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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

CASSANDRA OVERBY, Plaintiff and Respondent, v. MIGUEL A. SANTIAGO et al., Defendants and Appellants.	B281409 (Los Angeles County Super. Ct. No. YC070750)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stuart M. Rice, Judge. Affirmed.

D. Shawn Burkley for Defendants and Appellants.

Dan Hogue for Plaintiff and Respondent.

Appellants Miguel and Gerel Santiago[1] (together, the Santiagos) challenge a judgment awarding respondent Cassandra Overby specific performance of a purchase agreement related to the Santiagos' condominium. On appeal, the Santiagos assert the purchase agreement had terminated and the trial court erred in finding they waived the deadline to close escrow. They also contend specific performance was inappropriate. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 4, 2014,[2] the parties executed a residential purchase agreement and joint escrow instructions (Purchase Agreement), whereby the Santiagos agreed to sell their condominium to Overby. Overby indicated she would obtain a loan to cover a substantial portion of the sales price.

Per the Purchase Agreement, "Close of Escrow"[3] was to occur 45 days after acceptance. In Paragraph 14(E), the Purchase Agreement provides that, "[b]efore 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)."[4] In Paragraph 28, the Purchase Agreement states,

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[1] The Santiagos were sued and appear in their capacities as trustees of the Santiago Revocable Trust dated September 25, 1990.

[2] Unless otherwise noted, all referenced dates are in the year 2014.

[3] "Close of Escrow" is defined as the "date the grant deed, or other evidence of transfer of title, is recorded."

[4] "C.A.R. Form DCE" refers to a specific California

"Time is of the essence. . . . Neither this Agreement nor any provision in it may be extended, amended, modified, altered or changed, except in writing Signed by Buyer and Seller." Around April 9, the parties executed additional escrow instructions (Escrow Instructions), which state escrow would close no later than May 23.[5]

The parties were represented by the same real estate agency throughout the transaction, although they communicated through different individuals at the agency. Overby communicated through Bill Ruane and his associate, Athena Dinh. The Santiagos communicated through Jim Marak (listing agent).

While in escrow, the Santiagos' upstairs neighbor notified their home owner's association (HOA) of issues with the floor in his unit, which he suspected were caused by renovations to the Santiagos' unit. In response, the HOA sent an email to the escrow holder, stating there was a possible structural issue with the property that would need to be resolved before escrow could close. The HOA, through counsel, also sent a letter to the

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Association of Realtors form used for demands to close escrow. The Purchase Agreement states that references to a "C.A.R. Form means the specific form referenced or another comparable form agreed to by the parties."

[5] Neither party acknowledges the discrepancy between the escrow closing deadlines in the Purchase Agreement and Escrow Instructions. Under the Purchase Agreement, escrow was to close by May 19 (45 days from acceptance on April 4). Under the Escrow Instructions, however, escrow was to close by May 23. Although the Escrow Instructions are explicit that they do not supersede terms in the Purchase Agreement, both parties agree the deadline to close escrow was May 23.

Santiagos indicating they would need to seek retroactive approval for the remodeling work, which would require a report from a structural engineer. The letter noted that "any buyer of your unit would be buying with the understanding that they are inheriting this violation and will need to repair it."

On April 29, the listing agent contacted Overby's mortgage loan originator and informed her that the appraisal—which was required as a condition of the loan—could not proceed until the Santiagos resolved their issue with the neighbor.

A few days later, the Santiagos wrote to the escrow holder and requested that escrow be cancelled. They explained that the dispute with the neighbor and HOA would not be resolved by May 23, and may, in fact, take several months to resolve. The escrow holder forwarded Overby an amendment to cancel escrow, but she refused to sign it.

On May 8, Dinh wrote to Overby, stating, "I just spoke with the listing agent, the seller is not cancelling. This property will be on hold until we get clearance from HOA." The next day, Overby offered to extend the close of escrow to August 7. The Santiagos did not respond to the offer.

About a week later, Overby requested an update on the Santiagos' progress resolving the issues with the neighbor. Dinh responded that the Santiagos "are still dealing with HOA and the city to try to get the issues resolved . . . no resolution yet."

On May 17, Gerel Santiago informed the listing agent that, earlier in the day, she had been at the condominium "to complete all the items on the escrow's list to be repaired/resolved[]." She also noted, "It is reassuring to know the buyer is still interested after all this."

The May 23 deadline came and went without escrow closing. In June, a structural engineer issued a report finding the Santiagos' renovation to their kitchen caused the issues with the neighbor's floor, but it was not a "structural life safety concern." In response, the HOA informed the Santiagos that it was taking no position regarding the repairs, and it was up to the Santiagos and the neighbor to resolve the dispute.

On July 16, the escrow holder asked Overby to sign an amendment to cancel escrow. Overby refused and insisted the Santiagos were in breach of the Purchase Agreement. In response, Gerel Santiago wrote to the escrow holder, explaining that the Santiagos had "diligently attempted" to resolve the dispute with the neighbor, yet it was still unclear how long it would take to resolve. She noted the Santiagos had rented the unit because it "became obvious that it would take some time to resolve this matter."

The next day, Gerel Santiago sent a similar letter to Overby, but added, "We can understand your position but we have done everything to resolve this matter but it is obvious that this dispute may take longer than any of us anticipated. I respectfully ask you to sign the agreement to close escrow."

About two months later, Gerel Santiago wrote to the listing agent, "I am sorry that I have not gotten back to you. My husband had a heart attack last night and he is in ICU . . . . Right now I am focusing on him and this will have to wait." It is not clear what prompted the email.

In October, Gerel Santiago wrote to Overby: "When you contacted us by phone several weeks ago, I was taken aback. I thought the escrow . . . had been closed some time ago. You stated that you still wanted to purchase the property even

though you were aware of the problems associated with . . . [the neighbor]." The letter further indicated that the parties had negotiated a new price for the sale, but the Santiagos would not agree to an additional inspection because they did not want to disturb their tenant or interact with the neighbor. Gerel Santiago stated their "position at the present, is to have no contact with anyone and wait until [the neighbor] decides to take further legal action. Therefore I do not think discussion of this matter is merited and wish you to stop contacting us regarding this property."

Overby responded by requesting that the parties mediate their dispute. On November 7, the Santiagos' attorney wrote to Overby, "I understand that the escrow period closed without the transaction being completed. The escrow period was not extended by a writing signed by the buyer and sellers. This means that the escrow is canceled."

In July 2015, Overby filed a complaint for specific performance or damages for breach of contract. The parties stipulated that, in lieu of live trial testimony, they would submit written briefs and rely entirely on documentary evidence. The parties further agreed that the trial court would make an oral statement of decision, which would form the factual and legal basis for the judgment. The parties also waived their right to file objections to the oral statement of decision.

In their opening brief, the Santiagos argued the time is of the essence provision in the Purchase Agreement gave them the right to terminate the contract when escrow failed to close by May 23. Overby responded that the Santiagos had waived the May 23 deadline and were estopped from arguing that she had not performed by that date.

The trial court issued an oral statement of decision on January 10, 2017. After briefly summarizing the evidence, the court determined the Santiagos "waived the hard escrow closing date of May 23, 2015, [*sic*] through their own contradictory actions of expressing their intent to put the sale on hold, rather than to seek cancellation and staying in communication with [Overby]." It further determined the Purchase Agreement remained enforceable, and Overby was entitled to specific performance pursuant to its terms.

The court entered judgment in favor of Overby, and the Santiagos timely appealed.

DISCUSSION

I. The Purchase Agreement Did Not Automatically Terminate

The Santiagos do not dispute that they failed to perform or tender performance under the terms of the Purchase Agreement. They insist, however, that the Purchase Agreement is unenforceable because it automatically terminated when escrow failed to close by the May 23 deadline. We disagree.[6]

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[6] The Santiagos' argument before the trial court was slightly different. Rather than asserting the Purchase Agreement ceased to exist beyond the escrow deadline, the Santiagos argued they had the unilateral right to cancel the agreement beyond that date. Although we need not consider new theories raised for the first time on appeal, we exercise our discretion to consider the Santiagos' argument because it presents a pure question of law related to the interpretation of the Purchase Agreement. (See *Folden v. Lobrovich* (1959) 171 Cal.App.2d 627, 630.)

Generally, " 'if it is not clearly specified that time is of the essence in an escrow transaction, a "reasonable time" is allowed for performance of the escrow conditions.' [Citations.]" (*Conservatorship of Buchenau* (2011) 196 Cal.App.4th 1031, 1039; see *Fowler v. Ross* (1983) 142 Cal.App.3d 472, 479.) Where, however, time is specifically made of the essence, "California courts generally . . . strictly enforce time deadlines in real estate sales contracts, permitting the seller to cancel after the time specified . . . *unless* there has been a waiver or potential forfeiture." (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1341 (*Galdjie*).)

Here, the Purchase Agreement provides that the "Close of Escrow shall occur" 45 days after acceptance. It also contains a general time is of the essence provision, and mandates that the agreement not be "extended, amended, modified, altered or changed," except in writing signed by the parties. The Santiagos contend that, pursuant to these provisions—and the fact that a third party "frustrated" the sale[7]—the Purchase Agreement "cease[d] to exist" when the transaction failed to "consummate" by May 23. Thus, the Santiagos assert, they were free of any obligations to Overby beyond that date, and are not in breach of contract.

"[W]hen interpreting a contract, we strive to interpret the parties' agreement to give effect to all of a contract's terms, and to avoid interpretations that render any portion superfluous, void or inexplicable." (*Brandwein v. Butler* (2013) 218 Cal.App.4th

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[7] Throughout their briefing on appeal, the Santiagos frequently suggest the neighbor and HOA frustrated the purpose of the Purchase Agreement. They do not, however, specifically argue frustration as a defense to Overby's claims.

1485, 1507.) Here, the Santiagos' suggested interpretation ignores Paragraph 14(E),[8] which provides that either party "may cancel this Agreement for failure of the other party to close escrow pursuant to the Agreement." However, before doing so, the party "must first Deliver to the other [party] a demand to close escrow."[9] Paragraph 14(E) would be superfluous if, as the Santiagos urge, the Purchase Agreement automatically terminates when escrow does not close by the deadline. Accordingly, while the Santiagos may have had the right to cancel the Purchase Agreement after Overby failed to perform by May 23, we do not agree that the agreement automatically terminated when escrow failed to close by that date.[10]

The Santiagos' reliance on *Pittman v. Canham* (1992) 2 Cal.App.4th 556 (*Pittman*) is misplaced. In *Pittman*, the parties agreed to close escrow on a real estate transaction by December 24. (*Id.* at p. 558.) When neither party had performed

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[8] Neither party directly addresses Paragraph 14(E). Instead, both parties focus on Paragraph 14(C), which also provides the sellers with cancellation rights, but under circumstances not applicable here.

[9] The demand to close escrow must be on a specific form—C.A.R. Form DCE—or a comparable form agreed to by the parties. There is no evidence that the Santiagos delivered to Overby C.A.R. Form DCE or a comparable form.

[10] Our interpretation does not render the time is of the essence provision superfluous, as it would continue to apply to other deadlines in the Purchase Agreement, of which there are many. (See *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 96 [time is of the essence provision may apply to some, but not all, deadlines].)

by that date, the seller agreed to sell the property to someone else. (*Id*. at pp. 558–559.) The original buyer sued for breach of contract, but the Court of Appeal held that, "because time was made the essence of the contract, the failure of both parties to tender performance by December 24 . . . discharged both from performing. Neither party can hold the other in default and no cause of action to enforce the contract arises." (*Id*. at p. 560.)

Pittman is distinguishable because the purchase agreement in that case set no conditions precedent on cancellation in the event escrow did not close by the deadline. Here, in contrast, Paragraph 14(E) explicitly required that the Santiagos deliver a demand to close escrow prior to cancelling the Purchase Agreement for that reason. In addition, the *Pittman* court suggested a cause of action would have arisen had the seller waived the escrow deadline or prevented the buyer from performing by the deadline. (*Pittman, supra*, 2 Cal.App.4th at pp. 560–561; see *Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1131; *Galdjie, supra*, 113 Cal.App.4th at pp. 1341–1342.) Here, the court found the Santiagos waived the escrow deadline, and Overby alleged the Santiagos prevented her from performing by refusing to allow the appraisal to go forward.[11] Accordingly, *Pittman* is not controlling.

II. Substantial Evidence Supported the Trial Court's Waiver Finding

The Santiagos contend the trial court erred in finding they waived their right to enforce the May 23 deadline. We disagree.

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[11] The trial court did not reach this issue given its waiver finding.

A. Standard of Review

The parties dispute the proper standard of review of the waiver finding. The Santiagos urge us to review the issue de novo, while Overby maintains we should review the finding for substantial evidence.

According to the Santiagos, de novo review is appropriate because the underlying facts are undisputed and the waiver question is "predominantly legal." (See *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437 [independently reviewing question of law based on stipulated facts].) However, contrary to the Santiagos' contentions, "the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196; see *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443; *Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 679.) We also do not agree with the Santiagos that resolution of the waiver issue "requires a critical consideration, in a factual context, of legal principles and their underlying values . . . ." (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) Rather, the "pivotal issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right," (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60), which involves a relatively straightforward factual determination.

Moreover, even when the facts are undisputed, if conflicting inferences may reasonably be drawn from those facts, "this court is without power to substitute its own inferences or deductions for those of the trier of fact . . . . We must accept as true all

evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631; see *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 633; *Axis Surplus Ins. Co. v. Glencoe Ins. Ltd.* (2012) 204 Cal.App.4th 1214, 1222.) The Santiagos seem to acknowledge this general rule and that the evidence might be subject to conflicting inferences. Nonetheless, they insist we should make an exception because the law "disfavors inferences of a waiver." We are not persuaded that an exception is warranted.

Accordingly, we review the trial court's waiver finding for substantial evidence. (*St. Agnes Medical Center v. PacifiCare of California, supra*, 31 Cal.4th at p. 1196; see *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443 [waiver of right to contractual arbitration reviewed for substantial evidence].) When reviewing a factual finding for substantial evidence, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660; see *County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 540.) Moreover, because the Santiagos did not bring to the trial court's attention omissions or ambiguities in the statement of decision, we may infer the trial court made all factual findings necessary to support the judgment. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58–60; Code Civ. Proc., § 634.)

B. Analysis

Waiver " 'is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only.' " (*Old Republic Ins. Co. v. FSR Brokerage, Inc., supra*, 80 Cal.App.4th at p. 678.) It may be "either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [Citation.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.) "The pivotal issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd., supra*, 30 Cal.App.4th at p. 60.) "Like any other contractual terms, timeliness provisions are subject to waiver by the party for whose benefit they are made." (*Galdjie, supra*, 113 Cal.App.4th at p. 1339, fn. omitted.)

In finding the Santiagos waived the May 23 deadline, the trial court relied heavily on *Galdjie, supra*, 113 Cal.App.4th 1331. In that case, the parties entered into a purchase agreement related to an apartment, and set an April 9 deadline to close escrow. (*Id*. at p. 1334.) Like the present case, the purchase agreement contained a time is of the essence provision and mandated that modifications to the agreement be in writing. On April 1, the sellers informed the buyer they would not extend escrow beyond April 9, but escrow did not close by that date. (*Ibid*.) Between April 9 and early May, the buyer and sellers were in constant communication, the sellers assisted the buyer in obtaining a loan, and the sellers orally agreed to extend escrow. (*Id*. at p. 1136.) On May 13, however, the sellers requested cancellation of escrow on the basis that escrow had not closed on April 9. (*Ibid*.) The trial court determined the sellers' conduct

after April 9 evidenced a waiver of the escrow deadline, and awarded the buyer specific performance. The Court of Appeal affirmed the judgment after rejecting the sellers' argument that the purchase agreement automatically terminated on April 9. (*Id*. at p. 1342.)

Here, there was substantial evidence indicating the Santiagos intended to relinquish their right to enforce the May 23 deadline. In early May, the Santiagos requested escrow be cancelled, citing the fact that the issues with the neighbor and HOA would not be resolved by the May 23 deadline. However, after Overby indicated she wanted to proceed with the sale, the Santiagos represented that they would instead put the transaction "on hold" pending resolution of those issues.[12] Consistent with this representation, less than a week before the escrow deadline, and despite her knowledge that escrow would not close by that date, Gerel Santiago continued to work on "items on the escrow's list to be repaired/resolved." She also informed the listing agent it was "reassuring" to know Overby wanted to go forward with the sale. From this, the trial court could have reasonably inferred the Santiagos considered the sale to be "on hold," and did not intend to cancel the Purchase Agreement for failure to close escrow by the deadline.

Evidence of the Santiagos' conduct after the deadline further supported the waiver finding. When the May 23 deadline came and went, for example, the Santiagos did not immediately

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[12] The Santiagos assert the May 8 email in which Dinh relayed this information to Overby is "clearly third-party hearsay by an assistant who has flagrantly overstepped any authority granted to her." The Santiagos, however, forfeited this objection by failing to raise it below. (*Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 726.)

deliver a notice to close escrow or otherwise attempt to cancel the Purchase Agreement. Rather, they waited until mid-July—nearly two months after the deadline—to express any desire to cancel escrow. Even then, in their July 17 letter to Overby, the Santiagos did not cite the May 23 deadline as a reason to cancel escrow. Instead, they explained that, despite their best efforts, it remained unclear when the issues with the neighbor would be resolved. They also sought Overby's consent to cancel escrow, rather than asserting any unilateral right to cancellation based on the escrow deadline. When Overby refused to cancel, the parties continued to have occasional discussions about the sale over the next few months. It was not until November—more than five months after the May 23 deadline—that the Santiagos first claimed the deadline as a reason to cancel escrow. This was more than sufficient evidence from which the trial court could find a waiver.

III. Specific Performance Was Appropriate

The Santiagos assert specific performance was inappropriate because the Purchase Agreement did not provide a remedy for a situation where a third party frustrates the transaction. They contend this remedy was a material term of the contract, and without it, the Purchase Agreement was indefinite and unenforceable. We disagree.

" 'It is elementary that specific performance will not be enforced unless the contract not only contains all the material terms, but also expresses each in a sufficiently definite manner.' " (*Buckmaster v. Bertram* (1921) 186 Cal. 673, 676.) A remedy for frustration by third parties, however, is not a material term of the Purchase Agreement. Rather, it is a common law defense to a breach of contract claim. (See *Glenn R. Sewell Sheet Metal, Inc.*

v. Loverde (1969) 70 Cal.2d 666, 676, fn. 13.) Indeed, the Santiagos were free to assert a frustration defense before the trial court. For whatever reason, they chose instead to assert a defense based on the time is of the essence provision.[13] We do not agree that the Purchase Agreement was indefinite such that specific performance was inappropriate.[14]

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J. ROGAN, J.*

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[13] Before the trial court, the Santiagos also vaguely argued their performance was excused because it was impossible. The defense of impossibility is distinct from the defense of frustration. (*Lloyd v. Murphy* (1944) 25 Cal.2d 48, 53.)

[14] For the first time in their reply brief, the Santiagos assert specific performance was not appropriate because Overby was unable to perform on the day performance was due. We decline to consider this argument because the Santiagos failed to assert it before the trial court or in their opening brief on appeal. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764; *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.)

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