Filed 11/20/14

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANTONIO MARTINEZ-LUNA, Plaintiff and Appellant, v. TCI INTERNATIONAL, INC., Defendant and Respondent.	D064081 (Super. Ct. No. 37-2010-00102717-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Steven R. Denton, Judge. Affirmed.

The Casas Law Firm and Joseph N. Casas for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Timothy J. Watson, Brittany H. Bartold and Caroline E. Chan for Defendant and Respondent.

Antonio Martinez-Luna appeals from a summary judgment against him in his lawsuit against TCI International, Inc. (TCI). Martinez-Luna contends the trial court improperly concluded that the undisputed evidence showed the parties did not enter into a

sufficiently certain and definite oral agreement that TCI would pay Martinez-Luna for his role as a consultant for the beginning stages of an international business project. As we will explain, we find no merit to Martinez-Luna's appeal, and accordingly we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

According to the operative fourth amended complaint (the complaint), plaintiff Martinez-Luna had a long career in public service in Mexico, including as the former Attorney General for the state of Baja California, and through that role he made many contacts in both the Mexican government and industry that are useful to companies seeking to enter the Mexican marketplace. Defendant TCI is "a global provider of innovative radio frequency (RF) solutions for spectrum monitoring and antennae applications" and is headquartered in California.

This lawsuit arises out of Martinez-Luna's role in helping TCI develop a business relationship with Mexico's Secretary of National Defense (SEDENA), and possibly with other Mexican governmental entities, in 2009 and 2010. According to the complaint, Martinez-Luna and TCI agreed that their working relationship would be governed by three different agreements at different stages of the negotiations with SEDENA: a consulting agreement, a teaming agreement, and reseller agreement.

The consulting agreement was allegedly an oral agreement between TCI and Martinez-Luna intended to cover the "meet-greet phase" of the negotiations between

SEDENA and TCI (the oral consulting agreement). Under the oral consulting agreement, Martinez-Luna "would serve as the exclusive consultant to TCI . . . and would advise, consult and assist TCI . . . in procuring the SEDENA contract."

After entering into the oral consulting agreement, the parties allegedly planned to enter into a teaming agreement regarding "the parties' responsibilities regarding proposal preparations and submittals to the end-user." The complaint alleges that the parties exchanged several drafts of the teaming agreement, with the last draft purportedly exchanged on June 2, 2010, but not finalized or signed.[1]

The final agreement allegedly contemplated by the parties was a reseller agreement under which Martinez-Luna would buy TCI's products and resell them to SEDENA at a profit. Martinez-Luna was to be "an exclusive reseller . . . of [TCI's] products to SEDENA." Confusingly, however, the complaint alleges that the reseller agreement would also have the characteristics of a commission agreement. ". . . Martinez-Luna was to be paid a commission equal [to] no less than 30% of [TCI's] product sales to SEDENA as his consultant fees for the [oral consulting agreement]." Whatever its exact provisions, the reseller agreement was allegedly to be "the ultimate goal of Martinez-Luna's efforts" and would provide Martinez-Luna with "a 'success fee' " for his role in helping TCI obtain a contract with SEDENA. The reseller agreement allegedly would "continue year-to-year unless terminated by either Party."

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[1] The complaint states that a draft of the teaming agreement is attached as an exhibit, but no document is attached.

The complaint also describes some of the specific details of TCI's work with Martinez-Luna to approach SEDENA. Martinez-Luna alleges that at a meeting in 2009, he introduced TCI to one of his business contacts, Cesar Cortes, who was the representative to a high-level advisor to SEDENA named Sosumo Azano. The parties allegedly agreed that communications related to TCI's negotiations with SEDENA would pass through a chain of communication from TCI to Martinez-Luna to Cortes to Azano to SEDENA, and vice versa. During his dealings with TCI, Martinez-Luna allegedly met with TCI several times, provided advice to TCI, and facilitated TCI's meetings with key SEDENA representatives and other relevant entities. Although TCI allegedly had agreed that Martinez-Luna would be an "exclusive consultant" for the SEDENA negotiations, Martinez-Luna alleges that TCI was purportedly also using Azano as a consultant without his knowledge.

According to the complaint, on an unspecified date TCI purportedly was awarded a multi-year contract with SEDENA and "Martinez-Luna was an instrumental facilitator between TCI . . . and SEDENA." TCI allegedly told Martinez-Luna that it was cutting him out of the deal with SEDENA and would not compensate him. Although not explained in the complaint, other evidence in the record suggests that TCI ultimately entered into a reseller agreement directly with Azano's company, which then resold TCI's products to SEDENA.[2]

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2 Martinez-Luna testified in his deposition that he was told by Cortes and other sources that SEDENA bought TCI equipment through Azano. Brian Barlow, a vice president at TCI, testified in his deposition that he was told by the decisionmaker at

Martinez-Luna alleges that by cutting him out of the deal with SEDENA, TCI failed to honor the oral consulting agreement. Specifically, TCI breached its promise in the oral consulting agreement to enter into a reseller agreement with Martinez-Luna or otherwise pay him a success fee for his efforts. The complaint alleges causes of action for (1) breach of oral contract based on TCI's purported breach of the oral consulting agreement; (2) breach of implied-in-fact contract based on a breach of that same agreement; and (3) breach of the implied covenant of good faith and fair dealing in the oral consulting agreement.[3]

B. *The Summary Judgment Motion*

TCI filed a motion for summary judgment supported by Martinez-Luna's deposition testimony, Martinez-Luna's responses to special interrogatories, a declaration from TCI's president, and Martinez-Luna's verified original complaint.[4] TCI argued that

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SEDENA, General Ochoa, that the contract for TCI's products was going to go directly through Azano's company, STD, and not involve Martinez-Luna. Martinez-Luna's response to the separate statement for the summary judgment motion states that ". . . STD was awarded the SEDENA contract on June 10, 2010." According to Barlow, he informed Martinez-Luna that Martinez-Luna would no longer be involved in the SEDENA deal only *after* General Ochoa informed Barlow that SEDENA wanted to contract directly with Azano's company, STD.

[3] The original complaint contained 11 causes of action, many of which do not appear in the operative fourth amended complaint, including fraud, unjust enrichment and promissory estoppel. The current version of the complaint focuses on the allegation that TCI breached an oral or implied agreement.

[4] The operative fourth amended complaint was not verified.

the evidence established that the parties never reached an oral agreement as to Martinez-Luna's compensation and that the lawsuit was barred by the statute of frauds.

For its argument that no agreement existed, TCI pointed both to its president John Ballard's declaration and to Martinez-Luna's own admissions during his deposition that the parties had not agreed on any specific means of compensating Martinez-Luna for his role in the initial stages of reaching a deal with SEDENA.

Ballard stated, among other things, that TCI never entered into an oral contract for a consulting agreement with Martinez-Luna. Although TCI and Martinez-Luna discussed potentially having Martinez-Luna's company buy TCI products and then resell them to Mexico, the parties never reached an agreement on essential terms. Ballard explained that under a reseller agreement, the amount a reseller can make varies based on market forces impacting the reseller and TCI does not set a target or actual resale price for products sold by third parties. Ballard also stated that TCI has never agreed to a 30 percent commission of product sales for any consultant.

Martinez-Luna testified in the deposition excerpts submitted by TCI that he had an agreement with TCI to receive "the 30 percent," but the payment could have been made through one of a number of different scenarios. "[T]hey were trying to figure out how to do it." According to Martinez-Luna, "one of the ways of doing it" would be for Martinez-Luna to act as a reseller of TCI products and receive the markup between the domestic price and international price. "TCI sells at a domestic price to somebody, and SEDENA . . . buys the product at an international price, which can be up to 30 percent

higher." According to Martinez-Luna, the other possible scenario for him to receive payment "was a straight commission."

Martinez-Luna's opposition attempted to establish that the parties had reached a definite oral agreement by submitting additional deposition testimony from Martinez-Luna's deposition and from TCI vice president Barlow. The opposition also relied on a declaration from Cortes, which described what Cortes knew about the relationship between Martinez-Luna and TCI based on his involvement in TCI's efforts to reach a deal with SEDENA.

Although Cortes's declaration purported to describe the contractual relationship between TCI and Martinez-Luna, the trial court sustained TCI's objections to much of the declaration.[5] As a result of the evidentiary rulings, Cortes's declaration set forth several admissible statements about TCI's contractual relationship with Martinez-Luna. According to Cortes, it was clear to him that Martinez-Luna was a consultant for TCI and would be compensated. Cortes understood that TCI orally agreed to compensate Martinez-Luna through "a 'success fee' of no less than 30% of TCI's product sales to SEDENA as his consultant fees on the SEDENA project." According to Cortes, several options were discussed as to how TCI's products would ultimately be sold to SEDENA. One option was for Martinez-Luna to form a company to sell TCI products to SEDENA. Another option was for Martinez-Luna to obtain a straight commission of 30 percent from TCI. According to Cortes, although the structure of the deal was still being

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5 Martinez-Luna does not challenge the evidentiary rulings on appeal.

discussed, he understood that the parties were merely discussing options, and there was "not . . . some sort of a pre-condition that would prevent Mr. Martinez-Luna from getting paid the 30% commission."

The deposition testimony that Martinez-Luna submitted contained additional evidence that the parties did not agree on how Martinez-Luna would be compensated.

Barlow, who was involved in efforts to sell products to Mexico, testified that Martinez-Luna's company would have to go through a number of steps before TCI decided that it was appropriate to involve it in a transaction. "First of all, a review of what we initially presented as a teaming agreement[.] [T]here were a series of questions that dealt with banking, references, power and corruption. There was a review of the SPX power and corruption policies, and we were also looking at the ability of [the company][6] to be able to obtain an export license from the U.S. government."

Martinez-Luna's own deposition testimony that he submitted in opposition to the summary judgment motion contained additional evidence that the parties had not agreed on how Martinez-Luna would be compensated and that the parties were still trying to figure out how to structure the SEDENA deal.

The trial court granted TCI's motion for summary judgment. It ruled that although TCI had not established that the statute of frauds barred the action, summary judgment was appropriate because Martinez-Luna had not submitted admissible evidence to meet

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6 The company is referred to in the deposition as "ANS." Although Martinez-Luna did not supply enough surrounding deposition testimony to allow us to fully understand the subject matter being discussed in the excerpts appearing in the record, it appears that ANS is one of Martinez-Luna's companies.

his burden to create a triable issue of material fact as to whether he and TCI entered into a sufficiently definite oral agreement that he would receive compensation for his initial efforts on the SEDENA project.

Martinez-Luna appeals, contending that the trial court erred in granting summary judgment.

II

DISCUSSION

A. *Legal Standards Applicable to Summary Judgment*

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is to be granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant "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." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A defendant may meet this burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense. (*Ibid.*)

If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of material fact with respect to that cause of action or defense. (*Aguilar*, *supra*, 25 Cal.4th at p. 849; *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) Ultimately, the moving party "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." (*Aguilar*, at p. 850.)

We review a summary judgment ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) "[W]e are not bound by the trial court's stated reasons for its ruling on the motion; we review only the trial court's ruling and not its rationale." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.)

Further, with respect to the specific issue presented in this case, "[i]t is a question of law whether a contract term is sufficiently definite to be enforceable." (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 793.)

B. *Summary Judgment Was Proper Because the Undisputed Evidence Established That the Parties Did Not Enter into a Sufficiently Definite and Certain Agreement*

TCI based its summary judgment on the legal principle that "[w]here a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable." (*Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 481.) " 'To be enforceable, a promise must be definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.' " (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 209.) " '[I]f . . . a supposed "contract" does not provide a basis for determining what obligations the parties have

agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract.' " (*Ibid.*)

Related to the unenforceability of uncertain and indefinite contracts is the rule that " ' "if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise." ' " (*Patel v. Liebermensch* (2008) 45 Cal.4th 344, 352.) "[T]he failure to reach a meeting of the minds on all material points prevents the formation of a contract *even though the parties have orally agreed upon some of the terms, or have taken some action related to the contract.*" (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 359 (*Banner Entertainment*).)

Here, by submitting Ballard's declaration and Martinez-Luna's deposition describing his dealings with TCI, TCI met its initial burden to submit evidence showing that it did not enter into a contract to compensate Martinez-Luna. TCI's evidence showed that any discussions with Martinez-Luna about compensation were preliminary and contingent on entering into a reseller agreement or agreeing on some other method of structuring a deal through which Martinez-Luna could be compensated for his participation in the SEDENA project. Ballard's declaration stated that "TCI and [Martinez-Luna] never agreed to any terms with respect to compensation with respect to any alleged agreement." At most, according to Ballard, "TCI discussed potentially selling its product to a company owned by [Martinez-Luna's] company so that [Martinez-

Luna] could resell the subject products to Mexico. However, TCI and [Martinez-Luna] never reached an agreement as to essential terms."

The evidence submitted by Martinez-Luna in opposition did not serve to create a triable issue as to whether the parties entered into a definite and enforceable agreement as to Martinez-Luna's compensation. Instead, as Martinez-Luna's own deposition testimony and the Cortes declaration established, the parties were considering at least two very different financial arrangements to allow Martinez-Luna to profit from TCI's possible sale of products to SEDENA. One possibility was that Martinez-Luna's company would buy products from TCI and then resell them to SEDENA, making a profit on any markup that Martinez-Luna applied to the products when he resold them. For this to occur, Martinez-Luna's company would have to obtain an export license, and SEDENA would have to agree to purchase the products from Martinez-Luna. A second possibility, as Martinez-Luna explained, would be for TCI to sell products directly to SEDENA, with Martinez-Luna paid a commission by TCI.

The difference between these two scenarios does not merely concern *minor* details, as Martinez-Luna argues. Instead, the two scenarios represent radically different approaches to structuring the financial terms of Martinez-Luna's participation: either Martinez-Luna would (1) buy TCI products and resell them, profiting from the markup, or (2) work directly for TCI and receive a guaranteed commission percentage based on the sales that TCI was able to make. (See *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1458-1459 [settlement agreement was unenforceable because the parties had not agreed on material terms about how to structure the deal, so that "although the parties agreed to

the goals of the settlement, they clearly did not agree to the means of achieving the goals," and the means were material because "they had a significant financial impact on the parties"].) The parties failed to agree on the essential issue of how the deal would be structured to allow Martinez-Luna to profit from TCI's sale of products to SEDENA, and therefore, any oral agreement made by the parties was too uncertain and preliminary to constitute a legally binding and enforceable agreement. (See *Bustamante*, *supra*, 141 Cal.App.4th at p. 215 [when there was "no meeting of the minds as to the *essential structure and operation* of the alleged joint venture, even if there was agreement on some of the terms," no enforceable contract was created (italics added)].)

Because the basic structure of the transaction had not been agreed upon, the promise is not " 'definite enough that a court can determine the scope of the duty' " and " 'the limits of performance' " are not " 'sufficiently defined to provide a rational basis for the assessment of damages.' " (*Bustamante*, *supra*, 141 Cal.App.4th at p. 209.) The parties' "failure to reach a meeting of the minds on all material points prevent[ed] the formation of a contract." (*Banner Entertainment*, *supra*, 62 Cal.App.4th at p. 359.)

At most, as described by Martinez-Luna, the parties *agreed to agree* on a future reseller agreement or some other method of paying "a 'success fee' " to Martinez-Luna. Further, Martinez-Luna's ability to profit from a reseller agreement would be contingent on him being able to resell TCI's products at an adequate price to a willing buyer. " 'Preliminary negotiations or [agreements] for future negotiations are not the functional equivalent of a valid, subsisting agreement.' " (*Bustamante*, *supra*, 141 Cal.App.4th at pp. 213-214.) "Because essential terms were only sketched out, with their final form to

be agreed upon in the future (and contingent upon third-party approval), the parties had at best an 'agreement to agree,' which is unenforceable under California law." (*Id.* at p. 213.) The basic structure of the deal — whether Martinez-Luna would profit from the SEDENA deal as a reseller or as a commissioned salesperson — is a fundamentally essential term, on which the parties had only an agreement to agree.

We therefore conclude that summary judgment was proper on the cause of action for breach of oral contract because the undisputed evidence established that any agreement between TCI and Martinez-Luna on the essential issue of how Martinez-Luna would be compensated for participating in the initial stages of setting up a deal with SEDENA was too uncertain and indefinite to constitute an enforceable contract.

As the trial court properly recognized, because the cause of action for breach of oral contract failed, so did the causes of action for breach of implied contract and breach of the covenant of good faith and fair dealing. Specifically, the cause of action for breach of implied contract was based on the same alleged oral consulting agreement, which we have determined to be unenforceable and void because it is not sufficiently definite and certain. The cause of action for breach of the covenant of good faith and fair dealing fails because it depends on the existence of an underlying contract, which Martinez-Luna is unable to establish. (*Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 116.)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.

I, KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that this preceding and annexed is a true and correct copy of the original on file in my office.

WITNESS, my hand and the Seal of the Court this November 20, 2014

KEVIN J. LANE, CLERK

By Jonathan Newton Deputy Clerk