Filed 1/14/13 Concerned Citizens of South Central Los Angeles v. City of Los Angeles CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CONCERNED CITIZENS OF SOUTH CENTRAL LOS ANGELES, Plaintiff and Respondent, v. CITY OF LOS ANGELES, Defendant and Respondent.	B240301 (Los Angeles County Super. Ct. No. BC389760)

APPEAL from an order of the Superior Court of Los Angeles County, Coleman Swart and John L. Segal, Judges. Affirmed.

Klapach & Klapach, P.C. and Joseph S. Klapach for Plaintiff and Respondent.

Carmen A. Trutanich, City Attorney and Brian I. Cheng, Deputy City Attorney for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, Concerned Citizens of South Central Los Angeles, and defendant, City of Los Angeles, appeal from a January 30, 2012 judgment. The judgment at issue was entered after we reversed a judgment in a prior appeal. (*Concerned Citizens of South Central Los Angeles v. City of Los Angeles* (May 19, 2011, B222424) [nonpub. opn.].) Plaintiff argues: the trial court erroneously awarded a declaratory rather than a money judgment; it should have been granted leave to amend the declaratory relief complaint to add a contract breach claim; and it was entitled to pre-and post-judgment interest. On cross-appeal, defendant challenges the award of attorney fees to plaintiff. Defendant argues plaintiff is judicially estopped from recovering attorney fees. We reject all of these contentions and affirm the January 30, 2012 judgment.

II. BACKGROUND

A. Agreement

On November 20, 2001, the parties entered into a contract entitled, "Agreement Number 102346 of City Contracts Between the City of Los Angeles and Concerned Citizens of South Central Los Angeles Relating to the Antes Columbus Football Club Youth Center Acquisition." Defendant agreed to provide $2.4 million in community development block grant funds to be secured by a promissory note and a trust deed. Plaintiff agreed to use the funds to acquire "an abandoned, three acre industrial site" in Los Angeles. Plaintiff was to transform it into "a youth recreation facility" for the benefit of "very low and low income" persons. Section 203 of the agreement provides: "Concerned Citizens of South Central Los Angeles will transform an abandoned, three acre industrial site in Los Angeles into a youth recreation facility that will include a 31,000 square feet community center and a 75,000 square feet state of the art soccer field. The Antes Columbus Football Club Youth Center will serve 750 youths monthly and will

house a pre-school daycare facility, literacy and skills training programs, weight and aquatic training equipment, a multi-media computer center, a fully digital audio/video production studio, conference and classroom space, and a commercially equipped kitchen. The site will include a 28,000 square foot park, a 75,000 square foot state of the art soccer field and a 226 space parking structure." Section 103 of the agreement provides, "The term of this Agreement shall commence on upon execution of this agreement and end January 31, 2002, and provided that said term is subject to the provision of the general terms and conditions as detailed in §601 through §743 of this Agreement."

Section 203H of the agreement allows plaintiff to repay the promissory note as follows: "Two Million Four Hundred Thousand Dollars ($2,400,000) shall be repaid with services. . . . The services shall be amortized at the rate of $40,000 per year for a total of Sixty (60) years. Said amortization shall commence when the Contractor obtains a Certificate of Occupancy or Notice of Completion and begins utilizing the additional space to fulfill its service obligations as identified in this Agreement. [¶] The Contractor may, at its option, purchase the City's interest at anytime, for an amount equal to the current value as determined in the preceding paragraph. [¶] When the Contractor has fully complied with all aspects of this Agreement and the Promissory Note, the City's interest shall be zero and the City shall reconvey the aforesaid Deed of Trust or reassign the aforesaid Conditional Consent to Assignment of Lessee's Interest in Lease to the Contractor."

In addition, section 609 of the agreement contains a reversion of assets provision: "[Plaintiff] shall, within 45 days of the expiration of this Agreement, transfer to the City Treasury any, and all, grant funds on hand at the time of expiration and any, and all, accounts receivable attributable to the use of grant funds provided under this Agreement." Because the purchase price of the property was $2.1 million, plaintiff returned $300,000 in community development block grant funds to defendant pursuant to section 609A of the agreement. In addition, section 609B provides: "Any real property under the Contractor's control that was acquired or improved in whole or in part with

grant funds provided under this Agreement in excess of $25,000 shall either be: [¶] 1. Used to meet one of the national objectives set forth in 24 CFR 570.208 until five (5) years after the expiration of this Agreement, or such longer period of time as determined appropriate by the City; or [¶] 2. Disposed of in a manner which results in the City being reimbursed in the amount of the current fair market value of the property less any portion thereof attributable to expenditures of non-grant funds for acquisition of, or improvement to, the property. Such reimbursement is not required after the period of time specified in accordance with 1) above."

B. Promissory Note

On November 29, 2001, plaintiff signed a promissory note secured by a trust deed in favor of defendant. The promissory note states in part: "In consideration for the $2,400,000, the BORROWER shall utilize the Antes Columbus Footbal[l] Club Youth Center . . . for the purpose of providing youth recreation services. The services and reports to be provided by the BORROWER are detailed in Section 203 of Agreement No. 102346 between the LENDER and the BORROWER. . . . [¶] The BORROWER shall secure the promissory note of $2,400,000 in favor of the LENDER. If the BORROWER fails to comply with the conditions covered herein the Note shall be in default and the LENDER has the right to accelerate the loan. [¶] The Promissory Note shall be amortized at the rate of Forty Thousand Dollars ($40,000.00) per year for Sixty (60) years, while the BORROWER operates the project in compliance with the Agreement. Following the execution of Agreement No. 102346, the service payback period shall begin when the BORROWER notifies the LENDER that it has fulfilled the requirements of Section 203 of City Agreement No. 102346. [¶] The BORROWER may, at its option, purchase the LENDER'S interest at any time for an amount equal to the current value as determined by the preceding paragraph. Any amount owed under the Note may be prepaid, in whole or in part, without premium or penalty. [¶] When the BORROWER has fully complied with all aspects of Agreement No. 102346, the

LENDER'S interest shall be zero and LENDER shall execute and reconvey the Deed of Trust on the real property . . . . [¶] If action is instituted on this Note upon default by BORROWER, the BORROWER promises to pay reasonable attorney's fees and other related costs as the court may see fit."

C. Plaintiff's Complaint

On March 5, 2008, plaintiff sued defendant for declaratory relief. Plaintiff sought "a judicial determination of its rights and duties per the Agreement, and a declaration" as to what should be the purchase price for its interest in the property. Plaintiff requested: "1. A declaration that the Agreement allows the Plaintiff to acquire the City's interest in the real property mentioned therein for $2,100,000.00 and that the City must immediately release all lien[s] on the Property upon receipt of such funds; 2. Costs, including but not limited to attorney's fees; and 3. Any and all other relief to which Plaintiff may be justly entitled." Plaintiff never amended its complaint prior to the first appeal.

D. Defendant's Cross-Complaint

On April 8, 2008, defendant filed a cross-complaint against plaintiff for: rescission; contract breach; promissory note breach; accounting; and declaratory relief. Defendant alleged plaintiff breached the agreement and the promissory note by failing to build and operate the community center as required by the parties' agreement. In addition, defendant sought rescission based on plaintiff's failure to build the community center and provide services as required by section 203 of the agreement. Defendant also sought judicial determination of its rights and duties under the November 20, 2001 contract and November 29, 2001 note. In addition, defendant sought the following declaration, "[T]he current fair market value of the Property as determined by the amount of compensation to be paid by the [Los Angeles Unified School District] for the property in the Related Action."

E. Eminent Domain Action

On March 10, 2008, the Los Angeles Unified School District filed an eminent domain action against plaintiff, defendant and the Los Angeles County Tax Collector to acquire the property. On April 7, 2009, the trial court entered an interlocutory judgment in the eminent domain action fixing the condemnation award at $5,587,500 pursuant to the parties' stipulation. Of that amount, $154,177.46 was paid to the county tax collector for unpaid taxes and penalties. The remaining $5,433,322.54 remained on deposit with the trial court pending further orders.

F. Statement of Decision and Judgment

On November 12, 2009, after a bench trial, the statement of decision was issued. The trial court found plaintiff received a $2.1 million community development block grant funded by the United States Department of Housing and Urban Development. The funds were administered by defendant to acquire a three-acre parcel under the agreement. The trial court found: "After the property was cleared, it was partially used by the North Central American Youth Soccer League by about 1,800 children per year. Games were played on Saturday and there was some practice during the week. The property was also used as a used car lot. The property was leased to carnival operators about 15 times. Each carnival lasted one to two weeks. The property was used for a circus 5 times. The plaintiff[] collected $5,000 per week for these uses. Plaintiff[] testified the money was used to pay taxes and for maintenance of the property."

The trial court described plaintiff's efforts to buy out defendant's interest in 2006: "In March 2006, [plaintiff] sent an email to the City seeking 'to "buy out" the City's interest for "fair market value,"' which email was further confirmed by Mark Williams' testimony. [Exhibit 110]. The City responded stating that a property appraisal was needed to determine 'fair market value.' [Exhibit 110]. In August 2006, [plaintiff] sought to purchase the City's interest for $2.1 million, to which the City responded that

under the terms of the Contract and [Department of Housing and Urban Development] regulations, the City's interest is measured by the fair market value of the Property. [Exhibits 111-117]."

The trial court found plaintiff never completed the project outlined in section 203 of the agreement. Plaintiff built an earthen clay soccer field that was used for youth soccer but the construction did not comply with section 203. The trial court also found: "No further construction was accomplished as plaintiff had insufficient funds to complete the project as required by Para. 203. The property sat barren for 7 years until [Los Angeles Unified School District] took the property by eminent domain for the fair market value of $5,433,322.54. [Los Angeles Unified School District] deposited that amount with the court pending the court outcome of this case."

The statement of decision summarized the parties' contentions at trial: "Plaintiff seeks declaratory relief that plaintiff is entitled to a determination that plaintiff may exercise an option to purchase the defendant City's interest for a price of $2.1 million. (The amount of the grant used to purchase the property.) [¶] The city contends that the city is entitled to the full market value of the property in accordance with 24 CFR 570, 503(7) ii. [¶] Plaintiff's position is that plaintiff has a right pursuant to Para. 203H1 (2nd paragraph) and the promissory note to 'purchase the city's interest at anytime for an amount equal to the current value as determined in the preceding paragraph'; claiming this 2nd paragraph is a stand alone option. The city claims the 2nd paragraph of 203H1 is inextricably connected to the preceding 1st paragraph and only applies when service payback under the contract begins. Plaintiff further contends that under Para. 609 of the agreement (which paraphrases 24 CFR 570.503(7)[)] that plaintiff complied with #1 under that section as the property was used to meet one of the national objectives set forth in 24 CFR 503(7) for over 5 years. The objective being the 'elimination or reduction of blight.'"

The trial court rejected plaintiff's argument that it complied with section 609B1 of the agreement by reducing blight. The trial court reasoned: "Paragraph 203A2 of the agreement gives the national objective for the agreement in Para. 203A3a2 as being an

activity benefitting very low and low income youth. The objective re: blight (203A2b) is not checked in the agreement. The court finds that the national objective of this agreement was to benefit low or very low income youth. Plaintiff's argument under Para. 609B1 fails re: blight. Further, the court finds that the activities on the property do not meet the compliance standard required under Para. 609B1 or 24 CFR 570.503(7)i as set forth in Para. 203L of the agreement."

The trial court also ruled: "The court finds that the second paragraph of Section 203H1 is ambiguous and confusing and can understand how plaintiff could interpret the paragraph as it has. However, looking at the agreement as [a] whole and further finding that plaintiff has breached the agreement by not performing as promised under paragraph 203 of [the] agreement and also finding that 24 CFR 570.503(7)ii is applicable to this case, the court rules that plaintiffs do not have the right to the proceeds of the sale of the property other than the right to be reimbursed under 24 CFR 570.503(7)ii." As for the promissory claim, the trial court ruled: "Plaintiff's claim on the promissory note is derivative of the substantially identical terms at paragraph 203H1 of the agreement. The note does not stand alone. The note is merely reflective of the right of the city to recover the property from plaintiff upon default or breach of the agreement. The plaintiff[] did breach the agreement as indicated above."

On December 22, 2009, judgment was entered in defendant's favor on its claims for breach of the contract and promissory note in the amount of $4,684,843.22. Plaintiff received $406,237.03 in reimbursement for site improvement expenditures. In addition, the trial court awarded defendant $4,492.29 in costs and $127,600 in attorney fees. Plaintiff appealed the judgment on February 18, 2010.

G. Prior Opinion

On May 19, 2011, we reversed the December 22, 2009 judgment. (*Concerned Citizens of South Central Los Angeles v. City of Los Angeles, supra,* B222424.) We found substantial evidence supported the trial court's finding that plaintiff did not comply

with paragraph 609B(1) and 24 Code of Federal Regulations part 507.503(b)(7)(i). We explained: "It is undisputed that Concerned Citizens never built the youth recreation facility. The clay soccer field that was built on the property was not the soccer field contemplated by the parties under section 203 of the agreement. Moreover, Concerned Citizens leased the property to vendors for carnivals, used car sales and circuses, activities which did not benefit low or very low income residents." (*Concerned Citizens of South Central Los Angeles v. City of Los Angeles, supra*, B222424, at p. 13.) But we concluded the reversion of assets provision under section 609B(2) did not require plaintiff to reimburse defendant for the fair market value of the property. We explained the reversion of assets provision by its own term specified no reimbursement was required five years after the expiration of the agreement. (*Id*. at p. 14.) Because the agreement ended on January 31, 2002, under section 103, plaintiff was not required to reimburse defendant for the fair market value of the property since it was disposed of after January 31, 2007. Plaintiff disposed of the property on March 10, 2008, when the Los Angeles Unified School District condemned the parcel. (*Ibid.*) We ruled plaintiff was entitled to exercise its option to purchase defendant's interest under the service payback provision in section 203H of the agreement. (*Id*. at p. 15.) As for the attorney fees award, we held defendant was not entitled to recover attorney fees because there was no default on the promissory note. We found there was no default on the promissory note because plaintiff chose to exercise its option to purchase the city's interest. (*Id*. at pp. 15-16.)

H. Proceedings After Remand

After the remittitur issued, plaintiff filed a proposed judgment. Plaintiff sought: a monetary judgment of $4,816,935.51; "ownership of the interest attributable to $5,223,172.54 of the funds previously held on deposit in the related eminent domain action . . . between the date of the deposit of such funds and the date that such funds were disbursed"; "prejudgment interest at the rate of 7% per annum against the City for the

amount of the judgment from the date that the funds previously held on deposit in the related eminent domain action . . . were disbursed to the City until September 8, 2011"; and $224,446 in attorney fees.

Defendant objected to the proposed judgment, arguing plaintiff did not seek a monetary judgment. In addition, defendant contended we did not find plaintiff was entitled to a money judgment. Defendant argued if our opinion was read to allow plaintiff a money judgment, it must be reduced by $2.1 million to reflect the option price. Defendant also objected to any interest award.

On December 14, 2011, a hearing was held on the proposed judgment and plaintiff's motions for attorney fees and pre- and post-judgment interest. On December 22, 2011, plaintiff filed a motion requesting entry of a money judgment, or in the alternative, an ex-parte application for leave to amend the complaint to conform to proof. In the alternative, plaintiff sought to shorten the time on its motion for leave to amend its declaratory complaint.

On January 5, 2012, the trial court ruled on the proposed judgment issue and plaintiff's various motions. Concerning the proposed judgment, the trial court ruled: "The Court of Appeal reversed the December 22, 2009 judgment in this action. The Court of Appeal held that the trial court erred by ruling that plaintiff could not exercise its option to purchase the property, and that 'plaintiffs do not have the right to the proceeds of the property other than the right to be reimbursed' for improvements, taxes and insurance costs. 2011 WL 188918, at 5, 8. The Court of Appeal held that plaintiff 'is entitled to exercise its option to purchase the city's interest for $2.1 million.' Id. at 9. The Court of Appeal stated that plaintiff exercised this $2.1 million option to purchase on August 1, 2006. Id. at 4. Therefore, under the Court of Appeal's ruling, plaintiff was entitled on August 1, 2006 to purchase defendant's interest in the property for $2.1 million. [¶] On April 7, 2008, defendant's interest in the property became defendant's interest in $5,433,322.54, the net amount of the interlocutory judgment in the eminent domain action that [Los Angeles Unified School District] filed to acquire the property. Therefore, plaintiff has a right to purchase, for $2,100,000 the $5,433,322.65 that

represents defendant's interest in the property. [¶] For these reasons, plaintiff is entitled to a declaratory judgment that it has the right to pay defendant $2,100,000 in exchange for defendant paying plaintiff $5,433,322.65, less the $406,237.03 plaintiff already received from the funds deposited with the court. (Plaintiff concedes that this $406,237.03 should be credit against the amount of any money plaintiff receives in this case. . . .) Therefore, the court will enter a declaratory judgment declaring that plaintiff has the right to pay defendant $2,100,000 in exchange for defendant paying plaintiff $5,027,085.62."

Plaintiff's motion for pre- and post-judgment interest was denied. The trial court explained: "Section 3287(a) does not apply because . . . plaintiff is not entitled to damages in a sum certain or capable of being made certain by calculation. Plaintiff is entitled to a declaration that upon paying a certain amount of money ($2,100,000), plaintiff is entitled to receive a certain amount of money ($5,027,085.62). The declaratory judgment plaintiff is entitled to recover is similar to a judgment for damages, but it is not a judgment for damages. If plaintiff does not pay the $2,1000,000, plaintiff does not get any money. That is not a money judgment. [Civil Code] [s]ection 3287(b) does not apply because . . . plaintiff is not entitled to a judgment to receive damages based on a cause of action in contract. [¶] To the extent plaintiff is seeking post-judgment interest between the original judgment on December 22, 2009 and the soon-to-be-entered judgment after remand, such interest is also not recoverable. In cases where the original judgment is reversed on appeal and a new judgment is entered after remand, interest runs only from the date of the new judgment. [Citations.] The appeal in this case was a complete reversal, not a modification."

The trial court granted plaintiff's attorney fees motion. The trial court ruled: "Defendant sued plaintiff for breach of the promissory note. See Cross-complaint, ¶¶ 22-26. The Court of Appeal held that plaintiff 'did not default on the promissory note' and that 'there was no default on the promissory note.' 2011 WL 1889418, at 9. Because plaintiff did not breach the promissory note, plaintiff prevailed on defendant's third cause of action for breach of the promissory note. Plaintiff is the prevailing party. [¶]

Defendant does not challenge the reasonableness of any of plaintiff's claimed fees, nor raise any issue of allocation. Therefore the court will award plaintiff its reasonable attorneys' fees as requested in the amount of $220,096, plus an additional $8,040 incurred since plaintiff filed their motion (which the court finds is reasonable), for a total award of $228,136." Finally, the trial court denied plaintiff's ex parte application to amend the complaint, or in the alternative, an order shortening time on its motion for leave to amend.

On January 30, 2012, judgment was entered on plaintiff's complaint for declaratory relief. The judgment states, "[Plaintiff is awarded judgment on its Complaint for declaratory relief in its favor and against [defendant] as follows: [plaintiff] has the right to pay [defendant] $2,100,000 in exchange for [defendant] paying [plaintiff] $4,816,935.51." Plaintiff was awarded it costs of appeal in the amount of $3,552.89 and its attorney fees in the amount of $228,136. Notice of entry of judgment was served on February 1, 2012. Plaintiff filed its notice of appeal on April 2, 2012. Defendant filed its cross-appeal on April 18, 2012.

III. DISCUSSION

A. Plaintiff's Appeal

1. Declaratory Relief Judgment

Plaintiff argues the trial court erred in entering a declaratory rather than a money judgment. The January 30, 2012 judgment states, "[Plaintiff] has the right to pay [defendant] $2,100,000 in exchange for [defendant] paying [plaintiff] $4,816,935.51." This is precisely the judgment plaintiff sought in its complaint. It is this judgment we ruled plaintiff was entitled to under the agreement. Plaintiff's declaratory relief complaint seeks, "A declaration that the Agreement allows the Plaintiff to acquire [defendant's] interest in the real property mentioned therein for $2,100,000.00 and that

[defendant] must immediately release all [liens] on the Property upon receipt of such funds." In addition, plaintiff requested "[a]ny and all other relief" to which it was entitled. Prior to the first appeal, plaintiff never amended its declaratory relief complaint. In our May 19, 2011 decision, we concluded plaintiff was entitled to exercise its option to purchase defendant's interest under the service payback provision in section 203H of the agreement. We reversed the December 22, 2009 judgment because we ruled the trial court erred in not allowing plaintiff the right to exercise its option under the parties' agreement. The January 30, 2012 judgment provides plaintiff the relief sought in the declaratory relief complaint and on its first appeal. On both occasions, plaintiff sought the right to exercise its option to purchase defendant's interest for $2.1 million; the amount owed on the promissory note.

Plaintiff contends the trial court must return it to as near as possible the position it occupied prior to the December 22, 2009 judgment. Plaintiff argues this court should exercise its power under Code of Civil Procedure section 908 to order defendant to pay the condemnation proceeds plus interest. Code of Civil Procedure section 908 provides: "When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order . . . and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination." Our reversal of the December 22, 2009 judgment was based on our interpretation of the agreement. The agreement permitted plaintiff to exercise the option to purchase defendant's interest at any time. The posture that plaintiff occupied before the December 22, 2009 judgment is its current position -- it has a right to exercise its option.

Plaintiff also asserts the declaratory relief complaint was not limited to a declaration of rights but included a request for "any and all other relief" to which it may

be justly entitled. Plaintiff reasons once the trial court released the money to defendant, plaintiff was "justly entitled" to a judgment compelling defendant to repay the money received in error. But what plaintiff was "justly entitled" to under the agreement is the right to exercise its option. This is a right enforced by the January 30, 2012 judgment.

Plaintiff also argues the trial court erred by failing to recognize it had the power to enter a money judgment in a declaratory judgment action. Plaintiff argues the circumstances compel the award of money judgment in its declaratory judgment action, relying on: *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 608; *California Bank v. Diamond* (1956) 144 Cal.App.2d 387, 390; and *Tolle v. Struve* (1932) 124 Cal.App. 263, 268. Plaintiff's reliance is misplaced. To begin with, there is no evidence the trial court misunderstood its powers. It is presumed the trial court was aware of its powers. (Evid. Code § 664, *People v. Allegheny Casualty Co.* (2007) 41 Cal.4th 704, 718.)

In *County of San Diego*, the Court of Appeal recognized monetary relief may be appropriate in a declaratory action where the parties dispute the validity of a contract. (*County of San Diego v. State of California, supra,* 164 Cal.App.4th at p. 608.) In that situation, the trial court can declare the contract valid and award damages for the breach of the agreement to dispose of the entire controversy between the parties. (*Ibid.*) Here, the declaratory relief the complaint sought is not a declaration as to the validity of the agreement. Rather, plaintiff sought a declaration as to its right to exercise its option for $2.1 million.

Likewise, *Tolle* is distinguishable from the present case. In *Tolle v. Struve, supra,* 124 Cal.App.at pages 265-266, judgment was entered for past due rents in a declaratory relief action concerning the validity of the lease and sublease. The Court of Appeal rejected defendant's argument that her breach of the leases barred an award of declaratory relief. (*Id.* at pp. 267-268.) Here, plaintiff received the declaratory relief it sought in its complaint--the right to exercise its option.

Finally, the circumstances in *California Bank v. Diamond, supra,* 144 Cal.App.2d at pages 389-390 differ from this case. In *California Bank*, the plaintiff sought a

declaration determining the parties' rights and duties arising from a stop-payment of a check that the plaintiff subsequently paid. (*Ibid.*) The Court of Appeal concluded the complaint stated a declaratory relief claim and affirmed the award of the full amount plaintiff sought in its complaint for declaratory and other relief. (*Id.* at p. 390.) Here, the right that plaintiff had under the agreement is the right to exercise its option to purchase defendant's interest for $2.1 million.

2. Leave to Amend

The trial court denied plaintiff's post-remittitur ex parte application for leave to amend. In addition, plaintiff sought an order shortening time on its motion for leave to amend. Plaintiff argues the trial court erred in refusing to grant it leave to amend its complaint according to proof by adding a contract breach claim. A trial court may allow a pleading to be amended at any time up to and including trial. (Code Civ. Proc. §§ 473, subd. (a) (1), 576.) The Court of Appeal has held, "The basic rule applicable to amendments to conform to proof is that the amended pleading must be based upon the same general set of facts as those upon which the cause of action or defense as originally pleaded was grounded." (*Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400-401; accord, *Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 910.) The trial court had discretion to allow leave to amend the complaint. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242; *Singh v. Southland Stone, U.S.A. Inc.* (2010) 186 Cal.App.4th 338, 355; *Garcia v. Roberts, supra,* 173 Cal.App.4th at p. 909.) Leave to amend according to proof is properly denied where the proposed amendment raises new issues that opposing party has had no opportunity to defend. (*Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31; *Singh v. Southland Stone, U.S.A. Inc., supra,* 186 Cal.App.4th at p. 355; *Garcia v. Roberts, supra,* 173 Cal.App.4th at p. 912 ["[I]f a proposed amendment during trial is prejudicial to the opposing party, it is reversible error to grant leave to amend to conform to proof"].) No abuse of discretion occurred. Plaintiff presented no evidence of any breach of the agreement by defendant. Also, the facts alleged in

plaintiff's complaint do not state a contract breach claim. And the remittitur had issued after the first appeal. There was no showing of diligence. Thus, the trial court could properly deny plaintiff's request to amend the declaratory complaint.

3. Pre-Judgment Interest

Civil Code section 3287 subdivision (a) provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state." Our Supreme Court has stated: "[O]ne purpose of section 3278, and of prejudgment interest in general, is to provide just compensation to the injured party for loss of use of the award during the prejudgment period – in other words, to make the plaintiff whole as of the date of the injury." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 663; see *Howard v. American Nat. Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 535.)

Plaintiff argues it is entitled to recover prejudgment interest under section 3287, subdivision (a). Plaintiff asserts its "right to recover" damages from defendant vested in August 2006 when defendant refused to recognize plaintiff's option. Plaintiff reasons the damages became "certain or capable of being made certain by calculation" when the trial court entered a judgment in the condemnation action. According to plaintiff, the judgment fixed the property's fair market value.

Plaintiff's argument is premised on the mistaken assumption that we found defendant breached the agreement by refusing to honor plaintiff's right to exercise its buy-out option. We made no finding as to any contract breach by defendant in our May 19, 2011 decision. Rather, we ruled plaintiff was entitled to purchase defendant's interest

in the property for $2.1 million. This gave plaintiff the declaratory relief it sought in its complaint and at trial. As the trial court explained: "If plaintiff does not pay the $2,100,000, plaintiff does not get any money. That is not a money judgment." We conclude prejudgment interest under Civil Code section 3287 subdivision (a) was properly denied because plaintiff is not entitled to recover damages against defendant.

Plaintiff also asserts the trial court erred in refusing to award prejudgment interest under Civil Code section 3287, subdivision (b). Civil Code section 3287, subdivision (b) provides, "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed." Civil Code section 3287 subdivision (b) creates a limited exception to the general rule disallowing prejudgment interest on unliquidated obligations. (*Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist.* (2001) 90 Cal.App.4th 64, 69.) The trial court has discretion to determine whether prejudgment interest should be awarded on an unliquidated contractual claim. (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 829; *Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist., supra,* 90 Cal.App.4th at p. 69.) We review this contention for an abuse of discretion. (See *Gebert v. Yank* (1985) 172 Cal.App.3d 544, 555-556; *Moreno v. Jessup Buena Vista Dairy* (1975) 50 Cal.App.3d 438, 448.)

No abuse of discretion occurred. Under Civil Code section 3287, subdivision (b), a party may recover prejudgment interest on damages awarded on an unliquidated contractual claim. Here Civil Code section 3287, subdivision (b) is inapplicable because plaintiff did not receive damages based on an unliquidated contractual claim. Plaintiff asserted a declaratory relief claim. Plaintiff received the declaration of rights it sought in its complaint.

Plaintiff also argues it is entitled to recover all interest that accrued on the condemnation proceeds that continue to be held on deposit with the trial court. Plaintiff asserts our May 19, 2011 decision held defendant breached the agreement in August

2006. We found plaintiff tried to exercise its option in August 2006. But we did not rule defendant breached the agreement by refusing to recognize plaintiff's right to exercise its option. The evidence showed defendant recognized plaintiff's right to exercise its option but believed the price was the current market value of the property. Should plaintiff chose to exercise its option and buy out the city's interest for $2.1 million, plaintiff hypothetically may then be entitled to a pro rata portion of the accrued interest on the condemnation award. We do not reach the merits of this issue. But plaintiff is not entitled to recover any interest on that portion of the condemnation award that represents the $2.1 million principal amount even if the option is exercised. Here, the trial court did not err when it refused to release any accrued interest arising from the condemnation proceeds. Plaintiff has not yet purchased defendant's interest.

4. Post-Judgment Interest

Plaintiff argues the trial court erred in concluding it was not entitled to post-judgment interest prior to the date of entry of the January 30, 2012 judgment. This contention has no merit. Our prior appellate ruling and remittitur ordered the trial court to enter a declaratory judgment in plaintiff's favor. The question of when interest begins to run does not depend on "mere formalism" but on the substance of our order. (*Snapp v. State Farm Fire & Cas. Co.* (1964) 60 Cal.2d 816, 821-822; *Munoz v. City of Union City* (2009) 173 Cal.App.4th 199, 203-204.) Plaintiff is not entitled to any post-judgment interest. The judgment that it received is a declaratory, not a money judgment. Plaintiff has the right to exercise its option to buy-out defendant's interest pursuant to the agreement but it does not have to do so.

B. Defendant's Cross-Appeal

1. Attorney Fees

In its cross-complaint, defendant alleged plaintiff breached the promissory note by failing to provide services through the operation of the community center. Defendant sought the full amount of the note and reasonable attorney fees. The promissory note states in part, "If action is instituted on this Note upon default by [plaintiff], the [plaintiff] promises to pay reasonable attorney's fees and other related costs as the court may see fit." In our May 19, 2011 decision, we reversed the award of attorney fees to defendant. We explained there was no default of the note. The promissory note, as previously noted, states in part: "[Plaintiff] may, at its option, purchase [plaintiff's] interest at any time for an amount equal to the current value as determined by the preceding paragraph. Any amount owed under the Note may be prepaid, in whole or in part, without premium or penalty." We concluded plaintiff did not default on the promissory note because it tried to exercise its option to purchase defendant's interest.

After the remittitur issued, plaintiff moved for attorney fees, which were granted by the trial court. The trial court found plaintiff prevailed on defendant's claim for promissory note breach. The trial court reasoned we ruled plaintiff did not default on the promissory note. No doubt, only plaintiff agreed to pay reasonable attorney fees under the expositions of the promissory note. But, Civil Code section 1717[1], subdivision (a) grants a reciprocal right to attorney fees when a contract provides the right to one party but not the other. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610-611; *Hsu v. Abbara* (1995) 9 Cal.4th 863, 870.) Here, the attorney fees provision in the promissory note is

[1] Civil Code section 1717, subdivision (a) provides in part: "In 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 either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

subject to the reciprocal contractual attorney fees statute in Civil Code section 1717, subdivision (a).

Defendant does not dispute the amount of attorney fees awarded to plaintiff. Rather, defendant challenges plaintiff's entitlement to attorney fees. Defendant argues plaintiff is judicially estopped from recovering attorney fees under the promissory note. In *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987, our Supreme Court summarized the judicial estoppel doctrine: "'"Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] . . ."' [Citation.] The doctrine applies when: '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e. the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake.'" (Accord, *MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422.) Judicial estoppel is an equitable doctrine that is applied to maintain the integrity of the judicial system and protect parties from opponents' unfair strategies. (*MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc., supra,* 36 Cal.4th at p. 422; *Aguilar v. Lerner, supra,* 32 Cal.4th at p. 986.)

Here, defendant did not argue judicial estoppel in its opposition to plaintiff's attorney fees motion in the trial court. Thus, defendant has forfeited this argument by failing to raise it in the trial court below. (*Kern County Department of Child Support Services v. Camacho* (2012) 209 Cal.App.4th 1028, 1038; *Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 904; *Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 313.)

IV. DISPOSITION

The judgment is affirmed. The parties are to bear their own appeal costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

ARMSTRONG, J.

MOSK, J., Concurring

Concerned Citizens has repeatedly declared it has exercised the option, and, because the City is holding on to the condemnation proceeds, Concerned Citizens has the wherewithal to tender the option amount. There is no apparent justification to require Concerned Citizens to obtain the $2.1 million option amount, to exchange it for the over $5 million eminent domain amount the City has. I believe a judgment in Concerned Citizens' favor for the difference would be appropriate. A court can award monetary relief in a declaratory relief in the appropriate circumstances, including "in the interest of disposing of the entire controversy between the parties and granting complete relief." (See *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 608.) In effect, the money is on deposit with the City and thus can be the basis of a monetary judgment in a declaratory relief action. (Cf. *Enterprise Development Corp. v. Terry* (1953) 117 Cal.App.2d 389.)

But the trial court has the power to require that Concerned Citizens fully exercise the option by paying the $2.1 million to the City. I concur in the judgment.

MOSK, J.