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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MEHRDAD ELIE,

Plaintiff and Appellant,

v.

JOHN KALLIE,

Defendant and Respondent.

B272360

(Los Angeles County  
Super. Ct. No. BC559113)

APPEAL from a judgment and postjudgment orders of the Superior Court of Los Angeles County, Michael J. Raphael and Allan J. Goodman (Retired Judge of the Los Angeles Sup. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Judges. Affirmed.

Jeffer Mangels Butler & Mitchell, Michael J. Hassen, Joseph N. Demko, Christopher H. Doyle for Plaintiff and Appellant.

Fredman Lieberman Pearl, Howard S. Fredman for Defendant and Respondent.

Plaintiff seller Mehrdad Elie appeals from (1) the second amended judgment in favor of defendant buyer John Kallie, ordering specific performance of the parties' contract for the sale of a residential condominium; (2) the order denying him leave to amend his complaint; and (3) the postjudgment orders awarding buyer attorney fees totaling \$89,720. We affirm in all respects.<sup>1</sup>

### **FACTUAL AND PROCEDURAL BACKGROUND**

Seller owned a tenant-occupied, rent-controlled condominium in Los Angeles (the property). In July 2013, seller entered into an agreement with a real estate broker to list and sell the property for \$449,000. Within days, buyer submitted a written, all-cash \$430,000 offer. The offer was contingent on paragraph 5.C., which required the seller to remove the tenant from the premises at least five days before close of escrow unless the parties "otherwise agreed in writing." The contingency added, "Note to Seller: If you are unable to deliver the Property vacant in accordance with the rent control and other applicable Law, you may be in breach of this Agreement."

Seller submitted a written counteroffer holding firm on the listing price of \$449,000 and adding that he would "try to deliver the Property by October 15. If due to legal issues he cannot, buyer has the option to cancel the contract if not delivered by November 15, with no liability to seller." Otherwise, seller's

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<sup>1</sup> In an opinion also filed this date, we dismissed as moot seller's separate appeal challenging the order that he post an undertaking or appellate bond. (*Ellie v. Kallie* (June 12, 2018, B278267) [nonpub. opn.] )

counteroffer did not alter buyer's original offer. Buyer accepted the counteroffer. He deposited \$13,470.00 into escrow and timely completed his due diligence and inspections.

The following month, in September 2013, the tenant was prepared to vacate the property if paid a \$7,500 relocation fee. Seller declined to pay and in response to an email from the realtor asking how soon the tenant issue would be resolved because "the buyer has been guaranteed that the lessee will be vacating the property," seller responded: "I must have missed the '[GUARANTEED]' part of the deal because I made sure in my counter that we will try our best but I will be damned [*sic*] if I pay Bribe money to anyone to move. It is against my principals [*sic*] and I am not making money on this deal since it has cost me over \$425,000."

Buyer quickly proposed a reduction in the sales price in exchange for buyer assuming responsibility for removing the tenant. Seller rejected this suggestion, but initiated an unlawful detainer action against his tenant in October 2013. Seller voluntarily dismissed the unlawful detainer action. Seller filed and then voluntarily dismissed two more unlawful detainer actions and did not follow through with any other efforts; the tenant remained in residence.

In July 2014, seller delivered a grant deed into escrow and demanded buyer to deposit the balance of the purchase, although the tenant remained in possession. Buyer confirmed he was ready, willing and able to deposit the balance of the purchase funds into escrow, but insisted seller first remove the tenant.

Still without a resolution, seller initiated this lawsuit on September 29, 2014, alleging causes of action against buyer for declaratory relief and cancellation of seller's counter offer.<sup>2</sup> The operative pleading was the first amended complaint. Seller alleged there was no "meeting of the minds" as to all the material terms of the sales agreement because it did not include a deadline for removal of the tenant. He sought to have his own counteroffer declared void. Buyer answered and cross-complained for declaratory relief and specific performance of the terms of the parties' agreement, i.e., delivery of the property vacant. Both seller and buyer sought attorney fees.

On July 29, 2015, buyer moved for summary judgment on his cross-complaint. Before buyer's motion was heard, seller filed his own motion for summary adjudication of issues on the first amended complaint.

Buyer's motion was argued and decided first, on January 13, 2016. The record does not include a reporter's transcript or suitable substitute or even court minutes for the hearing. The trial court issued a written ruling the same day, ordering specific performance. In so ruling, the trial court determined the option in the counteroffer for cancellation of the agreement was not reciprocal and only applied to the buyer. Buyer's obligation to deposit the entire purchase price into escrow was excused because seller failed to perform his obligations to sign escrow

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<sup>2</sup> Seller also sued the broker and her realty company, but they are not involved in any of the issues before us on appeal.

instructions and remove the tenant from the property.<sup>3</sup> The ruling recognized the tenant still occupied the property and held buyer was “not entitled to compensation from [seller] for [seller’s] failing to deliver the property vacant.”

The following week, seller filed a motion for leave to file a second amended complaint to add a cause of action against buyer for buyer’s breach of contract based on buyer’s failure to “timely tender the purchase price of the property into escrow” and insistence on “enforcing the purported condition that [seller] must allegedly ‘remove’ the Tenant as a ‘condition” of the sale.”

Seller’s two motions were argued on the record on February 26, 2016, and denied. The trial court’s written ruling on seller’s summary adjudication of issues motion “incorporate[d] its analysis from its ruling on [buyer]’s motion and DENIE[D] [seller]’s motion.” The trial court also noted seller had spent \$18,000 in efforts to remove the tenant, but then stopped pursuing “eviction because he desires to sell the property to the tenant at a higher price than what [buyer] agreed to pay.” In denying seller’s motion for leave to amend to file a second amended complaint, the trial court noted it previously found seller to be in breach of the parties’ agreement by not signing escrow instructions or removing the tenant from the premises and “explicitly rejected the same theory [seller sought] to assert by way of a second [amended] complaint.”

The second amended judgment was entered April 20, 2016. It provided a schedule for seller to deliver escrow instructions,

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<sup>3</sup> The tenant’s relocation demand had risen to \$10,500 by this point.

buyer to deposit into escrow the balance due on the purchase price, and seller to execute a grant deed conveying the property to buyer without first having to remove the tenant.

Thereafter, buyer moved for \$82,650 in contractual attorney fees. Plaintiff opposed the fee motion, contending in part that buyer was not the prevailing party because the judgment eliminated seller's obligation to remove the tenant from the property. The trial court disagreed, finding buyer obtained a net recovery and was the prevailing party "under any interpretation of the procedural history." The trial court also granted defendant's subsequent ex parte application for an additional award of attorney fees in the sum of \$7,796.00

## DISCUSSION

### *Summary Judgment for Specific Performance in Buyer's Favor*

We review a summary judgment de novo, without deference to the trial court's reasoning or decision. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336.) Although we liberally construe the evidence propounded by the party opposing the summary judgment motion (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 370-371), the trial court's judgment "is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent." (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) The "party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) In the absence of an adequate appellate record, the judgment is presumed correct and must be

affirmed. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 (*Maria P.*.)

The gravamen of seller's argument is that in July 2014, several months before he initiated this lawsuit in September 2014, he deposited the property's grant deed into escrow and demanded that buyer close escrow, even though the tenant remained in possession of the property. What buyer achieved by way of summary judgment in 2016 was precisely what seller proposed in his 2014 prelitigation settlement demand, i.e., the closing of escrow with the tenant still in residence. Ergo, seller could not have been in breach of the parties' agreement because what the trial court ordered when it granted specific performance was what seller proposed before he even filed the lawsuit. Moreover, the "no liability to seller" language in the agreement must be interpreted to mean that if seller did not deliver the property tenant-free by November 15, 2014, seller was relieved of any and all obligation to do so. Finally, seller complains the trial court granted relief buyer did not request, i.e., ordering sale of the property with the tenant still in place.

The failure to provide this court with the reporter's transcript or suitable substitute from the hearing on buyer's motion for summary judgment, however, is fatal to this appeal. Seller did not sue to compel buyer to waive the requirement for removal of the tenant in order to consummate the deal; seller sued to void the parties' agreement. Buyer, on the other hand, cross-complained to compel seller to close the deal according to the parties' agreement, which was that seller deliver the property without the tenant. The buyer apparently waived that provision

some 16 months later at the hearing on his motion for summary judgment, paving the way for the trial court to order specific performance even though the property was not vacant. We say “apparently” because the only record of what transpired at the January 13, 2016 is the court’s decision.

Seller had the obligation to provide an adequate record of the January 13, 2016 hearing to demonstrate buyer did not waive the provision requiring seller to remove the tenant before close of escrow or the trial court granted relief that was not requested. Seller failed to do so, and we must assume the judgment is correct.

We also note that seller, without making a motion for a new trial or for reconsideration of the summary judgment granted in favor of buyer, sought to reargue buyer’s summary judgment motion at the February 26, 2016 hearing. That hearing was on the record, and seller did provide this court with a reporter’s transcript. There, and in this court, seller primarily relied on the agreement’s “with no liability to Seller” language. As the trial court aptly observed, however, “a provision obligating [seller] to remove the tenant is not the same as an option to cancel the transaction.” If seller could not remove the tenant, the parties’ agreement gave buyer alone the option to cancel the agreement “with no liability to seller,” i.e. without owing seller anything. But nothing in the agreement required buyer to cancel the agreement and walk away. The agreement was clear, as evidenced by the plain language in buyer’s offer, which was incorporated into the parties’ final agreement: the failure to remove the tenant could be a breach of the agreement, i.e., it



could result in liability imposed on seller. And it did, in the form of a judgment ordering specific performance, albeit without any additional payment to buyer to compensate him for the cost and inconvenience of removing the tenant.<sup>4</sup>

Seller failed to meet his burden to show reversible error. In the absence of an adequate record, we presume the summary judgment was correct.

### *One Final Judgment Rule*

Seller argues the summary judgment in buyer's favor on the latter's cross-complaint was not directed to seller's complaint, did not resolve all the issues between seller and buyer, and violated the "one final judgment rule." We disagree.

The operative pleadings were seller's first amended complaint and buyer's cross-complaint. Seller's pleading included three causes of action: the first was for breach of fiduciary duty against seller's real estate brokers only; buyer was the sole defendant in the second, where seller sought a declaration that buyer's counter offer was void and not enforceable; all defendants were named in the third, which asked for cancellation of the

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<sup>4</sup> In the reply brief in support of his motion for summary judgment, buyer did conclude, "Thus, the no-liability-to-Seller language relieved the Seller of being in breach of contract if he was unsuccessful in timely delivering the [p]roperty tenant-free." This statement was made before the hearing on buyer's summary judgment motion. Buyer's counsel disavowed it at the reported hearing on seller's motion for summary adjudication. We must assume buyer's change in position was the result of the unreported arguments on January 26, 2016. There is no basis for a reversal on this point.

various documents involved in the listing for sale, including the buyer's purchase agreement and seller's modifying counter offer (together, those two documents created the contract for the sale of the property). The prayer asked "[f]or a declaration by this Court [] regarding the parties' rights, duties and obligations under [those two documents], including whether [buyer] has any right to purchase the Property" and "[f]or a judgment that the Counter Offer is void." Buyer cross-complained against seller for specific performance of the same two documents and a declaration that they were both valid and enforceable.

Both sides moved for summary judgment as to the claims in their respective pleadings.<sup>5</sup> As noted, the competing motions were not heard on the same date. Ruling first on buyer's motion, the trial court found as a matter of law the purchase agreement and counter offer were valid and enforceable, entitling buyer to specific performance to the buyer based on them. This ruling necessarily was dispositive of seller's complaint to have the documents declared void and unenforceable, as the trial court noted several weeks later when it denied seller summary adjudication on his claims in the first amended complaint against buyer. At this hearing, the trial court also denied seller's motion for leave to file a second amended complaint. Accordingly, all the issues between buyer and seller were resolved before the April 20, 2016 entry of the second amended judgment.

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<sup>5</sup> We recognize seller styled his motion as one for summary adjudication of issues, presumably because it was not directed to the broker defendants. But the motion addressed all issues between buyer and seller; and in that respect, it was a motion for summary judgment.

Moreover, although seller asserts not all the claims between buyer and him have been “fully adjudicated,” he has not identified one issue that remains to be determined between the two parties or provided one citation to the record. Seller has forfeited this issue (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 589 [“appellant has the burden to demonstrate error. . . . An appellant who fails to cite accurately to the record forfeits the issue or argument on appeal that is presented without the record reference”]) and we presume the judgment is correct. (*Maria P., supra*, 43 Cal.3d at pp. 1295-1296.)

*Plaintiff’s Motion for Leave to File a Second Amended Complaint*

Seller next contends the trial court erred in denying his motion for leave to file a second amended complaint. The proposed pleading contemplated leaving in place allegations in the first amended complaint asserting there was never an enforceable sales agreement between the parties and adding entirely inconsistent allegations that the parties entered into an enforceable agreement and buyer breached it. We review the trial court’s denial of the motion for leave to file an amended complaint for an abuse of discretion. (*Ball v. FleetBoston Financial Corp.* (2008) 164 Cal.App.4th 794, 797.)

As a general rule, “there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show.” (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586.) But seller’s attempt to do so here did

not come until after the trial court found the parties entered into an enforceable agreement and seller breached it.

Under these circumstances, if seller sought to hold buyer liable for breach of the same agreement the trial court had already determined seller breached, seller should have challenged the trial court's ruling on buyer's summary judgment motion by filing a motion for new trial (Code Civ. Proc., § 659), a motion for reconsideration (Code Civ. Proc., § 1008, subd. (a)) or a motion a motion for relief from judgment (Code Civ. Proc., § 473, subd. (b)). Or, seller could have sought leave to amend the first amended complaint at or before the hearing on buyer's motion for summary judgment. (See, e.g., *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1257 [plaintiff who "wishes to introduce issues not encompassed in the original pleadings . . . must seek leave to amend the complaint at or prior to the hearing on the motion for summary judgment"].) Seller exercised none of these options. Instead, seller sought to hold buyer liable for breach of the same agreement the trial court had already determined seller breached. The trial court did not abuse its discretion in denying the motion for leave to amend.

### *Buyer Entitled to Contractual Attorney Fees*

Finally, seller contends the trial court erred in granting defendant's motions for contractual attorney fees.<sup>6</sup> We disagree.

The sales agreement provided the prevailing party was entitled to reasonable attorney fees and costs. By statute, the

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<sup>6</sup> Seller does not challenge the amount of the attorney fees award, only buyer's entitlement to it.

prevailing party is “the party who recovered a greater relief in the action on the contract.” (Civ. Code, § 1717, subd. (b)(1).) “A trial court has wide discretion in determining which party is the prevailing party under section 1717, and we will not disturb the trial court's determination absent ‘a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence.’” (*Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1539.) Buyer prevailed on his cross-complaint for specific performance and on seller’s complaint seeking a declaration that the parties’ agreement was void and not enforceable. Substantial evidence supports the trial court’s finding that buyer was the prevailing party entitled to reasonable attorney fees.

### **DISPOSITION**

The judgment is affirmed. Buyer is awarded costs and reasonable attorney fees on appeal.

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DUNNING, J.\*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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