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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BROMLEY, LLC et al., Plaintiffs and Respondents, v. ALTADENA LINCOLN CROSSING, LLC, Defendant and Appellant.	B275950 (Los Angeles County Super. Ct. No. BC562268)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ralph W. Dau, Judge. Affirmed.

Schock & Schock and John P. Schock for Defendant and Appellant.

Freedman + Taitelman, Michael A. Taitelman and Steven B. Stiglitz for Plaintiffs and Respondents.

INTRODUCTION

Plaintiffs Bromley, LLC (Bromley) and OPICS Real Estate Investments & Brokerage, LLC (OPICS) sued defendant Altadena Lincoln Crossing, LLC (Altadena) for breach of contract over a failed land purchase agreement. After a bench trial, the court entered judgment in favor of the plaintiffs. The court awarded Bromley $102,703.80 and OPICS $179,617.81, plus prejudgment interest, attorney's fees and costs.

Altadena argues the trial court erred in its interpretation of the contract, but Altadena has not included a reporter's transcript of the proceedings in its record on appeal. The record consists of the complaint and answer, the contracts at issue, the trial court's statement of decision, and the notice of entry of judgment, to which a copy of the judgment is appended. Accordingly, we treat the appeal as one on the judgment roll,[1] and our review is limited to errors appearing on the face of the record. (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324-325; see *County of Los Angeles v. Fairmont Specialty Group* (2008) 164 Cal.App.4th 1018, 1027.) Finding none, we affirm the trial court's decision.

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[1] Pursuant to Code of Civil Procedure section 670, subdivision (b), the judgment roll consists of the pleadings, the statement of decision and the judgment. Because the contracts were incorporated by reference in the complaint, they are considered part of the judgment roll. (*Call v. Alcan Pac. Co.* (1967) 251 Cal.App.2d 442, 448.)

FACTUAL BACKGROUND[2]

Bromley, as buyer, and Altadena, as seller, entered into an agreement for the purchase and sale of a shopping center located on Lincoln Avenue in the City of Altadena. The purchase agreement provided that a brokerage fee would be paid to OPICS.

A. *Original Purchase Agreement*

The original purchase agreement, dated April 10, 2014 (Agreement) provided that Bromley would purchase the shopping center from Altadena for $15,300,000 "'through an escrow . . . to close 30 or SEE ADDENDUM[3] days after the waiver or expiration of [Bromley's] Contingencies.'" Bromley's purchase offer was contingent upon Bromley obtaining a first mortgage loan; Bromley had 60 days to obtain the loan.

Paragraph 8 of the Agreement contained various provisions related to the close of escrow. Specifically, paragraph 8.7 provided that if the transaction was "'terminated for non-satisfaction and non-waiver of a Buyer's Contingency, . . . then neither of the [p]arties shall thereafter have any liability to the other under this Agreement, except to the extent of a breach of any affirmative covenant or warranty in this Agreement.'" (Underscoring omitted.) Paragraph 8 further provided that if escrow did not close by the expected closing date and was not extended by mutual instructions of the parties, then any party

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2 We take our factual background from the trial court's statement of decision.

3 The addendum included alternative closing dates and closing conditions.

not in default could notify the other parties that if escrow did not close in five days, the escrow would be deemed terminated.

Paragraph 9 of the Agreement addressed the contingencies to closing and referred to the addendum. The closing was contingent upon the satisfaction or waiver of the listed items. If Bromley failed to notify the escrow holder in writing of its disapproval of any of the contingencies within the specified time period, the contingency would be approved. If Bromley timely disapproved of any of the contingencies, Altadena would have 10 days to elect to cure the disapproved contingency prior to the expected closing date.

In paragraph 35 of the Addendum, the parties identified the importance of resolving title. In particular: "'The [c]losing [d]ate shall take place within five (5) business days following the later of (i) Buyer's satisfaction of the [f]inancing [c]ontingency in Section 5 of the Agreement, or (ii) the satisfaction of the [c]losing [c]onditions defined below. Buyer's obligation to complete the purchase of the [p]roperty shall be subject to the satisfaction of the following conditions: [¶] . . . [¶] . . . The title company being irrevocably committed to issue a [California Land Title Association] title policy to Buyer on the close of escrow, subject only to the title exceptions approved in writing by Buyer . . . . [¶] . . . The Disposition and Development Agreement with the . . . Community Development Commission [of the County of Los Angeles (LACDC)], affecting the [p]roperty, shall have been terminated under an agreement in form and content reasonably acceptable to Buyer. [¶] . . . . [¶] If any of the foregoing conditions are not satisfied by the scheduled [c]losing [d]ate, the party in whose favor the conditions exist shall have the right to be exercised with ten (10) business days after the scheduled

[c]losing [d]ate, to either . . . waive the unsatisfied condition and proceed with the [c]lose of [e]scrow, or . . . notify the other party that the benefited party is not willing to waive the unsatisfied condition, upon which the non-benefited party shall have ten (10) business days from receipt of the notice to cause the unsatisfied condition to be satisfied, in which case the [c]lose of [e]scrow will proceed upon satisfaction of the condition, and if the non-benefited party despite the exertion of its best efforts, is unable to cause the condition to be satisfied, Buyer will have the right to terminate this Agreement, in which event the [d]eposit shall be returned to [B]uyer.'" (Underscoring omitted.)

B. *The First Amendment*

On April 23, 2014, "the parties amended the Agreement to provide, among other things, that '[i]f any of the [following] closing conditions or contingencies are not satisfied prior to [c]losing, and Buyer terminates the Agreement, Seller shall return to Buyer all earnest money deposits and reimburse Buyer for Buyer's attorneys' fees, due diligence costs and other out-of-pocket costs incurred in the transaction: (a) the Disposition and Development Agreement with the LACDC is not terminated pursuant to Section 35(c) of the Agreement; . . . (d) Buyer and Seller have not executed a lease for twenty-five (25) parking spaces on the adjacent property which is owned by Seller, with a subordination, nondisturbance and attornment agreement from [East West Bank] in a form acceptable to Buyer.'"

C. *The Subsequent Amendments*

A second amendment dated May 20, 2014, extended the expiration date for the contingencies to May 23.

A third amendment, also dated May 20, provided that: "'Seller covenants that the following items will be removed from title to the [p]roperty on or prior to the [c]losing [d]ate . . . so that such exceptions shall be omitted from the title insurance policies that will be issued at the [c]losing: [¶] (a) Instruments requiring that the [p]roperty and other property which is not being purchased be held as one property and not "untied" ([No.'s] 7, 8, 11, 12, 27, and 48); [¶] (b) [Disposition and Development Agreement] exception (14) . . . .'"

The fourth amendment to the Agreement dated June 12, 2014 provided: "'Buyer and Seller agree[d] to amend the agreement . . .' to state that, '[c]onditioned on the matters set forth below, Buyer . . . waives its financing contingency under the Agreement: [¶] a. Satisfaction of the document and title requirements of Buyer's lender, First Bank . . . shall be a closing condition in favor of Buyer under the Agreement. [¶] b. The scheduled closing date under the Agreement is hereby extended to July 1, 2014.'"

D. *The Failure To Close Escrow and Resulting Liability*

According to the trial court's statement of decision, Greg Galletly, a representative from Altadena, testified on direct examination, pursuant to Evidence Code section 776, that prior to cancellation of the escrow, not all of the closing conditions in paragraph 35 of the Agreement had been satisfied. In particular, "exceptions 27 ('Instruments requiring that the property and other property which is not being purchased be held as one property and not "untied"' and 14 ('[Disposition and Development Agreement] exception') . . . were not removed from title to the [p]roperty." (Fn. omitted.) Galletly had agreed to pay fees to

Bromley's attorney for his work to obtain clean title. "Various 'work-arounds' were attempted, but [Bromley's] lender would not agree to those. Ultimately the [t]itle [c]ompany refused to insure title in fee simple with exceptions 27 and 14 still of record." The lender refused to fund the loan with those exceptions still in place.

The court's statement of decision went on to say that Galletly testified, "Altadena never got a notice from Bromley, pursuant to the last paragraph of paragraph 35 of the Agreement, either waiving these unsatisfied items or giving notice that it was not willing to waive those items." "Nevertheless," the court found, "the notice referred to in paragraph 35 of the Agreement concerned '[c]losing [c]onditions,' and those items ceased to be 'conditions [to the closing]' when the parties agreed to the [t]hird [a]mendment on May 20, 2014 . . . , pursuant to which Altadena 'covenanted' that 'the following items will be removed from title to the [p]roperty on or prior to the [c]losing date . . . so that such exceptions [27 and 14] shall be omitted from the title insurance policies that will be issued at the [c]losing.' The Agreement contained no provision for notice to Seller regarding unperformed covenants that would have allowed the covenanting party additional days following receipt of such a notice in which to satisfy a covenant."

The trial court found that Galletly also "conceded that one of the reasons for extending 'the scheduled closing date under the Agreement' to July 1, 2014 . . . was 'to set a deadline' for Altadena Lincoln Crossing to perform the covenants set out in paragraphs 1 and 2 of the [t]hird [a]mendment to the Agreement . . . ."

Discussing Bromley's attorney, Nicholas Klein, the trial court noted that Klein "testified that, in the negotiation of the [f]ourth [a]mendment, he told . . . Galletly that Bromley needed to have a final date by which everything had to be done, and that the [f]ourth [a]mendment created a firm date."

The statement of decision pointed out that "[w]hen it became clear to Bromley and to Altadena that Seller would not be able to perform the covenant to have title exceptions 27 and 14 removed from the record of title, the parties on August 1, 2014 signed Cancellation Instructions to Commerce Escrow Company. These instructions . . . state: 'My previous instructions in the . . . escrow are hereby amended and/or supplemented in the following particulars only: [¶] Escrow [h]older is hereby authorized and instructed by the undersigned Buyer and Seller to cancel the escrow in its entirety . . . . All of the parties' rights and remedies under . . . [the Agreement] and related documents are expressly reserved, and shall survive the cancellation of [the] escrow.' The [e]scrow [h]older cancelled the escrow transaction as of August 6, 2014."

The trial court found that "[t]he import of paragraph 8.7 of the Agreement is that, '[i]f this transaction is terminated . . . for the breach of any affirmative covenant . . . in this Agreement' the breaching party 'shall thereafter have . . . liability to the other [party] under this Agreement . . . .' This liability attached, pursuant to paragraph 8.7 when the parties cancelled the escrow as of August 6, 2014, because Seller had failed in its efforts to get title exceptions 27 and 14 removed from the record of title. The cancellation date was over a month beyond the July 1, 2014 'scheduled closing date.' As noted in the preceding paragraph, the parties agreed in their Cancellation Instructions to the

escrow company that 'all of [their] rights and remedies . . . under [the Agreement] . . . [were] expressly reserved, and [would] survive the cancellation of the escrow.'"

The trial court rejected Altadena's contention there was "a difference between 'cancellation of the escrow,' as used in [the Cancellation Instructions], and 'terminating the transaction,' . . . as used in Agreement [paragraph] 8.7." The court found that under the fourth amendment to the Agreement, by cancelling the escrow, the parties terminated the transaction, "while reserving their rights and remedies. By not getting title exceptions 27 and 14 removed from the record of title at any time before cancellation of the escrow on August 6, 2014, Altadena breached an affirmative covenant of the Agreement and made itself liable to plaintiffs under paragraph 8.7 of the Agreement."

Similarly, the court rejected Altadena's argument concerning the expected closing date, finding "the parties' representatives (Messrs. Galletly and Klein) testified to what they intended to accomplish through the [f]ourth [a]mendment" which was to set a "final date by which everything had to be done, and that the [f]ourth [a]mendment created a firm date."

The court concluded that "Bromley established by uncontradicted evidence that, by reason of Altadena's breach of the Agreement's affirmative covenants, it was damaged in the amount of $102,703.80."

E. *OPICS*

The trial court reviewed the provisions in the Agreement that were relevant to OPICS's claim for a broker's commission. In its statement of decision, the court noted that the Agreement provided: "'If this sale is not consummated due to the default of

either the Buyer or Seller, the defaulting [p]arty shall be liable to and shall pay to [the b]roker the [b]rokerage [f]ee that [the b]rokers would have received had the sale been consummated. . . .'"

The court found that "Altadena signed Revised Commission Instructions . . . on May 8, 2014 that instructed Commerce Escrow Company to pay a $153,000 commission to OPICS '[a]t the close of escrow . . . .'" Altadena, the defaulting party, failed to pay this amount to OPICS. Therefore, "OPICS established by uncontradicted evidence that it was entitled to damages in the amount of $153,000 by reason of Altadena's failure to pay the brokerage fee established by the Agreement."

DISCUSSION

A. *Standard of Review*

"'"A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." [Citations.]' [Citation.] Where, as here, the appeal is on the judgment roll alone, '[t]he question of the sufficiency of the evidence to support the findings [of the trial court] is not open.' [Citations.] Instead, 'the evidence is conclusively presumed to support the findings, and the only questions presented are the sufficiency of the pleadings and whether the findings support the judgment.' [Citation.]" (*Taylor v. Nu Digital Marketing, Inc.* (2016) 245 Cal.App.4th 283, 287-288; accord, *Nielsen v. Gibson*, *supra*, 178 Cal.App.4th at p. 324;

see also *Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, 574-575 [""validity of the judgment [or order] on its face may be determined by looking only to the matters constituting part of the judgment roll . . . ; where no error appears on the face of a judgment roll record, all intendments and presumptions must be in support of the judgment""]; *Estate of Kievernagel* (2008) 166 Cal.App.4th 1024, 1031 ["'In a judgment roll appeal every presumption is in favor of the validity of the judgment and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it'"]; *Bond v. Pulsar Video Productions* (1996) 50 Cal.App.4th 918, 924 ["The trial court's findings of fact and conclusions of law are presumed to be supported by substantial evidence and are binding on the appellate court, unless reversible error appears on the record"].)

As a general rule, "[w]e review issues of contract interpretation de novo unless there is an issue on which extrinsic evidence was properly admitted and there is a conflict in that evidence, in which case we review the trial court's interpretation under the substantial evidence standard. [Citation.]" (*Taylor v. Nu Digital Marketing, Inc.*, *supra*, 245 Cal.App.4th at p. 288.) Where the appeal is on the judgment roll, however, and extrinsic evidence is introduced, "'[t]he sufficiency of the evidence to support the [trial court's] findings is not open to review. [Citation.]' [Citation.]" (*Estate of Kievernagel*, *supra*, 166 Cal.App.4th at p. 1031; see *Fairchild v. Van De Nor Lumber Co.* (1958) 157 Cal.App.2d 164, 168 ["On this judgment roll appeal we must assume that there was evidence warranting the court's construction of the contract as reflected in its findings"]; compare *Smith v. Morton* (1972) 29 Cal.App.3d 616, 619 [where extrinsic

evidence was not introduced to resolve ambiguities in contract, de novo review applied in appeal on judgment roll].)

B. *No Errors Appear on the Face of the Judgment*

Altadena argues the trial court erred in its interpretation of the contract. To reach its decision, the trial court considered extrinsic evidence to interpret the meaning of the terms of the contract. For example, the court considered Galletly's testimony on issues related to Altadena's inability to deliver clear title and failure to comply with the contract's covenants. The court similarly considered Klein's testimony regarding the parties' intent with respect to the third and fourth amendments to the Agreement. Because extrinsic evidence was introduced to explain the meaning of the contractual terms, we cannot apply de novo review on a judgment roll appeal. (*Taylor v. Nu Digital Marketing, Inc.*, *supra*, 245 Cal.App.4th at p. 288; *Estate of Kievernagel*, *supra*, 166 Cal.App.4th at p. 1031.) Without a transcript, we presume the evidence produced at trial supports the court's interpretation of the Agreement. (*Taylor*, *supra*, at p. 288; *Fairchild v. Van De Nor Lumber Co.*, *supra*, 157 Cal.App.2d at p. 168.)[4]

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[4] Bromley and OPICS pointed out that Altadena's failure to provide a reporter's transcript cast this case as a judgment roll appeal. To this Altadena responded, "Although the interpretation, rather than the application, of any of the terms and conditions of the AGREEMENT is not really an issue, if the [r]espondents feel that an additional record was needed, in the form of a transcript, they should have provided that additional record." Altadena is wrong on both counts. First, Altadena, as the appellant, had the obligation to provide the reporter's transcript (Cal. Rules of Court, rule 8.120(b); *Southern California*

"[T]he burden of affirmatively demonstrating error is on the appellant. [Citation.] This places on appellant the burden to provide an adequate record on appeal to allow the reviewing court to assess the purported error [citation], and if the record on appeal does not contain all of the documents or other evidence considered by the trial court, a reviewing court will 'decline to find error on a silent record, and thus infer that substantial evidence' supports the trial court's findings. [Citation.]" (*569 E. County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 434, fn. 9; accord, *Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 932-933.)

Nothing on the face of the record suggests the trial court erred in reaching its judgment. The trial court relied upon the contractual terms as well as the testimony of several witnesses to conclude Altadena breached its obligation to obtain clear title by a date certain, and the contractual covenants authorized Bromley to cancel the escrow.

Gas Co. v. Flannery (2016) 5 Cal.App.5th 476, 483) and second, the interpretation of the contract was the issue at trial. Before determining whether a breach occurred, the court was obligated to determine the terms of the contact. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 345-346 [court determined the terms of the contract before determining whether the defendant breached contract].)

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal.

BENSINGER, J.*

We concur:

ZELON, Acting P. J.

SEGAL, 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.