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Burbank CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

NHP/PMB BURBANK MEDICAL
PLAZA I, LLC,

Plaintiff and Respondent,

v.

PREMIERE MEDICAL CENTER
OF BURBANK, INC., et al.,

Defendants and Appellants.

B284625

(Los Angeles County
Super. Ct. No. BC604193)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Ralph Hofer, Judge. Reversed.

J. Freund, Jonathan D. Freund and Craig A. Huber; Quinn
Emanuel Urquhart & Sullivan, John P. D'Amato and Ian S.
Shelton for Defendants and Appellants Premiere Medical Center
of Burbank, Inc. and Michael D. Marsh.

Mann & Zarpas, Lloyd S. Mann; Barack Ferrazzano
Kirschbaum & Nagelberg, Roger H. Stetson and Daniel R. Fine,
for Plaintiff and Respondent.

Premiere Medical Center of Burbank, Inc. and its principal Dr. Michael D. Marsh (collectively Premiere) appeal from the judgment entered in favor of Premiere's landlord NHP/PMB Burbank Medical Plaza I, LLC (NHP) following a court trial in NHP's unlawful detainer action. Premiere contends the court's finding it remained in possession of a medical suite it had surrendered to NHP prior to NHP's filing of the unlawful detainer action was based on a legally incorrect theory of "constructive possession" and, in any event, was not supported by substantial evidence. Because Premiere was not in possession of the surrendered suite, it argues, NHP's notices to quit or pay rent, which identified rent due for that suite, were incorrect, creating a fatal defect in NHP's unlawful detainer action. Premiere also appeals from the order denying its motion to vacate the judgment for intrinsic fraud, claiming a NHP principal had testified falsely at trial. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Original and Amended Lease Agreements

a. The original lease

Premiere leased office space in Burbank Medical Plaza, located across the street from Providence St. Joseph Hospital in Burbank. The initial lease agreement, signed by Dr. Marsh on behalf of Premiere Medical Center, identified "the premises" as those depicted in Exhibit B to the lease. Exhibit B, a floor plan of the third floor of the building, showed two suites of offices on the third floor: Suite 300, which was identified as the subject of the lease, and Suite 355, which was listed in the exhibit as "still available" and not included in the leased premises.

b. The first amendment to the lease

In February 2011 the parties signed a “First Amendment To Lease,” which expanded the premises to include suite 355, identified as the “Expansion Premises.” The first amendment provided, “[T]he Expansion Premises shall be deemed part of the Original Premises under the Lease and, except as set forth herein, the use and occupancy of the Expansion Premises will be subject to the same terms and conditions as the Original Premises under the Lease and the Expansion Premises and the Original Premises shall constitute the ‘Premises’ under the Lease.” Under the amended agreement the lease term for suite 355 would expire on September 30, 2014, and the term for suite 300 on August 31, 2014. The amendment also restructured Premiere’s rental obligation, imposing an increased monthly rent and a requiring payment of a greater percentage of operating expenses.

c. The second amendment to the lease

In July 2014 the parties entered into a “Second Amendment to Lease,” effective January 1, 2014. The second amendment identified a third suite, the “Imaging Suite” (Suite 325), made up of a portion of the square footage from what had been identified in the original lease as suite 300. The second amendment identified different rents for each of the three suites and different lease expiration dates. As to duration, the second amendment extended the lease term for suite 300 to August 31, 2018 and gave Premiere the option of extending the term for suite(s) 325 and/or 355 to August 31, 2018. If Premiere wanted to extend the term for either suite, the amendment required it to provide NHP with written notice of that intention on or before August 1, 2014. If Premiere did not elect to extend the term for

one or both suites, the lease agreement for the nonextended suite(s) only would expire on August 31, 2014. Upon expiration of the term for suites 325 and/or 355, the second amendment provided, “Tenant shall vacate and surrender that portion of the Premises to the Tenant in accordance with the applicable terms of the Original Lease, subject to Section 5, below.”

Section 5 of the second amendment addressed the fact that Premiere’s server room containing its patients’ electronic medical records, located in suite 300, could only be accessed through a door inside suite 325. Accordingly, following Premiere’s surrender of suite 325, the door to Premiere’s server room would need to be relocated to permit Premiere access to its server room without entering its former suite. Section 5 provided, “If Tenant elects to not extend the Term with respect to the Imaging Premises [Suite 325] . . . the access to Tenant’s telephone and IT [(information technology)] will need to be relocated from the Imaging Premises to Suite 300, and the Landlord shall cause the performance of such [access] work” and fund it from the refurbishment allowance identified in the lease. If the relocation work exceeded the refurbishment allowance, the second amendment provided, the tenant “shall be liable” for the difference.

2. Premiere’s Failure To Pay Rent and Its Surrender of Suite 325

Premiere elected not to exercise its option to extend the term of the lease to suite 325, although it continued to do business in that suite with NHP’s consent as a holdover (month-to-month) tenant after the lease term expired on August 31, 2014. According to NHP, Premiere soon stopped paying the holdover

(monthly) rent due for suite 325. By October 2015, NHP alleged, Premiere had stopped paying rent for all three suites.

On October 6, 2015 Premiere moved its equipment and employees out of suite 325 and informed NHP it was surrendering the suite. On October 9, 2015, following NHP's inspection of suite 325, NHP's agent signed a return-of-premises form confirming suite 325 had been returned to NHP in accordance with paragraph 5.7.2 of the lease, which required the tenant to return the premises in as good as condition as it had received them, subject only to ordinary wear and tear. After its approval of Premiere's return of suite 325, NHP stopped charging Premiere rent for that suite.

3. NHP's Three-day Notices To Quit or Pay Rent

On November 24, 2015 NHP served on Premiere four separate three-day notices to quit or pay rent pursuant to Code of Civil Procedure section 1161.¹ Instead of identifying the rental amounts due by suite number, each notice defined "the premises" as "suites 300, 325 and 355" collectively and sought an aggregate amount of rent for all three suites. The four notices to quit differed from each other only in the category of rent sought for the suites: (1) base rent under the lease; (2) base rent as a holdover tenant; (3) operating expenses, included as rent under the lease; and (4) late charges.² Each notice stated it was issued

¹ The question whether service was properly effected was vigorously disputed at trial. It is not at issue on appeal.

Statutory references are to the Code of Civil Procedure unless otherwise stated.

pursuant to section 1161.1 and represented the landlord's "good faith and reasonable estimate" of the amounts due and owing.

4. *NHP's Unlawful Detainer Action*

On December 14, 2015 NHP filed the instant unlawful detainer action, seeking possession of all three suites and the rental amounts and late charges identified in each of the notices to quit. NHP argued Premiere remained in possession of all three suites without paying rent for nearly one year. NHP alleged it had fulfilled all statutory prerequisites for filing the unlawful detainer action, including service of three-day notices to quit or pay rent as required under section 1161.1.

At trial Premiere argued, among other things, the notices to quit were defective: A significant portion—more than 50 percent— of the amounts identified in the notices related to suite 325, which Premiere insisted it had surrendered before the notices were served and the action was filed. As a result, Premiere asserted, the notices to quit were legally invalid and, therefore, fatal, to NHP's unlawful detainer action.³

² In the notices to pay rent, NHP identified the amounts owed for all three suites as (1) \$162,628.50 in base rent; (2) \$79,754.06 in holdover rent; and (3) \$89,417.52 for operating expenses. The fourth notice to quit (late charges) identified two different amounts: "Thirty-Eight Thousand Seven Hundred and Fifteen Dollars and Thirty-Eight Cents," which was stated numerically in the notice as "\$41,792.00." That ambiguity, addressed at trial, is not at issue on appeal.

³ Premiere and NHP have also countersued each other in two actions in Los Angeles County Superior Court asserting breach of contract and other claims relating to the parties' lease agreement.

In response, NHP argued Premiere remained in possession of suite 325 notwithstanding its purported surrender of that suite. According to NHP, Premiere's need to access suite 325 to enter its server room after its surrender undermined NHP's efforts to lease the premises and, consequently, interfered with its ability to fully repossess the suite. Consequently, NHP argued, the rental obligation identified in the notices to quit, which included substantial amounts related to suite 325, was correct.

In support of NHP's interference allegation Stephen King, the president of NHP's managing agent, testified at trial that NHP had marketed suite 325 for lease after Premiere's surrender of that suite in October 2015, but potential lessees had balked upon discovering that Premiere required access to suite 325. King acknowledged that section 5 of the second amendment to the lease imposed on NHP the burden of relocating the door to the server room after Premiere surrendered suite 325 to obviate Premiere's need for access. However, he claimed NHP had been unable, due to Premiere's conduct, from satisfying that contractual requirement. According to King, Premiere possessed large laboratory equipment in suite 300 that would need to be moved for the door to be relocated. In addition, King testified, Premiere had made certain not-to-code electrical and plumbing improvements in suite 300 that had to be corrected before the City of Burbank would grant NHP a construction permit to relocate the door.⁴

⁴ King admitted on cross-examination NHP had not actually been cited by the City of Burbank for any code violations.

NHP also introduced a September 2016 stipulation between NHP and Premiere to continue the trial date from its then-scheduled date of September 15, 2016 “to dates no later than late October, 2016” to accommodate Premiere’s counsel, who had a personal, out-of-town emergency requiring his attention. In exchange for the continuance Premiere agreed to pay \$75,000 “towards [NHP’s] claim for unpaid rent,” to be applied to rental obligations for August and September 2016. In addition, the stipulation provided that Premiere would cooperate with NHP’s efforts to relocate the door.⁵ The court approved the stipulation and entered it as an order on September 8, 2016. Apart from the stated recitals in the document itself, no evidence was offered by either party as to the parties’ motives for the stipulation.

⁵ Page three of the stipulation provided, “Premiere and its co-defendant, Michael Marsh . . . shall cooperate with respect to the ‘I.T. Project’ or ‘Suite 300 Door Relocation Plan’ . . . and shall take no action other than the remedies delineated below that interferes with the ability of NHP to complete the Project within the very near future. In that connection, Premiere and Marsh have been provided with a copy of the Suite 300 Door Relocation Plan (as revised on June 16, 2016) . . . and they understand and agree that, upon request by NHP, they shall, upon reasonable notice . . . remove all items from the Suite 300 Lab marked ‘1’ or ‘K’ on the Demo Plan NHP does not yet know precisely how long it will take to obtain a permit for the Project, and does not yet also know precisely the nature of all the work involved. As such, NHP cannot, at this time, provide exact days and times as to when the work will occur However, NHP will make every effort to have the work performed with as few interruptions and interference as possible.” The stipulation authorized immediate injunctive relief in the event either party violated the mutual cooperation agreement as well as recovery of attorney fees.

Premiere countered NHP's access argument by asserting, because it was NHP's obligation under the lease to move the door after it surrendered suite 325, NHP's failure to do so did not mean Premiere's access to the server room through suite 325 constituted possession of that suite. Premiere emphasized that its employees could not enter suite 325 unilaterally. As King acknowledged, Premiere's agents asked NHP each time they required access to suite 325, and the parties operated under a "gentlemen's agreement" to permit such access. In addition, Premiere argued, NHP had approved Premiere's surrender of suite 325 and ceased charging rent after October 2015, indicating it had accepted Premiere's surrender of that suite. Moreover, Premiere asserted, there was no evidence that Premiere had not cooperated with any NHP efforts to relocate the door. Its agreement to do so in the 2016 stipulation simply reduced to writing what Premiere had always agreed to do.

5. The Court's Statement of Decision After Trial

Following an eight-day court trial that spanned a four-month period from November 2016 through February 2017, the court found in favor of NHP and awarded it possession of all three suites and incidental damages in the amount \$1,141,074.60.⁶ In its written statement of decision the court concluded, "[T]he three-day notices, and the charges related to Suite 325 on those notices, were proper by virtue of the fact that

⁶ The court's award was comprised of \$373,592.68 in rental amounts (inclusive of operating expenses and late charges) due and owing, as identified in NHP's notices to quit, plus \$624,207.97 in holdover damages, \$53,121.16 in prejudgment interest and \$90,152.79 in attorney fees and costs.

[Premiere], as of the date the Notices were served, as of the date the unlawful detainer was filed, and, in fact, up to and including when this action was tried, still had ‘constructive possession’ over Suite 325, and, were in essence, interfering with the Plaintiff’s possession of Suite 325 thus making three-day notices and an unlawful detainer action, related to Suite 325, both proper and necessary.”

In finding Premiere continued to be “in constructive possession” of suite 325 even after it had purported to vacate that suite in October 2015, the court explained, “[Premiere] undeniably continued to possess Suite 300. The only access to the server room in Suite 300 was through the entry to Suite 325, and any person seeking to access the server room in Suite 300 would have to walk through Suite 325. [Premiere] acknowledged that [it] advised the Plaintiff, upon leaving Suite 325, that [it] continued to need access to the server. However, by continuing to maintain possession over Suite 300, [it] w[as] interfering with the Plaintiff having complete and total access to all parts of Suite 325, since [Premiere’s] access to the server room would require [its employees] to walk through Suite 325. The only way that the Plaintiff could have obtained complete control over Suite 325 was by relocating and restricting the access to the server room in Suite 300, but [Premiere’s] cooperation was necessary to do this. This was especially [true] in view of [Premiere’s] concerns regarding [its] duties to [its] medical practice patients in terms of keeping records and protecting the integrity of [its] laboratory. However, as recently as September 8, 2016, it was necessary for the Plaintiff to obtain a written Stipulation and Court Order requiring [Premiere] to cooperate with respect to the relocation of the server door entry. . . . In

addition, Mr. King testified that the Plaintiff had been unable to move the server door because of the ‘nature of certain improvements’ installed in the laboratory room that contains the server room that is a part of Suite 300. Those improvements for electrical and plumbing improvements were not installed to code according to Mr. King’s testimony. King then testified, ‘ . . . As a result, we’ve been unable to secure a building permit to relocate the door from Suite 325 to provide access from Suite 300. . . .’ . . . [¶] The court finds that Mr. King’s testimony regarding [Premiere’s] interference with possession of Suite 325, or its constructive possession of the same, was credible. This credibility was further strengthened by virtue of Mr. King’s testimony that the Plaintiff was unable to lease Suite 325 because of the situation regarding access to the server room in Suite 300.”

Judgment in favor of NHP was entered on May 19, 2017.

6. Premiere’s Motion To Vacate the Judgment

On July 11, 2017 Premiere moved pursuant to section 473 or the court’s inherent authority to vacate the judgment based on intrinsic fraud. According to Premiere, King had testified falsely at trial that Burbank had denied or delayed issuing a building permit to NHP until code violations in connection with suite 300 had been remedied. In fact, Premiere argued, public records obtained in July 2017 revealed NHP did not actually file a permit application to move the door until November 10, 2016, after King’s initial testimony in the action. Moreover, far from delaying action on that request, the city approved the plan for “relocation of existing door” the same day, November 10, 2016, indicating King had lied when he blamed purported code

violations as interfering with NHP's ability to obtain a construction permit to relocate the door.

In its opposition papers NHP argued Premiere's motion was untimely and without legal or evidentiary support. King had testified truthfully as to his efforts; and, to the extent he testified as to matters he learned from others, including that code violations had made obtaining necessary construction permits difficult, he had not been asked at trial the basis for his knowledge. NHP included a declaration from NHP's architectural firm and designer Lesley Ford, attesting that Ford had advised King that obtaining permits would be difficult based on code violations in suite 300.

The court denied Premiere's motion to vacate the judgment, concluding Premiere had not been diligent in filing its motion within a reasonable time: The public record evidence it relied on was discoverable at the time of trial and in the several months between King's testimony in November 2016 and entry of judgment in May 2017. In any event, the court found, King had testified truthfully to the best of his knowledge. The court concluded Premiere had not carried its burden to demonstrate intrinsic fraud.

Premiere filed a timely notice of appeal directed to both the judgment and the postjudgment order denying its motion to vacate. On September 21, 2017 we granted Premiere's petition for writ of supersedeas and ordered execution of the judgment

stayed pending disposition of the appeal on the condition that Premiere make timely rental payments for suites 325 and 300.⁷

DISCUSSION

1. *Standard of Review*

In reviewing an unlawful detainer judgment based upon a statement of decision following a bench trial, we review the trial court's legal interpretation of the governing statutes de novo and the court's factual findings for substantial evidence. (See *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801; *Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425.) Substantial evidence review requires that we ““consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings.] [Citations.]’ [Citation.] We may not reweigh the evidence and are bound by the trial court’s credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment.”” (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102; accord, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334 [“questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses . . . and the determination of [any] conflicts and inconsistencies in their testimony are matters for the trial court to resolve”]; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571 [“[w]hen two or more inferences can be

⁷ At the time Premiere petitioned this court for a writ of supersedeas, the parties agreed Premiere no longer occupied suite 355.

reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court”].)

Still, the term “substantial evidence” is not synonymous with “any” evidence. (*People v. Bassett* (1968) 69 Cal.2d 122, 138-139; *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 816.) To support the judgment, the evidence must be reasonable in nature, credible, and of solid value. (*Quigley v. McClellan* (2013) 214 Cal.App.4th 1276, 1283.) Moreover, “[a] judgment may be supported by inference, but the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork.”” (*Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1219; accord, *Quigley*, at p. 1283; *Frank*, at p. 816.)

2. Governing Law

An unlawful detainer action is a summary proceeding to determine the right to possession of real property. (See § 1161 et seq.; *Markham v. Fralick* (1934) 2 Cal.2d 221, 226 (*Markham*).) It may be initiated by a landlord when, among other things, a tenant continues in possession of the property without payment of rent provided the landlord has served the tenant with at least a three-days’ notice to quit the premises or pay rent. (§ 1161, par. 2 [prescribing items to be included in the notice].) Because of the summary nature of the proceeding,⁸ the

⁸ Because the primary purpose of an unlawful detainer action is to quickly recover possession of leased premises from a defaulting lessee, unlawful detainer actions are governed by procedural limitations allowing for a streamlined hearing process. (*Markham, supra*, 2 Cal.2d at p. 227.) For example, such actions are subject to calendar preference and shorter

landlord seeking to utilize the unlawful detainer remedy must demonstrate strict compliance with the statutory notice requirements. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 749 (*Culver Center*) [statutory requirements governing unlawful detainer actions “““must be followed strictly, otherwise a landlord’s remedy is an ordinary suit for breach of contract with all the delays that remedy normally involves and without restitution of the demised property”””]; *WDT-Winchester v. Nilsson* (1994) 27 Cal.App.4th 516, 526] (*WDT-Winchester*) [same].)

The mandate for strict compliance with statutory requirements generally means the three-days’ notice to quit must state precisely the amount of rent due (*Levitz Furniture Co. v. Wingtip Communications, Inc.* (2001) 86 Cal.App.4th 1035, 1038 (*Levitz*); and a notice that seeks rent in excess of the amount due is invalid and will not support an unlawful detainer action. (*Ibid.*; *Ernst Enterprises, Inc. v. Sun Valley Gasoline, Inc.* (1983) 139 Cal.App.3d 355, 359.) For commercial landlords, however, the standard of “strict compliance” is somewhat more forgiving. A notice to quit commercial premises may, as the notices did here, identify an amount due as “a reasonable estimate” of the rent due and owing. (§ 1161.1, subd. (a); *WDT-Winchester, supra*, 27 Cal.App.4th at p. 526; see *Levitz*, at p. 1040 [a less exacting standard makes sense in commercial context where rental

briefing schedules; and the tenant is not permitted to file a cross-complaint to litigate related issues. (See § 1166 et seq; *Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 906, fn. 5.)

amount due is “not always easily fixed or readily ascertained by simply reading the terms of a lease”].)⁹

For purposes of satisfying this statutory requirement, the amount claimed in the notice to quit is presumptively reasonable if the court or jury determines the amount stated in the notice does not exceed the actual amount due by more than 20 percent. (§ 1161.1, subd. (e); see *WDT-Winchester*, *supra*, 27 Cal.App.4th at p. 532.) If the court finds at trial the amount identified in the notice exceeds the amount due by more than 20 percent, the landlord bears the additional burden of proving that the amount sought in the notice to quit was nonetheless reasonably estimated despite the greater than 20 percent variance. (*WDT-Winchester*, at p. 531.) If the landlord fails to carry that burden, the notice to quit is invalid and cannot support an unlawful detainer action. (*Ibid.*)

In the unlawful detainer proceeding the recovery of rent “is a mere incident to the main object” of obtaining possession. (*Markham*, *supra*, 2 Cal.2d at p. 227; accord, *Garfinkle v. Montgomery* (1952) 113 Cal.App.2d 149, 153.) “If a tenant vacates the premises and surrenders possession to the landlord prior to the complaint being filed, then no action for unlawful

⁹ The commercial tenant may in response to a notice to quit tender its own reasonable estimate. (§ 1161.1, subd. (a).) “If the court determines that the amount so tendered by the tenant was less than the amount due, but was reasonably estimated, the tenant shall retain the right to possession if the tenant pays to the landlord within five days of the effective date of the judgment (1) the amount previously tendered if it had not been previously accepted, (2) the difference between the amount tendered and the amount determined by the court to be due, and (3) any other sums ordered by the court.” (*Ibid.*)

detainer will lie” (*Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905-906 (*Briggs*); accord, *Markham*, at p. 225.) In such a case, the landlord’s remedy to recover rent due and owing is not an unlawful detainer proceeding, but an action for breach of contract. (*Briggs*, at p. 906, fn. 5; *Culver Center*, *supra*, 185 Cal.App.4th at p. 749.)

3. *The Court Erred in Concluding Premiere Was in Possession of Suite 325 at the Time NHP Filed Its Unlawful Detainer Complaint*

a. *The trial court’s “constructive possession” theory*

Premiere contends the trial court applied a legally incorrect theory of “constructive possession” to support its unlawful detainer judgment. According to Premiere, it was either in possession of suite 325 at the time NHP filed its unlawful detainer complaint or it was not. If it was not, as Premiere insists the undisputed evidence shows, then the rental amounts identified in the notices to quit were substantially inaccurate and cannot support an unlawful detainer action.

As a linguistic matter, Premiere is correct that “constructive possession” is not a recognized term in the governing statutes or case authority. Nonetheless, in citing *Cohen v. Superior Court* (1967) 248 Cal.App.2d 551 (*Cohen*) to support its constructive possession finding, the court made its meaning clear: If a tenant purports to surrender the premises but leaves behind property or interferes with the landlord’s repossession of the premises in a manner that constitutes a “holding over,” such that the landlord is effectively deprived of its right to possession, the tenant’s purported surrender is incomplete and does not preclude the unlawful detainer proceeding. (*Id.* at p. 554.)

In *Cohen, supra*, 248 Cal.App.2d 551, a landlord initiated an unlawful detainer action, claiming the tenants' failure to remove certain equipment following termination of the lease constituted a holding over equivalent to physical occupation. The tenants, who had surrendered the premises before the landlord filed his unlawful detainer complaint, argued the equipment was a fixture belonging to the landlord. Without reaching the question of which party owned the equipment, the trial court ruled in favor of the tenants, concluding their surrender of the premises precluded the unlawful detainer action. (*Id.* at p. 553, & fn. 3.)

The court of appeal granted the landlord's petition for a writ of mandate and directed the trial court to conduct a hearing to consider whether the tenants owned the equipment and, if so, whether leaving the equipment behind was tantamount to a holding over. The *Cohen* court explained, "[T]he issue of possession remains. The record established by the pleadings and the declarations demonstrates that the issue of possession can only be resolved by a determination of the disputed question of the title to the property which remains in the premises, and, if it is found to belong to the tenants, the additional question of whether their failure to remove it constitutes an unwarranted interference with the landlord's right to possession." (*Cohen, supra*, 248 Cal.App.2d at p. 554.) The fact the tenants had surrendered their keys to the landlord, the court ruled, was not dispositive. If the tenants "own the equipment their failure to remove it from the premises may constitute a holding over which deprives the landlord of his right to possession. [Citation.] [The tenants'] delivery of the keys to petitioner does not constitute a

surrender of the premises unless petitioner accepted them with the intent of retaking possession of the premises.” (*Ibid.*)

Markham, supra, 2 Cal.2d 221, relied on by the *Cohen* court, further illustrates the principle that possession is surrendered when a tenant does everything in its power to return the premises. In *Markham* the landlord served her lessees with a notice to quit or pay rent, but not the lessees’ subtenants who were in actual possession of the premises. Upon being served with the notice to quit, the lessees immediately informed the landlord in writing of their surrender of the premises; they also informed their subtenants and ceased collecting rent from them. In her unlawful detainer action against the lessees, the landlord argued the lessees continued to remain in possession of the premises by virtue of their subtenants’ occupancy. The trial court disagreed, and the Supreme Court affirmed. The Court stated, “In the instant action, the evidence shows that the [lessees] had surrendered their individual possession of the premises to the plaintiff within three days after the service of the notice to pay rent or quit. They notified the plaintiff in compliance with her demand for the rent or for the surrender of the premises, that they surrendered to her the possession of the premises; they notified their agent to collect no more rent from the subtenants; and also notified the subtenants that neither they nor their agent would collect any rent in the future. We think it is apparent from the evidence that [lessees] did all within their power to comply with plaintiff’s demand for the surrender of said premises, except to oust their subtenants and turn over to the plaintiff the premises in an absolutely vacant and tenantless condition. Plaintiff had it in her power to compel the defendants to free said premises of the possession of said subtenants before defendant’s

surrender of said premises would be complete. She neglected to exercise this right by declining to serve notice to quit upon the subtenants. . . . [A]s the [lessees] surrendered the possession of said premises, subject only to the possession of these subtenants, they did all that was required of them to put the plaintiff in possession and to divest themselves of such possession. As the [lessees] were not in the possession of said premises at the date of the commencement of said action, they were not guilty of unlawful detainer. An action, therefore, in unlawful detainer will not lie.” (*Id.* at pp. 224-225; accord, *Briggs, supra*, 53 Cal.App.3d at p. 906 [because the tenant had done everything it could to surrender premises to landlord short of ousting the subtenant, the court erred in concluding landlord had established unlawful detainer; landlord’s remedy for rent and damages could not be found in summary unlawful detainer proceeding].)

b. *The court’s finding Premiere interfered with NHP’s repossession of suite 325 in a manner tantamount to holding over is not supported by substantial evidence*

The evidence was undisputed that Premiere had moved its equipment and employees out of suite 325 on October 5, 2015; NHP had formally accepted the surrender in writing “in accordance with the lease” following a physical inspection of the suite on October 9, 2015; and NHP ceased charging rent and began marketing that suite for lease at that time. In concluding Premiere continued to be in possession of suite 325 notwithstanding this surrender, the court relied on (1) Premiere’s continuing need for access to suite 325; (2) NHP’s difficulty in leasing the suite after Premiere’s surrender; and (3) King’s testimony that Premiere continued to occupy and maintain large laboratory equipment in suite 300 that made relocating the door

difficult and had also made electrical and plumbing improvements to suite 300 that did not comply with applicable building codes, hindering NHP's ability to obtain necessary construction permits. The court also inferred from the cooperation paragraph in the September 2016 stipulation to continue trial that Premiere had not cooperated with NHP's efforts to relocate the door prior to its execution of the September 2016 stipulation.

Significantly, as NHP acknowledges, all this evidence, including King's testimony, relates to Premiere's possession of suite 300, not suite 325.¹⁰ Moreover, while we doubt the inclusion of a cooperation paragraph in the stipulation to continue the trial date is substantial evidence of Premiere's lack of cooperation prior to that date,¹¹ the lack of cooperation the court inferred also

¹⁰ In its respondent's brief NHP asserts, "The trial court did not find that Premiere interfered because it did not relocate the door itself. [Citation.] Premiere interfered by continuing to occupy suite 300." "What matters," NHP continued in its brief, "is that Premiere did not end its occupation of suite 300, which by itself interfered with NHP's possession of suite 325," making that suite "unleasable."

¹¹ As drafted, the stipulation stated Premiere's counsel had a serious personal family matter requiring out-of-town travel and had requested a one-month continuance of the trial in consideration for which Premiere would pay a specified sum in rent. (See fn. 5, above.) In addition, the stipulation provided for the parties' mutual cooperation with the relocation of the door. There was no evidence that paragraph was included because Premiere's cooperation had not previously been forthcoming; such an inference is simply conjecture or speculation. (*Joaquin v. City of Los Angeles*, *supra*, 202 Cal.App.4th 1217, 1219 [to withstand

related to suite 300, not suite 325. Simply stated, there was no evidence that Premiere left equipment or otherwise engaged in a holding over of suite 325.

NHP's assertion that Premiere's continuing occupation of suite 300 following its surrender of suite 325 constitutes a holding over in the latter suite misses the mark. The second amendment to the lease expressly contemplates that Premiere may surrender suite 325 without concomitantly surrendering the other suites. Moreover, as NHP acknowledges, whether NHP remained contractually obligated under section 5 to move the door for Premiere's benefit after Premiere ceased paying its holdover rent is immaterial.¹² If the location of the door interfered with NHP's ability to re-lease suite 325, NHP had the power to move the door once Premiere surrendered that suite. That NHP had not done so, making re-leasing of that property difficult, does not negate Premiere's undisputed surrender of the

substantial evidence review inference must be based on evidence and not on speculation, conjecture or guesswork].)

¹² The parties' lease authorized a holdover tenancy with NHP's written consent. Under California law it is presumed that a holdover tenancy continues all of the lease's terms if the tenant pays rent and the landlord accepts it. (See Civ. Code, § 1945 ["[i]f a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year"].) Of course, it is also the case that if a tenant materially breaches the contract, the landlord may declare a forfeiture and treat the contract as terminated. (See *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 82.)

premises. (Cf. *Markham, supra*, 2 Cal.2d at p. 224 [“[The landlord] had it in her power to compel the defendants to free said premises of the possession of said subtenants She neglected to exercise this right by declining to serve notice to quit upon the subtenants”]; *Briggs, supra*, 53 Cal.App.3d at p. 906 [issuance of the notice to quit on the subtenants was within landlord’s power; “[a] landlord cannot avoid a tenant’s surrender of possession merely by purporting to retain subtenants on his behalf”].)

4. *NHP’s Alternative Interpretation of the Lease Is Without Merit*

NHP offers an alternative interpretation of the lease that it insists makes Premiere’s surrender of suite 325 immaterial to the question whether the amounts in the notices to quit were reasonably estimated. According to NHP, the original lease identified the premises as suite 300, which at that time included the square footage later comprising suite 325. The first amendment to the lease redefined and expanded the premises to include the premises identified in the original lease plus suite 355. The second amendment to the lease did not modify the definition of premises in the first amendment. In fact, NHP argues, if anything paragraph 1 of the second amendment made clear that while the premises would now be subdivided into three “portions”—suites 300, 325, and 355 with different square footage allocated to each—the premises remained the entire third floor, as illustrated in Exhibit A to the Second Amendment To Lease.¹³

¹³ Paragraph 1(a) of the second amendment, identifying new terms for each of the three suites, describes the suites as portions of the premises: “The Term with respect to that portion of the Premises identified as Suite 300 . . . is hereby extended until

Accordingly, NHP contends, Premiere's occupation of any part of those premises, including suite 300, without payment of the aggregate rent due is a holding over requiring forfeiture of the entire "premises." (See § 1161, par. 1 [unlawful detainer occurs when, absent landlord's agreement, tenant continues in possession "of the property, or any part thereof . . ."]; *Richard v. Degen & Brody, Inc.* (1960) 181 Cal.App.2d 289, 292 "[t]he fact that Allied Stores was in possession of only part of the premises does not alter its liability, for it occupied . . . the main portion of the leased premises, and thereby effectively precluded plaintiff's enjoyment of any portion of the premises"], disapproved on another ground in *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 498.) Because it is undisputed that Premiere owed rent for all three suites, NHP continues, the notices to quit were accurate and supported the unlawful detainer action.

At the threshold, apart from King's allusion at trial to the definition of premises, NHP did not make this argument at trial.¹⁴

August 31, 2018. . . . Upon the expiration of the Term with respect to the Imaging Premises and/or Suite 355, Tenant shall vacate and surrender that portion of the Premises . . . in accordance with the applicable terms of the Original Lease."

Paragraph 1(b) of the second amendment and Exhibit A of that amendment identified and depicted the newly allocated square footage for each of the three suites.

¹⁴ At trial King testified the premises included the entire third floor. Asked the basis for that conclusion, King testified, "[A]ll three of the suites were defined as 'the premises.' The lease speaks for itself." Although NHP suggested at oral argument that it had also submitted this interpretation of the lease in its closing trial brief, in fact that brief argued the legal effect of the interlocking nature of the two suites. NHP did not address in

Accordingly, the court had no opportunity to consider, if appropriate, extrinsic evidence of a latent ambiguity in the lease agreement and the parties' actual contractual intent. (See generally *Pacific Gas & Electric Co v. G.W. Thomas Drayage & Rigging, Co. Inc.* (1968) 69 Cal.2d 33, 40; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1133.)

On its face, the unambiguous language in the initial lease and its subsequent amendments does not support NHP's interpretation. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393-394 [absent conflicting extrinsic evidence, interpretation of contract is a judicial function when it is based on language of contract alone]; *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350-1351 [same].) As discussed, the second amendment to the lease identifies different rental obligations and tenancy lengths for each suite and grants Premiere the option of not extending its lease on suite 325 while maintaining possession of suite 300. Significantly, nothing in the lease or the amendments remotely suggests that a failure to pay rent on one suite would result in a forfeiture of all the suites under the lease. That NHP understood the lease was comprised of different terms for each suite is further evidenced by NHP's acceptance of Premiere's return of suite 325 "in accordance" with the lease. (See *City of Hope National Medical Center*, at pp. 393-394 [a party's predispute, post-contracting conduct is powerful evidence of that party's intent and understanding of the contract at the time it entered into the agreement]; *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 753-754 [same].) Accordingly, NHP's proffered interpretation of the lease,

that brief the contractual interpretation of premises that it has advanced on appeal.

unsupported by the language of agreement, fails as a matter of law.

5. The Notices To Quit or Pay Rent Were Defective and Fatal to NHP's Unlawful Detainer Action

NHP does not dispute that more than 20 percent of the amounts identified in each of the notices to quit related to suite 325, nor does it contend that the amounts in the notices were reasonably estimated even if monies owed for suite 325 had not been included. Because Premiere had surrendered suite 325 prior to the issuances of the notices to quit, those notices, which included unreasonable statements of the rent due, were legally deficient and cannot support an unlawful detainer action. (See *Levitz, supra*, 86 Cal.App.4th at p. 1041; *WDT-Winchester, supra*, 27 Cal.App.4th at p. 526.)¹⁵

DISPOSITION

The judgment is reversed. Premiere Medical Center of Burbank, Inc. and Dr. Marsh are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

WILEY, J.*

¹⁵ In light of our holding that the unlawful detainer judgment was in error, we do not consider Premiere's arguments directed to its motion to vacate the judgment.

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