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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHADI EMEIN et al.,

Plaintiffs and Respondents,

v.

KENNETH GHARIB,

Defendant and Appellant.

B248352

(Los Angeles County
Super. Ct. No. SC108721)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed in part, reversed in part, and remanded for further proceedings.

Perry Roshan-Zamir, for Defendant and Appellant.

Law Offices of Ronald Richards & Associates, Ronald Richards and Nicholas A. Bravo, for Plaintiffs and Respondents.

INTRODUCTION

In a court trial, plaintiffs and respondents Shadi Emein, individually and in her capacity as trustee of the EM Trust, and her husband Kami Emein¹ obtained a judgment of \$1,796,625.50 against defendant and appellant Kenneth Gharib for breach of contract. The contract at issue was a settlement agreement and mutual release (settlement agreement) arising from prior litigation between plaintiffs and Gharib and a corporation Gharib controlled, Kenny G. Enterprises, LLC (KGE). The settlement agreement called for installment and other payments to plaintiffs totaling \$1.5 million.

At trial, the parties introduced different documents that they purported to be the settlement agreement. Under the document plaintiffs introduced (Exhibit 1), both Gharib and KGE were liable for the \$1.5 million. Plaintiffs' document bore the parties' original signatures. Under the document Gharib introduced (Exhibit 102), only KGE, and not Gharib, was liable for the \$1.5 million.² Gharib's document bore copied signatures. The trial court found that Exhibit 1 was the operative settlement agreement. After the trial court rendered its verdict but before it entered judgment, Gharib moved to reopen his case-in-chief, claiming that he had found his signed original copy of the settlement agreement under which only KGE, and not Gharib, was liable.³ The trial court denied the motion. On appeal, Gharib contends that the trial court abused its discretion in denying his motion to reopen his case-in-chief. Alternatively, he contends that the trial court erred in accelerating the payments due under the settlement agreement. We affirm the trial court's denial of Gharib's motion to reopen his case-in-chief, reverse the trial

¹ Because Shadi and Kami share a last name, we will refer to them individually by their first names.

² Which document was the operative settlement agreement was significant because, on October 24, 2011, KGE filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code.

³ Gharib did not make the newly discovered signed original settlement agreement or a copy thereof a part of the record on appeal.

court's damages award, and remand the matter to the trial court for a recalculation of damages, including interest.

BACKGROUND⁴

In their third amended complaint for breach of contract, plaintiffs alleged that they were involved in certain commercial real estate transactions with Gharib and KGE, that there was a dispute concerning the transactions and litigation ensued, and that the litigation was resolved through the settlement agreement. Plaintiffs alleged that under the settlement agreement they were to transfer title to the subject commercial properties and Gharib and KGE were to pay plaintiffs \$1.5 million, pay the mortgages and other expenses for the subject commercial properties, and execute in plaintiffs' favor three promissory notes representing the principal to be paid under the settlement agreement. The \$1.5 million due under the settlement agreement was to accrue interest at five percent and to be paid by an initial payment of \$18,750, monthly installment payments of \$6,250 from April 1, 2010, to January 1, 2017, and a balloon payment of any outstanding principal and interest at the end of the term. Plaintiffs alleged that they complied with all obligations under the settlement agreement, except those excused by Gharib and KGE, including transferring title to the subject commercial properties to Gharib and KGE. They alleged that Gharib and KGE breached the settlement agreement by making a single \$5,000 payment, and no other payments; by failing to pay the mortgages and other expenses on the subject commercial properties; and by failing to execute the promissory notes. Plaintiffs sought recovery of all amounts due under the settlement agreement. Plaintiffs attached Exhibit 1, the document they alleged was the settlement agreement, as Exhibit A to their third amended complaint.

⁴ Because the issues on appeal largely do not concern the facts adduced at trial, we set forth the allegations in plaintiffs' third amended complaint as background for Gharib's issues on appeal. We set forth certain additional facts adduced at trial that are necessary to address Gharib's appeal issues.

The primary issue at trial was whether plaintiffs' Exhibit 1 or Gharib's Exhibit 102 was the operative settlement agreement. Paragraph number two on page four of Exhibit 1 begins, "KENNETH and KGE shall pay to EM TRUST a total sum of one million five hundred thousand dollars (\$1,500,000.00) hereinafter referred to as the 'Settlement Agreement Amount', evidenced by a Note in the form attached hereto as Exhibit 'A', which shall be paid as follows"⁵ The same paragraph in Exhibit 102 begins, "KGE shall pay to EM TRUST a total sum of one million five hundred thousand dollars (\$1,500,000.00) hereinafter referred to as the 'Settlement Agreement Amount', evidenced by a Note in the form attached hereto as Exhibit 'A', which shall be paid as follows" That is, Exhibit 102 differs from Exhibit 1 in that the words "KENNETH and" are not a part of the beginning of paragraph 2 in Exhibit 102.⁶

The attorney who negotiated the settlement agreement on Gharib's behalf testified that the final settlement agreement was prepared at his office. Gharib, Kami, and plaintiffs' attorney were present. Shadi was not present. Gharib's attorney printed four copies of the settlement agreement and gave copies to Gharib, Kami, and plaintiffs' attorney, and retained a copy. Plaintiffs and Gharib went to a notary where they signed the agreement. The parties' attorneys did not sign the settlement agreement and were not present when their clients signed the agreement.

Prior to trial, Gharib agreed that Exhibit 1 was the operative settlement agreement. In an interrogatory response and at his deposition, Gharib identified Exhibit A to plaintiffs' third amended complaint (trial Exhibit 1) as the operative settlement

⁵ The Settlement Agreement identifies Gharib as "KENNETH."

⁶ It appears that Exhibit 102, the document Gharib introduced at trial, was altered to remove from the settlement agreement the words "KENNETH and"—i.e., the words that obligated Gharib personally to pay plaintiffs \$1.5 million under the settlement agreement. All of the full lines in Exhibits 1 and 102 were fully justified—i.e., the words on the lines were spaced so that each full line extended from the left to the right margin. The only full line in the document that Gharib produced that was not fully justified was the line at the beginning of paragraph two from which "KENNETH and" apparently had been removed. That line contained a large space at the end of the line.

agreement. At his deposition, Gharib was asked, “The second paragraph states, quote: ‘KENNETH and K.G.E. shall pay to the E.M. Trust a total of 1,500,000 dollars, hereinafter referred to as the settlement agreement amount.’ Is that your understanding?” Gharib responded, “Yes. You’re reading English and it says on that. What do you want me to do?”

At trial, Gharib introduced Exhibit 102, claiming that it, and not Exhibit 1, was the operative settlement agreement. He testified that there were two signed copies of the operative settlement agreement—he kept a copy that he put in a cabinet in his office and Kami kept a copy. When Kami asked him to “find” the settlement agreement—apparently in discovery—he looked in the cabinet but could not find it. Gharib testified that he found Exhibit 102, a copy of the original settlement agreement, in his cabinet a few days before trial. Gharib’s attorney testified that Exhibit 102 was a copy of the final settlement agreement that he prepared, that Gharib gave him a copy of Exhibit 102, and that he had never seen a signed original copy of the settlement agreement.

At the conclusion of the trial, the trial court stated its tentative finding that Exhibit 1 was the operative settlement agreement. It based that finding in part on testimony from plaintiffs’ attorney that he insisted in the negotiation of the settlement agreement that Gharib be liable personally under the settlement agreement, a position the trial court found logical. The trial court also stated that the parties left Gharib’s attorney’s office with copies of the operative settlement agreement, plaintiffs introduced their signed original copy of the settlement agreement, and Gharib did not have his signed original copy and instead introduced a copy that included a “different page 4”—i.e., different language in paragraph two about who was responsible for paying plaintiffs \$1.5 million. In its judgment for plaintiffs, the trial court found that Exhibit 102 “was not the Settlement Agreement executed by all parties and that Exhibit 1 is the Settlement Agreement.”

DISCUSSION

I. Gharib's Motion to Reopen His Case-In-Chief

After the trial court rendered its verdict, but before it entered judgment, Gharib moved to reopen his case-in-chief, claiming that he had found the signed original copy of the operative settlement agreement. Under that purported signed original copy of the settlement agreement, only KGE, and not Gharib, was liable to plaintiffs for payment of \$1.5 million. He contends that the trial court abused its discretion in denying his motion. We disagree.

A. *Background*

In a declaration in support of his motion to reopen his case-in-chief, Gharib stated that he maintained his business documents in a large filing cabinet in his office that contained about 50 files. He said that during discovery he searched his files for the signed original copy of the settlement agreement without success. Also, prior to trial, he had “searched his entire file for this matter” but was unable to locate the signed original copy of the settlement agreement. His attorney also searched his files for the signed original copy of the settlement agreement without success. Gharib stated that he found the signed original copy of the settlement agreement in his filing cabinet before he received the trial court’s decision in this case when he was looking for documents concerning another matter.⁷ Gharib apparently did not file or lodge the newly discovered signed original copy of the settlement agreement in the trial court. Instead, he put the document in a sealed envelope to preserve for future forensic analysis and gave the envelope to his attorney.

Gharib represented that unlike Exhibit 1, the newly discovered signed original copy of the settlement agreement made only KGE, and not Gharib, liable to plaintiffs for payment of \$1.5 million. He stated, “In all other aspects, the original signed copy of the

⁷ Although Gharib included the judgment as a part of the record on appeal, he did not include the trial court’s decision that served as the basis for the judgment.

agreement I have just uncovered is an exact duplicate (word by word with the same font and justification) of the version presented by the Plaintiff[s]”

The trial court found the “timing . . . a little suspicious.” It stated that Kami had produced a signed original copy of the settlement agreement at trial and that Gharib “produced a copy that appeared to be altered.” Gharib’s counsel acknowledged that the document Gharib had proffered (Exhibit 102) “seems altered,” but stated, “In this version, which is the original version, there is no such alteration. It looks completely pristine.” Counsel for Gharib stated that the newly discovered signed original copy of the settlement agreement was “in this envelope, and forensic analysis could show who’s touched this agreement if it’s been tampered with.”

The trial court asked Gharib’s counsel why Gharib had not produced the newly discovered original copy of the settlement agreement at trial. Explaining its inquiry, the trial court observed, “it just so happens, a couple weeks after I make the ruling, that all of a sudden now it appears, he finds it, yet he declared earlier that he had searched his records and couldn’t find it and all he had was a photocopy which looked altered.” Gharib’s counsel responded, “Your Honor, all I could say is bad timing on my client with regard to finding something by complete accident in a separate part of his filing cabinet, your Honor. And timing couldn’t be worse. We would have loved to have this agreement at trial to present to you, your Honor.” He stated that the newly discovered signed original copy of the settlement agreement “support[ed] every basis for our case” and argued that the trial court should grant Gharib’s motion to reopen his case-in-chief because there would be no prejudice to plaintiffs as they were earning interest on any award.

After argument by plaintiffs’ counsel, the trial court said to Gharib’s counsel, “[Y]our client’s taken three different positions: One, that the copy of the settlement agreement that was attached to the complaint was the settlement agreement. Then he comes in days before the trial and takes the position, no, it was Exhibit 102; I don’t have the original, but here’s a photocopy. [¶] And now three, he’s saying, wait, I found the original.” The trial court said, “[H]e’s taken three different positions about the settlement

agreement. Which one should I believe?” Gharib’s counsel responded, “Let the document speak for itself, the original.” The trial court again asked, “Which one should I believe?” The trial court stated, “I don’t know how—how that document in the envelope came to be. All I know he’s taken three different positions.” The trial court then denied Gharib’s motion to reopen his case-in-chief.

B. Standard of Review and Application of Relevant Principles

Reopening a case to present further evidence “is not a matter of a right but rests upon the sound discretion of the trial court. That discretion should not be overturned on appeal absent a clear showing of abuse. [Citations.]” (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 793; *Guardianship of Phillip B.* (1983) 139 Cal.App.3d 407, 428 [“A request to reopen for further evidence is addressed to the discretion of the trial court whose determination is binding on appeal in the absence of palpable abuse. [Citations.]”].)

“A motion to reopen a case for further evidence can be granted only on a showing of good cause. [Citation.]” (*Sanchez v. Bay General Hospital, supra*, 116 Cal.App.3d at p. 793.) A trial court properly denies a motion to reopen a case to introduce new evidence “where there has not been a sufficient showing of any excuse for not having produced the evidence at trial [citation], or where there is no showing of diligence. [Citation.]” (*Estate of Horman* (1968) 265 Cal.App.2d 796, 805.) A trial court also properly denies a motion to reopen a case if the new evidence will not produce a different outcome. (*Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1222.)

Gharib identified three different documents as the operative settlement agreement. The first document was plaintiffs’ Exhibit 1 which Gharib agreed was the operative settlement agreement until just before the trial. At trial, Gharib introduced the second document, Exhibit 102, which he claimed to have found in his office cabinet shortly before trial. Exhibit 102 was the version of the settlement agreement that had the line justification issue that indicated that the document had been altered to remove Gharib’s liability under the settlement agreement. The third document was the purported signed

original copy of the settlement agreement. Gharib claimed to have found the third document after trial, but before he received the trial court's decision, in his filing cabinet despite other prior unsuccessful searches. Accepting Gharib's and his counsel's descriptions of the third document, the third document was like Exhibit 102 in that only KGE, and not Gharib, was liable to pay plaintiffs' \$1.5 million, but was unlike Exhibit 102 in that it did not have Exhibit 102's line justification issue that plaintiffs' counsel had pointed out during trial.

Gharib's motion to reopen his case-in-chief failed to show good cause because it appears to have been based on a second altered version of the settlement agreement. (See *Sanchez v. Bay General Hospital*, *supra*, 116 Cal.App.3d at p. 793.) The motion failed to show Gharib's diligence in locating, or a sufficient excuse in failing to find, the purported signed original copy of the settlement agreement in his office filing cabinet during the over two and a half years of litigation prior to trial. (*Estate of Horman*, *supra*, 265 Cal.App.2d at p. 805.) Moreover, as the trial court found that Exhibit 1 was the operative settlement agreement in part because plaintiffs' attorney testified that he insisted in the negotiation of the settlement agreement that Gharib be liable personally under the settlement agreement—a position the trial court found logical—and because of the trial court's view of Gharib's conflicting statements about the operative settlement agreement, the newly discovered signed original copy of the settlement agreement would not have produced a different result. (*Broden v. Marin Humane Society*, *supra*, 70 Cal.App.4th at p. 1222.) Accordingly, the trial court did not abuse its discretion in denying Gharib's motion to reopen his case-in-chief. (*Sanchez v. Bay General Hospital*, *supra*, 116 Cal.App.3d at p. 793; *Guardianship of Phillip B.*, *supra*, 139 Cal.App.3d at p. 428.)

II. Damages

Gharib contends that the trial court erred in awarding plaintiffs the entire \$1.5 million due under the settlement agreement rather than the total of the installment and other payments that had not been paid at the time of trial—i.e., that it erred in

accelerating the payment of future installment payments.⁸ Because the trial court erred in accelerating the installment payments in its award, we remand the matter to the trial court for a recalculation of damages, including interest.

A. Background

Before rendering its decision, the trial court stated that it appeared that plaintiffs had proved their case and that it would award plaintiffs \$1.5 million less \$10,000 in payments already made under the settlement agreement. Gharib's counsel stated that the settlement agreement did not have an acceleration clause—i.e., a provision that all installment payments would be due immediately if Gharib breached the settlement agreement. The trial court stated that the settlement agreement did not appear to have an acceleration clause and asked plaintiffs' counsel if he agreed. Plaintiffs' counsel argued that the lack of an acceleration clause was irrelevant because Gharib had anticipatorily breached the settlement agreement thus causing to be due the entire balance owed under the settlement agreement.

At the trial court's suggestion, the parties submitted briefs addressing the acceleration of the future installment payments due under the settlement agreement.⁹ In their brief, plaintiffs argued that the settlement agreement contained an acceleration provision. They argued that paragraph two of the settlement agreement¹⁰ incorporated

⁸ Plaintiffs also argue that if the trial court properly accelerated the installment payments, it nevertheless erred in failing to award those payments at their net present value rather than at their full stated value. Because we hold that the trial court erred in accelerating the payment of future installment payments, we need not reach this issue.

⁹ The record on appeal does not reflect that the trial court held a hearing on the acceleration of the installment payments due under the settlement agreement after the parties filed their briefs or that the trial court issued a ruling on the issue.

¹⁰ “KENNETH and KGE shall pay to EM TRUST a total sum of one million five hundred thousand dollars (\$1,500,000.00) hereinafter referred to as the ‘Settlement

by reference a secured promissory note that contained an express acceleration clause.¹¹ They further argued that the settlement agreement was a bilateral contract and that Gharib’s repudiation of the contract was an anticipatory breach that permitted them to recover the entire amount due under the settlement agreement. Gharib argued that the settlement agreement did not contain an acceleration clause and that by plaintiffs’ complete performance the settlement agreement had become a unilateral contract to which the principle of anticipatory breach did not apply. The trial court accelerated the installment payments due under the settlement agreement in its award to plaintiffs. It awarded plaintiffs \$1.49 million for Gharib’s breach of the settlement agreement—\$1.5 million less \$10,000 in payments made under the settlement agreement—plus interest, costs, and attorney fees for a total judgment of \$1,796,625.50.

B. Application of Relevant Principles

1. The acceleration clause in the secured promissory note

The settlement agreement does not contain an acceleration clause. The secured promissory note referred to in paragraph two of the settlement agreement does contain an acceleration clause. Gharib was not, however, a party to that note. KGE and other entities were the “Borrower” under the note. Because Gharib was not a party to the note, he was not subject to the acceleration clause in the note.

Agreement Amount’, evidenced by a Note in the form attached hereto as Exhibit ‘A’, which shall be paid as follows”

¹¹ The secured promissory note’s acceleration clause provided: “If an Event of Default has occurred and is continuing, the entire unpaid principal balance, any accrued interest, any prepayment premium payable under Section 10, and all other amounts payable under this Note and any other Loan Document, shall at once become due and payable, at the option of Lender, without any prior notice to Borrower (except if notice is required by applicable law, then after such notice). Lender may exercise this option to accelerate regardless of any prior forbearance. For purposes of exercising such option, Lender shall calculate the prepayment premium as if prepayment occurred on the date of acceleration. If prepayment occurs thereafter, Lender shall recalculate the prepayment premium as of the actual prepayment date.”

2. Anticipatory breach

“Anticipatory breach occurs when one of the parties to a bilateral contract repudiates the contract. The repudiation may be express or implied. An express repudiation is a clear, positive, unequivocal refusal to perform [citations]; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible [citations].”¹² (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137.) When a party to a bilateral contract repudiates the contract, the injured party may “treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract.” (*Ibid.*; *Daum v. Superior Court* (1964) 228 Cal.App.2d 283, 287 [“a definite and unconditional repudiation of the contract by the promisor communicated to the promisee, being a breach of the contract, creates an immediate right of action even though it takes place long before the time prescribed for the promised performance and before conditions specified in the contract have ever occurred”].)

A contract that was originally bilateral becomes a unilateral contract by one party’s complete performance. (*Minor v. Minor* (1960) 184 Cal.App.2d 118, 122 (*Minor*); 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 867, p. 954 (Witkin).) The doctrine of anticipatory breach does not apply to unilateral contracts. (*Cobb v. Pacific Mutual Life Ins. Co.* (1935) 4 Cal.2d 565, 573 (*Cobb*); *Minor, supra*, 184 Cal.App.2d at p. 122; *Maudlin v. Pacific Decision Sciences Corp.* (2006) 137 Cal.App.4th 1001, 1018 [“It is well established in California law that, in the absence of an acceleration clause, a contract made unilateral by one party’s complete performance

¹² True anticipatory breach occurs when the promisor repudiates the contract prior to the time for his performance. (*Taylor v. Johnston, supra*, 15 Cal.3d at p. 137.) Thus, Gharib’s failure to make installment payments prior to repudiating the contract were breaches of the settlement agreement by nonperformance. When he repudiated the settlement agreement, he anticipatorily breached the agreement as to future installment payments. (*Ibid.*)

renders the doctrine of anticipatory breach inapt. [Citations.]”]; *Diamond v. University of So. California* (1970) 11 Cal.App.3d 49, 53.)¹³

Minor, supra, 184 Cal.App.2d 118, demonstrates the trial court’s error in accelerating Gharib’s future installment payments in light of plaintiffs’ full performance. In *Minor*, a husband and wife signed a contract in which the wife waived any future claim to alimony in consideration of her husband’s agreement to pay her an initial payment of \$1,000 followed by the payment of \$9,000 in monthly installment payments of \$175 for a total of \$10,000. (*Id.* at p. 120.) The contract did not contain an acceleration clause pursuant to which the whole amount would become due in the event of a default. (*Ibid.*) Immediately after the wife obtained a divorce, her former husband renounced his obligation under the contract and failed and refused to make the initial \$1,000 payment and the first or any \$175 installment. (*Ibid.*) The wife brought an action for the total \$10,000 due under the contract contending that her former husband had committed an anticipatory breach of the contract. (*Id.* at p. 121.) The trial court denied the wife’s claim, holding that the doctrine of anticipatory breach did not apply to the contract. (*Ibid.*) It also denied the wife relief as to the payments due at the time of trial. (*Ibid.*)

On appeal, the court held that the wife had completed her performance under the contract by waiving her right to alimony and that the contract, by such completed performance, had become a unilateral contract. (*Minor, supra*, 184 Cal.App.2d at p. 122.) It held, “Appellant wife must fail in her chief contention here that because of the alleged repudiation of respondent husband she is entitled to the total sum due on a property settlement agreement which provides only for monthly installment payments.

¹³ “While this rule has been criticized (see, e.g., *Harris v. Time, Inc.* [(1987)] 191 Cal.App.3d [449,] 457-458), we are bound by our Supreme Court’s holding in *Cobb. (Auto Equity Sales, Inc. v. Superior Court* [(1962)] 57 Cal.2d [450,] 455.)” (*Maudlin v. Pacific Decision Sciences Corp., supra*, 137 Cal.App.4th at p. 1018.) The rule is criticized by other authorities. (See *Central States, SE & SW Pen. v. Basic Am. Ind.* (7th Cir. 2001) 252 F.3d 911, 916 (Posner, J.); 10 Murray, Corbin on Contracts (Rev. Ed. 2014) § 54.5, pp. 146-147.) This is an issue that may deserve reexamination.

Since the wife had fully performed her part of the agreement, and since the doctrine of anticipatory breach does not apply to a unilateral contract, the trial court correctly denied the wife's claim for the sum total due on the contract." (*Id.* at p. 120.) It further held, however, that the trial court erred in failing to award the wife the installment payments due at the time of trial. (*Id.* at pp. 126-129.)

Kami testified that plaintiffs transferred to KGE the commercial properties identified in the settlement agreement. There was no dispute at trial that plaintiffs had fully performed their obligations under the settlement agreement. By their full performance of their obligations under the settlement agreement,¹⁴ plaintiffs turned the settlement agreement into a unilateral contract. (*Minor, supra*, 184 Cal.App.2d at p. 122; 1 Witkin, *supra*, Contracts, § 867, p. 954.) The doctrine of anticipatory breach does not apply to unilateral contracts. (*Cobb, supra*, 4 Cal.2d at p. 573; *Minor, supra*, 184 Cal.App.2d at p. 120; *Maudlin v. Pacific Decision Sciences Corp., supra*, 137 Cal.App.4th at p. 1018; *Diamond v. University of So. California, supra*, 11 Cal.App.3d at p. 53.) Accordingly, the trial court erred in accelerating the payment of future installment payments due under the settlement agreement. We remand the matter to the trial court for a recalculation of damages—i.e., to calculate the installment and other payments due at the time of judgment and interest.¹⁵

¹⁴ On appeal, plaintiffs identify the property transfers and their obligation to file a request for dismissal in an identified lawsuit as the obligations under the settlement agreement that made the settlement agreement a bilateral contract. Plaintiffs did not contend in the trial court and do not contend on appeal that they did not transfer to KGE the identified properties or that they failed to file the request for dismissal thus causing the settlement agreement to remain bilateral. Instead, in their third amended complaint, they alleged that they fully complied with the settlement agreement except as excused by Gharib and KGE, and on appeal they argue, "The trial court heard ample evidence of Kami Emein's performance and made the factual determination he performed a bilateral contract."

¹⁵ By prevailing at trial, plaintiffs established Gharib's duty under the settlement agreement to pay plaintiffs the \$6,250 monthly installment payments due after the date of

DISPOSITION

The trial court's denial of Gharib's motion to reopen his case-in-chief is affirmed, the trial court's damages award is reversed, and the matter is remanded to the trial court for a recalculation of damages, including interest. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, Acting P. J.

We concur:

KRIEGLER, J.

GOODMAN, J.*

the judgment through January 1, 2017—the principal bearing interest at five percent—and the payment of any outstanding principal and interest at the end of the term.

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