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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MILLENNIUM-DIAMOND ROAD PARTNERS, LLC et al., Plaintiffs and Respondents, v. DIAMOND BAR COUNTRY ESTATES ASSOCIATION, Defendant and Appellant.	B285539 (consolidated with B288020 and B289009) (Los Angeles County Super. Ct. No. KC066717)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert A. Dukes, Judge. Affirmed in part and reversed in part.

Freedman + Taitelman, Michael A. Taitelman, Benjamin A, Marsh; Greines, Martin, Stein & Richland, Robin Meadow for Plaintiffs and Respondents.

Arias & Lockwood, Joseph Arias and Christopher D. Lockwood for the Defendant and Appellant.

INTRODUCTION

In this appeal, appellant Diamond Bar Country Estates Association (DBCEA) challenges the portion of the trial court's judgment awarding contractual damages, prejudgment interest and attorneys fees. In addition, DBCEA challenges the trial court's finding that Millennium-Diamond Road Partners, LLC and Hua Qing Enterprises, LLC (collectively, Millennium) currently have no obligation to pay annexation fees. DBCEA asserts that the trial court's rulings on these issues were not supported by substantial evidence at trial or, regarding certain aspects of the award of pre-judgment interest and attorneys fees, are contrary to law. Significantly, DBCEA no longer challenges the trial court's conclusion that Millennium has a right to access their properties via DBCEA's private gates and streets.

We find that the law and substantial evidence support the trial court's award of damages based on DBCEA's breaches of the 2005 Declaration of Covenants, Conditions and Restrictions (CC&Rs), the Declaration of Annexation (Annexation Agreement) and the Transamerica Development Corporation (TADCO) option. We find that Millennium is entitled to an award of attorneys fees and that the trial court's award is supported by substantial evidence. We find that the judge could decline to apportion attorneys fees based on the facts found here. Thus, on these grounds we affirm. Further, we find no error in the trial court's construction of the Annexation Agreement and the conclusion that Millennium's obligation to pay fees pursuant to that agreement is conditioned on the occurrence of events that have not yet occurred. Finally, although we find that the law and substantial evidence supports an award of 10 percent pre-

judgment interest, we conclude that the trial court erred in determining the interest triggering date under Civil Code section 3287, subdivision (a).[1] The starting date for calculating prejudgment interest that is supported by substantial evidence in the record is March 23, 2017, the date on which Millennium's damages calculations were provided to DBCEA. As Millennium concedes, this portion of the judgment must be vacated and reversed for a re-computation of prejudgment interest under section 3287, subdivision (a).

BACKGROUND

As supported by substantial evidence in the record, the essential facts regarding this protracted property dispute are as follows:[2]

In the 1960s, TADCO owned a large tract of land in Diamond Bar, California. TADCO subdivided its tract into parcels and sold some of them. In 1969, one of the parcels was sold to Diamond Bar Development Corporation (Diamond Bar

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[1] All further undesignated statutory references are to the Civil Code.

[2] DBCEA's appeal is largely an attack on the factual findings of the trial court. In this respect, DBCEA "misconceives the function of an appellate court which is to review errors of law, and not to pass on questions of fact." (*Waller v. Brooks* (1968) 267, Cal.App.2d 389, 393.) In the present case, DBCEA is asking this court to reweigh the evidence and accept its version of the facts, notwithstanding contrary findings by the trial court. "This we are not free to do." (*Ibid.*) "Where the evidence is in conflict, an appellate court will not disturb the findings of the trial court. Indeed, there is a presumption in favor of the facts as found by the lower court." (*Id* at pp. 393–394.)

Development). The northern parcel that TADCO sold to Diamond Bar Development was adjacent to public streets, but the unsold southern parcels were landlocked. To ensure that no parcel would be inaccessible, TADCO retained assignable access rights for the southern parcels, including easements appurtenant to each of the remaining parcels not owned by Diamond Bar Development.

Eventually, TADCO conveyed some of the remaining southern parcels to Diamond Bar Development, who later conveyed them to Bank of California. TADCO retained some other parcels.

Diamond Bar Development subdivided its northern parcel into home sites and, in 1969, recorded a declaration of restrictions regarding its development plans (1969 CC&Rs). In relevant part, the 1969 CC&Rs stated that some of the land would be used as private roads, it would be a gated community, with a guardhouse at the entrance, and that DBCEA would hold fee title to the roadways and manage the guardhouse. Over time, Diamond Bar Development built the Diamond Bar Country Estates (Country Estates) and DBCEA managed the streets and gates and controlled access.

The Bank of California ultimately sold its undeveloped parcels to another developer-investor (Parcels). These Parcels were conveyed with "non-exclusive easement[s] to be used" for ingress and egress over Diamond Bar Development's parcel. Millennium purchased four of these Parcels. Developer Stanley Cheung purchased one of the Parcels in 1997 and three more in 2001. A few years later, Stanley conveyed his parcels to Millennium. In 2010, Millennium conveyed three parcels to Hua Qing Enterprises LLC, but Millennium continued to manage pre-

development activities. Stanley is Millennium's managing member.

In 1997, DBCEA recorded new CC&Rs (1997 CC&Rs). These superseded the 1969 CC&Rs. The 1997 CC&Rs recognized that certain lots located south of DBCEA's boundary would eventually be developed into home sites, but were still undeveloped. The 1997 CC&Rs referred to those properties, which included the Parcels, as Back Country Lots. The 1997 CC&Rs gave Back Country Lot owners rights of access to their land through DBCEA's streets.

In 2005, Millennium sought approval for a tentative tract map from the City of Diamond Bar (City). As part of that process, Millennium had to establish that it had valid rights to access its property through DBCEA's streets. Millennium asked DBCEA to affirm those property access rights through the residential project and DBCEA did so. "We have reviewed the applicable title documents and confirm that said documents establish that the property does have access rights through The Country [Estates] to the parcels in the Tentative Map." The City, thereafter, approved the tentative map.

By this time, DBCEA was facing a serious problem with morning traffic congestion at its gates. On weekday mornings, more than 3,000 cars entered and exited through the two gates of Country Estates. The guards could not handle the heavy flow and cars would queue outside of the gates and block Diamond Bar Boulevard and Grand Avenue. As part of its search for solutions, DBCEA considered a proposal that would extend a nearby public street, Pathfinder Road, and build a third gate.

In 2005, DBCEA recorded another set of CC&Rs (2005 CC&Rs). As with the preceding CC&Rs, the 2005 CC&Rs

included access-right guarantees and protections for the Back Country Lots. The trial court found that these provisions gave Millennium access rights to DBCEA's private gates and roads.

The 2005 CC&Rs also described the way in which properties adjacent to Country Estates could be annexed into the DBCEA. Annexation required approval of the DBCEA board and voting homeowners and would result in the recordation of an annexation certificate and the approved offer of the adjacent property owner. The 2005 CC&Rs stated that "upon recordation" of those documents, "the annexation shall become effective" and "the annexed property shall become and constitute a part of the [Country Estates] Development."

In 2007, Millennium and DBCEA agreed to an annexation. The parties agreed that Millennium's total annexation fee would be set at $1 million, but that the amount would be paid in installments. One portion of the fee would be paid when Millennium obtained a grading permit, to "off-set the costs to [DBCEA] incurred" during construction. Another portion of the fee would be paid "as costs [were] due for the improvements to the extension" of Pathfinder Road. Finally, a third portion of the annexation fee would be due when the lots were sellable (i.e. when the final map record was finished and the grading permit was obtained) and would be paid out of escrow when those lots were sold to a purchaser. If any saleable lots remained unsold as of April 30, 2011, the entire balance would be remitted by Millennium. DBCEA's board approved the annexation proposal and submitted it to the homeowners, who also approved.

In January 2008, DBCEA recorded the Annexation Agreement. The Annexation Agreement spelled out how the annexation fee of $20,833 per lot would be due and owing. A

$3,000 per lot payment would be due "at the time a grading permit is issued." A $5,921 fee per lot would be due "for the improvements to the extension of Pathfinder Road by DBCEA, after the grading permit is issued for the development of TTM 553430." The balance due on each lot ($11,912) would be paid out of escrow at the time Millennium or its successor sells each individual lot to a purchaser. "Nevertheless, the entire balance shall be remitted to the DBCEA on or before April 30, 2011, even though not all of the lots may be sold at that time."

As credibly testified to by Stanley, the parties understood that implementation of the first three payments were preconditions for the performance of the fourth point. In other words, the subdivision, and final map record, the grading permit and Pathfinder Road would all be ready, therefore every lot would be sellable.[3] Once individual lots were saleable to a purchaser—even if not actually sold—after April 30, 2011, the $20,833 payment would be due for each such lot.

From 1997 until 2013, Millennium had access to its parcels. It used DBCEA's road and gates to perform development work. Millennium's access came to an abrupt halt in 2013. A new group of DBCEA's board members began to oppose Millennium's development efforts. From October 2013 to the time of trial, DBCEA did not allow Millennium access through its gates or on its roads. On March 11, 2014, Millennium filed suit.

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[3] Stanley's testimony regarding the conditional nature of Millennium's obligation to pay annexation fees was corroborated by DBCEA's former board president. In fact, DBCEA was concerned that the failure of the Pathfinder Road effort negated Millennium's obligation to pay any part of the annexation fee.

With litigation commenced, Millennium sought other solutions to its access problem. Millennium's attorneys discovered that there were access rights available through TADCO's successors. As part of a settlement of a class action lawsuit in the 1980s, TADCO and DBCEA entered into an agreement (TADCO Agreement). Under that agreement, DBCEA acknowledged that TADCO and its residential-purchaser successors would have access to TADCO's retained parcels, and DBCEA granted TADCO the option to purchase additional access rights. Under this option, TADCO could acquire access rights for a group of non-TADCO lots, which included Millennium's parcels, by paying DBCEA $144,000. TADCO's rights to exercise this option were fully assignable.

In September 2014, Millennium acquired from TADCO the option to purchase the access rights afforded under the settlement. On September 29, 2014, Millennium wrote to DBCEA that it had acquired additional access rights via the TADCO Agreement and "hereby unconditionally tender[ed] to DBCEA the requisite $144,000 fee." Millennium also sent a $144,000 option fee check. A few days later, DBCEA informed Millennium that it would refuse Millennium's tender. And, DBCEA continued to refuse Millennium access. Millennium amended its complaint to include a claim based on DBCEA's breach of the TADCO Agreement.

Despite DBCEA's denial of access, Millennium continued its efforts at development. As part of those efforts, Millennium applied to the City to obtain final tract map approval. As part of that process, the City required Millennium to re-establish their access. Based on easements on adjacent private streets under grant deeds, the City approved the final tract map.

With the final tract map approved, Millennium sought to obtain a grading permit—the last step of pre-development. To do so, Millennium again had to establish their access rights to the City's satisfaction, obtain DBCEA's formal confirmation of property access, and obtain DBCEA's formal acknowledgment "giving the okay to begin construction." DBCEA refused to provide the required acknowledgment approving construction and refused to confirm property access. The City denied Millennium's application for a grading permit. Without a grading permit, Millennium was unable to begin development and the project remained at a standstill through trial.

Millennium sued DBCEA on March 13, 2014. The operative second amended complaint alleged that it held access rights based on their deeds to the Parcels, implied easements, the 2005 CC&Rs, and the TADCO Agreement. Millennium sought damages, injunctive relief preventing further access denials, and a judgment quieting title. They also sought a "judicial declaration" of their "easement and contract rights."

DBCEA answered, denied liability, and cross-complained to enforce the Annexation Agreement, alleging that Millennium was required to pay, but had not paid, the annexation fee.

The court trial commenced on March 15, 2017 and lasted for nine days. The trial judge issued an oral statement of decision and directed Millennium's counsel to prepare a proposed statement of decision. After hearing and objections, the trial court entered a final statement of decision and judgment for Millennium. In addition, the trial court granted Millennium's motion for attorneys fees under section 5975. The trial court also awarded certain costs and indicated that pre-judgment interest would be set at seven percent. The trial court, thereafter, found

that 10 percent, not seven, was the correct rate for pre-judgment interest and amended the judgment.

DBCEA appeals the attorneys fee, pre-judgment interest orders and resulting amended judgment.

DISCUSSION

I. Standards of Review

Under the substantial evidence standard, this court must " 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor.' " (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1096.) The power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the trial court's findings. (*Waller v. Brooks*, *supra*, 267 Cal.App.2d at p. 394.) Of course, all the evidence must be examined, but it is not weighed. (*Id.*)

Other issues presented in the appeal are subject to different standards of review. These will be noted as necessary.

II. Analysis

1. Substantial evidence supports the trial court's finding that Millennium possessed access rights pursuant to the 2005 CC&Rs and that DBCEA breached them.

Under DBCEA's 2005 CC&Rs, all owners of land within the Country Estates development have certain rights. The CC&Rs include in Country Estates development an area designated as Back Country Lots. Under article XVI, section 5 of the 2005 CC&Rs, owners of lots within any Back Country Lot have "a non-

exclusive right to easement for ingress, egress, and support over and through DBCEA's 'private roads.' "

Substantial evidence supports the trial court's finding that Millennium's parcels were Back County Lots. Millennium's 2006 tentative tract map and a different tract map from 1997 show that the Millennium parcels were divided into smaller residential lots within this specific area. The use of the present tense in this section supports the trial court's conclusion that Millennium had existing and current access rights. These were not access rights reserved for subsequent residential purchasers.

The trial court also properly rejected DBCEA's claim that because Millennium has not paid monthly assessments, they could not claim to be covered by the 2005 CC&Rs. The plain language of the 2005 CC&Rs explains the owner's access rights and direct that they are subject to the enumerated restrictions. None of these five listed restrictions mentions the non-payment of monthly assessments. Further, article IV, section 3(e) of the 2005 CC&Rs instructs that DBCEA "shall have no power to cause a forfeiture or abridgement of an Owner's right to full use and enjoyment of his Lot" based on non-compliance with the governing instruments or DBCEA's rules, absent a judicial/arbitral order or a foreclosure of DBCEA's liens. Thus, under the plain language of the 2005 CC&Rs, DBCEA could not revoke Millennium's right of access to the roads of the development based only on a claimed failure to pay monthly assessments.

The 2005 CC&Rs also include an annexation process for landowners who wish to become part of Country Estates and subject to the CC&Rs. After an approved proposed annexation and upon the recordation of an annexation certificate by the

board, the annexation of the new land "shall become effective." And, when an annexation is effective, "the annexed property shall become and constitute a part of the Development and shall be subject to this Declaration."

Millennium and DBCEA followed this annexation process. The board approved, the homeowners of Country Estates voted to annex the Millennium parcels and in 2008 DBCEA's board recorded the Annexation Agreement. Under the express provisions of the 2005 CC&Rs, upon that recordation, the Millennium parcels became part of the development and were entitled to the rights and privileges contained in the CC&Rs, including, inter alia, the non-exclusive right to easement over and through DBCEA's private roads.

DBCEA's then-president and a successor president both understood that the Millennium parcels were fully annexed, thereby giving Millennium full access rights to DBCEA's roads. The trial court's conclusion regarding the validity of the Annexation Agreement and the effect of that agreement to give Millennium the access rights afforded under the 2005 CC&Rs is fully supported by substantial evidence in the record.

DBCEA's contention that the Annexation Agreement gives rights only to Millennium's successor-residential purchasers ignores the plain language of that agreement. The paragraph preceding the one cited by DBCEA states that (1) Millennium owns all lots to be annexed, and (2) those lots "are hereby annexed into the [Association] effective on the date" of recordation. Thus, the agreement made a present change in the legal status of Millennium and the Parcels and described (in the paragraph cited by DBCEA) the future rights that Millennium's successors will enjoy.

Testimony from then-active DBCEA board members as to their desire for annexation in advance of the development of the Back Country Lots corroborates this plain language. DBCEA wanted to ensure uniformity with the architectural standards and other aspects of their community in the new Millennium project before home-construction began. Given that these landlocked parcels would be able to obtain access over the Country Estate roads in any event, the board considered it to their advantage to encourage annexation at the development stage and to expand the coverage of the CC&Rs, and the restrictions imposed therein, before homes were constructed and ultimate buyers were in place.

DBCEA's contention that the validity of the Annexation Agreement was "outside the pleadings" and, therefore could not be presented at trial is also without merit. The validity of the Annexation Agreement is a factual pre-condition to Millennium's claim that it was entitled to enforce its rights under the 2005 CC&Rs. Thus, the determination of the Annexation Agreement's validity—regardless of whether it was specifically identified in the pleadings—is a necessary component of the claim for damages based on obstructing access and violating Millennium's rights under the 2005 CC&Rs.

DBCEA objected to the introduction of this evidence as at variance with the operative complaint and prejudicial. The trial judge admitted the evidence over that objection—finding not only that it had been adequately plead as a component of the breach of the 2005 CC&R claim, but also that its introduction was not prejudicial. That ruling is not an abuse of discretion. As correctly noted by the trial judge, the Annexation Agreement was

one argument upon which Millennium asserted enforceable access rights under the 2005 CC&Rs.

As an owner subject to the 2005 CC&Rs, Millennium could seek to enforce them and seek damages for breach. (*Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1385 [CC&Rs may be enforced by any owner and parties damaged by a violation of their terms may seek money damages.].)

Substantial evidence supports the trial court's finding that DBCEA breached the 2005 CC&Rs by systematically and continuously denying Millennium access to DBCEA's private gates and roads. Further, substantial evidence established that this denial of access delayed Millennium's development of their parcels, causing them to incur unnecessary and otherwise avoidable carrying costs.

> 2. Substantial evidence supports the trial court's finding that Millennium possessed an option for access rights pursuant to the TADCO Agreement and that DBCEA breached.

A second contractual agreement provided Millennium with an option to acquire rights through Country Estates—the TADCO agreement. Having acquired TADCO's option, Millennium had only to tender the $144,000 fee. There is substantial evidence in the record that Millennium validly tendered that amount. As conceded by DBCEA, Millennium's attorney sent a letter to its counsel stating, "Millennium hereby unconditionally tenders to DBCEA the requisite $144,000 fee."[4]

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[4] Regardless of its initial recipient, DBCEA ultimately did receive the September 29, 2014 letter.

This letter is an "offer in writing" to pay the option fee. As such, it is the equivalent to the actual production and tender of the money, instrument, or property. (Code of Civ. Proc., § 2074.) Tender, as in this case, "is an offer of performance, not performance itself." (*Walker v. Houston* (1932) 215 Cal. 742, 745, italics omitted.) In the context of an option (as in this instance), it "is well-settled that tender of money is such acceptance of an option-offer as will create an enforceable contract." (*State of California v. Agostini* (1956) 139 Cal.App.2d 909, 913 [an "offer in writing dispenses with actual production and tender of the property itself"].) Thus, Millennium's unconditional present offer to pay the fee was sufficient to bind DBCEA to a fee-for-access-rights contract.

DBCEA erroneously contends that the offer in writing was insufficient to exercise the TADCO option. It asserts that Millennium was required to prove that the check would have been covered by money. That contention is incorrect. Millennium's unconditional present offer to pay the fee was alone sufficient. None of the cases cited by DBCEA support a contrary conclusion. Each of those cases involved a promise of future performance based on future information.[5] Here, there was

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[5] In *Waller v. Brooks*, *supra*, 267 Cal.App.2d at page 394, the court held that the plaintiff's statements were nothing more than "a mere indication of a willingness to perform in the future," not a valid tender of performance. In *Lichty v. Adams* (1967) 247 Cal.App.2d 605, 606–607, the court held that one is not a "redemptioner" within former Code of Civil Procedure section 702 by merely offering to pay an uncertain amount at some point in the future since that statute contemplated actual payment or tender of payment. In *O'Connor v. Credit Bureau of San Diego, Inc.* (1966) 245 Cal.App.2d 984, again, under former Code of Civil

nothing conditional or future-oriented in the Millennium tender. Further, none of the cases on which DBCEA relies dealt with an option exercisable by tendering payment of the option fee.[6] As held in *State of California v. Agostini*, *supra*, 139 Cal.App.2d at page 913, tendering payment in this setting is an act that, rather than representing performance of a contract, does no more than a create a contract that can be performed later.

When Millennium informed DBCEA that it "hereby unconditionally tenders" the $144,000 fee, it made an offer of performance that was the equivalent to fee payment for purposes of exercising their option. That offer was, without more, effective to expose DBCEA to liability for breach if it was unjustifiably refused. (*Walker v. Houston*, *supra*, 215 Cal. 742 at pp. 745–746.)

In addition, although Millennium was not required to send a check to establish valid tender, there is substantial evidence in

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Procedure section 702, the court held that an offer to "tender all sums required" to redeem a property sold via sheriff's sale without specifying the amount, was "a mere offer of tender." (*O'Connor*, at p. 985.) Where the amount due could be determined with mathematical precision, the defendant's offer to "tender all sums . . . required . . . to effect redemption" and a request to "kindly advise us the exact amount due . . . and we will promptly furnish said sum," did not meet the statutory requirements. (*Ibid*.)

6 Similarly, section 1500, on which DBCEA relies to argue that sending a check creates no obligations concerns "obligation[s] for the payment of money," not the exercise of an option. Further, section 1500 is irrelevant to tender. (*Walker v. Houston*, *supra*, 215 Cal. at pp. 745–746 [explaining the difference between tender and § 1500].)

the record that they did.[7] The trial court could reasonably infer that DBCEA received the letter and check because counsel contacted Millennium 10 days later and advised that DBCEA would "refuse Millennium's tender."

3. DBCEA's breach of the 2005 CC&Rs and the TADCO Agreement caused Millennium's damages.

DBCEA argues that even if Millennium could prove a legal entitlement to damages from the breach of these agreements, "there is no support for the findings of causation." Substantial evidence in the record rebuts that contention.

In determining causation, "courts rely on 'the light of past experience,' which in turn may be drawn from expert testimony or common knowledge." (*Inouye v. Black* (1965) 238 Cal.App.2d 31, 34.) It is common knowledge that to be able to develop its Parcels, Millennium needed access to them. Credible testimony from Stanley and Tiffany Cheung is substantial evidence that Millennium's owners and sub-contractors were unable to get past the gate security or drive on Country Estate's roads to visit the parcels, and, therefore, many pre-development projects slowed. Additionally, competent testimony established that DBCEA's refusal to acknowledge Millennium's access rights prevented the developer from obtaining a grading permit, which brought pre-construction activities to a stand-still.[8] A reasonable inference

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[7] That DBCEA adduced contrary evidence regarding the timeline and the mailing of the check, this is nothing but a re-argument of the evidence.

[8] DBCEA argues that the testimony of a City Engineer is preclusive on why the City refused to issue Millennium a grading permit. The trial court was not required to accept this controverted testimony. Rather, the trial judge found Stanley

from these facts is that DBCEA's refusal to afford Millennium its contractual access rights resulted in delayed development and that Millennium incurred interest and carrying-cost damages due to the delay. Accordingly, the trial court's finding of causation is supported by substantial evidence in the record.

With causation established, the remaining question is whether substantial evidence supports the $1,673,691 awarded as damages by the trial court. A review of the evidence shows that it does. Millennium's expert testified and explained his computations in detail. DBCEA did not challenge his methodology or calculations; it did not call any expert witness regarding damages at trial.

4. DBCEA's breaches of Millennium's valid contractual access rights support the trial court's award of attorneys fees.

DBCEA contends that the trial court erred as a matter of law in awarding Millennium the full amount of their attorneys fees. We disagree.

Section 5975 subdivision (c) requires trial courts to award attorneys fees in a successful "action to enforce the governing documents" of a common interest development. Governing documents include declarations of restrictions, like the 2005 CC&Rs. (§§ 4150, 4135, 4250.) Given that Millennium's lawsuit

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and Tiffany Cheung very credible. These witnesses testified that the City refused to give a grading permit because DBCEA refused to acknowledge Millennium's access rights or to acknowledge that construction could begin. "[A] showing on appeal is wholly insufficient if it presents a state of facts, . . . which, . . . merely affords an opportunity for a difference of opinion." (*Waller v. Brooks*, *supra*, 267 Cal.App.2d at p. 394.)

was to enforce the access rights afforded to them under the 2005 CC&Rs, the trial court's award of attorneys fees is mandated. As we have considered, and rejected, DBCEA's contention that the court could not grant Millennium access rights under the 2005 CC&Rs, we need not reconsider it here.

Nor, as DBCEA contends, was it error for the trial court to decline to apportion those fees between and among the various causes of action. A fee award cannot be disturbed unless, "[u]nder all the evidence viewed most favorably" to Millennium, no reasonable judge would make it. (*City of Oakland v. McCullough* (1996) 46 Cal.App.4th 1, 9; *Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 522.) Where, as here, Millennium raised multiple causes of action and are statutorily entitled to fees on one, the trial court can apportion the attorneys fees. (*Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 628.) Or, the court can decline to apportion the fees. (*Ibid.*) If the claims for which fees are available are "so intertwined" as to make apportionment impracticable, if not impossible, apportionment is not required. (*Id.* at p. 625.) As the trial court heard the entire case, it is in the best position to determine whether apportionment is appropriate. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 556.)

Moreover, apportionment is not required where the distinct causes of action involve a common core of facts or are based on related legal theories. (*Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493.) Here, the trial court declined to apportion fees and stated the reasons for doing so.

> "Here, the court finds that [Millennium's] remaining claims and relief sought falls [*sic*.] within the

> enforcement of the governing documents. The lst cause of action to Quiet Title to Express Easements were based on Deeds, which were 'subject to . . . Covenants, conditions, restrictions and reservations' contained in the recorded declarations. [Millennium's] quiet title cause of action is inextricably intertwined with the CC&Rs. The 2nd–3rd causes of action to Quiet Title by Necessity and to Implied Easement are not precluded by CCP 1021 because the statute exempts " 'attorney's fees . . . specifically provided for by statute.' " Here, attorney's fees are provided by CC 5975 and the claims are inextricably intertwined because the parties contemplated access rights to a landlocked parcel of real property. The 5th cause of action for breach of the TADCO agreement are the same access rights set forth in the CC&Rs. The association's board member, Michelle Yi, testified at trial as such. Even if the two claims may be based on different documents, the claims are so inter-related, it would be impossible for the court to allocate fees. Finally, the 6th–7th causes of action for specific performance and declaratory relief seek relief based on the CC&Rs. These claims are directly related to enforcement of the governing documents."

As fully and reasonably explained, well-supported by the evidence and consistent with the law, the trial court did not abuse its discretion in denying DBCEA's request to apportion attorneys fees.

5. DBCEA's breaches of Millennium's valid contractual access rights support an award of 10 percent pre-judgment interest but remand is required for re-computation.

Section 3287, subdivision (a) provides that a party is entitled to recover pre-judgment interest on an amount awarded as damages from the date that the amount was both (1) due and owing and (2) certain or capable of being made certain by calculation.[9] (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 919.) Damages are certain or capable of being made certain by calculation or ascertainable, for purposes of section 3287, subdivision (a) if the defendant knows the amount of damages or could compute that amount from information reasonably available. (*Uzyel*, at p. 919.) A legal dispute concerning the defendant's liability or uncertainty concerning the measure of damages does not render damages unascertainable. (*Ibid.*) On appeal, we independently determine whether damages are ascertainable. (*Ibid.*)

The trial judge awarded prejudgment interest from January 2014 through July 21, 2017. Millennium concedes that this ruling was erroneous. Pre-judgment interest cannot start before specific items of damages occur. Instead, both sides agree that Millennium's damages were certain on March 23, 2017—

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[9] We decline to instruct the trial court to reconsider the question of pre-judgment interest under section 3287 subdivision (b), as that contention was not made at any time during the original trial and was not the basis for the trial court's award of prejudgment interest. Issues not raised in the trial court are waived. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 110–111.)

when they were disclosed at Millennium's expert deposition. As the start-date for the computation of pre-judgment interest was incorrectly established by the trial court, this one aspect of the judgment must be reversed and remanded for recalculation.

DBCEA's other arguments regarding whether Millennium's entitlement to 10 percent pre-judgment interest are without merit. The imposition of a 10 percent annual rate of interest is proper where, as here, there is a successful suit for breach of a contract that was entered after January 1, 1986. (§ 3289, subd. (b).) In this case, Millennium successfully sued to enforce the 2005 CC&Rs. These CC&Rs are a contract. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 240, 246.) And, the 2005 CC&Rs were recorded well after January 1, 1986.[10]

6. The trial court properly rejected DBCEA's cross-claim for annexation fees.

DBCEA's last argument is that the trial court erroneously interpreted that portion of the Annexation Agreement requiring the payment of annexation fees. The agreement includes, as exhibit C, a fee-payment exhibit requiring a fee of $20,833 for each lot within Millennium Estates. The first three paragraphs direct that certain payments are required upon the occurrence of an identified event. In paragraph one, $3,000 per lot is payable "at the time a grading permit is issued." In paragraph three, the

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10 DBCEA cites no authority in support of the argument that the 2005 CC&Rs ought to relate back to 1969 since the provisions regarding access "simply repeated the provisions of the 1969 CC&Rs." This argument contradicts the language of the 2005 CC&Rs, which stated that it superseded the previous declaration of restrictions "in its entirety."

balance due on each lot of $11,912 will be paid out of escrow "at the time Millennium or its successor sells each individual lot to a purchaser." The fourth paragraph states, "[n]evertheless, the entire balance shall be remitted to the DBCEA on or before April 30, 2011, even though not all of [the] lots may be sold at that time." And paragraph five said that if Millennium "sells the property in bulk sale after the Grading Permit," the total annexation fee would be due at closing of that sale.

The fourth paragraph is at the crux of DBCEA's argument. DBCEA contends that there is only one interpretation—that no matter whether a grading permit was ever issued, or whether Pathfinder Road could ever be built—Millennium owed DBCEA $1 million as of April 30, 2011. Under this construction, paragraph four creates an absolute payment deadline for the entire annexation fee whether the events enumerated in paragraphs one, two and three have occurred.

DBCEA's construction was properly rejected by the trial court. It is well-established that the whole of a contract is to be taken together and effect is to be given to every part, with each clause helping to interpret the other. (*In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 688, citing § 1641.) DBCEA's focus on "[n]evertheless" ignores the part of paragraph four that states "even though not all of [the] lots may be sold at that time." That phrase must be given meaning. Were "[n]evertheless" to be interpreted in a way advocated by DBCEA, that clause would be rendered surplusage. Had the parties intended the term "balance" in paragraph four to refer to the full $1 million annexation fee, they would have drafted the clause to require that. Had the paragraph been written to require Millennium to remit any outstanding balance on the $1 million annexation fee

to DBCEA on or before April 30, 2011—period—it would not be unreasonable to impose a deadline for the unpaid balance whether "the conditions [in] the first three paragraphs are met."

But that is not what the parties who wrote exhibit C did. Rather, they wrote that paragraph four applies "even though not all of [the] lots may be sold at that time." That additional language must be given meaning, and that is what the trial court did. The trial court properly interpreted exhibit C as making Millennium's annexation fee payment obligations conditional on the development and sale of individual graded lots to an individual purchaser or as a bulk sale of graded lots.[11] The agreement expressly contemplates that as certain events occurred—such as a grading permit being obtained or costs are due for the improvements of Pathfinder Road—a series of sequential payments would be made. These sequential payments would reduce the remaining balance due on each lot. As those individual lots were sold, the purchaser of that lot would pay the $11,912 balance out of escrow. If, and only if, graded lots remained unsold after April 30, 2011, would the balance (that amount left after having already made payments of the grading installment and the Pathfinder Road installment) be triggered and due. "Nevertheless" as used in paragraph four merely explains and qualifies paragraph three. While in paragraph

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[11] To the extent that "[n]evertheless" in paragraph four was ambiguous, the trial court was entitled to and did receive extrinsic evidence as to the parties' intentions. Credible testimony established the interpretation that the parties intended for the lots to be in saleable condition before $1 million was due and payable. That finding, as supported by substantial evidence, cannot be disturbed.

three, the balance (after the installment payments at grading and upon incurring costs for Pathfinder Road) would be paid out of escrow by individual purchasers, in paragraph four that method of paying down the balance would not last indefinitely. If there were any unsold lots as of April 30, 2011, Millennium would be obligated to pay the entire balance.

It was undisputed that Millennium had not obtained a grading permit at the time of trial. It was further undisputed that DBCEA had failed to construct the extension to Pathfinder Road. Finally, Millennium had made no sales of graded lots to individual purchasers. Given that the conditions precedent to an obligation to pay annexation fees, as set out in exhibit C, have not yet occurred, Millennium has not breached any obligation.

DISPOSITION

The judgment is affirmed in part and reversed in part. The case is remanded to re-compute pre-judgment interest at the legal rate of 10 percent as of March 23, 2017. Millennium shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JONES, J.*

We concur:

LAVIN, Acting P. J.

EGERTON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.