Filed 9/14/23 (unmodified opn. attached)

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PIEDMONT CAPITAL MANAGEMENT, L.L.C.,
 	
        Plaintiff and Appellant,
 	
    v.
 	
RAYMOND MCELFISH,
 	
        Defendant and Respondent.
	B316372
	
	(Los Angeles County Super. Ct. No. 20STCV14138)
	
	ORDER MODIFYING OPINION AND DENYING REHEARING
	
	NO CHANGE IN THE JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on August 24, 2023, be
        modified as follows:

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*   Pursuant to California Rules of Court, rules 8.1100 and
8.1110, this opinion is certified for publication as to all parts
except Part II of the Discussion.

1. On page 13, line 1, insert "(*Jozovich*)" immediately after "223-224" so the full citation reads:

   (*Jozovich v. Central Cal. Berry Growers Assn.* (1960) 183 Cal.App.2d 216, 223-224 (*Jozovich*) ["a contract which calls for the payment of a specified sum for performance by the other party is not 'severable' merely because payments are divided into installments"].)

2. On page 13, immediately following the paragraph that ends with "weight of authority set forth above" insert the following new paragraphs:

   McElfish resists our conclusion with three arguments.

   First, he argues that the acceleration clause was not discretionary (and hence that the duty to pay the entire amount is not divisible from the duty to make a single payment) because the HELOC agreement spells out that he would be "in default" the moment he failed to make even one payment. McElfish's conclusion does not follow from its premise: Although the HELOC agreement provides that a single nonpayment puts the borrower "in default," being in default is merely what gives the lender the option of invoking the acceleration clause in the first place. McElfish's argument collapses the two events (default and acceleration) into a single

event, and robs the discretionary acceleration clause of any effect in derogation of the principle that we cannot rewrite contracts. (E.g., *24th & Hoffman Investors, LLC v. Northfield Ins. Co.* (2022) 82 Cal.App.5th 825, 833 [courts "do not rewrite any provision of any contract"].)

3. On page 13, in the first sentence of the first full paragraph, delete the words "McElfish asserts" and replace them with "Second, and relatedly, McElfish argues" so the full sentence reads:

> Second, and relatedly, McElfish argues that lenders should not be allowed to include discretionary acceleration clauses in contracts because their very existence means that lenders are not obligated to sue for the full amount of a debt upon the first instance of a periodic nonpayment, which McElfish asserts is inconsistent with the policy behind statutes of limitations to encourage lawsuits as early as possible.

4. On page 14, immediately following the paragraph that ends with "undue delay" in line 8, insert the following new paragraph:

> Third and lastly, McElfish argues that a treatise and California case law dictate that a contract is divisible only when "'performance of each party is divided into two or more parts,'" such that contractual duties are not divisible merely because

the duty to pay for a single performance is broken up into multiple payments. (*Jozovich*, supra, 183 Cal.App.2d at pp. 223-225, quoting 3 Williston, Contracts, p. 2408, § 860A (rev. ed.).) Applying this principle, McElfish continues, means that the duties owed under the HELOC agreement are not divisible because the lender had only a single performance (that is, loaning him money), such that McElfish's duty to repay every month is a subset of a single performance broken up into multiple payments. McElfish's argument ignores that the case law he cites is designed to set up a default rule for assessing the parties' intent regarding divisibility, and when it is appropriate to infer divisibility from a contractual duty to make payments over time. As explained above, in this case, the parties have—by their express designation of a maturity date and use of a clause that grants the lender discretion over whether to accelerate that maturity date—explicitly evinced a mutual intent to make the duty to pay the whole amount distinct from (and hence divisible from) the duty to make a single payment.

5. On page 14, line 11, immediately after "McElfish makes two further arguments" insert ", unrelated to the issue of divisibility," so the full sentence reads:

>   McElfish makes two further arguments, unrelated to the issue of divisibility, for why the trial

court was correct to dismiss Piedmont's breach of contract claim.

* * *

There is no change in the judgment.

Respondent's petition for rehearing is denied.

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ASHMANN-GERST, Acting P. J. CHAVEZ, J. HOFFSTADT, J.