924) 194 Cal. 717.) In such instances interest is awarded in the nature of damages for the retention of the principal amount of the note and not by virtue of any provision in the note. By analogy, therefore, the payee of a note with a usurious interest provision would be entitled to damages in the nature of interest at the legal rate for that period of time which the obligor on the note withheld the principal beyond the date of maturity. [¶] The denial of interest up until the maturity of the note is a sufficient deterrent against the exacting of usurious interest. The payee, notwithstanding the usury, has the right to recover the principal of the note in full on the date of its maturity. If the obligor improperly withholds payment of this obligation it is neither unjust nor contrary to policy that he be chargeable with interest at the legal rate from the date he was obligated to pay the note until the date he discharges that obligation, or to the date a judgment is rendered against him." (*Epstein*, at p. 123.)

The holding and analysis of *Epstein* has been followed in *Mark McDowell Corp. v. LSM 128* (1962) 214 Cal.App.3d 1427, disapproved on another ground in *Southwest Concrete Products v. Gosh Construction Corp.* (1990) 51 Cal.3d 701, and in *Green v. Future Two* (1986) 179 Cal.App.3d 738. Witkin has also explained the effect of a usurious interest provision: "Because the principal of the loan is unaffected, the usurious interest provision results in a note payable at maturity without interest; and the creditor-payee is entitled to interest at the legal rate from the date of maturity to the date of judgment." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 468, p. 512.)

Ben argues that *Epstein* was wrongly decided. He focuses on the *Epstein* court's statement that the *Blodgett* holding was "no longer persuasive or controlling," because the California Constitution was amended in 1934 and did not included the language that the *Blodgett* court had interpreted. (*Epstein, supra,* 125 Cal.App.3d at pp. 123-124.) The 1934 amendment added section 22, which provided that the maximum rate of interest that a lender could charge was 10 percent per year. However, to the extent that the Usury Law does not conflict with this constitutional amendment, it remains in effect. (*Penziner v. West American Finance Co.* (1937) 10 Cal.2d. 160, 170-178.)

Regardless of the *Epstein* court's interpretation of *Blodgett*, we find its analysis persuasive for two reasons. First, section 2 of the Usury Law does not expressly prohibit the recovery of interest after the maturity of the debt. Had the voters intended to do so, they could have clearly made this distinction. Second, if, as the *Blodgett* court held, a lender cannot recover interest at any rate after maturity, a borrower would then have no incentive to pay the principal. Since it is undisputed that a borrower is entitled to recover his or her principal amount, we conclude that Civil Code section 3289 governs in these circumstances. Subdivision (b) of this section states: "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach." Thus, this court interprets the language that "no action at law to recover interest in any sum shall be maintained" as a prohibition against recovery of the legal rate of interest prior to the maturity date of the loan.

Ben argues, however, that the Usury Law and Civil Code section 3289 cover the same subject.[4] He then maintains that since the Usury Law is more specific, it is

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[4] Nacianceno argues that Civil Code section 3289 was amended in 1985, and thus it controls over the Usury Law. In response, Ben has requested that this court take judicial notice of the legislative history of section 3289 to demonstrate that it was merely

controlling in the present case. We disagree. The Usury Law, section 2 declares "null and void" interest provisions in a contract or agreement that are in excess of the statutory amount. In contrast, Civil Code section 3289 is contained in the chapter entitled "Damages in General" and the article entitled "Interest as Damages," and does not award interest pursuant to any provision in the parties' contract or agreement. Thus, the Usury Law and Civil Code section 3289 do not cover the same subject.[5]

In conclusion, we find that there was no error in awarding Nacianceno interest from the date of breach until judgment.[6]

B. Maturity Date of the Loan

Ben next argues that Nacianceno's acceptance of interest payments after the maturity date waived any default and extended the maturity date until October 3, 1998.

"As a general rule, failure to raise a point in the trial court constitutes [] waiver and appellant is estopped to raise that objection on appeal. An exception to the general

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reflective of existing case law. Since we have not addressed Nacianceno's argument, we deny this request for judicial notice.

5 Ben's reliance on *Gibbo v. Berger* (2004) 123 Cal.App.4th 396 (*Gibbo*) is misplaced. In *Gibbo*, the sole issue on appeal was whether the loan was exempt from the usury provision, because it was "arranged" by a licensed real estate broker. (*Gibbo*, at p. 400.) The court also rejected the defendant's claim that she was entitled to interest pursuant to a "so-called saving clause in the note." (*Gibbo*, at p. 403.) There was no analysis of Civil Code section 3289, subdivision (b) or prior case law. Thus, *Gibbo* is not relevant to the present case.

6 Ben also contends that "the trial court improperly instructed the jury to award Nacianceno interest at the legal rate of 10 percent following the purported maturity of the principal obligations in 1993.". The trial court instructed the jury: "If you decide to award damages to plaintiff, you shall include in the amount of your damages interest on the money owed by defendant at the rate of 10 percent per annum from the date that the money was due. If you decide that defendant made a payment on the loan before the loan was due, you must apply that payment to the principal amount of the loan." As previously discussed, this is a correct statement of the law. (See Civ. Code, § 3289, subd. (b); *Westman v. Dye* (1931) 214 Cal. 28, 36.)

rule may be presented, however, where the theory presented for the first time on appeal involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence. [Citation.] And whether the general rule shall be applied is largely a question of the appellate court's discretion. [Citation.]" (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.) In general, the issue of waiver is a question of fact. (*Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.)

Here, Ben concedes that he did not present the issue of whether Nacianceno waived any default on the payment of the principal in the trial court. He argues that the facts are undisputed on this issue. The parties agree that Nacianceno accepted payments after the maturity date specified in the note. However, since the issue of waiver was not presented at trial, Nacianceno did not have the opportunity to present evidence as to whether she accepted these payments under protest or objected in some manner. Under these circumstances, we decline to consider this issue on appeal.[7]

C. Entitlement to Set-Off

Ben also argues that he is entitled to a "set-off against the principal obligation equal to treble the amount of the illegal interest that he paid."

Section 3 of the Usury Law states in relevant part: "Every person . . . who for any loan . . . of money . . . shall have paid . . . any greater sum . . . than is allowed to be received under the preceding sections, one and two, *may* . . . recover in an action at law against the person . . . who shall have taken . . . the same, . . . treble the amount of the

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7 We also note that the case of *Gibbo, supra*, 123 Cal.App.4th 396 is distinguishable. When a note is secured by a deed of trust, as in *Gibbo*, the holder of the note must provide written notice of when the unpaid principal and interest is due. (Civ. Code, § 2966, subd. (a).) The failure to provide such notice extends the maturity date "90 days from the date the delivery or mailing of the notice, or the date specified in the notice, whichever is later." (Civ. Code, § 2966, subd. (b).) Here, it is undisputed that the note was not secured by a deed of trust.

money so paid . . . in violation of said sections, providing such action shall be brought within one year after such payment . . . ." (Italics added.) Treble damages are awarded at the discretion of the trial court. (*Burr v. Capital Reserve Corp.* (1969) 71 Cal.2d 983, 994.)

In the instant case, Ben did not request a set-off or treble damages in his answer, in a cross-complaint, or at any time during trial. Nevertheless, he claims that it was undisputed that Nacianceno collected illegal interest and that his general denial "is sufficient to allow the defendant to prove a set-off relating to the same account without specifically mentioning that in an affirmative defense." We reject this claim. Ben did not raise the issue below, and thus the trial court was not given the opportunity to exercise its discretion. This was not a case in which the borrower was entitled to treble damages as a matter of law. In our view, the trial court could have properly exercised its discretion and denied Ben's claim, because Ben was Nacianceno's financial advisor and close friend, he drafted the note, he chose the amount of interest, and he misled her when he told her that the loan would be secured by a deed of trust. Accordingly, Ben has forfeited this issue on appeal, because he failed to raise it before the trial court.

D. Statute of Limitations

Ben argues Nacianceno was required to file suit by October 3, 2000, on any oral contract pursuant to Code of Civil Procedure section § 339, subd. (1), since his final payment to her was made on October 3, 1998. He also argues that, assuming there was a single written contract, Nacianceno was required to file suit by October 3, 2002, pursuant to Code of Civil Procedure section 337, subd. (1). Since Nacianceno did not file suit until February 28, 2003, Ben contends, for the first time on appeal, that Nacianceno's claims are barred by the statute of limitations.

Though Ben acknowledges that he failed to plead the statute of limitations as an affirmative defense, he argues that "Nacianceno effectively pled compliance with applicable statutes of limitation" and "[w]hen a plaintiff thus puts a subject at issue in her

Complaint, the defendant's general denial, sometimes called a 'traverse,' is sufficient to place that subject at issue throughout the litigation without need for the defendant to separately plead it as an affirmative defense, even in cases where the subject ordinarily must be pled as an affirmative defense, which is indeed true of the statutes of limitation defense." Thus, he claims that the "limitations issue is now before this Court of Appeal as an issue of law based upon undisputed facts." Ben has not cited any legal authority for the proposition that a defendant is not required to plead the statute of limitations where the complaint alleges facts that toll the statute of limitations or invoke the doctrine of equitable estoppel.

Code of Civil Procedure section 431.30, subdivision (b)(2) provides that an answer to a complaint "shall contain . . . [a] statement of any new matter constituting a defense." "If the *onus* of proof is thrown upon the defendant, the matter to be proved by him is new matter. A defense that concedes that the plaintiff *once* had a good cause of action, but insists that it no *longer* exists, involves new matter." (*Piercy v. Sabin* (1858) 10 Cal. 22, 27.) Thus, "[a] mere denial is insufficient to raise the bar of limitations." (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1117, p. 544.) Moreover, as our Supreme Court explained in *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 744-745, "'the statute of limitations is a special defense, personal in nature, which may be waived or asserted, and . . . the party relying on it must affirmatively set it up in his pleading either by demurrer or answer, or it will be deemed to have been waived . . . he cannot invoke the plea for the first time on appeal.'"

Here, Ben did not assert the statute of limitations in his answer, argue the defense at trial, or request jury instructions. Thus, we conclude that Ben has waived his statute of limitations defense. The rule regarding the statute of limitations has particular relevance in the present case, because Nacianceno pleaded the doctrine of equitable estoppel in the

first amended complaint.[8] "The doctrine of equitable estoppel is based on the theory that a party who by his declaration or conduct misleads another to his prejudice should be estopped from obtaining the benefits of his misconduct. [Citation.] Under appropriate circumstances, equitable estoppel will preclude a defendant from pleading the bar of the statute of limitations where the plaintiff was induced to refrain from bringing a timely action by the fraud, misrepresentation or deceptions of defendant. [Citations.] A defendant should not be permitted to lull his adversary into a false sense of security, cause the bar of the statute of limitations to occur and then plead in defense the delay occasioned by his own conduct. [Citations.]" (*Kleinecke v. Montecito Water Dist.* (1983) 147 Cal.App.3d 240, 245.) In the present case, Nacianceno testified that Ben was her close friend and financial advisor, she trusted him, and they had many conversations regarding repayment of the loan. Given Nacianceno's testimony and the allegations in the complaint, Ben's counsel may have concluded that any statute of limitations defense would only have created more sympathy for Nacianceno. Since Ben failed to raise the issue at trial, he cannot now assert that the facts are undisputed.[9]

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8 The amended complaint alleged in relevant part: "At various times between 1996 and 2002, defendant BEN Z. LOZADA informed plaintiff that defendant would settle plaintiff's claim and pay plaintiff the sum of $85,000.00, which was acceptable to plaintiff. However, except for some interest payments, no payments of principal were made. Between those dates, plaintiff refrained from filing a complaint because of defendant's continued assurances that payment was forthcoming. Plaintiff relied on defendant's promises to pay because of defendant's relationship to plaintiff as plaintiff's investment advisor. In 2002, plaintiff discovered that defendant never had any intention of paying said $85,000.00, but, instead, intended to induce plaintiff not to timely commence an action."

9 Ben also argues for the first time on appeal that the "so-called 2002 re-affirmation agreement, although made within the four-year period, was insufficient on multiple grounds to preserve the written contract claim against the running of that statute." He argues that the agreement is "vague and ambiguous, it contains a new illegal usury provision, it is fatally premised on both mistake of fact and mistake of law, and it is fatally uncertain even as to its crucial price term, i.e., when its purported interest is

E. Sufficiency of Evidence

Ben argues that "Nacianceno failed to carry her burden of proving that the second loan of $45,000 was pursuant to an oral modification of the written promissory note for the first loan of $4[0],000, so as to create a single written contract for $85,000."

"When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, citation and quotation marks omitted.) "Substantial evidence is evidence of ponderable legal significance, reasonable, credible and of solid value. However, [s]ubstantial evidence . . . is not synonymous with any evidence. Instead, the evidence must be substantial proof of the essentials which the law requires." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100, citations and quotation marks omitted.)

In the present case when Ben asked for an $85,000 loan from Nacianceno, she told him that she could give him $40,000 immediately. He drafted a promissory note in which he agreed to repay the $40,000 no later than July 16, 1993. Nacianceno then gave Ben an additional $45,000 between October 30, 1992 and December 3, 1992. Though there was no written agreement regarding the loan amount of $45,000, Nacianceno "assumed the rest of the 45,000 is included in the initial note because he was borrowing 85." More importantly, Ben's monthly payments of $1,700 were based on an interest rate of 24 percent per year on the $85,000 that he borrowed. Thus, since the parties treated

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supposed to commence accruing." On February 25, 2002, Nacianceno prepared an agreement for Ben to sign, which read: "I acknowledge and admit that I owe Sally Nacianceno, M.D. the sum of $85,000, plus 12% interest." Before signing the document, Ben added, "This will be negotiated again." Even assuming that this document was insufficient to preserve her claim from the expiration of the statute of limitations, Ben did not raise this issue before the trial court. Accordingly, he has waived the issue.

the loan of $45,000 as an oral modification of the written promissory note for $40,000, there was substantial evidence to support this implied finding.

As support for his claim that the parties intended the $45,000 loan to be a separate obligation with different terms, Ben relies on Nacianceno's declaration in support of her motion for summary judgment in which she stated that the loan of $45,000 was payable upon demand rather than payable on a fixed date. He argues that a "party's testimony at trial should be disregarded, for substantial evidence satisfaction purposes, if it contradicts her own pre-trial admissions." However, Nacianceno's declaration was never admitted into evidence at trial, and Ben did not cross-examine her regarding this statement. Thus, Ben cannot rely upon this evidence on appeal to support his challenge to the sufficiency of the evidence.

F. Amortization Schedule

Exhibit 8 is an amortization schedule. It credits Ben's first payment of $1,700 to payment of the principal of $85,000. All of Ben's subsequent payments of $1,700 were made after July 17, 1993, the date on which the loan matured.[10] The amortization schedule lists each of these payments and states the portion of the payment that was first credited to interest due at 10 percent and then the portion that was credited to the principal.

Ben contends that the amortization schedule is incorrect, because it improperly credits his payments first to interest and then to principal. He claims that "[b]ecause Lozada's payments were regarded by both parties as interest, and because that interest was illegally usurious, as a penalty under the usury law those payments must be first regarded as and credited to repayment of principal, not to interest at the 10 percent rate or

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[10] There were three months in which Ben made three separate payments of $1,000 and $700.

at any other rate." However, Ben's payment of $1,700, which was made prior to the maturity of the debt, was credited entirely to principal.

Ben next argues that the award of prejudgment interest as damages under Civil Code section 3289 does not authorize allocation of his payments first to interest and then principal. He cites no legal authority for this proposition. He then states that he is "only asking the Court to note the self-evident fact that if Lozada's $54,400 worth of payments over a period of somewhat more than five years were properly allocated first to principal, and only then to 10 percent interest on a declining principle balance that started at $85,000, a substantial portion of that principal amount obviously would have to be deemed, as a matter of law, to have been paid down. Indeed, we believe that the paid down amount would exceed the original principal amount of $40,000 on the written promissory note. Whatever the case, all that matters is that Lozada could not possibly in 2002 still have owed Nacianceno $85,000."

Nacianceno points out that Ben has waived this argument on appeal. We agree. When Nacianceno asked Wayne Dippel, a certified public accountant, to give his opinion as to how much Ben owed Nacianceno based on a hypothetical set of facts in which the payments of the loan were credited first towards the interest due and then to principal, the following colloquy occurred. "MR: KIM [Ben's counsel]: Objection; improper hypothetical, lacks foundation, assumes facts not in evidence. [¶] THE COURT: Well, if the objection is limited to facts not in evidence, that will be overruled. What was the other? [¶] MR. KIM: It was an improper hypothetical and lacks foundation. [¶] THE COURT: I assume this is what you're saying, improper hypothetical because it's not based on evidence? [¶] MR. KIM: Correct, Your Honor. [¶] THE COURT: Same thing. That's overruled. [¶] MR. KIM: Lacks foundation as to applying interest at 10 percent. Just the interest on the interest rate, on the method of payment, crediting the payments towards interest first, then principal, I believe there is no foundation laid for that. [¶] THE COURT: All right. So you're saying there is no factual basis for

crediting first to interest then to principal? [¶] MR. KIM: Correct, Your Honor. [¶]. THE COURT: Exhibit 1 says the payments shall be credited first on interest and then the remainder on principal. Exhibit 1 is in evidence. Isn't that sufficient basis for that assumption? [¶] MR. KIM: I'll withdraw my objection, Your Honor. [¶] THE COURT: Okay. So is there another basis for your objection? [¶] MR. KIM: None, Your Honor."

Here, Ben initially objected to Dippel's testimony on the ground that there was no factual basis for crediting Ben's payment first to interest and then principal. When the trial court asked whether exhibit 1, the promissory note, was a sufficient basis for that assumption, he withdrew his objection and specifically stated that he had no other objection. He did not argue that there was no legal basis for crediting his payments first to interest and then to principal. In fact, Ben's counsel argued that it was the jury's function "to determine how much of the payments made by Mr. Lozada should be applied to the principal and how much should be applied to the interest." He then argued that Nacianceno did not credit Ben for all of the payments that he made, and he presented an alternate method of computing the amount that Ben owed Nacianceno. A party "may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal." (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685. citation and quotation marks omitted.) Here, Ben has waived the issue on appeal by failing to object and then arguing to the jury that it was a factual issue for it to resolve.

G. Attorney's Fees Order

Ben argues that Nacianceno was not entitled to an award of attorney's fees, because there is no way to determine on which theory of recovery the jury based its award. He claims that the jury could have found in favor of Nacianceno on the breach of contract cause of action based on: (1) the written promissory note of $40,000; (2) the written promissory note that was then orally modified to create a written contract with a

principal amount of $85,000; (3) the oral contract for a loan of an additional $45,000; and (4) the 2002 agreement, which was a new written contract, with a principal amount of $85,000. He also contends that the jury could have concluded that the written contract was illegal, and thus awarded recovery pursuant to the common count claim for money lent. Since only the first two alternatives for breach of contract would have authorized an award of attorney's fees, Ben asserts that the award of attorney's fees must be reversed.

Civil Code section 1717 states in relevant part that "[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 . . . to the prevailing party, then the party who is determined to be the party prevailing on the contract, . . . shall be entitled to reasonable attorney's fees in addition to other costs." It is the plaintiff's burden of proof to establish that the jury verdict and judgment in the plaintiff's favor is based on a written contract that contains an attorney's fees provision. (*McKenzie v. Kaiser-Aetna* (1976) 55 Cal.App.3d 84, 87.)

In the present case, Nacianceno's first amended complaint alleged a breach of contract cause of action and a common count claim for money lent, and sought attorney's fees based on a provision in the parties' written contract.[11] However, as Ben correctly notes, the jury was also not instructed to make special findings, and it returned a general verdict of $118,400.40.

Despite the failure to request special findings, the amount of the jury's award indicates that its verdict was based on its finding that Ben had breached the parties' written contract. Ben's monthly payments of $1,700 were based on an interest rate of 24 percent per year on the $85,000 that he borrowed. It was undisputed that Ben made a payment of $1,700 prior to July 16, 1993, which could only be attributed to payment on

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[11] The installment note, dated and signed by Ben on October 17, 1992, includes a provision regarding attorney's fees: "[i]f action be instituted on this note [he] promise[s] to pay such sum as the Court may fix as attorney's fees."

the principal amount. Nacianceno was also entitled to interest of 10 percent per year on the principal that was owed after the date of maturity. Exhibit 8 and expert testimony then established that Nacianceno was entitled to recover $120,100.40 based on a principal amount of $85,000 that was due on July 16, 1993, with 10 percent interest minus Ben's payments of $54,400. Ben's counsel argued that Ben was entitled to credit for an additional payment of $1,000. The jury then awarded Nacianceno $118,400.40. Thus, the jury's verdict closely approximates the amount set forth in exhibit 8, which Nacianceno claimed under the written note that was orally modified. Based on these calculations, the jury could not have relied on any other contract theory when it found in favor of Nacianceno. The written promissory note for $40,000 payable in July 1993, the oral contract for $45,000 payable in July 1993, and the written agreement for $85,000 at 12 percent payable in 2002 would have resulted in an award of damages that was significantly less than $118,400.40.

We next consider whether the jury could have relied on the common count for money lent claim. Ben argues that the jury could have concluded that Nacianceno's contract was illegal, and thus awarded her damages based on this claim. He asserts that the jury could have concluded "the written note was illegal on its face because it contained a massively illegal usury provision, that no award could be based on that flawed writing, but nevertheless [Ben] did receive the $85,000 and he ought to pay it back simply because he received it as a loan, and not because of any written contract."

Nacianceno lent $40,000 to Ben on October 17, 1992, $10,000 on October 30, 1992, and $35,000 on December 3, 1992. Pursuant to a common count claim for money lent, the defendant's obligation to pay the plaintiff arises when the money was lent to the defendant. (*Tabata v. Murane* (1944) 24 Cal.2d 221, 226.) Thus, Nacianceno would have been entitled to interest from each of these dates pursuant to her money lent claim. However, neither party presented evidence as to how the jury could have calculated the damages award pursuant to this claim. There was also no suggestion in

either party's arguments to the jury that the money lent claim was at issue. Though the trial court instructed the jury on breach of contract and common count for money lent, it did not instruct on how damages were to be calculated under the claim for money lent.[12] We also note that Ben never argued that the contract was illegal and the jury was never instructed that it could find that the contract was illegal based on the usurious provision or any other theory. More importantly, as previously discussed, the award of damages comports with the terms of the written contract that was modified by the parties' oral agreement. Had the jury rejected this contract theory, there would have been no basis to rely on the contractual terms to compute the damages award. Since the jury could only have relied on the contract theory that would have supported an award of attorney's fees, the trial court did not err in awarding attorney's fees to Nacianceno.

G. Fraudulent Transfer

Ben also contends that "[t]he trial court's 2005 order re-conveying the real property from Caroline Lozada to her and Ben Lozada as joint tenants is invalid." He asserts that the trial court was required to give the federal bankruptcy court's order full faith and credit, and that Nacianceno could not collaterally attack the bankruptcy court's 1997 order in a state court proceeding.

Ben did not list Nacianceno as a creditor in his bankruptcy petition. On July 3, 1997, the bankruptcy court entered an order in Caroline's case that states in relevant part: "RECITALS [¶] . . . In addition, in order to effect a valid transfer of a deed of trust to Patelco on the Woodside Property, Ben Lozada shall execute a quit claim deed of any interest he has (if any) in the Woodside Property. . . . [¶] ORDER [¶] . . .

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12 The trial court only instructed the jury regarding the calculation of damages under the breach of contract claim. "If you decide to award damages to plaintiff, you shall include in the amount of your damages interest on the money owed by defendant at the rate of 10 percent per annum from the date that the money was due. If you decide that defendant made a payment on the loan before the loan was due, you must apply that payment to the principal amount of the loan."

Caroline Lozada shall immediately execute a promissory note in favor of Patelco, in the sum of $27,500.00, and shall execute a deed of trust in favor of Patelco to secure repayment of said note. Ben Lozada shall immediately execute a quit claim of any interest he has in the Woodside Property. . . . [¶] . . . [¶] . . . Ben shall file an amended Chapter 13 plan, which provides notification to all creditors that he is releasing any interest (if any) that he may have in the Woodside Property . . . ." Ben never notified Nacianceno that he was releasing any interest in the Woodside property.[13]

Following trial, the trial court found that Ben fraudulently transferred his interest in the Woodside property to Caroline in violation of Civil Code section 3439.05.[14] The trial court then set aside and declared void the interspousal transfer deed, dated October 20, 1995, and the grant deed, dated August 8, 1997. The trial court also ordered that title to the Woodside property be restored to Ben and Caroline as joint tenants. The trial court did not refer to the 1997 bankruptcy order.

A party who seeks to establish the interest of all persons in certain property brings an in rem action. (2 Witkin, Cal. Procedure (5th ed. 2008) Courts Jurisdiction, § 243, p. 846.) "Bankruptcy proceedings operate in rem [citation] and, thus, orders rendered therein with respect to the debtor's property are conclusive upon the whole world [citation]." (*Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 896; see also *In the Matter of Met-L-Wood Corp.* (7th Cir. 1988) 861 F.2d 1012, 1017.) When

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[13] We have taken judicial notice of the bankruptcy court docket sheets. (Evid. Code, §§ 452, 459; Calif. Rules of Court, rule 8.252.)

[14] Civil Code section 3439.05 states: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation."

a party obtains a judgment by fraud, it may be set aside under Federal Rules of Civil Procedure, rule 60.

While it is true that a California court gives full faith and credit to a final order or judgment of a federal court (*Levy v. Cohen* (1977) 19 Cal.3d 165, 172), at issue in the present case is whether the trial court's order nullifies the bankruptcy court order.

We first note that the parties never litigated the issue of Ben's fraudulent transfer of his property to Caroline in bankruptcy court, and that Nacianceno was deprived of her due process right to participate in those proceedings due to lack of notice. Consequently, the bankruptcy court never considered Nacianceno's interests. Against this backdrop, we consider the bankruptcy court order. In contrast to the trial court's order enjoining Ben and Caroline "and their respective representatives, attorneys, and agents . . . from encumbering, selling, transferring, conveying, or otherwise disposing of the Woodside" property "[u]ntil full satisfaction of this judgment," the bankruptcy court order did not in any way limit Caroline's subsequent voluntary or involuntary transfer of title of the Woodside property to Ben or any other party. At issue in the bankruptcy court order was the protection of Patelco's lien. The trial court order, however, does not affect Patelco's lien on the Woodside property. Instead, the trial court adjudicated Nacianceno's, Ben's and Caroline's interests in the property. Thus, the trial court's order did not "set aside, nullify, or overrule" the bankruptcy court order.

III. Disposition

The judgment is affirmed. Costs are awarded to Nacianceno.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.

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