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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

FIRST SOUTHERN CAPITAL DEVELOPMENT CORPORATION, Plaintiff and Appellant, v. SHEET METAL WORKERS' PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA et al., Defendants and Respondents.	B276724 (Los Angeles County Super. Ct. No. YC065531)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Kenneth D. Sisco for Plaintiff and Appellant First Southern Capital Development Corporation.

Gilbert & Sackman, Michael D. Weiner and Benjamin M. O'Donnell for Defendants and Respondents Sheet Metal Workers' Pension Plan of Southern California, Arizona and Nevada; Board of Trustees of the Sheet Metal Workers' Pension Plan of Southern California, Arizona and Nevada; Sheet Metal Benefit Plans Administrative Corporation and Melanie Shepherd.

First Southern Capital Development Corporation appeals from the judgment entered after the trial court granted summary judgment in favor of Sheet Metal Workers' Pension Plan of Southern California, Arizona and Nevada and related parties[1] (collectively Pension Plan) on First Southern's complaint for breach of a lease agreement. The trial court concluded, because First Southern was not a party to the lease or a third party beneficiary of that agreement, as a matter of law it could not prevail on its contract claims for damages. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Commercial Lease*

Pension Plan owns Manhattan Plaza, an office building located in Manhattan Beach. In June 2009 Pension Plan entered into a new five-year lease with Aviation Mortgage Partners, Inc., doing business as Milestone Mortgage. Richard Thomas and

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[1] The named defendants in this action were Sheet Metal Workers' Pension Plan of Southern California, Arizona and Nevada; Board of Trustees of the Sheet Metal Workers' Pension Plan of Southern California, Arizona and Nevada; Sheet Metal Benefit Plans Administrative Corporation; and Melanie Shepherd.

Denise Thomas, Aviation Mortgage's shareholders and executive officers, personally guaranteed the lease on Aviation Mortgage's behalf.

The lease prohibited assignment or transfer by the tenant of its interest in the lease without the written consent of the landlord, "which consent shall not be unreasonably withheld or delayed." In the event of a merger or sale of all the tenant's assets, the lease provided the tenant could seek approval by giving timely notice to the landlord of the proposed assignment and providing the landlord with "detailed financial information (including references) regarding the creditworthiness and financial condition of the proposed assignee . . . and such other information and documentation as the Landlord may require," including new lease guarantees or "lease guarantor estoppel certificates, affirmations and agreements." In connection with the landlord's covenant not to withhold its consent to assignment unreasonably, the lease specified, "[T]he Landlord's withholding or delaying approval will be deemed reasonable if it is based on . . . Landlord's good faith analysis of the prospective assignee'[s], sublessee's or other transferee's credit, character and business or professional standing."

2. *The Asset Sale and Proposed Assignment*

In April 2010 First Southern agreed to purchase all of Aviation Mortgage's assets. Although the asset purchase agreement contemplated the assignment to First Southern of Aviation Mortgage's existing real property leases, including its lease of the office space in Manhattan Plaza, the agreement

specified assignment of that lease was subject to Pension Plan's approval and not a condition of the asset sale.[2]

In May 2010 First Southern moved into Aviation's offices in Manhattan Plaza and began paying the monthly rent Aviation Mortgage owed under the lease. Richard Thomas informed Melanie Shepherd, Pension Plan's building manager for Manhattan Plaza, of Aviation Mortgage's asset sale and proposed assignment of its lease to First Southern and requested she identify the documents or paperwork Pension Plan would need to investigate and approve the proposed assignment. In response Shepherd requested two years of First Southern's audited financial statements, the company's tax returns and a completed lease application from Michael Jones, First Southern's principal owner. Concerned about First Southern's limited credit history (First Southern had been in business for only one year), in October 2010 Shepherd requested additional documentation,

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[2] The asset purchase agreement stated, "Seller and Purchaser shall use their best efforts to obtain the landlord or lessor consents for all contracts, Leases or otherwise (as necessary or applicable), set forth herein or as otherwise agreed by the Parties, and estoppel certificates . . . prior to the Closing Date [of the asset purchase agreement]. . . . Shareholders, Seller and Purchaser agree, however, that obtaining a Landlord Consent for any of the Leases shall not be a condition to Closing. Subsequent to Closing, Shareholders, Seller and Purchaser shall continue to use their best efforts to obtain Landlord Consents for those Leases for which a Landlord Consent was not obtained as of the closing date. If it is determined that a Landlord Consent cannot reasonably be obtained for an assignment of a Lease, and if permissible under the terms of such Lease, Shareholders, Seller and Purchaser shall enter into a sublease for the location covered by that Lease."

including First Southern's business plan, a list of its investors with amounts invested and key executive biographies. Pension Plan also retained a tenant risk assessment firm to advise it on the creditworthiness of First Southern.

3. *The Unraveling of the Asset Purchase Agreement Between Aviation Mortgage and First Southern*

While Pension Plan considered Aviation Mortgage's request for approval of the proposed assignment, the asset purchase agreement between Aviation Mortgage and First Southern began to unravel for a variety of reasons, many unrelated to the lease. In late December 2010 Richard Thomas notified First Southern that Aviation Mortgage was exercising its termination rights under the asset purchase agreement due to First Southern's failure to perform. He also notified Shepherd that Aviation Mortgage was withdrawing its request for approval of the proposed assignment and would be serving First Southern with a notice to vacate the premises.

In January 2011, at Richard Thomas's request, Pension Plan denied First Southern access to the office space in Manhattan Plaza, resulting in a physical altercation between Richard Thomas and Emile Auguste, First Southern's chief financial officer. Following this confrontation, First Southern obtained a temporary restraining order enjoining the Thomases from entering the office in Manhattan Plaza and from using the name Aviation Mortgage Partners, doing business as Milestone Mortgage. First Southern then reoccupied the premises.

4. *The Unlawful Detainer Action*

After neither Aviation Mortgage nor First Southern paid rent for January or February 2011, Pension Plan initiated unlawful detainer proceedings naming both Aviation Mortgage

and First Southern as defendants. Pension Plan obtained a judgment in its favor for possession of the premises and $120,728.94 in rent and attorney fees.

5. *This Lawsuit and Pension Plan's Special Motion To Strike*

After judgment was entered in the unlawful detainer action, First Southern filed this lawsuit against Pension Plan, asserting in its initial complaint causes of action for breach of contract, wrongful eviction, negligence, civil conspiracy and negligent and intentional interference with contract and prospective economic advantage. Underlying each of First Southern's claims was the allegation the Thomases and Pension Plan had conspired to delay approval of the assignment to give the Thomases time to cancel the asset purchase agreement with First Southern and resell Aviation Mortgage to another firm at a greater profit and to allow Pension Plan to recapture the office space and rent it to the new tenant at a higher rate.

Pension Plan moved to strike the complaint pursuant to Code of Civil Procedure section 425.16 on the ground it arose from its protected activity of prosecuting the unlawful detainer action. The trial court denied the special motion to strike, and we affirmed that order in a nonpublished opinion (*First Southern Capital Development Corp. v. Sheet Metal Workers' Pension Plan of Southern California, Arizona and Nevada et al.* (Jan. 23, 2014, B239824)).

6. *Pension Plan's Motion for Summary Judgment Directed to the Operative Second Amended Complaint*

In its second amended complaint, the operative pleading, First Southern asserted three contract causes of action based on alternative theories of express contract, implied contract and

third party beneficiary of an express contract. In each cause of action First Southern alleged Pension Plan had breached the provision in its lease with Aviation Mortgage that prohibited it from unreasonably withholding its consent to assignment.

Pension Plan moved for summary judgment and, in the alternative, summary adjudication, arguing First Southern could not prevail on its contract claims as a matter of law because it was not a party to the lease agreement between Pension Plan and Aviation Mortgage or a third party beneficiary of that contract and no other express or implied agreement concerning the proposed assignment existed between them. Alternatively, it argued, Pension Plan acted reasonably in response to the proposed assignment and did not breach the lease agreement.

In its opposition to Pension Plan's motion, First Southern argued it was a party to an express or implied contract or a third party beneficiary of an express or implied contract as a matter of law and, at a minimum, triable issues of material fact existed on each of those questions. In addition, citing statements made in Auguste's declaration, First Southern argued triable issues of material fact also existed as to whether Pension Plan unreasonably and in bad faith delayed its decision on the proposed assignment.

The trial court granted Pension Plan's summary judgment motion, concluding as a matter of law that First Southern was not a party to the lease or an implied contract incorporating the lease terms or a third party beneficiary of the lease and, therefore, could not prevail on any of its contract claims.

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter,* at p. 618.)

2. *The Trial Court Did Not Err in Granting Pension Plan's Motion for Summary Judgment*

With certain rare exceptions only a party to a contract or its privy may enforce or be bound by it. (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 294 [122 S.Ct. 754, 151 L.Ed.2d 755] ["[i]t goes without saying that a contract cannot bind a nonparty"]; *Berclain America Latina v. Baan Co.* (1999) 74 Cal.App.4th 401, 405 [one who is not a party to a contract or an intended third party beneficiary of a contract ordinarily lacks standing to enforce the contract's terms]; cf. *DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352 ["generally "'one must be a party to an arbitration agreement to be bound by it or invoke it'"'"; however, agents, alter egos and intended third party beneficiaries of arbitration agreements are exceptions to that rule]; *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412, 424 [same].)

The trial court concluded First Southern was not a party or privy to the lease agreement or a third party beneficiary of that agreement and thus could not sue for damages based on Pension Plan's alleged breach of its covenant not to withhold its assignment unreasonably. Pension Plan contends this was error because it acquired the lease when it purchased Aviation Mortgage's assets and thus could sue as Aviation Mortgage's successor-in-interest. Alternatively, it argues its payment of rent and Pension Plan's acceptance of that payment created an implied contract in which Pension Plan agreed not to withhold its consent to assignment unreasonably. Finally, it contends it was, at least, a third party beneficiary of the lease agreement. None of these arguments has merit.

a. *There was no express contract between Pension Plan and First Southern*

First Southern did not become Aviation Mortgage's successor-in-interest under the lease by virtue of its purchase of that company's assets.[3] Both the lease and the asset purchase agreement expressly provided the lease could not be assigned without Pension Plan's written approval. It is undisputed that this constitutes a lawful condition for assignment (see Civ. Code, §§ 1995.210 [subject to limitations in this chapter, commercial lease may include a restriction on tenant's ability to transfer interest in lease]; 1995.240 ["[a] restriction on transfer of a tenant's interest in a lease may provide that the transfer is subject to any express standard or condition"]; 1995.250

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[3] While not directly addressed by the parties, there appears to be some disagreement whether the asset purchase was completed. For purposes of this opinion only, we assume First Southern is correct the asset purchase actually occurred.

[permissible for lease to condition transfer on landlord's consent, provided conditions for consent are articulated in lease or lease contains statement that consent shall not be unreasonably withheld]; see generally *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 367-368 [discussing permissible restrictions on tenant's right to transfer leasehold]) and that no written approval was given. Accordingly, First Southern did not acquire any rights under the lease by virtue of the asset purchase agreement.

b. *There was no implied agreement between Pension Plan and First Southern concerning the proposed assignment*

First Southern's implied contract theory also fails. (See *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 794 ["[t]he only distinction between an implied-in-fact contract and an express contract is that, in the former, the promise is not expressed in words but is implied from the promisor's conduct"]; *Pacific Bay Recovery, Inc. v. California Physicians' Services*, *Inc.* (2017) 12 Cal.App.5th 200, 215 ["both the express contract and contract implied in fact are founded upon an ascertained agreement or, in other words, are consensual in nature, the substantial difference being in the mode of proof by which they are established"].) The landlord's acceptance of a rental payment by a third party occupant of the premises, alone, does not create an implied contract to perform the terms of the landlord-tenant lease agreement. (See *Vallely Investments v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 823 [absent express assumption of lease terms, tenant's assignment of lease to third party does not bind landlord to the terms of the lease it had with tenant];

Kelly v. Tri-Cities Broadcasting, Inc. (1983) 147 Cal.App.3d 666, 676 [same].)

First Southern argues, even if there was no implied agreement as to the terms of the lease agreement, by accepting First Southern's rental payments, Pension Plan was bound by an implied covenant of good faith and fair dealing that included an obligation to act reasonably with respect to the proposed assignment. However, First Southern did not plead that theory or present that argument in the trial court. Accordingly, it has not been properly preserved for appeal. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 489 [failure to raise argument below in connection with opposition to summary judgment results in forfeiture on appeal]; see *Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp.* (1994) 29 Cal.App.4th 1459, 1472 [""The rule which forbids raising a new issue for the first time on appeal takes on added significance in summary judgment proceedings because "[t]he moving party's burden on a motion for summary judgment is only to 'negate the existence of triable issues of fact in a fashion that [entitles] it to judgment on the issues raised by the pleadings. [Citation.] It [is] not required to refute liability on some theoretical possibility not included in the pleadings."""].)

The argument also fails on its merits. Any relationship created by First Southern's occupation of the premises rested on privity of estate, not privity of contract. (See *Ellingson v. Walsh, O'Connor & Barneson* (1940) 15 Cal.2d 673, 675 [absent an agreement, third party assignee's occupation of the premises and payment of rent creates privity of estate; landlord and third party occupant are bound by privity of estate to those covenants that run with the land for the duration of the occupancy]; *Treff v.*

Gulko (1932) 214 Cal. 591, 600 [absent fresh contractual stipulations between a landlord and a tenant's assignee, "there is no privity of contract between the [tenant's] assignee of the lease and the landlord," only privity of estate]; *BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach* (2017) 14 Cal.App.5th 992, 1000 [same].) While the implied covenant of good faith and fair dealing exists in every contract (see *Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal.4th 917, 937 [""every contract imposes upon each party a duty of good faith and fair dealing""]; *Carma Developers* (*Cal.*), *Inc. v. Marathon Development California, Inc.*, *supra*, 2 Cal.4th at pp. 371-372 [covenant of good faith and fair dealing is implied in every contract, including commercial leases]), First Southern cites no case, and we are not aware of any, that extends the implied covenant of good faith and fair dealing to a tenancy created not by contract, but by privity of estate.

Furthermore, even if a covenant of good faith and fair dealing were implied in a tenancy created solely by privity of estate, it would not encompass the obligation on the part of a lessor to the third party occupant to reasonably consider the tenant's anticipated assignment, an express contractual term between the tenant (Aviation Mortgage) and the lessor (Pension Plan). To hold otherwise would contravene long-established precedent that a third party occupant inherits under privity of estate only those benefits and obligations that run with the land, such as rent, and not the contractual benefits and obligations provided for in the lease agreement. (See *Treff v. Gulko*, *supra*, 214 Cal. at p. 600; *Kelly v. Tri-Cities Broadcasting*, *Inc.*, *supra*, 147 Cal.App.3d at p. 678.)

Finally, to the extent First Southern argues Pension Plan's acceptance of rental payments alone amounted to implied consent to the assignment, that argument too, fails. The lease and the asset purchase agreement made clear that no assignment would be valid absent the landlord's consent; and the undisputed evidence established that both First Southern and Pension Plan operated in accordance with that understanding and no approval was given. The trial court did not err in rejecting the implied contract claim as a matter of law. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336-337 [although generally the existence of an implied contract is a question for the trier of fact, if only one reasonable conclusion can be drawn from the undisputed facts, the issue may be decided as a matter of law on summary judgment]; *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 739 [same].)

c. *First Southern was not a third party beneficiary of the lease between Pension Plan and Aviation Mortgage*

First Southern asserts it was a third party beneficiary of the lease. (See Civ. Code, § 1559 ["[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it"]; *Lucas v. Hamm* (1961) 56 Cal.2d 583, 590; see *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1021 (*Spinks*) ["'California law permits third party beneficiaries to enforce the terms of a contract made for their benefit'"].) This theory, too, fails.

"'The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.]

If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person.'" (*Spinks, supra,* 171 Cal.App.4th at p. 1022.) The third person need not be expressly identified in the contract. (*Lucas v. Hamm, supra,* 56 Cal.2d at p. 591; *Garratt v. Baker* (1936) 5 Cal.2d 745, 748.) It is sufficient that the promisor must have reasonably understood that the promisee had such intent. (*Lucas,* at p. 591; see also *Spinks,* at p. 1023 [third party beneficiary need not be expressly named in contract; it is sufficient if contract shows he or she "'is a member of a class of persons for whose benefit it was made'"].) However, "'[a] third party who is only incidentally benefited by performance of a contract is not entitled to enforce it.'" (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233; accord, *Eastern Aviation Group, Inc. v. Airborne Express*, *Inc.* (1992) 6 Cal.App.4th 1448, 1452.)

Ascertaining whether the third party is an intended or merely incidental beneficiary is a question of contract interpretation. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524; *Eastern Aviation Group, Inc. v. Airborne Express*, *Inc., supra,* 6 Cal.App.4th at p. 1452.) The agreement must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting (Civ. Code, § 1636; *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395), considering both the language of the contract (Civ. Code, §§ 1638-1639) and the circumstances under which the contract was made (Civ. Code, § 1647; see *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 437 ["[i]n determining the meaning of a written contract allegedly made, in part, for the benefit of a third party, evidence of the circumstances and

negotiations of the parties in making the contract is both relevant and admissible"]; *Prouty v. Gores Technology Group, supra,* 121 Cal.App.4th at p. 1233 [same]).

Absent conflicting extrinsic evidence, we review the trial court's interpretation of the contract de novo. (*City of Hope National Medical Center v. Genentech, Inc., supra,* 43 Cal.4th at p. 395; see *Prouty v. Gores Technology Group, supra,* 121 Cal.App.4th at p. 1233 [when evidence is in conflict, the question whether a particular third person is an intended beneficiary of a contract is a question of fact; "[h]owever, where, as here, the issue can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the issue becomes one of law that we resolve independently"].)

In insisting it is a third party beneficiary of Aviation Mortgage's lease with Pension Plan, First Southern argues the general provisions in the lease relating to assignment and transferability were intended to benefit proposed assignees, a class of persons or entities to which it belongs. However, absent evidence the lease agreement was intended at the time it was executed to benefit a proposed assignee—and no such evidence was presented in this case—any benefit to the proposed assignee is incidental, not intentional. (See *Don Rose Oil Co., Inc. v. Lindsley* (1984) 160 Cal.App.3d 752, 756 (*Don Rose Oil*) [proposed assignee of franchise was incidental beneficiary, not third party beneficiary, of contract between franchisor and franchisee]; see also *Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1725 [lessee was not a third party beneficiary of lessor's contract with its insurer even though insurance payout would

benefit lessee in form of rent reduction; at most lessee was incidental beneficiary of lessor's insurance contract].)

Although dealing with the assignment of a franchise interest, rather than a leasehold interest, *Don Rose Oil Co.* provides a persuasive analogy. There, the tenant (Gifford) sought to assign his franchise interest with Shell Oil to a third party. Shell refused to approve the assignment. The proposed assignee sued Shell for declaratory relief, an injunction and damages for breach of contract, arguing Shell violated the provision of its franchise agreement with Gifford that prohibited it from unreasonably withholding its consent to assignment. The Fifth District rejected the proposed assignee's contract claim, concluding that, as a proposed assignee, it was, at most, an incidental beneficiary of the franchise agreement: "Shell's promise that it would not withhold its consent to a sale unreasonably was made for the benefit of Gifford, rather than some third person. The provision assured the marketability of Gifford's interest in the contract. Any benefit to an amorphous class of potential assignees was unintended and incidental. [¶] We conclude the Shell-Gifford contract did not include Rose [the proposed assignee] as a third party beneficiary." (*Don Rose Oil, supra,* 160 Cal.App.3d at p. 758.) Like the proposed assignee in *Don Rose Oil,* First Southern was at most an unintended and incidental beneficiary, not a third party beneficiary of the Pension Plan-Aviation Mortgage lease agreement.

Finally, First Southern urges there must be some way for it to hold Pension Plan accountable for its alleged bad faith behavior. In *Don Rose Oil* the appellate court suggested a proposed assignee that lacks standing as a third party beneficiary of a contract might be able to pursue an equitable

action against the lessor to enforce the assignment provision. (See *Don Rose Oil, supra,* 160 Cal.App.3d at pp. 759-760 [proposed assignee could not enforce contract as third party beneficiary of franchise agreement because proposed assignee was incidental beneficiary only; but proposed assignee could pursue declaratory relief and request for injunction on question whether landlord withheld consent to assignment unreasonably: "Although the assignment was conditional, the condition is totally within Shell's control," and "[i]t is inconsistent of Shell to admit for the purposes of summary judgment that it may not refuse consent unreasonably, but argue that a conditional assignment—subject only to Shell's consent—creates no rights in the assignee"].)[4]

Although we question this aspect of *Don Rose Oil's* analysis (see generally *Lande v. Jurisich* (1943) 59 Cal.App.2d 613, 618 ["'[w]hile a court of equity may exercise broad powers in applying equitable remedies, it may not create new substantive rights under the guise of doing equity'"]; *Heath v. Kettenhofen* (1965) 236 Cal.App.2d 197, 207-208 [same]), we need not decide whether

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[4] *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488 also involved an action by a proposed assignee seeking a declaration that the landlord, whose consent was required under the lease to effect an assignment of the tenant's leasehold interest, had withheld its consent unreasonably. Without deciding the proposed assignee's standing under the lease, the Supreme Court held that a commercial landlord may not withhold its consent unreasonably, whether or not that condition for withholding consent is stated in the lease. (*Id.* at p. 497; see *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134 [cases are not authority for propositions not considered]; *City of Bellflower v. Cohen* (2016) 245 Cal.App.4th 438, 451 [same].)

a tenant's proposed assignee might be able to assert some form of tort or equitable claims against the tenant's lessor in the circumstances presented by the instant case. Here, First Southern advanced only contract claims in its operative second amended complaint. (See *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 585 [defendant moving for summary judgment need only negate theories of liability alleged in operative complaint]; *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342 [same]; see also *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1699 [plaintiff wishing to rely on unpleaded theories to oppose motion for summary judgment must first move to amend the complaint].) Accordingly, the trial court did not err in granting Pension Plan's motion for summary judgment.[5]

DISPOSITION

The judgment is affirmed. Pension Plan is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. SEGAL, J.

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[5] In light of our holding, we also do not address First Southern's contention that triable issues of material fact exist as to whether Pension Plan unreasonably delayed its review of the proposed assignment.