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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LEON PERLSWEIG et al.,

Plaintiffs and Appellants,

v.

JP MORGAN CHASE BANK,

Defendant and Respondent.

B228132

(Los Angeles County
Super. Ct. No. BC421536)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Leon Perlsweig, in pro. per., and for Plaintiffs and Appellants.

Palmer, Lombardi & Donohue, E. Scott Palmer, Brett D. Watson and Russell G. Gomm for Defendant and Respondent.

I. INTRODUCTION

Plaintiffs, Leon Perlsweig (“Mr. Perlsweig”) and Judith Supkoff (“Ms. Supkoff”), appeal from a summary judgment entered on their contract breach claim against defendant, JP Morgan Chase & Company, for failure to pay on demand the cash amounts posted in seven passbook or certificate of deposit accounts. The accounts were originally with two now defunct financial institutions and show deposit amounts dating back to the mid 1980’s. Because defendant presented a prima facie showing the accounts had been closed prior to defendant’s acquisition of the liabilities of Washington Mutual Bank and plaintiffs presented no conflicting evidence, we affirm the trial court’s order granting summary judgment.

II. BACKGROUND

A. The Second Amended Complaint

The second amended complaint, which is the operative pleading, contains the following allegations. Elaine Perlsweig, who died in November 2005, was the longtime spouse of Mr. Perlsweig. Ms. Perlsweig and Ms. Supkoff were sisters and the daughters of Mitchell Bauer. Mr. Bauer predeceased Ms. Perlsweig. At the time of Mr. Bauer’s death, his two daughters were his sole survivors. Elaine Perlsweig allegedly devised all her personal property on her death to Mr. Perlsweig.

During the 1980’s, seven accounts were opened. The accounts were opened by plaintiffs or for their benefit. Plaintiffs attached copies of the passbooks and certificates to the second amended complaint showing deposits by the three individuals in four separate accounts at Coast Federal Savings as follows: passbook account No. 1-189485-4 with a balance of \$105,233.01, on March 14, 1985, with Ms. Perlsweig and Mrs. Supkoff, as depositors; passbook account No. 1-373203-7 with a balance of \$23,898.62, on December 9, 1985, with Ms. Perlsweig and Ms. Supkoff, as depositors;

passbook account No. 1-371398-7 with a balance of \$19,291.60, on July 12, 1983, with Mr. Bauer as depositor in trust for his two daughters, Ms. Perlsweig and Ms. Supkoff and; passbook account No. 1-189867-3, with a balance of \$63,994.32, on March 17, 1986, with Ms. Perlsweig as trustee for Mr. Perlsweig. There were three passbook accounts at Home Savings of California: account No. 018-131823-8 with a balance of \$1,819.96 on May 4, 1983, with Mr. Bauer as depositor in trust for his two daughters; account No. 18-523577-7 with a balance of \$89,345.97 on February 20, 1986, with Mr. Bauer as depositor in trust for his two daughters; and account No. 018-147024-6 with a balance of \$47,701.34 on March 17, 1986, listing Leon and Elaine Perlsweig as depositors. In 2008, defendant acquired ownership of Washington Mutual Bank, with its rights, liabilities and obligations. The obligations included the accounts, deposits and customers of Washington Mutual Bank. Washington Mutual Bank acquired the now defunct Coast and Home Savings well prior to 2008.

In 2009, Mr. Perslweig discovered the passbook accounts in a safe deposit box. Plaintiffs then demanded payment of the funds with interest from defendant of the amounts listed in the passbooks. Defendant refused to pay the deposits on the basis it could not locate any records regarding the accounts. Plaintiffs checked with appropriate officials and were advised that neither defendant nor its predecessors in interest have ever escheated or delivered the funds to the State of California. The sole claim in the second amended complaint was a contract claim for failure to pay the amounts posted in the seven accounts. Defendant answered the second amended complaint and moved for summary judgment.

B. Summary Judgment Motion

Defendant asserts summary judgment was appropriate because the undisputed evidence demonstrates the accounts were closed before defendant became the successor in interest to Washington Mutual Bank. In support of this contention, defendant relied on plaintiffs' interrogatory responses and declarations which will be digested shortly.

Plaintiffs' interrogatory responses stated they have no evidence indicating the accounts still existed and were not closed. Plaintiffs admitted that they were relying solely on the existence of the passbooks to show that the accounts were never closed.

Defendant presented the following evidence that the accounts were closed sometime prior to 2002. Donald J. Schiffer, an attorney with an extensive banking history dating from 1972 through 1991, signed a declaration regarding the operations of savings and loan associations in California from 1972 to 1987. In 1998, Coast Savings and Loan, Coast Federal Savings, and Home Savings of California merged into Washington Mutual Bank. According to Mr. Schiffer, Coast Federal Savings and Home Savings of California were savings and loan institutions as distinguished from commercial banks. The two institutions had different practices. A savings and loan's passbooks and certificate of deposits were evidence of the existence of the account. The passbooks and certificates of deposits were not negotiable instruments. The accounts existed only in the institutions' books and were not transferable except on the books of the institutions. By contrast, commercial banks offered negotiable certificates of deposit which required presentation to be paid and could be endorsed to a different individual. According to Mr. Schiffer, the contract between the institution and the depositor was not the passbook or the certificate of deposit. Rather the contract was the signature card.

Mr. Schiffer declared that savings and loan institutions commonly allowed transactions involving accounts without presentation of the passbook or certificate of deposit based on a withdrawal slip or a draft from a different financial institution. If the customer subsequently produced the passbook or certificate of deposit, the teller would post all interest and transactions to date. If the account was closed without the passbook or certificate of deposit, the depositor was required to execute a Lost Passbook Affidavit. If the depositor's signature on the affidavit matched the signature card on file, the account would be closed. If there were a partial withdrawal from an account, Mr. Schiffer declared, "In the event of a partial withdrawal, all that was done was a check of the signature and identification of the owner and the funds were released without presentation of a [p]assbook] or [certificate of deposit]."

During the time period when the accounts at issue were opened, the mid to late 1980's, almost all savings and loans instituted savings programs. Passbooks and certificates of deposits were phased out. Rather than collecting the passbooks or certificates of deposits, Mr. Schiffer explained that the customer would receive a monthly or quarterly statement. Many passbooks were never returned or posted because they were converted to what Mr. Schiffer called "Statement Savings." If an account was closed, the Lost Passbook Affidavit and other closed signature cards were, pursuant to industry wide practice, destroyed after a period of 7 to 10 years. In Mr. Schiffer's opinion, the funds in all of the accounts in this lawsuit could have been removed anytime after April 1986 and the 1998 merger of Coast Savings and Loan, Coast Federal Savings, and Home Savings of California into Washington Mutual Bank.

Mr. Schiffer described what occurred when savings and loan institutions merge. Mr. Schiffer related: "[T]he disappearing [s]avings and [l]oan's asset and liability accounts on the institutions [b]alance [s]heet had to balance and extensive time was spent on this activity. All cash in the disappearing institution was counted, all savings accounts verified and listed, all loan balances verified and listed and all securities held by the disappearing institution were verified. If savings accounts or [c]ertificates of [d]eposits existed at the time of the mergers, their record on the trial balance would have transferred as well. Otherwise the trial balance would not have been in balance, which is a requirement of closing the merger." Mr. Schiffer stated if the accounts existed on the books of Coast Savings and Loan, Coast Federal Savings, and Home Savings of California at the time of the 1998 merger, they would be assigned Washington Mutual Bank account numbers. Further, the customers would have received Washington Mutual Bank statements. And if the accounts existed at the time of the 2008 merger, they would have been transferred to defendant in a similar fashion.

Bradley P. Crooks, an Assistant Vice-President and Manager of Regulatory Reporting with defendant, filed a declaration concerning reporting obligations. According to Mr. Crooks, if the seven passbook accounts were open and had existing balances, interest would have been reported to the Internal Revenue Service (and to the

accountholder) with federal tax Form 1099. Defendant maintains a database of Washington Mutual records including reported interest and Form 1099s for the period 2002 through 2008. Computer searches for interest bearing accounts, in the names and social security numbers of Ms. Perlsweig, Ms. Supkoff and Mr. Bauer and by account numbers did not yield any results. Rather, one account under the name of Ms. Perlsweig was found for the 2002 taxable year which was opened at Washington Mutual Bank. This account was not opened at Coast Federal Savings, Coast Savings and Loan or Home Savings of California. Mr. Crooks concluded, "The nonexistence of interest reporting records, including Form 1099s, regarding the seven passbooks for interest-bearing accounts at issue in this lawsuit evidences the fact that these seven passbook accounts were closed by the [accountholders] prior to 2002."

Defendant's employee, Edgar Elias, a branch manager, filed a declaration concerning customer bank accounts, bank policies and procedures. Mr. Elias worked at Washington Mutual Bank from 1999 to 2008 in various capacities including as a branch manager. He worked at Home Savings of California in 1998 through 1999 as a teller. Mr. Elias searched defendant's databases for: customer accounts and names; social security numbers; and tax identification numbers. No savings account, certificate of deposit, or any deposits existed for Ms. Perlsweig, Ms. Supkoff, or Mr. Bauer, their social security numbers or tax identification numbers. While Mr. Elias was employed by Home Savings of California and Washington Mutual Bank, a customer could make withdrawals or other transactions without presenting the passbook. The transactions could be performed with sufficient identification. For a year after the acquisition of Home Savings of California, Washington Mutual Bank tellers would record the transaction in the passbook if the customer brought it into the bank. But, about a year later, Washington Mutual began using printers at its teller windows and did not physically permit passbooks to be used.

When defendant acquired Washington Mutual Bank's assets and liabilities in 2008, any open depository accounts with existing balances including savings accounts and certificates of deposit were subject to the sale. Closed accounts or those with zero

balances were not part of the sales. If the seven passbook accounts were open at Washington Mutual and had existing balances as of September 25, 2008, the accounts would have transferred to defendant. Mr. Elias declared, “The nonexistence of records regarding these seven passbook accounts evidences the fact that these seven passbook accounts were closed at some point prior to [defendant’s] acquisition of Washington Mutual’s assets and liabilities.”

III. DISCUSSION

A. Standard of Review

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, our Supreme Court described a party’s burden on summary judgment or adjudication motions as follows: “[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court’s action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]” (Fns. omitted, see *Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 877-878.) A moving defendant must present evidence which, if uncontradicted, would constitute a preponderance of evidence that an essential element of the plaintiff’s case cannot be established. (*Kids’ Universe v.*

In2Labs, supra, 95 Cal.App.4th at p. 879; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 10:240, pp. 10-97-10-98 (rev. # 1, 2011).) We strictly construe a moving party's evidence. (*Parsons v. Crown Disposal Co.* (1997) 15 Cal. 4th 456, 500-501; *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1002-1003.) Once the production burden shifts, the party opposing summary judgment must cite to specific facts which demonstrate that a triable controversy exists. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 490; *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.)

We review the trial court's decision to grant the summary judgment motion de novo. (*Coral Const., Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling not its rationale. (*Coral Const., Inc. v. City and County of San Francisco, supra*, 50 Cal.4th at p. 336; *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, overruled on a different point in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5.) Those are the only issues a summary judgment motion must address. (*Conroy v. Regents of University of Cal.* (2009) 45 Cal.4th 1244, 1249-1250; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.)

B. Summary Judgment Was Properly Entered

Defendant contends it was entitled to summary judgment because there was no triable controversy as to whether the accounts at issue were closed at the time of the acquisition in 2008 of the obligations of Washington Mutual Bank. As noted, in order for the duty to produce evidence to shift to plaintiffs, all defendant must make is a prima facie showing they will be unable to prevail. (*Aguilar v. Atlantic Richfield Co., supra*, 25

Cal.4th at p. 851; *Kids' Universe v. In2Labs*, *supra*, 95 Cal.App.4th at p. 879.) Once that occurs, plaintiffs had the duty to present facts demonstrating the existence of a triable controversy. (Code Civ. Proc., § 437c, subd. (p)(2); *Merrill v. Navegar, Inc.*, *supra*, 26 Cal.4th at p. 490; *Wiz Technology, Inc. v. Coopers & Lybrand*, *supra*, 106 Cal.App.4th at p. 11.) Here, defendant presented a prima facie showing the accounts at issue were closed when it took possession of the Washington Mutual Bank. Narrowly construed, the declarations of Mr. Schiffer, Mr. Crooks and Mr. Elias indicated: by the time of the Washington Mutual Bank acquisition, passbooks and certificates of deposits had been phased out and replaced with accounts documented by monthly statements; funds could have been removed from the accounts without any notations in the passbooks; the accounts at issue could have been closed out without the passbooks; records of *closed* accounts were destroyed prior to defendant's acquisition of Washington Mutual Bank; an extensive amount of time was expended at the time of the mergers verifying the existence and status of existing accounts; bank and tax records showed the accounts did not exist in 2002 and later in 2008 at the time of the Washington Mutual Bank acquisition; and the nonexistence of bank and tax records prior to the Washington Mutual Bank acquisition indicated that the accounts had been closed prior to 2002. This evidence constituted prima facie evidence the accounts at issue were closed prior to defendant's acquisition of Washington Mutual Bank and thus no funds were owed to any plaintiff.

Thus, the burden of persuasion shifted to plaintiffs to present evidence the accounts existed, in whole or in part, when defendant acquired Washington Mutual Bank's obligations in 2008. Plaintiffs presented no evidence, apart from the passbooks themselves which reflect no activity since March 17, 1986. Plaintiffs presented no evidence of any activity at all after the 1998 merger of Coast Savings and Loan, Coast Federal Savings, and Home Savings of California into Washington Mutual Bank. As noted, the burden rested with plaintiffs to present specific facts in response to defendant's comprehensive showing. (Code Civ. Proc., § 437c, subd. (p)(2); *Merrill v. Navegar, Inc.*, *supra*, 26 Cal.4th at p. 490; *Wiz Technology, Inc. v. Coopers & Lybrand*, *supra*, 106

Cal.App.4th at p. 11.). Defendant's summary judgment motion was properly granted. We need not address the parties' other contentions.

IV. DISPOSITION

The judgment is affirmed. Defendant, JP Morgan Chase & Company, is awarded its costs on appeal from plaintiffs, Leon Perlsweig and Judith Supkoff.

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TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.