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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

CRCH, LLC, Plaintiff and Respondent, v. LAKHA PROPERTIES-CHINO HILLS, et al., Defendants and Appellants.	B288257, B290396 (Los Angeles County Super. Ct. No. BC478341)

APPEAL from a judgment of the Superior Court of Los Angeles County. Monica Bachner, Judge. Affirmed.

Greines, Martin, Stein & Richland, Robin Meadow and Jeffrey E. Raskin for Defendants and Appellants.

Ervin Cohen & Jessup, Barry MacNaughton, Allan B. Cooper, and Russell M. Selmont; Sarah Jeong for Plaintiff and Respondent.

Defendants and appellants Lakha Properties-Chino Hills and Amin S. Lakha[1] (collectively, Seller) appeal from the judgment entered in favor of plaintiff and respondent CRCH, LLC (Buyer) rescinding a real estate purchase and sale agreement and awarding Buyer restitution and consequential damages. We affirm the judgment.

BACKGROUND

The purchase agreement

On August 19, 2008, the parties entered into a purchase and sale agreement for the Crossroads Shopping Center (the Property). The purchase agreement required Buyer to pay the $79,304,000 purchase price by making two initial deposits totaling $2 million, assuming a $63 million loan secured by a deed of trust on the Property, and making a $14.6 million cash payment at closing.

Section 5 of the purchase agreement accorded Buyer the right to terminate the transaction for any reason by giving written notice to Seller on or before September 10, 2008. Section 5.7 prohibited Seller from modifying or amending any leases without first obtaining Buyer's written consent and gave Buyer the right to terminate the agreement and obtain a refund of the deposits if any leases were modified or amended without its consent.

Section 11 of the purchase agreement contains Seller's representations and warranties. These included representations that Seller had no knowledge of any condition that would constitute a default under any of the leases; that the rent roll contained no material misstatement or inaccuracy; that Seller

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[1] Amin Lakha is sometimes referred to as Seller's principal.

received no notice of any pending or threatened suits, actions or proceedings which could have a material adverse effect on the Property; and that all of Seller's representations and warranties would survive the closing.

Section 7.1.1 of the purchase agreement states that Seller's representations and warranties "will be true and correct on and as of the Closing Date with the same force and effect as if those expressly stated representations and warranties had been made on and as of the Closing Date unless Seller has provided written notice to the Buyer to the contrary and has given Buyer the opportunity to terminate or withdraw from this transaction and receive return of the Deposit at or prior to Closing."

Section 15.1.2 of the purchase agreement sets a $2 million limit on Seller's liability "arising pursuant to or in connection with" its representations and warranties and obligations under the purchase agreement. It states in relevant part:

> "Notwithstanding anything contained herein to the contrary, if the Closing has occurred and Buyer has not waived, relinquished and released all rights or remedies available to it at law, in equity or otherwise as provided hereunder, the total aggregate liability of Seller arising pursuant to or in connection with Seller's representations, warranties, covenants and other obligations (whether express or implied) arising from this Agreement and/or any documents executed by Seller in connection with this Agreement (including, without limitation, the Deed, General Assignment and the Lease Assignment), will not exceed Two Million Dollars ($2,000,000) in the aggregate."

Section 15.3 of the purchase agreement imposes an 18-month limitation period on actions arising from or relating to breach of any representation or warranty. It states:

> "15.3 Time Limitations for Actions. Each Party hereby expressly agrees that no action will lie, at law or in equity, in any court or in arbitration or before any other adjudicatory body, for damages, losses, costs, indemnity, contribution, or any relief arising from or relating to any breach by any representation or warranty of any Party relating in any way to the Property, the Land, or this Agreement, including, but not limited to, any representation or warranty expressly or impliedly arising hereunder, unless the party making such claim actually commences an action therefor within eighteen (18) months after the Closing Date. Each party acknowledges this provision imposes a limitation upon all such actions that is shorter than the statute of limitations as provided for by applicable case and statutory law and that this limitation upon actions may foreclose or bar a claim for matters unknown or undiscovered within the limitations period here agreed upon, but each Party agrees that the limitation of actions herein provided is fair and reasonably and mutually beneficial to each Party for the sake of limiting the time in which either Party could commence an action against the other for any matter as herein encompassed, and consequently, neither Party will commence an action or seek relief inconsistent with the limitation herein provided. The one-year limitations period herein provided will not apply to any action arising from any provision of this Agreement expressly providing for either Party to indemnify the other as to certain matters herein specified, including, but not limited to, the

indemnities provided under the Lease Assignment, General Assignment and Article V hereof."

The purchase agreement also contains an arbitration provision that states in relevant part:

"15.4 Arbitration. Each party expressly agrees that any claim, dispute or controversy based upon or arising from this Agreement or any of the rights or obligations of either or both the parties hereunder shall be resolved exclusively by binding arbitration except for any provisional remedies including, without limitation, writs of attachment, writs of possession, lis pendens, temporary restraining orders and preliminary injunctions. . . ."

Sellers' concealment of material information

At the time the parties entered into the purchase agreement, the Property had two types of tenants: "Big box" anchor tenants that drew traffic to the shopping center, and smaller "in-line" tenants that were largely dependent on traffic drawn by the big box tenants.

During escrow, Buyer learned that one of the Property's big box tenants, Off Broadway Shoes, had ceased operations and vacated its space, and Buyer exercised its right to terminate the transaction under section 5.1 of the purchase agreement. The parties resurrected the transaction after Seller agreed to reduce the purchase price.

Escrow closed on February 4, 2009. Shortly thereafter, Buyer learned that Seller had concealed material information about the financial status of the Property and its tenants. First, Buyer learned that a large tenant, Banner Mattress, had filed for bankruptcy prior to the close of escrow and was planning on

rejecting its lease, and that Seller had agreed to rent concessions. Buyer immediately demanded financial redress from Seller, and the parties entered into a settlement agreement.

After the Banner Mattress settlement, Buyer learned that the Property's largest tenant, Sport Chalet, had informed Seller prior to the close of escrow that it was considering a bankruptcy filing that could involve closing its store at the Property, and that it needed a rent reduction. Buyer also learned that an in-line tenant, Cold Stone Creamery, had also demanded a rent concession from Seller. Seller had not disclosed any of this information to Buyer.

On September 21, 2009, Buyer's counsel sent Seller a letter stating that since the close of escrow, Buyer had learned that the financial health of the Property was not as disclosed by Seller, citing Sport Chalet and Cold Stone Creamery as examples. The letter further stated: "We have been advised that [Seller] had discussions with some tenants -- again without the knowledge of [Buyer] -- offering them a waiver of past due rent if they stayed current on their rent and did not default during escrow with [Buyer]." The letter asked Seller whether it had "learned about the financial distress of any other tenants at any time prior to the close of escrow" and if so, to provide that information along with an explanation of whether the information had been provided to Buyer. Although Seller's response disclosed no other financially troubled tenants at the Property, Seller knew at the time that several other tenants were delinquent on their rent payments and were experiencing financial problems.

The current action

In February 2012, Buyer commenced this action against Seller, asserting causes of action for fraud/concealment-

rescission, fraud/concealment-damages, negligent misrepresentation, and breach of contract. The parties stipulated to appointment of a referee under Code of Civil Procedure section 638.

On February 2, 2018, the referee filed a statement of decision, finding that Seller had concealed material facts from Buyer, including tenant financial difficulties and Seller's forgiveness of delinquent rent owed by several tenants in order to bring their account balances nominally current at the time escrow closed. The referee found that Seller had concealed these facts to maintain the appearance of a financially healthy shopping center and to induce Buyer to complete the purchase transaction.

The referee rejected Seller's argument that the 18-month limitations period set forth in section 15.3 of the purchase agreement barred Buyer's claims against Seller for fraudulent concealment of material adverse information, finding that these claims fell outside the scope of that section. The referee found Seller liable for fraud and recommended that the trial court order title to the Property to be reconveyed by Buyer back to Seller; the loan assumed by Buyer to be declared reassumed by Seller; and to hold Seller and its principal jointly and severally liable for restitution and consequential damages.

On February 20, 2018, Buyer filed an ex parte application for an order shortening time on a motion to enter judgment, because the lender had scheduled a foreclosure sale for the Property that day. Buyer also requested a prejudgment order requiring Seller to accept a quitclaim deed to the Property before the foreclosure sale occurred. The trial court granted Buyer's ex parte application and issued the requested prejudgment order.

On March 13, 2018, judgment was entered in Buyer's favor, awarding Buyer restitution in the amount of $27,927,005.81, consequential damages of $2,098,252.12, and prejudgment interest of $3,283.81 per day. This appeal followed.

CONTENTIONS ON APPEAL

Seller raises the following contentions on appeal:

1. The 18-month limitations period in section 15.3 of the purchase agreement bars Buyer's fraud and fraudulent concealment claims.

2. The referee did not find actual reliance, an essential element of Buyer's fraudulent concealment claim.

3. Rescission was an improper remedy because (A) it could not restore Seller to the status quo ante; (B) it could not be effected without the consent of the lender; (C) it exceeds the $2 million limit on liability imposed by section 15.1 of the purchase agreement; and (D) the referee did not fully consider the equities.

DISCUSSION

I. Contractual limitations period

A. General legal principles

Contractually shortened limitations periods are enforceable as long as they are reasonable. (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 73.) The parties here do not dispute the enforceability of section 15.3 but its interpretation, specifically, whether Buyer's claims for fraud and fraudulent concealment come within the ambit of that section. To answer that question, we apply the general principles of contract interpretation.

The fundamental rules of contract interpretation require a court to ascertain the mutual intention of the parties at the time the contract is formed. (Civ. Code, § 1636; *MacKinnon v. Truck*

Ins. Exchange (2003) 31 Cal.4th 635, 647.) That intent should be inferred, if possible, solely from the written provisions of the contract. (Civ. Code, § 1636.) A court must consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation. (§ 1641; *American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245 (*American Alternative*).) The clear and explicit meaning of the contractual provisions, interpreted in their ordinary and popular sense, controls their interpretation. (*MacKinnon*, at p. 647.)

If the meaning of contractual terms is ambiguous, the trial court must provisionally receive any proffered extrinsic evidence relevant to show whether those terms are "'reasonably susceptible of a particular meaning.'" (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350-1351 (*Wolf*).) If the extrinsic evidence is in conflict, the resolution of that conflict is a question of fact that will be upheld on appeal if supported by substantial evidence. (*Id.* at p. 1351.) When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, a reviewing appellate court independently interprets the contract as a matter of law. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955-956.) Because the parties in this case presented no parol evidence as to the meaning of section 15.3, we independently interpret its provisions. (*Ibid.*)

Buyer and Seller disagree on whether section 15.3 should be strictly construed against the party invoking its provisions. Courts are divided on this issue. (Compare *Lewis v. Hopper* (1956) 140 Cal.App.2d 365, 367 ["'(c)ontractual stipulations which limit the right to sue to a period shorter than that granted by statute, are not looked upon with favor because they are in

derogation of the statutory limitation. Hence they should be construed with strictness against the party invoking them"'] with *Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1030 [agreement to shorten the statute of limitations does not violate public policy so long as a reasonable time to sue is provided; accordingly, strict construction is not warranted].) We need not resolve this issue because we conclude, under the general principles of contract interpretation, that section 15.3 does not encompass Buyer's fraud and fraudulent concealment claims.

B. Section 15.3 does not encompass Buyer's fraud and fraudulent concealment claims

Section 15.3 does not apply to all claims based upon or arising from the purchase agreement. The plain language of section 15.3 covers only claims arising from or relating to "breach by any representation or warranty." The relevant language states:

> "[N]o action will lie, at law or in equity, in any court or in arbitration or before any other adjudicatory body, for damages, losses, costs, indemnity, contribution, or any other relief arising from or relating to any breach by any representation or warranty of any Party relating in any way to the Property, the Land, or this Agreement, including, but limited to, any representation or warranty expressly or impliedly arising hereunder . . . ."

The scope of section 15.3 is significantly narrower than the section that immediately follows it. Section 15.4, which governs arbitration, provides in relevant part: "Each party expressly agrees that any claim, dispute or controversy based upon or arising from this Agreement or any of the rights or obligations of

either or both of the parties hereunder shall be resolved exclusively by binding arbitration . . . ."

Had the parties intended section 15.3 to apply to all claims, they could have used similarly broad language. The absence of such language in section 15.3 supports a narrower interpretation as to its scope. (See Civ. Code, § 1641; *American Alternative, supra,* 135 Cal.App.4th at p. 1245 [court must "consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation"].)

Seller argues that Buyer's fraud and fraudulent concealment claims are based on the same conduct as the breach of contract claims, and that "no reasonable person" would have intended section 15.3 to apply to breach of a contractual representation but not to apply to a tort claim based on the identical alleged conduct. *Therma-Coustics Manufacturing, Inc. v. Borden, Inc.* (1985) 167 Cal.App.3d 282 (*Therma-Coustics*), on which Seller relies, does not support its position.

The contract language in *Therma-Coustics* differed significantly from that at issue here. The *Therma-Coustics* contract language stated: "'Any action by Buyer hereunder shall be commenced within one year after receipt of said products'" and ""Claim Period. . . . In no event shall Buyer commence any action under this contract later than one year after the cause of action has accrued."" (*Therma-Coustics, supra,* 167 Cal.App.3d at pp. 286-287.) The buyer in *Therma-Coustics* argued that the one-year contractual limitation period did not apply to claims against the seller for fraud and negligent misrepresentation. (*Id.* at p. 298.) The trial court rejected this argument, noting that the contract language "'doesn't say any action for breach of contract or for warranty or anything of that sort. It says action under this

contract, and it would be unreasonable to assume that they would want to limit actions at law for breach of contract and not limit actions in equity or actions for tort.'" (*Ibid.*) The Court of Appeal agreed "that it would be highly unlikely for a seller who had undertaken to introduce a limitation period into the contract with reference to actions brought by the buyer arising 'under this contract' to be thinking in differential terms as to which causes of action would be barred and which would not. Thus, there is no doubt but what the defendant's intent was to limit to one year all actions which the buyer might bring, arising 'under this contract,' i.e., arising from any dispute which evolved as a result of the buyer and seller relationship." (*Id.* at p. 299.)

Here, in contrast, the contract language at issue is much narrower. Section 15.3 is expressly limited to actions "arising from or relating to *any breach by any representation or warranty of any Party* . . . ." (Italics added.) The plain language of the provision limits its application to breaches of representations and warranties.

That Buyer's fraud claims against Seller are premised on the same conduct as the breach of contract claims does not bring the fraud claims within the ambit of section 15.3. As the referee noted in his statement of decision, a seller of real property in California owes a common law duty to disclose facts materially affecting the value of the property if those facts are not known by the buyer. (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 303 (*Hinesley*); *Reed v. King* (1983) 145 Cal.App.3d 261, 265.) That common law duty is wholly independent of any contractual obligation that may exist under the parties' purchase and sale agreement. (*William L. Lyon &*

Associates, Inc. v. Superior Court (2012) 204 Cal.App.4th 1294, 1311-1312 (*Lyon & Associates*).)

The instant case is factually and legally analogous to *Lyon & Associates*. The court in that case held that a home buyer's tort claims against a real estate broker were outside the scope of a limitation provision in the brokerage agreement requiring any "[l]egal action for breach of this Agreement, or any obligation arising therefrom" to be brought within two years. (*Lyon & Associates, supra*, 204 Cal.App.4th at pp. 1301, 1311.) The court reasoned that "the fiduciary duty of real estate brokers to their clients does not arise under contract" but under the common law, and that "[e]ven if the [buyer] had not signed the buyer-broker agreement, Lyon & Associates would still have had an obligation to exercise reasonable skill and care on the buyers' behalf. [Citation.]" (*Id.* at p. 1311.) The court therefore concluded that the buyer's tort claims, including claims for fraud and breach of fiduciary duty, were outside the scope of the contractual limitations provision. (*Id.* at p. 1312.)

Here, as in *Lyon & Associates,* Buyer's fraud and fraudulent concealment claims are based on common law legal duties that Seller owed to Buyer independent of any obligation under the purchase agreement. (*Hinesley, supra,* 135 Cal.App.4th at p. 303.) Buyer's fraud and fraudulent concealment claims do not come within the scope of the 18-month limit for actions "arising from or relating to any breach by any representation or warranty of any Party" under the purchase agreement. (*Lyon & Associates, supra,* 204 Cal.App.4th at pp. 1311-1312.)

We are unpersuaded by Seller's argument that the terms "arising from" and "relating to" any breach by representation and

warranty cannot both be interpreted to mean breach of contractual representations, and that in order "to avoid rendering terms surplusage," the term "relating to" must be interpreted to encompass fraud and fraudulent concealment. Seller's reliance on arbitration cases as support for this argument is misplaced. (See, e.g., *Rice v. Downs* (2016) 248 Cal.App.4th 175, 186, and cases cited therein.) Those cases are distinguishable not only because the arbitration clauses at issue were much broader than section 15.3 (covering "any claim" or "any controversy" relating to the contract, as opposed to claims relating to "any breach by any representation or warranty"), but also because unlike contractual arbitration, there is no California public policy that favors enforcement of contractual limitation provisions. (See *Rice*, at p. 185 [California's strong public policy in favor of arbitration "has resulted in the general rule that arbitration should be upheld 'unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute'"].)

Buyer's fraud and fraudulent concealment claims do not come within the scope of section 15.3.[2] Seller fails to establish any error by the referee in this regard.

II. Reliance as an element of fraud

Reliance is a necessary element of a fraud claim. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 (*Engalla*).) "Actual reliance occurs when a misrepresentation is

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[2] Because we conclude Buyer's fraud and fraudulent concealment claims are not barred by section 15.3, we need not address the parties' arguments as to whether Seller's post-closing concealment of material facts tolled the contractual limitations period or equitably estopped Seller from enforcing it.

"'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,'" and when, absent such representation, "'he would not, in all reasonable probability, have entered into the contract or other transaction.'" [Citations.]" (*Id.* at p. 976.)

We reject Seller's contention that the statement of decision "makes clear that the referee did not ultimately find actual reliance" as an element of Buyer's fraud claims. In the final statement of decision, the referee made the following findings:

> "The evidence preponderates that had [Seller] disclosed the concealed information discussed regarding Sport Chalet and the many other 'inline' tenants experiencing financial difficulties at Crossroads, [Buyer] would either have cancelled the acquisition of Crossroads entirely, would have negotiated a significantly reduced price as an alternative to outright cancellation, or at a minimum would have investigated further to determine the true financial condition of Crossroads (and then made an informed decision on how to proceed.) [¶] . . . [¶] . . . What [Buyer] would have done had [Seller] revealed the deteriorating financial condition of Crossroads cannot now be known, but [Buyer] at a minimum would have had an opportunity to make its own decision in its own best interests rather than, in effect, having that decision made for it in secret by [Seller]."

Those findings are sufficient to establish actual reliance as an element of Buyer's fraud and fraudulent concealment claims. They show that Seller's material nondisclosures were "an immediate cause" of Buyer's conduct, which altered its legal relations, and that Buyer would not, in all reasonable probability,

have entered into the transaction as it was consummated. (*Engalla, supra,* 15 Cal.4th at p. 976.)

Seller's reliance on preliminary findings by the referee in a tentative statement of decision that Buyer "would . . . have cancelled the acquisition" had the concealed information been timely disclosed and its absence in the final statement of decision as support for its position is unavailing. Seller does not claim to have raised with the referee any purported omission of necessary factual findings. The doctrine of implied findings therefore applies, and we infer any material factual findings necessary to support the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [reviewing court must infer any factual findings necessary to support the judgment]; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 59-60 [to avoid application of implied findings doctrine, "a party claiming omissions or ambiguities in the factual findings must bring the omissions or ambiguities to the trial court's attention"].)

Seller does not challenge the sufficiency of the evidence supporting the referee's factual findings. We therefore disregard Seller's suggestion that we reweigh the evidence concerning reliance as an element of Buyer's fraud claims.

III. Rescission

A party to a contract may rescind the contract if it was obtained through fraud. (Civ. Code, § 1689; *Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 402.) "Rescission extinguishes the contract (Civ. Code, § 1688), terminates further liability, and restores the parties to their former positions by requiring them to return whatever consideration they have received. [Citation.]" (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1145.)

"Whether to grant relief based on rescission 'generally rests upon the sound discretion of the trial court exercised in accord with the facts and circumstances of the case [citations.]' [Citations.]" (*Wong v. Stoler* (2015) 237 Cal.App.4th 1375, 1387 (*Wong*).)

A. Inability to restore Seller to status quo ante

Seller contends rescission was impermissible because it could not restore Seller to the status quo ante, given the lender's foreclosure on the Property immediately after the trial court ordered Seller to accept reconveyance of title to the Property. In cases of rescission based on fraud, prejudice to the defrauding seller is an "improper consideration." (*Wong, supra,* 237 Cal.App.4th at p. 1389.) "'Persons who attempt to secure profits by deceitful means may not confidently expect to receive special consideration from courts of equity. In such a case, as a result of the rescission by the court, *nothing is extracted from the plaintiff out of particular regard for the condition of the defendant.* If his fraudulent acts have resulted in disastrous financial consequences to himself, it is no one's fault but his own, and he must sustain the necessary inconveniences thereby entailed. [Citations.] Where it is possible to bring about substantial justice by adjusting the equities between the parties, the fact that the *status quo* cannot be exactly reproduced will not preclude the plaintiff from equitable relief. . . .' [Citations.]" (*Ibid.*, quoting *Arthur v. Graham* (1923) 64 Cal.App. 608, 612.)

That Seller lost the Property through foreclosure immediately after Buyer reconveyed title back to Seller does not make rescission an improper remedy in this case. The Restatement Third of Restitution and Unjust Enrichment states that rescission of a transaction induced by the defendant's fraud

is appropriate even when the defendant cannot be restored to the status quo ante:

> "(3) Rescission is limited to cases in which counter-restitution by the claimant will restore the defendant to the status quo ante, unless
>
> > "(a) the defendant is fairly compensated for any deficiencies in the restoration made by the claimant, or
> >
> > "(b) the fault of the defendant or the assignment of risks in the underlying transaction makes it equitable that the defendant bear any uncompensated loss.
>
> "(4) Rescission is appropriate when the interests of justice are served by allowing the claimant to reverse the challenged transaction instead of enforcing it. As a general rule:
>
> > "(a) If the claimant seeks to reverse a transfer induced by fraud or other conscious wrongdoing, the limitation described in subsection (3) is liberally construed in favor of the claimant."

(Rest.3d Restitution and Unjust Enrichment, § 54.)

An illustration included in this section of the Restatement supports the grant of rescission in this case and the allocation to Seller of the loss resulting from the lender's foreclosure on the Property:

> "A conveys Blackacre to B in exchange for Whiteacre and a restaurant business being operated on Whiteacre. Whiteacre is subject to an existing mortgage to C, which A assumes. . . . Two months

> after the exchange is competed, A discovers that B has misrepresented the restaurants' profitability. A gives B prompt notice of her intent to rescind the transaction and later files suit for this purpose. After B refuses to resume ownership, A takes reasonable steps to close down the business and halt operating losses. While A's suit for rescission is pending, C forecloses the mortgage on Whiteacre, which neither A nor B takes steps to redeem. The court finds that B's misrepresentation justified A's election to rescind. Under the circumstances, the fact that A cannot restore B to the status quo ante (given the closure of the restaurant and the foreclosure of the C mortgage) does not bar rescission: it would have been inequitable to require that A make any further investment in the transaction, and B had adequate opportunity to protect his own interest. To the extent that either event has resulted in a loss to the owner of Whiteacre, that loss is appropriately assigned to B."

(Rest.3d Restitution and Unjust Enrichment, § 54, com. g, illus. 15, p. 278.)

Rescission was properly granted notwithstanding the lender's foreclosure on the Property immediately after Buyer reconveyed title to Seller.

B. Consent of lender

Seller contends rescission was improperly granted because the lender was an indispensable party to the order granting rescission. Seller argues that the loan agreement assumed by Buyer requires the lender's consent before the Property can be transferred and prohibits such a transfer when the borrower is in default. Seller failed to raise these arguments with either the referee or the trial court below,

and we decline to consider them for the first time on appeal.[3] (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1343-1344.)

Seller also failed to raise, before the close of evidence, any argument concerning Buyer's alleged violation of certain provisions of the loan agreement that allow the lender to avoid the loan's non-recourse provisions. The referee did not abuse his discretion by declining Seller's request to reopen the trial to consider this issue. (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208.)

C. Contractual liability cap

We reject Seller's argument that the $2 million liability cap in section 15.1.2 of the purchase agreement precluded issuance of the rescission order, which requires Seller to pay Buyer approximately $30 million in restitution and consequential damages.

Section 15.1.2 limits Seller's liability "arising pursuant to or in connection with" its representations, warranties, covenants and obligations under the purchase agreement. The remedies of rescission, restitution, and consequential damages were awarded based on Seller's fraud and fraudulent concealment, not for breach of Seller's

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[3] U.S. Bank, the trustee for the lenders and holders of the deed of trust that encumbered the Property, also had notice of this action and of Buyer's rescission claim, as it was originally named as a defendant on Buyer's fraud claim but was subsequently dismissed. U.S. Bank has filed a separate action to enforce its rights under the loan agreement.

contractual obligations. Section 15.1.2 by its terms does not apply to the fraud claims.

Interpreting section 15.1.2 to limit Seller's liability for fraud would contravene Civil Code section 1668, which prohibits as against public policy "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud . . . ." (Civ. Code, § 1668.) Under this statute, "'a party cannot contract away liability for his fraudulent or intentional acts . . . ,' regardless of whether the public interest is affected. [Citations.]" (*Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4th 224, 234.)

Farnham v. Superior Court (1997) 60 Cal.App.4th 69, 71, does not support Seller's argument that Civil Code section 1668 covers only contracts that "exempt" a party from fraud liability and does not prohibit contractual *limitations* on liability for fraud. *Farnham* did not involve a claim for fraud but for negligence and breach of duty, and the court in that case "express[ed] no view about the validity" of the contractual limitation provision at issue "if Farnham's claim alleged fraud, or some other intentional tort." (*Id.* at pp. 75, 77, fns. 6, 7.)

D. Equitable considerations

The record does not support Seller's argument that the referee failed to fully consider the equities before ordering rescission. The statement of decision addresses in detail Seller's arguments that unwinding the transaction would unduly prejudice Seller. Citing Code of Civil Procedure section 1692 and *Wong*, the referee concluded that prejudice to a fraudulent seller does not bar rescission

unless caused by imprudent or improper actions by the buyer or be so extreme as to justify denial of rescission in the face of fraud. The referee found that Seller had made neither a "strong showing of prejudice" nor "a convincing showing of imprudent conduct by buyer."

Seller fails to establish any abuse of discretion.

DISPOSITION

The judgment is affirmed. Buyer is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST