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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

KAMILAH SMITH, Plaintiff and Appellant, v. ANACAPA PARTNERS LP et al., Defendants and Respondents.	B267805 Los Angeles County Super. Ct. No. BC516078

APPEAL from a judgment of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed.

Lorden & Reed and Zshonette L. Reed for Plaintiff and Appellant.

Nussbaum and Sandra L. Stevens for Defendants and Respondents.

INTRODUCTION

Plaintiff Kamilah Smith appeals from the summary judgment entered in favor of defendants and respondents Anacapa Partners LP (Anacapa) and Strategic Acquisitions. Plaintiff entered into a real estate purchase agreement with Anacapa. After Anacapa canceled the purchase agreement and sold the property to Strategic Acquisitions, plaintiff filed the instant breach of contract suit seeking specific performance of the agreement.

Resolution of the issues on appeal depends upon whether Anacapa's "Notice to Buyer to Perform" triggered plaintiff's obligation to perform within a certain time, and whether Anacapa's subsequent cancellation of the purchase agreement was effective. We conclude the notice to perform was valid and effective. Further, because plaintiff failed to perform within the time required by the notice to perform, Anacapa had the contractual right to cancel the agreement and it did so effectively. We therefore affirm the judgment in Anacapa's favor.

FACTS AND PROCEDURAL BACKGROUND

1. The Purchase Agreement

In December 2012, plaintiff agreed to buy a duplex in Los Angeles from Anacapa for $575,500. The parties signed a form "Residential Income Property Purchase Agreement and Joint Escrow Instructions" (the purchase agreement), as amended by four counteroffers, which provided that plaintiff would pay an initial deposit of $16,050 plus an additional cash payment of $90,950, and would obtain a loan for the remaining balance. The purchase agreement provided plaintiff would release all

contingencies within 17 days, and that escrow would close 45 days after acceptance of the agreement.

2. Delays During Escrow

The parties agreed in writing to extend the escrow closing date to February 27, 2013. As of that date, however, plaintiff had not removed the escrow contingencies, obtained financing, or deposited any further monies into escrow.

Plaintiff's broker advised Anacapa's broker, Timothy Pai, that plaintiff was attempting to obtain a loan from Wells Fargo Bank. Over the next several months, Pai kept in contact with representatives of Wells Fargo regarding plaintiff's loan application. Also during this time, one of plaintiff's inspections of the property revealed termite damage. On June 3, 2013, the parties amended the purchase agreement to provide plaintiff with a credit of $7,750 in lieu of repairs.

On June 23, 2013, Wells Fargo discovered an expired mineral lease on title to the property and advised Anacapa that the lease would need to be removed prior to funding plaintiff's loan. Anacapa believed it would not be able to remove the mineral lease.

3. Anacapa Demands Performance

On June 25, 2013, Anacapa sent plaintiff's broker a "Notice to Buyer to Perform," (notice to perform) using a standard form prepared by the California Association of Realtors (CAR). Anacapa demanded that plaintiff remove all contingencies and close escrow within 48 hours. After receiving the notice to perform, plaintiff's broker contacted Pai and advised him that the purchase agreement provided that, in the event Anacapa issued a notice to perform, plaintiff would have a three-day period in

which to comply. Anacapa agreed and advised plaintiff's broker it would accept plaintiff's performance at any time prior to 12:00 a.m. on June 29, 2013.

Plaintiff failed to remove the contingencies and close escrow within the period provided.

4. Anacapa Cancels the Purchase Agreement

On June 28, 2013, Pai sent plaintiff's broker a form "Cancellation of Contract, Release of Deposit and Joint Escrow Instructions," indicating Anacapa was canceling the purchase agreement due to plaintiff's failure to comply with the notice to perform.

Nevertheless, plaintiff attempted to move forward with escrow. On July 1, 2013, fully signed loan documents were delivered into escrow. The same day, plaintiff wired the required additional cash payment of $21,663.89 to escrow.[1] On July 3, 2013, plaintiff emailed Pai, requesting that Anacapa rescind its cancellation of the purchase agreement. Anacapa declined. Nonetheless, Wells Fargo wired loan proceeds of $508,227.50 to escrow on July 5, 2013. Anacapa never deposited the title or closing documents to escrow.

5. Plaintiff's Lawsuit

Plaintiff initiated this lawsuit on July 23, 2013. The operative complaint asserts the notice to perform sent by Anacapa was defective because it stated plaintiff had only 48 hours to perform, whereas the purchase agreement provided that any notice to perform would provide at least three days. As a result, plaintiff alleges, the notice to perform was invalid and

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[1] Apparently, plaintiff deposited $50,550 before July 1, 2013.

Anacapa breached the purchase agreement by failing to accept plaintiff's performance when tendered on July 5, 2013. The complaint sought monetary damages and specific performance.[2]

6. Summary Judgment in Favor of Anacapa

Anacapa moved for summary judgment, arguing mainly that it lawfully canceled the purchase agreement due to plaintiff's failure to perform within the time provided by the agreement and the notice to perform. In response to plaintiff's assertion that the notice to perform was invalid, Anacapa acknowledged that the form stated that plaintiff had 48 hours to perform, whereas the purchase agreement required it to allow at least three days. Anacapa argued the notice was valid, notwithstanding the error, because the preprinted form also stated the time allowed for the buyer's performance was " 'no less than the time specified in the Agreement,' " i.e., three days. Moreover, as it was undisputed Anacapa agreed at the time that

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[2] Although plaintiff named Strategic Acquisitions as a party to the suit, and the court granted summary judgment in favor of Strategic Acquisitions as well as Anacapa, plaintiff makes no mention of that company on appeal. By failing to raise any issue concerning the judgment in favor of Strategic Acquisitions, plaintiff forfeited the issue. (See, e.g., *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issue not raised on appeal deemed forfeited or waived]; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177 ["Generally, appellants forfeit or abandon contentions of error regarding the dismissal of a cause of action by failing to raise or address the contentions in their briefs on appeal"]; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 729, fn. 1 [same].) In addition, plaintiff sought only specific performance as to Strategic—a remedy counsel conceded at oral argument is no longer available.

it would accept plaintiff's performance if tendered within three days of the notice, and plaintiff failed to perform within three days time, Anacapa asserted it was entitled to cancel the contract. The court agreed and granted Anacapa's motion for summary judgment.

7. Judgment and Appeal

The court entered judgment in favor of Anacapa on August 13, 2015. Plaintiff timely appeals.

DISCUSSION

1. Standard of Review

The applicable standard of review is well established. "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) As such, the summary judgment statute (Code Civ. Proc., § 437c), "provides a particularly suitable means to test the sufficiency of the plaintiff's prima facie case and/or of the defendant's [defense]." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) A summary judgment motion must demonstrate that "material facts" are undisputed. (Code Civ. Proc., § 437c, subd. (b)(1).) The pleadings determine the issues to be addressed by a summary judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, revd. on other grounds by *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490; see *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.)

The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) A defendant moving for summary judgment must " 'show[ ] that one or more elements of the cause of action … cannot be established' by the plaintiff." (*Id.* at p. 853 [quoting Code Civ. Proc., § 437c, subd. (o)(2)].) A defendant meets its burden by presenting affirmative evidence that negates an essential element of plaintiff's claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) Alternatively, a defendant meets its burden by submitting evidence "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" supporting an essential element of its claim. (*Aguilar, supra,* 25 Cal.4th at p. 855.)

On appeal from summary judgment, we review the record de novo and independently determine whether triable issues of material fact exist. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*); *Guz, supra,* 24 Cal.4th at p. 334.) We resolve any evidentiary doubts or ambiguities in favor of the party opposing summary judgment. (*Saelzler, supra,* 25 Cal.4th at p. 768.)

In performing an independent review of the granting of summary judgment, we conduct the same procedure employed by the trial court. We examine (1) the pleadings to determine the elements of the claim, (2) the motion to determine if it establishes facts justifying judgment in the moving party's favor, and (3) the opposition—assuming movant has met its initial burden—to decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 629-630.)

We need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Ibid.*)

2. The court did not err by granting Anacapa's motion for summary judgment.

2.1. Background principles

To prevail on a cause of action for breach of contract, a plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff. (See, e.g., *Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.) Similarly, to obtain specific performance of a real estate contract, a plaintiff must establish its own performance or excuse for nonperformance. (See *Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1126.)

Here, Anacapa's motion for summary judgment asserted plaintiff could not, as a matter of law, prove she performed under the contract. Specifically, Anacapa contended plaintiff breached the purchase agreement when she failed to release all escrow contingencies and close escrow within the time provided by the June 25, 2013 notice to perform.

To determine whether Anacapa demonstrated, as a matter of law, that plaintiff failed to perform her obligations under the purchase agreement, we examine the agreement itself. "Escrow instructions are interpreted under the rules applicable to contracts." (*Claussen v. First American Title Guaranty Co.* (1986) 186 Cal.App.3d 429, 437.) "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the

parties." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) "Such intent is to be inferred, if possible, solely from the written provisions of the contract." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822; Civ. Code, § 1639.) "If contractual language is clear and explicit, it governs." (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1264; Civ. Code, § 1638.)

2.2. Anacapa's notice to perform was valid and any ambiguity regarding the deadline for plaintiff's performance was contemporaneously resolved by the parties.

Plaintiff asserts Anacapa failed to provide adequate notice to perform under the purchase agreement. We disagree.

Paragraph 18 of the purchase agreement sets forth the provisions relating to contingencies, time to perform, and cancellation. The agreement provided plaintiff with a limited period of time to conduct her inspections and release contingencies. Paragraph 18B(1) states, in pertinent part: "BUYER HAS: 17 (or □ ___) Days After Acceptance, unless otherwise agreed in writing, to: (i) complete all Buyer Investigations; approve all disclosures, reports and other applicable information, which Buyer receives from Seller; and approve all other matters affecting the Property …." Paragraph 18B(3) further provides: "Within the time specified in 18B(1) (or as otherwise specified in the Agreement), Buyer shall Deliver to Seller either (i) a removal of the applicable contingency (C.A.R. Form CR); or (ii) a cancellation (C.A.R. Form CC) of this Agreement based upon a remaining contingency or Seller's Failure to Deliver the specified items."

The parties signed the purchase agreement in late December 2012 and plaintiff was therefore obligated to cancel or release contingencies in mid-January. Although the parties subsequently extended the escrow closing date in writing to February 27, 2013, there is no evidence they also agreed in writing to extend plaintiff's time to release contingencies, as required under the contract.[3] It is undisputed that plaintiff did not remove all contingencies until July 5, 2013—well after the time provided by the purchase agreement.

Plaintiff's failure to perform within the time provided by the purchase agreement does not end our inquiry, however, because the agreement does not provide for automatic cancellation in that event. Instead, the agreement provides that plaintiff could release contingencies or cancel the agreement at any time, so long as Anacapa had not yet formally canceled the agreement. Specifically, Paragraph 18B(4) provides: "Continuation of Contingency: Even after the end of the time specified in 18B(1) and before Seller cancels this Agreement, if at all, pursuant to 18C, Buyer retains the right to either (i) in writing remove remaining contingencies, or (ii) cancel this Agreement based upon a remaining contingency. Once Buyer's written removal of all contingencies is Delivered to Seller, Seller may not cancel this Agreement pursuant to 18C(1)." Plaintiff argues she fully performed under the agreement prior to any valid cancellation of the agreement by Anacapa. We disagree.

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[3] Paragraph 18 states at the outset: "The following time periods may only be extended, altered, modified or changed by mutual written agreement."

Anacapa's cancellation rights are set forth in Paragraph 18C which provides, in pertinent part: "(1) Seller Right to Cancel; Buyer Contingencies: If, within the time specified in this Agreement, Buyer does not in writing Deliver to Seller a removal of the applicable contingency or cancellation of this Agreement then Seller, after first Delivering to Buyer a Notice to Buyer to Perform (C.A.R. Form NBP) may cancel this Agreement. In such event, Seller shall authorize return of Buyer's deposit." It is undisputed that Anacapa sent plaintiff a notice to perform on June 25, 2013, and subsequently sent plaintiff a notice purporting to cancel the contract. However, plaintiff contends the notice to perform was void and without effect, rendering Anacapa's cancellation invalid as well. We reject this contention and conclude Anacapa's notice to perform complied with the terms of the purchase agreement.

The provisions relating to the notice to perform are found in Paragraph 18C(3), which provides in pertinent part: "The NBP [C.A.R. Form NBP] shall: (i) be in writing; (ii) be signed by Seller; and (iii) give Buyer at least 2 (or [x] 3) Days After Delivery (or until the time specified in the applicable paragraph, whichever occurs last) to take the applicable action." Using the required form, Anacapa demanded that plaintiff remove "all contingencies" and "close within 48 hours." As plaintiff correctly points out, the 48 hours specified by Anacapa in the notice to perform is less than the minimum time (3 days) to which the parties agreed, as provided in paragraph 18(C)(3). Accordingly, if Anacapa had refused to accept plaintiff's performance after the expiration of the 48-hour period—but before the expiration of the three days required by the contract—Anacapa would have been in breach of the purchase agreement. But that is not what happened in this

case: Plaintiff acknowledges she did not perform until July 5, 2013—10 days after delivery of the notice to perform.

Nevertheless, plaintiff urges that, as a result of the error, Anacapa's notice to perform is void and entirely without legal effect. While we agree that the notice was, in part, inconsistent with the purchase agreement, it is notable that the parties clarified and mutually acknowledged at the time that the purchase agreement, not the notice to perform, set forth the time frame for plaintiff's performance. After receiving the notice to perform, plaintiff's broker noticed the discrepancy between the time specified on the form and the time specified in the purchase agreement. Plaintiff's broker called a representative of Anacapa, who confirmed Anacapa would accept plaintiff's performance at any time during the three-day period following the notice to perform, or by 12:00 a.m. on June 29, 2013. To the extent any ambiguity existed regarding the purchase agreement, the notice to perform, or Anacapa's demand for performance, that ambiguity was eliminated by the parties' contemporaneous discussions.[4] (See, e.g., *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1356 [" 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties' "].)

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[4] The pre-printed form also indicates that the time to perform should not be less than the time provided by the purchase agreement.

Notwithstanding the evidence of the parties' mutual understanding at the time, plaintiff now insists the notice to perform had no legal effect. Plaintiff cites no legal authority in support of her contention and instead rests her argument entirely on a document entitled, "How a Seller May Cancel a Purchase Agreement: Checklist and Q&A," which she represents was created by the California Association of Realtors.[5] As plaintiff fails to support her argument with relevant legal authority, we do not consider it further. (See, e.g., *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700 [issue not supported by pertinent or cognizable legal argument may be deemed abandoned].)

Plaintiff also argues Anacapa waived the "time is of the essence" provision of the purchase agreement by working with her to resolve the termite damage issue and by waiting for her to obtain financing, both of which occurred over the course of several months after the agreed-upon time to close escrow had passed.[6] We agree but conclude it is of no moment under the facts of this case.

Generally, a provision that "time is of the essence" is deemed to constitute a material term of the contract, the nonperformance of which breaches the contract and excuses the other party's performance. (See, e.g., *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1337–1338 [where contract specified time was of the essence, buyer's failure to deposit funds for purchase

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[5] This document does not fall within any category of judicially-noticable material. (Evid. Code, §§ 451, 452, 459.) Plaintiff's request for judicial notice filed May 17, 2016, is denied.

[6] Paragraph 37 of the contract states: "Time is of the essence."

price within specified time deprived buyer of right to specifically enforce seller's obligation to convey].) However, the failure to promptly object to the other party's untimely performance may be deemed to waive a time of the essence clause, precluding rights and remedies for a breach of contract based thereon. (See, e.g., *Chan v. Title Ins. & Trust Co.* (1952) 39 Cal.2d 253, 258 (*Chan*).) Arguably, Anacapa waived the "time is of the essence" provision by continuing to work with plaintiff for several months after the escrow closing date passed. However, that waiver does not mean, as plaintiff would have it, that Anacapa lost all rights to insist on performance by a date certain. Rather, the purchase agreement controls. Anacapa's right to cancel the contract after the date for plaintiff's performance expired is controlled by paragraphs 18B and 18C. Those provisions, as we have already explained, evidence the parties' intent to allow plaintiff to perform even after the time for performance has lapsed, and to allow Anacapa to cancel the contract due to plaintiff's nonperformance with three-days notice. (Cf. *Chan, supra*, 39 Cal.2d at p. 259 [noting where time is of the essence clause is waived, "[a]ny right of forfeiture which may have existed was thus suspended until definite notice to perform the contract by a specific date was given"].) The general rules cited by plaintiff regarding the "time is of the essence" clause are superseded in this case by the purchase agreement's express terms.

In sum, Anacapa's notice to perform, when viewed in light of the circumstances, put plaintiff on notice that she was required to release all pending contingencies and complete all steps necessary to close escrow within three days of the notice. It is undisputed that plaintiff failed to perform within that time.

2.3. Anacapa's cancellation of the purchase agreement was valid.

Plaintiff also contends Anacapa's cancellation of the purchase agreement was ineffective, and therefore Anacapa breached the agreement by repudiating her performance on July 5, 2013. We disagree.

First, plaintiff argues Anacapa's cancellation of the contract was premature and therefore void. Plaintiff asserts that, even if the notice to perform was valid, Anacapa's right to cancel the contract did not arise until her time to perform had passed. She contends her time to perform expired at 12:01 a.m. on July 1, 2013, and argues that Anacapa's notice of cancellation, which was delivered to plaintiff on the morning of June 28, 2013, was premature. Although we agree that Anacapa's right to cancel the contract was not perfected until the expiration of plaintiff's time to perform, we are unaware of any legal authority—and plaintiff cites none—stating that delivery of a cancellation notice prior to its legally effective date and time renders it void. Further, although the purchase agreement places a restriction on when a notice to perform may be delivered,[7] it does not place any restriction on when a notice of cancellation may be delivered. We infer from this fact that the parties did not intend that a notice of cancellation delivered prior to its effective date and time would be ineffective to cancel the agreement.

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[7] Paragraph 18C(3) provides, "A NBP may not be Delivered any earlier than 2 Days Prior to the expiration of the applicable time for Buyer to remove a contingency or cancel this Agreement or meet an obligation specified in 18C(2)."

Finally, plaintiff asserts Anacapa's cancellation of the agreement was invalid because Anacapa failed to deliver a demand to close using CAR Form DCE. Plaintiff cites Paragraph 18E of the purchase agreement which provides, "CLOSE OF ESCROW: Before Seller or Buyer may cancel this Agreement for failure of the other party to close escrow pursuant to this Agreement, Seller or Buyer must first Deliver to the other a demand to close escrow (C.A.R. Form DCE)." We reject plaintiff's argument because, as already explained, Anacapa's notice of cancellation complied with Paragraph 18C(1) and (3), which relates to cancellation due to the buyer's nonperformance.

For all these reasons, we conclude no issue of material fact exists regarding plaintiff's performance under the purchase agreement. Accordingly, the court properly granted Anacapa's motion for summary judgment.

DISPOSITION

The judgment is affirmed. Respondents to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

BACHNER, 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.