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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

GREENWICH INSURANCE COMPANY, Plaintiff and Appellant, v. ARGONAUT GROUP, INC., et al., Defendants and Respondents.	B281218 (Los Angeles County Super. Ct. No. BC439212)

APPEAL from judgment and order of the Superior Court of Los Angeles County, Elizabeth A. White, Judge. Reversed.

Clark Hill, David L. Brandon, Pamela A. Palmer, Steven L. Hoch, for Plaintiff and Appellant

Meylan Davitt Jain Arevian & Kim, Vincent J. Davitt, Shaunt T. Arevian, for Defendant and Respondent AGI Properties, Inc.

Crowell & Moring, Richard J. McNeil, for Defendant and Respondent Argo Group US, Inc.

Plaintiff and appellant Greenwich Insurance Company appeals from a judgment following an order granting summary judgment in favor of defendants and respondents Argonaut Group, Inc., AGI Properties, Inc., and Argo Group US, Inc. (collectively Argo), in this action arising out of an indemnity agreement. Argo, as the seller of real property, agreed to indemnify any cost based on hazardous materials in the groundwater, but the buyer agreed not to voluntarily undertake any further investigative or remedial action unless required by a governmental authority. Argo successfully argued in the trial court that the buyer's decision to participate in a program under the California Land Reuse and Revitalization Act of 2004 (CLRRA) (Health & Saf. Code, § 25395.60 et seq.) was a voluntary act that barred recovery under the indemnity contract. On appeal, Greenwich contends the decision to obtain oversight and a covenant not to sue under the CLRRA agreement was not a voluntary act that barred recovery under the indemnity contract. We conclude Argo did not submit evidence of an alternative to the CLRRA program that would have allowed the buyer to develop the property without requiring

groundwater investigation and remediation. Argo failed to shift the burden of proof on summary judgment. We reverse.

FACTS

Purchase and Indemnity

In 2003, Argo sold industrial property in Torrance, California, to Grae Lomita, LLC. Section 8.20 of the purchase agreement addressed remediation of hazardous materials as follows in pertinent part: "In the event from time to time Buyer discovers any Hazardous Materials . . . existing on the Property (including in the soil and groundwater) as of the Close of Escrow, which were not placed on the Property (including the soil or groundwater) by Buyer, its affiliate or anyone acting under Buyer's direction or authorization, and it is necessary to perform remediation of such Hazardous Materials to permit Buyer's intended development of the Property . . . , Buyer shall first submit to Seller a copy of all site environmental assessment reports in Buyer's possession (not previously provided to Seller) and shall submit a plan of action (including scope of work and estimated budget) ('Buyer's Action Plan') to Seller for its review, approval, or conditional approval or disapproval in its reasonable discretion. The plan of action shall be a plan for remediation of such Hazardous Materials, to the extent remediation is required by, and in accordance with, any and all Environmental Laws . . . applicable to the Property or, to

a point where 'no further action' is required by such Environmental Laws, to be evidenced by appropriate closure or other permits or approvals (if reasonably available) from agencies with jurisdiction over the Property.

"If Seller fails to respond in writing fifteen (15) business days after Seller's receipt of Buyer's Action Plan, Buyer's Action Plan shall be deemed approved. If Seller disapproves or provides conditional approval of Buyer's Action Plan, Seller shall within fifteen (15) business days thereafter provide its alternative plan of action (including scope of work and estimated budget) ('Seller's Action Plan'). If Seller's Action Plan is not provided prior to the end of such additional fifteen (15) business day period, Seller shall be deemed to have approved Buyer's Action Plan.

"If Seller provides a Seller's Action Plan, Buyer and Seller shall have two (2) weeks after Buyer's receipt of Seller's Action Plan to amicably agree on a final action plan. If no such agreement is reached within such two (2) week period, Buyer's environmental consultant and Seller's environmental consultant shall together select a third, independent environmental consultant ('Third Consultant') who shall determine the final action plan which shall be binding on Buyer and Seller. The final action plan shall include a firm bid, subject only to customary conditions.

"Each party shall bear its own costs prior to agreement on the final action plan, provided that the costs of the Third Consultant shall be shared equally by Buyer and Seller. In the event the costs of remediation are going to exceed the

amount set forth in the final action plan by more than 5% in the aggregate, Seller and Buyer shall within ten (10) business days negotiate and use good faith to agree on whether such excess cost is necessary to complete the remediation required by this Section 8.20. If no such agreement is reached, the parties shall submit the issue to the Third Consultant who shall decide the issue which shall be binding on Buyer and Seller.

"Subject to the foregoing, all costs and expenses of remediation pursuant to the final action plan, reduced by the amount of any such cost which would have been incurred by Buyer in the development of the Property had there been no such Hazardous Materials existing on the Property at the Close of Escrow, shall be [deducted from the purchase money note due Seller]."

In March 2005, Arcadis G&M, Inc. prepared a "Soil Remedial Action Work Plan" for Watt Developers on behalf of Grae. The Arcadis plan primarily addressed soil remediation. With respect to groundwater, it stated in pertinent part: "Chlorinated [volatile organic compounds] have affected groundwater beneath the Site. The [Los Angeles Regional Water Quality Control Board] is the default agency for dealing with assessment, remediation and closure for groundwater-affected sites. On May 20, 2003, Hart Crowser submitted a request to Dr. [Rebecca] Chou of the [Regional Board], via E-Mail, inquiring about the [Regional Board's] requirements for designating either the Torrance Fire Department or the [Los Angeles County Fire

Department (LACFD)] as the lead agency for soil closure on the subject site. After discussing Hart Crowser's request with management, Dr. Chou indicated . . . [¶] 1. Watt Developers can work with the LACFD to address soil issues at the Site, and to obtain closure for Site soil. [¶] 2. Watt Developers can proceed with a self-directed assessment of the groundwater at the Site. Dr. Chou requested that the [the Regional Board] be provided with existing data related to groundwater at the Site, and any future groundwater data collected as part of the site assessment. [¶] 3. Watt Developers should keep the [Regional Board] apprised of the project status. Dr. Chou requested that when the groundwater assessment was completed, that the [Regional Board] be advised of remediation plans, so they could ensure that Site development would not interfere with potential remediation needs."

The Arcadis plan noted that a 2003 subsurface investigation report prepared by Hart Crowser showed concentrations of volatile organic compounds in groundwater beneath the site, but only TCE and PCE exceeded the maximum contaminant levels (MCLs). "As PCE concentrations in [the perched zone area along the west property line] exceed MCLs, it is likely that remediation will be required. Groundwater remediation will be addressed separate from soil remediation (this document)." It similarly stated, "As concentrations of TCE in groundwater beneath the Site exceed MCLs, it is likely that clean-up will be required. Groundwater remediation will be addressed

separate from soil remediation (this document.)" Arcadis stated that it would perform a human health risk assessment using site data from previous assessments and calculate risk-based cleanup goals. The proposed goals would be "calculated to be protective of groundwater and human health." The LACFD approved the Arcadis plan in April 2005 as long as specified contingencies were met.

On November 29, 2005, Byron LeFlore, Jr., on behalf of Argo, and Rick Edwards, on behalf of Grae, entered into an indemnity agreement. The agreement stated that Grae had discovered hazardous materials in the soil and groundwater, primarily petroleum hydrocarbons and volatile organic compounds. Argo entered into the agreement with Grae to allow development of the property for residential, retail or other purposes permitted under the purchase agreement by addressing soil remediation pursuant to the provisions of the purchase agreement, and to protect Grae "from certain future costs and liability associated with the presence of Hazardous Materials in the groundwater under or in the vicinity of the Property as described below."

With respect to soil remediation, Grae agreed that "it will remediate Hazardous Materials under or in the vicinity of the Property pursuant to Section 8.20 of the Purchase Agreement substantially in accordance with the Soil Remedial Action Work Plan prepared by Arcadis, dated March 4, 2005, as approved by all regulatory authorities (the 'Plan'). . . . The Parties agree that the Plan shall be the approved 'Buyer's Action Plan' for purposes of Section 8.20 of

the Purchase Agreement. Upon completion of all work under the Plan, [Grae] shall certify the following to [Argo] that [(a)] it is satisfied that Hazardous Materials currently located in, on, and under the Property have been remediated sufficiently, (b) the Property has been rendered suitable for such residential, retail or other uses as are permitted under the Purchase Agreement, and (c) any residual Hazardous Materials do not create any liability for [Grae]. The amount related to costs and expenses incurred by [Grae] to complete the work pursuant to the Plan that shall be eligible for deduction by [Grae] from the balance of the Note pursuant to the terms of the Note (and any amendments in writing to the Note) and Section 8.20 of the Purchase Agreement shall not exceed $800,000.00" to remediate hazardous materials under the terms of the purchase agreement in accordance with the 2005 Arcadis soil remediation plan, which had been approved by regulatory authorities.

The indemnity provisions stated that Argo would indemnify Grae from any liability, claim, cost, or any other proceeding, which arose from or was based on hazardous materials in existence as of March 19, 2003, at the property or the adjacent Costco property that were contained or transported in groundwater. The agreement required Argo to accept or reject any claim for indemnification tendered by Grae within 10 days. Argo was required to promptly undertake any investigation, characterization, monitoring or remediation activities required under the indemnity agreement at Argo's expense, and to perform these activities

in compliance with environmental laws and government requirements.

The indemnity agreement prohibited Grae from taking voluntary action as follows: "[Grae] agrees not to voluntarily undertake any further investigative or remedial action with respect to Hazardous Materials in the Property other than in accordance with the Plan unless such action is required by a governmental authority under the Environmental Laws."

Assignment and CLRRA Plan

In March 2006, Grae sold the property to Rock-Lomita, LLC, and assigned its rights under the indemnity agreement, with Argo's consent. In an e-mail to Rock-Lomita's environmental consultant Mark Cousineau on March 15, 2006, Edwards suggested updating the data, revising the Arcadis remedial action plan, and consistent with prior meetings with the agencies involved, submitting it to the LACFD for soil remediation and the Regional Board for groundwater oversight as provided in the plan.

In May 2006, Cousineau sent a remedial action plan to Edwards that he stated was similar in scope to the plan proposed by Edwards' consultant. Cousineau's proposed plan would monitor, not remediate, groundwater in order to show that the soil remediation had been effective. He hoped to get approval of the plan from Edwards quickly because the plans were basically identical. He planned to approach the Regional Board as the lead agency. Edwards forwarded

the proposal to LeFlore. LeFlore replied that Argo had not consented to submission of any plan other than the one appended to the signed documents. Edwards forwarded LeFlore's response to Rock-Lomita.

In June 2006, Rock-Lomita purchased a pollution and remediation legal liability insurance policy from Greenwich. On June 5, 2006, Cousineau submitted information to Chou, believing the Regional Board was the lead agency for oversight on the project. On June 22, 2006, Chou notified Cousineau that an internal determination had been made that the Regional Board would not take the case. Instead, the California Department of Toxic Substances Control would be the lead agency, because the Regional Board had limited resources for oversight and the Department could provide faster response times. Cousineau was concerned, because in his experience, the Department was slower and more bureaucratic than the Regional Board. He told Rock-Lomita that the assignment to the Department was bad news. He added, "Our options are to meet and see if we can work with [the Department] or, withdraw our request and go to the County of [Los Angeles] who would normally be more reasonable to work with." It was decided that Cousineau would meet with the Department and discuss how the Department would provide oversight of the project.

The Department's traditional method for overseeing projects on which they had not sent an order was through a voluntary cleanup program. Property owners who walked in seeking the Department's oversight typically entered into a

voluntary cleanup program. At the end of the traditional voluntary cleanup program, the Department issued a "no further action" letter. The Department presented the CLRRA program to Cousineau as an alternative to the traditional program. The CLRRA plan was a new program that had been passed based on the changes in state law. The Department discussed the benefits of a CLRRA plan with him, including the liability protections that it offered. The property owner did not have to follow certain requirements and was allowed to use more presumptive remedies. The Department explained that the CLRRA program was a streamlined process compared to the traditional voluntary cleanup program, ending in a covenant not to sue once the work in the agreement had been completed. Instead of a "no further action" letter, the Department would provide the property owner with a covenant not to sue. The Department agreed to give Cousineau a draft of a voluntary cleanup agreement under the CLRRA statute.

In August 2006, Rock-Lomita submitted an application to the Department under the CLRRA program. In November 2006, Rock-Lomita entered into a CLRRA agreement with the Department. The express purpose of the agreement was to implement CLRRA for assessment and remediation of the site, so Rock-Lomita would qualify for the immunities afforded under CLRRA and the Department would be reimbursed for the costs it incurred. Rock-Lomita was permitted to voluntarily withdraw from the CLRRA program at any time, pursuant to the requirements of

Health and Safety Code section 25395.93, including, among others, "[d]emonstrating to the satisfaction of the agency that conditions at the site to which the agreement applies do not pose an endangerment to public health and safety or the environment."[1] (Health & Saf. Code, § 25395.93, subd. (a)(2).)

In Cousineau's view, "The CLRRA Agreement provided an avenue to formally work with the [Department] and to negotiate means to perform the required environmental remediation at the Site. Agency oversight is normally provided only when a particular site becomes a priority such to warrant the available State or federal resources. The CLRRA Agreement, however, allowed Rock-Lomita to gain immediate oversight for the Site remediation. The agreement also allowed Rock-Lomita to qualify for immunities under certain State statutes. In administering agreements under the CLRRA, the [Department] is required to apply the same laws, regulations and rules as to non-CLRRA cases."

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[1] Withdrawal would have the effect of leaving Rock-Lomita subject to the agency's other enforcement powers. In the event of withdrawal, section 25395.93, subdivision (a)(2) nevertheless provides, in relevant part, "If the agency determines that conditions at the site pose an endangerment to public health, safety, or the environment, this article does not prevent the agency from exercising its authority to take appropriate response actions or to cause the person or persons responsible for the endangerment to take appropriate response actions."

In February 2007, a supplemental site investigation work plan was prepared by Ardent Environmental Group, Inc., for Cousineau, the Department and Rock-Lomita. On May 9, 2007, the Department responded with comments, including the following: "The [] Workplan states that based on data obtained to-date no groundwater remediation is planned. Analytical testing indicates that groundwater beneath the site contains PCE at concentrations well above the maximum contaminant level (MCL) of 5 µg/L. [The Department] generally requires cleanup of groundwater that exceeds MCLs. The rationale for concluding that groundwater remediation is not required should be included in the [] Workplan and Pilot Study." The Department directed that "[t]he [] Workplan should be revised to include the rationale for the monitoring plan, a summary of the data that will be collected, and how these data will be used to guide the site clean up."

On May 13, 2007, Cousineau wrote an email forwarding the Department's comments to Argo's attorney Rick McNeil, Greg Korth of Rock-Lomita, LeFlore, Edwards, and others. Cousineau summarized the Department's comments in the e-mail as follows: "In short, they want more formatting, more sampling and are now asking why groundwater should not be remediated. We will prepare a response addressing their formatting and sampling questions and reiterate that we do not feel groundwater remediation is warranted."

McNeil replied to all parties that the Department's demands were absurd. "No one applies MCLs to groundwater at sites like this where the shallow aquifer is of poor quality, not used for drinking water and already is contaminated by multiple sources – certainly, USEPA and the Regional Water Board would not do so. Obviously, [the Department] does not have the extent of the practical experience and expertise in groundwater remediation that the other agencies do and/or they are demonstrating their desire to aggressively increase their political stature." He stated that the levels were sufficiently low not to require remediation based on the depth to the first water and the planned water use.

McNeil added, "I vigorously object to groundwater remediation at this site as completely unnecessary and a colossal waste of time and money. However, we cannot address the issue head on with [the Department] now (or, obviously, in that manner); they will just dig in their heels and we will be collectively worse off. So, my two cents would be let's say we'll consider it and revisit it after the other work and soil remediation. That way, you don't prejudice your bona fide purchaser application but you also don't committ [*sic*] to several million dollars of work . . . ." He did not discuss the Department's other comments because they did not directly involve Argo, "whereas we have a common interest, along with GRAE, on the groundwater and reducing or eliminating those costs." He asked to review the response

before it was submitted. Cousineau replied that he agreed on all counts.

In a meeting between Department representatives, Cousineau, and others held on July 24, 2008, a Department manager informed Cousineau that the concentrations found in the groundwater required remediation.

In October 2008, Cousineau e-mailed a draft of the response plan that would be submitted to the Department to LeFlore and Edwards. He stated, "The [Department] has directed that we remediate groundwater in order to (a) address the risk that off-gassing may pose for future occupants of the site . . . , and (b) the protection of groundwater as a regionally significant resource. The [Department] has referred us to the [Regional Board] guidelines for clean-up standard guidance. We need to get this into the [Department] so please get your comments back to us by end of business 10/24/08."

Rock-Lomita tendered its indemnity claim to Argo in January 8, 2009. On January 16, 2009, the Department wrote to Rock-Lomita that it had reviewed the response plan. The Department provided comments, including the following: "1) The report states that groundwater beneath the site may have beneficial use (page 40 and 50). This is contrary to statements made in the human health risk assessment report (Page 19 of 2008 report), which stated that groundwater presents an incomplete exposure pathway, since future receptors at the site will not come in direct contact with this media. If groundwater is indeed slated for

beneficial use, the risk assessment should be revised to estimate risks/hazards to potential users at the site. If not, the current report should clearly state that groundwater beneath the site is not designated for beneficial use, and further action (such as a deed restriction) should be taken to ensure that it is not used in the future. [¶] 2) HERD recommends that contaminants in groundwater be remediated to California enforceable maximum contaminant levels (MCLs), or health protective (risk-based) levels, if groundwater is designated for beneficial use. The report states that levels as high as 20 times the MCLs could be proposed for this site, since they have been approved by [the Regional Board] at other sites (page 27). HERD does not concur with the proposal that levels as high as 20 times the MCL be used as cleanup goals for groundwater contaminants at the site."

By letter in February 2009, LeFlore stated that Argo was not responsible for implementing the costs of the response plan submitted to the Department. In March 2009, Rock-Lomita's attorney sent a letter stating that Argo was in breach of the indemnity agreement, construing the indemnity agreement broadly and asserting that groundwater remediation had been required by the Department. The attorney sent a letter to Greenwich providing notice of a claim under the policy, asserting that Argo's failure to provide indemnity triggered the contingency under the insurance policy.

Cousineau requested clarification from the Department as to whether groundwater remediation was being required by the Department. The Department responded in pertinent part, "[Rock-Lomita] has been working with [the Department] under a [CLRRA agreement] signed in November 2006, to conduct investigation, perform groundwater monitoring, and remediate the property located at the above mentioned address. The data derived during these activities have provided basis for [the Department] to recommend remediation of soil, soil gas, and groundwater at the Site. Since [Rock-Lomita] has been working cooperatively thus far, an Order mandating that they remediate the Site has not been necessary. [¶] Also, in reviewing the data from quarterly groundwater monitoring samples, it is clear that groundwater contamination is present and that levels exceed the maximum contaminant levels (MCLs) for drinking water according to the [Regional Board]. Since the groundwater is designated as having a beneficial use and contaminant concentrations exceeds MCLs, it is important that groundwater be remediated to decrease potential human health risks. Therefore, it is necessary to begin remediation of the groundwater as part of the Site's remedial efforts. [¶] It is understood that groundwater remediation takes time to complete. However, in order for Rock Lomita to obtain full closure at the property, groundwater remediation must be done during, and if necessary, continued after the soil and soil gas remediation phase of the project is complete. Groundwater

monitoring will continue throughout the project, as directed by [the Department], until groundwater contaminant concentrations have reached a level where monitoring is no longer required."

In December 2009, Greenwich informed attorney McNeil that it was exercising subrogation rights under its policy because Argo had refused to indemnify Rock-Lomita for costs related to Rock-Lomita's investigation and remediation of groundwater contamination under the indemnity agreement.

On April 29, 2011, Keith Rolick, who was a senior environmental claims consultant, reviewed a draft of a monitoring report for the site and suggested proposing a reduced sampling and reporting program. He noted that it required negotiation with the Department's project manager, "but since this is a 'voluntary' cleanup site, it seems that they might be more lenient /flexible in requirements."

Rock-Lomita sold the property to Costco in November 2014.

PROCEDURAL BACKGROUND

Greenwich filed a complaint against Argo on June 7, 2010, and an amended complaint on November 3, 2010, for causes of action including breach of contract, subrogation and declaratory relief. Argo filed a motion for summary judgment on September 16, 2016, on the grounds that Rock-Lomita took voluntary, unilateral action to investigate and

remediate groundwater contamination based on Rock-Lomita's choice to submit and enter into a voluntary program under the CLRRA, which was not covered by the indemnity agreement. Greenwich opposed the motion on the grounds that Rock-Lomita did not breach the indemnity agreement by entering into the CLRRA agreement, and the Department had required investigation and remediation of groundwater. Argo filed a reply arguing that Argo never approved a plan for groundwater remediation and Rock-Lomita pursued a voluntary CLRRA application. A hearing was held on the motion on November 14, 2016. On November 18, 2016, the trial court granted Argo's motion on the ground that Argo met its burden of proof by showing Rock-Lomita voluntarily entered into the CLRRA agreement to obtain certain immunities, not as a necessary condition of a proposed development of the property. The court found Greenwich failed to raise a triable issue of fact that Rock-Lomita undertook remediation as a condition of development of the property. On January 18, 2017, the trial court entered judgment in favor of Argo. Greenwich filed a timely notice of appeal.

DISCUSSION

Standard of Review and Rules of Contract Interpretation

We review the trial court's order granting summary judgment de novo. (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 69 (*Scheiding*).) "In determining whether there is a triable issue of material fact, we consider all the evidence set forth by the parties except that to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We resolve evidentiary conflicts, doubts, or ambiguities in the opposing party's favor. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)" (*Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 6–7 (*Iqbal*).)

A defendant who moves for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "[T]he burden should not shift without stringent review of the direct, circumstantial and inferential evidence." (*Scheiding, supra,* 69 Cal.App.4th at p. 83.) If the defendant fails to make this initial showing, it is unnecessary to examine the plaintiff's opposing evidence and the motion must be denied. However, if the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to make a

prima facie showing that a triable issue of fact exists. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra,* 25 Cal.4th at p. 849.)

In determining whether the parties have met their respective burdens, "the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar, supra,* 25 Cal.4th at p. 843.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850, fn. omitted.) "Thus, a party 'cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144–1145 (*Dollinger DeAnza*).)

"'Under long-standing contract law, a "contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) Although "the intention of the parties is to be ascertained from the writing alone, if possible" (*id.,* § 1639), "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (*id.,* § 1647).'" (*Iqbal, supra,* 10 Cal.App.5th at pp. 7–8.)

"'The ultimate construction placed on the contract might call for different standards of review. When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract. [Citations.] When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction [following a trial] will be upheld if it is supported by substantial evidence. [Citations.]'" (*Iqbal, supra,* 10 Cal.App.5th at p. 8.)

CLRRA Agreement

Argo argued in its motion for summary judgment that Greenwich could not establish a right to payment under the indemnity agreement, because Rock-Lomita voluntarily selected the CLRRA agreement, which required remediation of groundwater contamination, instead of pursuing a different method of oversight which would not have required remediation. Argo's evidence in support of the motion, however, did not establish entering the CLRRA agreement was a voluntary act that breached the indemnity agreement. Instead, Argo's own evidence shows triable issues of fact as to whether groundwater remediation under the CLRRA was voluntary action, or action required by governmental authorities, under the terms of the indemnity agreement. Argo failed to make a prima facie showing justifying

judgment in its favor, and summary judgment must be denied.

In support of the motion for summary judgment, Argo submitted the purchase agreement, the 2005 Arcadis plan, the indemnity agreement, the CLRRA agreement, declarations, and e-mail correspondence. The terms of the indemnity agreement allowed Rock-Lomita to take the voluntary acts necessary to develop the property, including obtaining closure of groundwater contamination issues consistent with the Arcadis plan. The Arcadis plan provided for Rock-Lomita to: 1) complete a self-directed assessment of groundwater; 2) provide existing and future groundwater data to the Regional Board, which was identified as the default agency for assessment, remediation and closure of groundwater affected sites; and 3) advise the Regional Board of remediation plans to ensure the development of the site would not interfere with remediation needs. The indemnity agreement prohibited Rock-Lomita from investigating or remediating groundwater contamination other than in accordance with the Arcadis plan, unless required by a government authority under the environmental laws.

Argo's evidence did not conclusively establish that by selecting the CLRRA program, Rock-Lomita was required to remediate groundwater contamination in any way differently or beyond what would be required by a government authority under the environmental laws outside the CLRRA program. Accordingly, Argo failed to show entering the CLRRA agreement was a voluntary action in

breach of the indemnity agreement. The fact that the Department referred to the CLRRA as a voluntary program is not determinative. The Department considered both the CLRRA and the traditional cleanup program to be voluntary, compared to the Department's mandatory proceedings. It can be inferred from the evidence that Rock-Lomita was required to obtain oversight and closure of groundwater contamination issues in order to develop the property, so some action to resolve groundwater contamination issues was not voluntary from the developer's perspective.

Argo contends Rock-Lomita breached the indemnity agreement by selecting the CLRRA agreement instead of an oversight program that would not have required remediation of groundwater contamination. Argo submitted no evidence, however, that Rock-Lomita had an option for oversight that would not have required investigation or remediation of groundwater contamination. Argo suggests that Rock-Lomita could have pursued the Department's traditional cleanup program instead of the CLRRA program, which Argo asserts would have resulted in a no action letter, but Argo produced no evidence of the Department's requirements for issuing a no action letter and no evidence that Rock-Lomita would qualify to receive one. The fact that the CLRRA could result in Rock-Lomita obtaining a covenant not to be sued did not necessarily mean that the requirements for remediation of groundwater contamination were different than what government authorities would require in any event. In fact, Rock-Lomita was told the CLRRA program

was streamlined, had fewer requirements, and applied the same laws, rules and regulations as the traditional program. Argo provided no evidence that the Department would have issued a no action letter to Rock-Lomita under the traditional program without requiring the same level of investigation and remediation of groundwater contamination.

Argo also speculates that Rock-Lomita could have obtained closure of groundwater contamination issues through the Regional Board or Los Angeles County without remediation. There was no evidence that oversight through the Regional Board was available. The Regional Board declined the case and transferred authority to the Department. Moreover, the Department relied on the requirements of the Regional Board. There was no evidence that oversight through the Regional Board would not have required investigation and remediation of groundwater contamination. Similarly, there was no evidence of the requirements of the County's oversight program and no inference could be made that the County would not have required investigation and remediation of groundwater contamination. Argo's evidence did not conclusively establish that by signing the CLRRA agreement Rock-Lomita undertook a voluntary act with respect to groundwater contamination prohibited by the indemnity agreement, because the indemnity agreement permitted the property owner to develop the property, including seeking closure of the groundwater contamination issue consistent

with the Arcadis plan, and there is no evidence that any other method of government oversight would have led to different results.[2]

After selecting the CLRRA program, in order to withdraw, Rock-Lomita would have been required to demonstrate that site conditions did not pose an endangerment to public health, safety, or the environment. Argo submitted no evidence that Rock-Lomita could make this showing. Even if Rock-Lomita had withdrawn from the CLRRA program and entered the traditional voluntary cleanup program, the Department could have exercised its full authority to cause Rock-Lomita to take appropriate actions, including remediation. Since Argo failed to meet its burden as the moving party to conclusively establish that Rock-Lomita breached the indemnity agreement, the judgment must be reversed and summary judgment denied.

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[2] Regardless of whether Rock-Lomita had the ability to select the agency to oversee the groundwater issues, the mere selection of which agency to approach does not affect Argo's obligation to indemnify. Section 8.20 of the Purchase Agreement expressly contemplated that Grae (or a successor-in-interest such as Rock-Lomita) might propose a plan of remediation to any number of agencies with jurisdiction over the property. Further, the indemnity agreement provided that Grae (or its successor) could take action to comply with steps "required by a governmental authority under the Environmental Laws," regardless of how that authority became involved in overseeing the property.

DISPOSITION

The judgment and the order granting summary judgment are reversed. The trial court is directed to enter a new and different order denying the motion for summary judgment. Appellant Greenwich Insurance Company is awarded its costs on appeal.

MOOR, J.

We concur:

BAKER, Acting P.J.

KIN, 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.