Filed 12/13/01

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ETE, INC., Plaintiff and Appellant, v. MAXWELL INFORMATION SYSTEMS, INC., et al., Defendants and Respondents.	D035212 (Super. Ct. No. 726553)

APPEAL from a judgment of the Superior Court of San Diego County, Vincent P. DiFiglia, Judge. Reversed.

SUMMARY

Plaintiff in this case, ETE, Inc. (ETE), has developed unique traffic monitoring software, and in the summer of 1997 it hoped to use the software in obtaining a contract for an experimental traffic management program the Southern California Association of Governments (SCAG) was planning to employ in the San Gabriel Valley. ETE had previously used its software successfully in a small pilot program, the Athena project,

and ETE's performance had created a favorable impression of it in the eyes of SCAG officials. However, because ETE is a relatively small company, it did not have the financial wherewithal to meet SCAG bidding qualifications for the $1.5 million San Gabriel project. Thus in the summer of 1997 ETE approached defendant Maxwell Information Systems, Inc. (Maxwell[1]), which did have the needed capital, about the possibility of presenting a joint bid to SCAG.

According to ETE, Maxwell in fact agreed to present a joint bid to SCAG. Under the terms of the alleged agreement, Maxwell agreed that ETE would provide and be compensated for two-thirds of the hardware, communications and software services needed for the project and that any profits which existed after payment of out of pocket expenses would be split between Maxwell and ETE in proportion to the number of personnel hours each had provided to the project.

ETE representatives repeatedly asked Maxwell for a written partnership agreement setting forth the agreement between them. Initially, Maxwell responded to these requests by telling ETE that a partnership agreement would be forthcoming. While ETE was waiting for a written partnership agreement, it continued to work with Maxwell in preparing a joint proposal to SCAG.

At the same time ETE was helping Maxwell prepare its joint proposal and looking to Maxwell for a written partnership agreement with respect to the SCAG project, ETE

---

1 All references to Maxwell also include defendants Maxwell Technologies, Inc., and Maxwell Technologies Systems Division, Inc., which has been erroneously sued as Maxwell Federal Division, Inc.

was also providing Maxwell with a substantial amount of financial information about itself in response to Maxwell's representation that it was interested in acquiring ETE. Acquisition by Maxwell was a very attractive possibility to the much smaller ETE.

In response to bidding information provided SCAG, Maxwell and ETE presented a joint bid consistent with their agreement that ETE and its employees would provide a substantial portion of technical support for the program. The Maxwell/ETE bid was one of four proposals SCAG received. In evaluating each proposal a panel of SCAG evaluators conducted fairly detailed interviews of representatives of each proponent and rated each proposal in a number of categories.

The Maxwell-ETE proposal received the highest rating, and SCAG advised Maxwell that it would negotiate exclusively with Maxwell with respect to the final terms of an agreement. SCAG had previously advised all project proponents that because federal funds were involved, it would be using a contract approved by federal agencies and that the terms of the contract were therefore not subject to a great deal of negotiation.

After winning the exclusive right to negotiate with SCAG, Maxwell failed to provide SCAG with information the agency needed in a timely manner and advised SCAG that it no longer planned to use the personnel team identified in the joint Maxwell/ETE proposal. Rather, Maxwell wanted to use considerably more of its own personnel and less of ETE's.

In addition to its delay in providing information to SCAG and the changes it was attempting to make in the initial proposal it made to SCAG, Maxwell was also being less than forthcoming with ETE. After the joint proposal was selected by SCAG, ETE was

again told a contract would be forthcoming shortly. In November 1997 Maxwell representatives told ETE that it could not execute a formal contract with ETE until Maxwell had executed a formal agreement with SCAG, at which point ETE would be made a subcontractor. Although this was not the arrangement ETE had expected, ETE did not object because it believed Maxwell was still interested in acquiring ETE.

In December 1997 SCAG decided that because of Maxwell's failure to promptly provide it with needed information and because of the personnel changes Maxwell wanted to make, it would not award the contract to Maxwell. Following SCAG's decision, Maxwell made no further effort to acquire ETE.

ETE sued Maxwell for breach of contract, fraud and intentional interference with prospective economic advantage. After conducting discovery, Maxwell moved for summary judgment. Maxwell argued ETE's breach of contract action was barred by the fact that any obligation it owed to ETE was subject to execution of a contract with SCAG, a contingency which did not occur. Maxwell also argued that in any event any contract it made with ETE was barred by the statute of frauds. Maxwell argued ETE's tort claims were also barred by the statute of frauds and because ETE had no evidence that any of its representations were intentionally misleading. The trial court granted Maxwell's motion and entered judgment in Maxwell's favor. ETE filed a timely notice of appeal.

We reverse.

DISCUSSION

I

Standard of Review

Summary judgment may be granted only when a moving party is entitled to a judgment as a matter of law. (§ 437c, subd. (c).) In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 841 (*Aguilar*), the Supreme Court recently undertook to clarify the law courts must apply in California in ruling on motions for summary judgment. Where the motion is brought by a plaintiff, the plaintiff bears the burden of proving each element of the cause of action entitling him to judgment on that cause of action. (*Aguilar, supra,* 25 Cal.4th at p. 849.) "'Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' [Citation.]" (*Ibid.*)

Where the motion is brought by a defendant, the defendant will bear "the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Aguilar, supra*, 25 Cal.4th at p. 850, citing § 437c, subd. (o)(2).) In *Aguilar,* the Supreme Court established that summary judgment law in California does not require that a defendant conclusively negate an element of the plaintiff's cause of action. Rather, in accordance with federal law, "All that the defendant need do is to 'show[] that one or more elements of the cause

of action . . . cannot be established' by the plaintiff. [Citation.] In other words, all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X. Although he remains free to do so, the defendant need not himself conclusively negate any such element -- for example, himself prove *not* X." (*Aguilar, supra*, 25 Cal.4th at pp. 853-854, fns. omitted.)

In meeting its burden, a defendant must present evidence, in the form of affidavits, declarations, admissions, answers to interrogatories, depositions or matters of which judicial notice must be taken. (*Aguilar, supra*, 25 Cal.4th at p. 855; Code Civ. Proc., § 437c, subd. (b).) In addition to presenting evidence which negates an element of plaintiff's cause of action, "[t]he defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence -- as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar, supra*, 25 Cal.App.4th at p. 855, fn. omitted.)

Once a defendant has met its burden of showing that a cause of action has no merit, "'the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations of denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' [Citation.]" (*Aguilar, supra*, 25 Cal.4th at p. 849.)

The plaintiff's burden in defeating a motion for summary judgment is only a burden of production and only a burden of making a prima facie showing of a triable issue of fact. (*Aguilar, supra,* 25 Cal.App.4th at p. 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.)

In broadly outlining the law of summary judgment, the Supreme Court stated: "If a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case . . . the 'court should grant' the motion 'and avoid a . . . trial' rendered 'useless' by nonsuit or directed verdict or similar device. [Citations.]" (*Aguilar, supra*, 25 Cal.4th at p. 855, fn. omitted.)

II

Contingent Liability

According to the December 8, 1997, letter SCAG sent to Maxwell, no final agreement was reached with Maxwell because Maxwell had repeatedly failed to meet deadlines, failed to provide needed information to SCAG and substantially altered the personnel working on the project. In particular, at the time of its initial selection Maxwell had represented that Nancy Anderson, who had worked with ETE on the Athena project, would be working for Maxwell on the smart shuttle project and would be available for the entire duration of the project. However, on December 5 Maxwell advised SCAG that it had not retained Anderson's services and did not intend to use her as extensively as previously represented. In light of these circumstances, SCAG advised Maxwell "the basis for working with your firm no longer exists. We thus cannot

continue negotiation with Maxwell for the Smart Shuttle Technology Field Operational Test Services contract. At the January 8, 1998 meeting of the SCAG Administration Committee . . . our staff will recommend entering into negotiations with the bidder with the second-highest score."[2]

Given this evidence that Maxwell's own conduct was responsible for the failure to obtain a written contract with SCAG, Maxwell cannot use that failure to avoid liability to ETE. "[A] person may not take advantage of his own act or omission to escape liability. 'If he prevents or makes impossible the performance or happening of a condition precedent, the condition is excused.' [Citation.] Similarly, in *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 868-869, the court stated, 'Each party to a contract has a duty to do what the contract presupposes he will do to accomplish its purpose. [Citation.] Thus, "A party who prevents fulfillment of a condition of his own obligation . . . cannot rely on such condition to defeat his liability.' [Citations.]"' (*Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1418.)

In *Jacobs v. Tenneco West, Inc.*, the defendant corporation argued that a condition of any obligation to convey property to the plaintiffs was approval by its board of

---

2 As it did in the trial court, Maxwell objects to our consideration of the December 8, 1997, letter from SCAG to Maxwell. However, the letter was initially offered by *Maxwell* in support of its motion for summary judgment and then offered by ETE as part of its opposition. Thus Maxwell's hearsay objection is somewhat unusual. In any event, the letter was admissible as a business record of SCAG. (Evid. Code, § 1271; see *Verdugo Highlands, Inc. v. Security Ins. Co.* (1966) 240 Cal.App.2d 527, 535.)

directors of escrow instructions. However, although such instructions were prepared, they were never submitted to the board by the corporation's officers. Accordingly, the court held that "the prevention of the condition of board approval caused by Tenneco's officers' failure to submit the contracts to the board excused [the] condition." (*Jacobs v. Tenneco West, Inc., supra,* 186 Cal.App.3d at p. 1418.) Similarly here, in light of the reasons set forth in SCAG's December 8 letter, a trier of fact could conclude Maxwell's own conduct prevented a contract with the agency from being signed and that the contingency was therefore excused.

Maxwell contends ETE, unlike the plaintiffs in *Jacobs v. Tenneco West, Inc.,* could not have reasonably believed that any binding agreement had ever come into existence. In making this argument, Maxwell relies upon authority which itself is materially distinct from the record presented here. In *Helperin v. Guzzardi* (1951) 108 Cal.App.2d 125, 126-127, a husband and wife held joint title to an apartment house and the husband signed an agreement to sell the property. The husband gave the agreement to a real estate broker to hold until his wife consented to it. The wife never consented to the sale. In affirming a judgment in favor of the husband and wife in the buyer's action for damages, the court found the husband had never in fact accepted the plaintiff's offer because his wife's consent was a condition of any acceptance by him. (*Id*. at p. 128.) Thus the court found that no binding contract had ever been formed. (*Ibid*.) In *Los Angeles Rams Football Club v. Cannon* (S.D. Cal. 1960) 185 F.Supp. 717, 721, the court found that a college football player had never accepted an offer to play for a professional football team because the contract he signed was subject to approval by the commissioner

of football and because the player wished to remain eligible to play in a post-season bowl game. (*Los Angeles Rams Football Club v. Cannon, supra,*185 F.Supp. at pp. 721-722.) Given those circumstances, the court found that neither the team nor the player could reasonably have believed a binding agreement had been reached. (*Ibid*.)

Here, in contrast to the circumstances considered in *Helperin v. Guzzardi* and *Los Angeles Rams Football Club v. Cannon* the record contains ample evidence which supports ETE's allegation that it had a reached a binding agreement with Maxwell. As ETE points out, if it did not have a binding agreement with Maxwell, it could have and would have pursued partnership opportunities with one of the bidders on the project for which it possessed the recognized technical expertise. In addition to this circumstance, persuasive evidence of the parties' understanding that a binding agreement existed is set forth in the proposal Maxwell submitted to SCAG: "Maxwell Information Systems, Inc., a Maxwell Technologies, Inc. company, *has organized a Team with ETE, Inc.* and the Caltrans certified DBE Jill Kollman & Associates (JKA) to perform as the Technology Integrator for the San Gabriel Valley Smart Shuttle Field Operational Test (SST FOT). The Maxwell/ETE Team combines ITS, transit and specific ATHENA lessons learned and project-related experience with a strong technical and organizational background in technology integration and testing. *Maxwell/ETE/JKA are committed to making SST FOT a success.*" (Italics added.) The proposal goes on to set out, among other matters, the percentage of time key personnel from Maxwell, ETE and the other team members were expected to devote to the project as well as their respective billing rates. These categorical and detailed representations to SCAG strongly suggests the existence of a

binding, but contingent obligation between Maxwell and ETE rather than any understanding that Maxwell was completely free to abandon either ETE or the project at anytime before it signed an agreement with SCAG.

Given this record, ETE plainly met its burden on summary judgment of producing evidence that would support a finding that in the summer of 1997 it had made a binding agreement with Maxwell, subject only to the condition that SCAG award Maxwell and ETE the traffic management contract. (See *Aguilar, supra*, 25 Cal.4th at p. 850.) Obviously, as Maxwell points out, the lack of a formal written agreement setting out the precise terms under which work would be performed and payments made would support a finding that no binding agreement had been made. However, the existence of circumstances which would support a factual finding in Maxwell's favor will not support summary judgment where, as here, its adversary has produced evidence sufficient to support a factual finding in its favor. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851.)[3]

In sum then, ETE's contract cause of action should not have been dismissed on the grounds that, as a matter of law, Maxwell's obligation to ETE was contingent upon an event which did not occur.

---

[3] We do not accept Maxwell's alternative contention that the contract alleged by ETE was so uncertain and indefinite that as a matter of law it cannot be enforced. In light of the terms of the proposal Maxwell made to SCAG, which sets for the nature and amount of ETE's participation, and the amount of money SCAG had available for the contract, Maxwell's obligations under the alleged contract can be determined. (See *Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1066 ["uncertainty about '"the precise act . . . to be done"' may be resolved in light of extrinsic evidence"].)

III

Statute of Frauds

California's statute of frauds is embodied in Civil Code section 1624 and provides in pertinent part: "(a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: [¶](1) An agreement that *by its terms* is not to be performed within a year from the making thereof." (Italics added.) "The important words are 'by its terms'; i.e., only those contracts which expressly preclude performance within a year are unenforceable. [Citation.] And these words have been literally and narrowly interpreted . . . ." (1 Witkin, Summary of California (9th ed. 1987) Contracts, § 282, p. 274.)

"The cases hold that section 1624, subdivision 1, applies only to those contracts which, by their terms, cannot possibly be performed within one year." (*White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 343.) "[I]f a condition terminating a contract may occur within one year of its making, then the contract is performable within a year and does not fall within the scope of the statute of frauds. This is true even though performance of the contract may extend for longer than one year if the condition does not occur." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 673.)

Accordingly, an employment contract which may not be terminated except for good cause and which has either a definite term exceeding a year or even an indefinite term, is nonetheless outside the statute of frauds because within a year good cause may arise and the contract may be terminated. (*Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037, 1043-1044.) Similarly, a distributorship agreement which continues

"so long as an agent" uses his best efforts to distribute a product, is outside the statute because the agent may in fact cease using his best efforts within a year. (*Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 281; *Mangini v. Wolfschmidt, Ltd.* (1961) 192 Cal.App.2d 64, 75.)

In arguing that the agreement alleged in the complaint falls within the scope of Civil Code section 1624, subdivision (a), Maxwell relies on the fact that the request for proposals (RFP) SCAG published with respect to the traffic project stated that following installation of the necessary hardware and software, the successful contractor would have to provide one year of service. Maxwell contends that the RFP makes it clear the parties understood the contract with SCAG could not be completed within a year.

The principal problem we have with Maxwell's statute of frauds argument is that the record makes it clear that any obligation Maxwell had to ETE was contingent on SCAG's agreement to award Maxwell the underlying contract. Whether as ETE argues any contingency was completely satisfied when the exclusive right to negotiate was given to Maxwell, or whether the contingency was never satisfied because no written contract with SCAG was ever executed as Maxwell argues, is of no moment for purposes of applying the statute of frauds. The critical fact is that there is no dispute that *at the time the contract was made* in July 1997, it was subject to the condition that within a year it would be completely performed if SCAG failed to award the project to Maxwell. (See *Foley v. Interactive Data Corp., supra*, 47 Cal.3d at pp. 673-674; *White Lighting Co. v. Wolfson, supra,* 68 Cal.2d at p. 343; *Abeyta v. Superior Court, supra,* 17 Cal.App.4th at p. 1042.) "'A promise which is not likely to be performed within a year, and which in

fact is not performed within a year, is not within the Statute if at the time the contract is made there is a possibility in law and in fact that full performance such as the parties intended may be completed before the expiration of a year.' [Citation.]" (*Burgermeister Brewing Corp. v. Bowman, supra*, 227 Cal.App.2d at p. 281.) Here, Maxwell's obligation to ETE would have been entirely satisfied if, within a year and for reasons unrelated to Maxwell's conduct, SCAG chose one of the competing proposals for the project. That possibility was sufficient to satisfy the statute of frauds. (*Ibid*.)

Thus we need not reach ETE's contention that even if the statute of frauds applied, Maxwell is estopped to assert it because, in reliance upon Maxwell's promise, ETE had refrained from pursing other potential partners. Nonetheless, in this regard we do not accept Maxwell's contention that in order to defeat a motion for summary judgment on this issue, ETE would have been required to show, in addition to Maxwell and the successful bidder, the identity of a third bidder willing to become ETE's partner. Given ETE's development of the technology needed for the project, its successful participation with Maxwell in the initial bidding process and the fact that the record shows that there were at least three other bidders which wanted to participate in the project, there is enough in this record to support a reasonable inference that in the absence of Maxwell's promise, ETE would have been able to find another partner.

In short, ETE's contract cause of action is not barred as a matter of law by the statute of frauds.

IV

Tort Liability

ETE's tort claims are predicated on the theory that even before the joint Maxwell-ETE proposal was submitted to SCAG, Maxwell had serious reservations about the contract form SCAG had provided to all project proponents and that in the event its proposal was successful, it would attempt to alter those terms. ETE further alleged Maxwell either intentionally or negligently failed to disclose these reservations and had ETE known about the reservations, it would have found another partner with which to make a proposal to SCAG.

Contrary to the argument Maxwell made in the trial court, even if the statute of frauds applied to the alleged contract, the statute would not prevent ETE from pursuing these tort causes of action. (See *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 29-30.)

Moreover, to the extent ETE was required to show fraudulent intent to support its tort claims, it met its burden. Although the mere failure to perform a promise is not sufficient to show fraudulent intent on the part of the promisor, other circumstances, such as the hasty repudiation of a promise or failure to even attempt performance, will support a finding of fraud. (*Tenzer v. Superscope, Inc., supra*, 39 Cal.3d at p. 30.) Here, such circumstantial evidence of fraud can be found in the fact that although Maxwell knew the terms of the SCAG contract before the joint proposal was made, very shortly after Maxwell won the right to exclusive negotiation, it attempted to change not only the terms of the SCAG contract but the nature of the services it would provide. The swiftness with which SCAG changed its position strongly suggests that before the joint proposal was

made, Maxwell had reservations about participating in the project under the terms required by SCAG and that it intentionally concealed those reservations from ETE.

The existence of undisclosed reservations is also suggested by Maxwell's use of Nancy Anderson. According to the president of ETE, Maxwell's representative categorically represented to SCAG during the interview process that Anderson had been hired. Immediately after the interview, Maxwell's representative purportedly told an ETE executive that she had "lied through her teeth." Maxwell's deception of SCAG is circumstantial evidence that it was also willing to deceive ETE.

In short, like the contract claims, ETE's tort claims should have survived Maxwell's motion for summary judgment.

Judgment reversed. Appellant to recover its cost of appeal.

_____
BENKE, Acting P. J.

WE CONCUR:

_____
HALLER, J.

_____
O'ROURKE, J.