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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

ARDAKE HOLDINGS, LLC, Plaintiff and Appellant, v. ALLAN ANTHONY KONCE, Individually and as Trustee, etc., et al., Defendant, Cross-complainant and Appellant; STEVEN FISHMAN et al., Cross-defendant and Appellant.	B232432 (Los Angeles County Super. Ct. No. BC414047)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Shook, Judge (Retired). Affirmed in part, reversed in part, and remanded.

Blum Collins, Steven A. Blum and Gary Ho for Plaintiff and Appellant.

Borowsky & Hayes, Philip Borowsky, and Christopher J. Hayes for Defendant, Cross-complainant and Appellant Allan Anthony Konce.

INTRODUCTION

This consolidated appeal is from an amended judgment following a bench trial. The trial court determined that Allan Anthony Konce, individually and as trustee of the Allan Anthony Konce Trust, (Konce) was contractually obligated to pay a $775,000 promissory note owed to Ardake Holdings, LLC (Ardake). The court also determined that an oral agreement between Konce and Steven Fishman (Fishman), relating to a $600,000 investment in three car wash operating businesses, should be rescinded for material failure of consideration. Both parties appealed.

On appeal, Konce contends the judgment against him should be reversed because: (1) the trial court failed to properly issue its statement of decision, (2) the court erred in determining that the Fishman parties (Fishman, Ardake, CWN01 LLC, SE3CW LLC, and Peninsula Partners Real Estate Fund I, LLC) were not contractually obligated to build car washes on the three properties within 18 months of the execution of certain documents, and (3) the court erred in denying Konce's request for rescission of all written contracts based upon his counter-claims that the Fishman parties had committed fraud.[1] In addition, Konce contends he is entitled to the return of his entire $600,000 investment in the car wash operating businesses, without an offset for rental payments made to him by those same businesses.

The Fishman parties contend the oral agreement should not be rescinded for failure of consideration. They argue the trial court erred in determining that Konce

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[1] Fishman created Ardake, CWNO1, and SE3CW to perform different functions (financing, management, landowner), so as to attract a wide range of investors, including investors interested only in a management company. CWNO1 is sometimes referred to as CW1 in the documents, and SE3CW is sometimes referred to as SE3. Peninsula Partners was formed as a real estate fund to develop vacant land, but Konce did not invest in the fund.

paid $600,000 to participate in the profits of operating car washes, rather than to invest in businesses that planned to develop and operate car washes. In addition, they contend the trial court erred in determining the applicable prejudgment interest on the various monetary awards.

We conclude that the monetary award to Konce should not have been reduced by the rental payments, and that the Fishman parties were entitled to a prejudgment interest rate of 10 percent following Konce's default. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. *Konce's Investment in Vacant Land and Car Washes*

Konce is a physician and sophisticated real estate investor. During the six years before the events that led to the instant matter, he had engaged in seven or eight successful real estate deals with the advice and assistance of his long-time real estate agent, Lawrence Serna. Konce would sell a piece of real property and use the sales proceeds to purchase similar and potentially more valuable property. These real estate deals were structured as property exchanges pursuant to section 1031 of the Internal Revenue Code (Section 1031 exchanges) to defer the taxes incurred by selling the real property. Serna and his brokerage firm made over a million dollars in commissions on these transactions.

In 2007, Serna advised Konce to sell a 44-unit apartment building because it was no longer a good investment. On May 8, 2007, Konce sold the building for $4.5 million, resulting in capital gains of $2.7 million. As part of the transaction, Konce paid the commissions of both Serna, his broker, and the buyer's broker. Konce admitted that it is "usually the case that the seller pays the brokerage commission on both sides of the deal."

In order to defer taxes on the capital gains and to comply with the requirements for a Section 1031 exchange, Konce had to designate like-kind

replacement properties within 45 days of the sale (June 22, 2007) and to close escrow on those properties within 180 days (November 4, 2007). Konce admitted that "[a]bsent compliance with these deadlines, [he] risked incurring substantial tax liability on the proceeds of the sale of the apartment building. This put [him] under substantial pressure to select and invest in replacement property rapidly."

Konce decided to purchase three vacant parcels of land, two in Georgia (Stone Mountain and Lilburn) and one in North Carolina (Winston Salem), from Fishman to use as the replacement properties for the Section 1031 exchange. Fishman had told Konce that he intended to build a car wash on each of the properties, and Serna had previously advised Konce that "car washes are good investments." Serna also had told Konce that Fishman was "very, very knowledgeable and expert at car washes, building them and running them, and that he was a very reliable, honest guy." Serna testified he knew Fishman as "Mr. Car Wash," and believed that Fishman "knew everything that there was to know about [car washes]." Fishman testified that he bought, developed, and profitably sold a car wash located in Los Angeles. He had also built car washes at three other locations.

Konce had some concerns about investing in the properties. On June 25, 2007, Konce's nephew and property manager, Vytas Juskys, sent an e-mail to Fishman, with a copy to Serna and Konce: "A concern of mine (I certainly don't expect this to be the outcome) is that if the car wash is not built and we own the land, what else could we do with it?" Konce sent an e-mail to Fishman, attaching Juskys's e-mail, and stating: "I agree. AK." In response, Fishman sent a reply e-mail: "Anything that does not compete with Lowe[']s, such as a paint or hardware

store, and no bad users such as massage parlors, funeral, bowling alley."[2] On June 8, 2007, Konce sent an e-mail to his nephew, stating: "Do you believe this car wash stuff? My stomach is in knots. I don't feel like I know what I'm doing." Despite these concerns, Konce went forward with the purchase of a 50 percent interest in the Stone Mountain property.[3]

Serna acted as Konce's agent in negotiating with Fishman to invest in the three properties. After the Stone Mountain transaction closed, Serna, on Konce's behalf, asked Edward Blum, a lawyer, to review the various documents for that transaction. After reviewing the documents, Blum sent an e-mail to Fishman, Serna, and Konce, detailing his concerns. In response, Serna told Konce "that lawyers are deal killers; that, don't worry, this is still the best deal you can get, and that there were . . . some changes that would be made." The appellate record shows changes were made to the documents for the Lilburn and Winston Salem transactions. These revised documents were executed August 10, 2007.

Konce admitted signing the various transactional documents without reading them. Konce further admitted he "made no effort to determine what the value of the raw land was that was in those prices by getting any comparables in Georgia and North Carolina." Nor did Konce call a local contractor to determine the cost of constructing car washes.

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[2] The three parcels of land are adjacent to Lowe's stores, and were originally owned by Lowe's. Fishman had developed a relationship with Lowe's that allowed him to be an approved buyer of the real property. Fishman purchased the properties with restrictive covenants in favor of Lowe's.

[3] Konce did not purchase a 100 percent interest in the land because Fishman did not want to lose control of the property. Instead, Fishman wanted to hold onto the land to develop it.

One of the transactional documents included a provision about brokers. In an e-mail, Blum asked, "So, who pays Mr. Serna? Is there an agreement in place for that?" In response, Fishman sent an e-mail to Serna and Juskys, stating: "Brokers will be a side agreement between seller and broker and therefor the purchase contract stays the same as to [the broker's provision]." Fishman paid Serna a five percent finder's fee of $215,000. On September 7, 2007, at Konce's direction, Serna paid Konce's girlfriend, Vida Kucenas, $20,000.[4] Serna testified that he remained loyal to Konce during the entire process, and acknowledged meeting with Konce's lawyer shortly before trial to review various transactional documents.

After the transactions closed, Konce, through Serna, asked if he could also invest in the car wash businesses. Konce testified that Fishman told him that "I would . . . have an opportunity to buy 20 percent investment in the business." Specifically, Konce could buy "20 percent of the profits" of operating car wash businesses. Fishman agreed to an investment of $600,000. He testified that Konce paid him "$200,000 for 20 percent profit[,] for an interest in each of the car washes that were to be built on those properties." Fishman admitted he received "$600,000 for 20 percent profit interest in the three car washes that were never built." At trial, a wire transfer instruction was introduced stating in pertinent part: "The $200,000 for the purchase of the 20% interest in the Stone Mountain carwash operating business is payable to [the car wash business entity]." Fishman also testified that the car wash operating businesses made rental payments over a six-month period, and that Konce was paid about $260,000 in rent, based on his

[4] The appellate record also includes an undated note written on Konce's medical prescription pad, containing Kucenas's name, address, and social security number, and "$20K."

ownership share of the land. The money for these payments came from Konce's $600,000 investment.

With Konce's approval, Fishman hired Built Green in February 2008 to build the car washes. Fishman chose Built Green, in part, based on Serna's relationship with someone at Built Green. Fishman and Serna told Built Green there would be a bonus for early completion of the construction and a penalty if the construction was late. Over the next few months, Fishman and Serna corresponded with Built Green about the progress on designing the car washes. In late August 2008, Fishman e-mailed Serna expressing concern about the pace of Built Green's work. He wrote, "What is up with the renderings? Got to build. If they are this slow, should we talk again to [another contractor]?" Serna replied that "he felt really comfortable with the Built Green people, and they had to overcome an issue or two, but they will get the work done and we have already been down the road with them this far, so let's go and keep going with them." On November 19, 2008, Fishman fired Built Green because he "was tired of them coming up with excuses and the project was not moving forward." During this entire time, Fishman made periodic payments to Built Green for its work.

Fishman stated he had found new contractors to replace Built Green, but had not hired them, "because there [was] litigation going on and . . . an incredible downturn in the market, and hopefully, if everything [got] sorted out properly, we [would] move forward on it." Fishman also stated that the only thing holding up development of the properties was the lack of building permits. He explained he had paid Built Green for blueprints and architectural drawings, but Built Green had not prepared those documents. Fishman testified that the blueprints and architectural drawings "have to be submitted to be approved before you can get a permit to build."

Konce testified that prior to the transactions, Fishman had told him that "he would build the car washes in 18 months." Fishman denied ever telling Konce, Serna or anyone acting on Konce's behalf that he would guarantee construction of the car washes in 18 months.

Konce acknowledged that between June 2007 and October 2008, he spoke with Serna weekly to discuss the progress, or lack thereof, of the construction of the car washes. At no time did he express to Fishman concerns over the progress of the car wash construction or over Serna's role. Serna testified that Konce told him, "Larry, keep me informed what was going on," and he did. Fishman testified he understood that throughout the process, Serna had been keeping Konce up to date on the development of the car washes. Fishman confirmed that no one told him, "You're running out of time, you better move this along." Finally, Fishman testified that: "Everything [wa]s documented. Everything was completely transparent. Everything was an open book. There was nothing hidden. There was full access to everything."

As part of the financing structure of the transactions, Konce borrowed $2 million from Ardake on three separate promissory notes. The notes were each secured by one of the properties, and were personally guaranteed in writing by Konce. Konce paid off two of the three notes totaling $1,225,000. He refused to pay the last note of $775,000, which was secured by a deed of trust on the Winston Salem property, claiming that the Fishman parties had breached their obligation to build car washes on the three properties within the prescribed 18-month deadline. Konce admitted making an interest payment on the Winston Salem promissory note in November 2008.

B. *The Lawsuits and Underlying Contracts*

On May 19, 2009, in Los Angeles Superior Court, Ardake filed a complaint for breach of contract, seeking to collect on the $775,000 note, which was

personally guaranteed by Konce. The complaint attached the promissory note and the written guarantee.

1. Promissory Note

The note provided that Konce would pay interest on the principal at the rate of 7.5 percent per year, but the interest rate would increase to 14 percent after default. However, "[a]ny interest rate provided for [in the note] which exceeds the maximum rate provided by applicable law shall instead be deemed to be such maximum rate." Finally, the "Note and all related documents are to be governed by, and construed in accordance with, the laws of the State of Georgia."

2. Guarantee

The guarantee, executed September 12, 2007 in Los Angeles, California, provided that Konce would submit to personal jurisdiction in the State of California in any action arising from the guarantee. It further provided that it was "a contract entered into under and pursuant to the substantive laws of the State of California." The parties further agreed that the guarantee "shall be in all respects governed, construed, applied and enforced in accordance with the laws of the State of California without regard to principles or conflicts of laws."

On July 24, 2009, Konce filed an answer to the complaint, generally denying the allegations and asserting as affirmative defenses, among other grounds, that the contracts were invalid because of fraud, lack of consideration, and equitable estoppel. Konce also sought an offset based upon his cross-complaint.

On the same date, Konce filed a cross-complaint against the Fishman parties, seeking at least $7,000,000 in money damages. In the cross-complaint, Konce alleged that "[a]s part of the agreement by which [he] would acquire interests in the real estate and planned car washes, Cross-Defendants guaranteed to Dr. Konce that one of the Cross-Defendants would develop, build, and manage a car wash on each of the three sites within 18 months of Dr. Konce's purchase." Among other

remedies, Konce sought to rescind "every agreement he entered into with the Cross-Defendants."

On July 20, 2010, Konce filed a second amended cross-complaint (SACC). In the SACC, Konce alleged he was fraudulently induced by the Fishman parties "to take the . . . proceeds of selling a profitable Los Angeles apartment building and invest them in partial interests in three parcels of vacant land . . . . Dr. Konce was persuaded to do so because of Mr. Fishman's convincing presentation that a third company, either CWNO1 or Peninsula Partners, guaranteed that within 18 months it would turn the vacant land into highly profitable car wash operations."

The alleged misrepresentations included: (1) "Mr. Fishman's promises that Dr. Konce would earn substantial rental income based on Mr. Fishman's promise to develop each parcel through his management company CWNO1 or his development company Peninsula Partners"; (2) Fishman's claim that he had "more than 12 years of experience as a 'developer of shopping center real estate and upscale carwashes'"; and (3) a guarantee "that CWNO1 or Peninsula Partners would develop, build, and manage a car wash on each of the three sites within 18 months of Dr. Konce's purchase." Konce also alleged that the Fishman parties concealed the fact that they paid Serna a five percent finder's fee.

Konce alleged nine causes of action: (1) breach of the tenants in common agreements (TIC Agreements); (2) negligent misrepresentation; (3) intentional misrepresentation; (4) concealment, (5) promise without intent to perform; (6) common count (money paid); (7) intentional misrepresentation, related to the oral agreement to invest $600,000 in three car wash businesses; (8) rescission of all written contracts; and (9) common count (money paid), as to the oral agreement. The SACC was the first time that Konce expressly asserted a claim on the oral agreement.

Konce sought to rescind the TIC Agreements and "interrelated contracts," such as the agreements of sale and the management agreements. These written contracts were attached to the SACC and produced during the bench trial.

3. Agreements of Sale

The agreement of sale for the Winston Salem parcel was dated August 10, 2007, which was defined as the "Effective Date." There was no mention of car washes in the agreement of sale. Rather, the agreement expressly stated that it was an "As-Is Sale." It also provided: "Seller has not made, and Buyer acknowledges that Seller has not made, any warranty or representation, express or implied, written or oral, statutory or otherwise concerning the Premises, or any uses to which any of the Premises may or may not be put."

In addition, there was an integration clause, providing that the agreement of sale constituted the entire agreement between the parties, and a choice of law clause, providing that the agreement would be governed and construed according to California law.

The agreements of sale for the Stone Mountain and Lilburn properties were substantially identical to that for the Winston Salem property.

4. TIC Agreements

Under "Conditions to Closings," the agreements of sale provided that: "Buyer and Seller must deliver a mutually accepted Tenant[s] in Common ('TIC Agreement') Agreement to escrow on the Effective Date." Each property had a separate TIC Agreement. The Winston Salem TIC Agreement provided that it would be governed by and construed under California law.

The first sentence of the Winston Salem TIC Agreement defined that the term "Agreement" as used in the document to mean "[t]his Tenants in Common Agreement." Paragraph 2 of the Agreement provided:

> "2. <u>*Management*</u>**.** Concurrently with the acquisition of the Property, CW1 is the ('Property Manager'), dated as of June 14, 2007 (the 'Management Agreement'). Pursuant to the *Management Agreement*, the Property Manager, or its successor, shall be the sole and exclusive manager of the Property to act on behalf of the Tenants in Common with respect to the management, operation, maintenance, overseeing all construction on the Property, and leasing of the Property, although the Property is currently under a that [*sic*] certain 20 year lease agreement with Speedway for use as a carwash. *The Property Manager will also guarantee that all construction is completed within 18 months of this agreement. All of the terms, covenants, and conditions of the Management Agreement are hereby incorporated herein by this reference and are hereby consented to by Konce.*" (Italics added.)

The TIC Agreement for the Lilburn property was substantially identical.[5]

The "*Management Agreement*" is referenced 17 times in the TIC Agreement, including in the integration clause, which provided: "*This Agreement, together with the Management Agreement and the Assignment, constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.*" (Italics added.)

5. Management Agreements

The management agreement for the Winston Salem property, dated June 14, 2007, provided: "Agent shall oversee all construction on the Property by any Tenant. . . . Agent shall be able to guarantee to the Owner that the construction is of high quality and meets all federal, state and local laws and building and other codes of the municipality. *Any tenant shall have a period of 18 months to complete construction upon issue from all federal, state and local municipalities of*

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[5] The parties state that the Stone Mountain TIC Agreement was amended to include the highlighted language, although the revised document is not in the appellate record.

all necessary building permits needed to commence construction. If construction goes beyond 18 months from the time of issue of building permits, then Agent shall impose a penalty on the Tenant equal to $900 per day beginning on the 548th day after issue of building permits and terminating on the day of receipt of certificate of occupancy." (Italics added.) The Management Agreement also provided that it "shall be governed by the internal laws of the State of California without required conflict of law precepts."

The management agreement for the Lilburn property is substantially similar. The appellate record does not include a copy of the Management Agreement for the Stone Mountain property.

C. *Statement of Decision and Judgment*

Following a bench trial, on February 1, 2011, the trial court issued its tentative decision in an oral statement that was entered into the minutes. The court's oral statement and minute order directed Fishman to prepare a "Statement of Decision in accordance with the Court's announced decision and prepare a judgment within 10 days." Both the oral statement and the minute order indicated that Konce would have 10 days thereafter to file objections.

On February 10, 2011, Fishman served a proposed statement of decision and proposed judgment. Konce concedes the proposed statement of decision was "essentially a transcription of the trial court's tentative decision." Fishman also lodged objections to the proposed statement of decision. On the same day, Konce filed a request for a formal statement of decision, including a request for findings on all elements of his affirmative defenses and counterclaims and on certain evidentiary issues, totaling 98 findings.

On February 15, 2011, the trial court entered an order, stating: "The court having reviewed the objections submitted by both counsel, hereby makes its ruling as reflected in the Court's Statement of Decision and Judgment signed and filed

this date." The statement of decision differed from the proposed statement of decision in that it granted Fishman's request for attorney fees. The statement of decision and judgment were filed February 15, 2011.

In the statement of decision, the trial court determined that Konce was contractually obligated to pay the promissory note. The court "reject[ed] all of Konce's defenses, finding that the TIC Agreements (together with the Management Agreements) did not provide a guarantee of construction with 18 months of the signing of the TIC Agreements, and that Konce's promissory fraud claim is completely meritless."

The trial court also determined that the Fishman parties were not liable on Konce's breach of contract claim in the SACC because "the TIC Agreements unambiguously guarantee[d] construction of car washes within 18 months of the issuance of building permits and not from the date the agreements were signed." The court interpreted the clause "within 18 months of this agreement" to refer to the management agreement, noting that term "agreement" had been used within a paragraph discussing the management agreement and that the TIC Agreement had previously been referred to as "Agreement." The court also noted that the management agreement was expressly integrated into the TIC Agreement, and the management agreement contained "specific language giving an unambiguous meaning to the 18-month period as 18 months from the issuance of [the] building permits."

The court further found that "[e]ven if the TIC Agreements were ambiguous, the extrinsic or parol evidence presented during the trial proved by a preponderance of the evidence that the TIC Agreements must be interpreted as guaranteeing construction within 18 months of the issuance of building permits." In support, the court noted: "As Konce admitted in his testimony, after the deal documents were signed and delivered, the parties acted as if there were no 18-

month construction deadline from the signing of the TIC Agreements. [¶] In the large amount of e-mails and other correspondence exchanged during the two years after the TIC Agreements were signed, there is not one scintilla of evidence showing that any of the parties thought there was an 18-month construction deadline from the signing of the TIC Agreements. Konce never once mentioned such a deadline, neither before nor after 18 months passed after the signing of the TIC Agreements. The same was true of Fishman, Serna, Juskys, and Konce's attorney Edward Blum." The court also noted: "This was not a bait-and-switch type of case, or a manufactured document case. All of the deal documents were made available to the parties."

The trial court found that the Fishman parties were not liable on Konce's various fraud claims because "[t]he record is devoid of any evidence of a false promise or misrepresentation made by the Fishman Parties to Konce. The evidence discloses no basis for a fraud claim. The evidence indicates that the Fishman Parties acted in good faith at all times during the course of their transaction with Konce." The court specifically found that "the Fishman Parties fully intended to build car washes from the very beginning and over two years worked diligently to build them, as reflected in a long and consistent chain of emails and correspondence admitted during the court of the trial." It further found that "Fishman's and Serna's angry e-mails to Built Green showed they desperately wanted to construct the car washes. The emails showed Fishman pushed hard for construction. However, Built Green engaged in endless delays that kept Fishman and Serna from obtaining building permits." The court also noted that the "substantial economic downturn in the United States which directly affected real estate values" during this time period also explained why the car washes were never built.

The court also found "no evidence that Fishman misrepresented his expertise in car washes to Konce." It held that "Fishman's statement[s] regarding the profitability of car washes and that the subject property would some day become extremely valuable with the development of car washes . . . were nothing more than a personal opinion," and were not actionable as misrepresentations, as they were "nothing more than sales puffing or dealer's talk."

The court found no fraudulent concealment of Fishman's payment of a five percent commission to Serna. It further found the record "devoid of any evidence of disloyalty or conflict of interest on Serna's part as a result of the commission payment. . . . Serna worked diligently to protect the interests of Konce, participating in the attempted development of car washes through[out] the entire two-year period following the signing of the TIC Agreements, as evidenced by a long chain of emails and correspondences."

Finally, the trial court found the Fishman parties liable on the sixth and ninth causes of action in the SACC, relating to Konce's $600,000 investment in the three car wash businesses. The court rescinded the oral agreement for failure of consideration because "there is no car wash in existence." The court offset the damages by the $247,210 rental payments the car wash businesses had paid to Konce.

On March 2, 2001, Konce filed a motion for a new trial, contending the trial court had failed to consider his request for statement of decision and had not allowed him an opportunity to file objections to the Fishman parties' proposed statement of decision and proposed judgment. The motion also proposed changes to the statement of decision. Konce further moved to vacate judgment on the same grounds. On April 6, 2011, the trial court denied the motion for a new trial. The court partially granted the motion to vacate by amending the judgment to allow

prejudgment interest on certain monetary awards. Konce timely appealed, and the Fishman parties cross-appealed.

DISCUSSION

A. *Konce's Appeal*

1. Statement of Decision

On appeal, Konce contends the trial court committed per se reversible error and deprived him of a full and fair trial by failing to complete the entire procedure for issuing a statement of decision. We conclude there was no reversible error.

Section 632 of the Code of Civil Procedure provides that the trial court "shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." A statement of decision "may be vitally important to the litigants in framing the issues, if any, that need to be considered or reviewed on appeal. . . . [A] careful issue identification and delineation may also be of considerable assistance to the appellate court." (*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129 (*Miramar*).) "Another equally important aspect of the orderly procedure ordained for eliciting and originating a statement of decision is the parties' opportunity to make proposals [and objections] as to its content." (*Ibid*.) Thus, "[w]hen a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court . . . , it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue." (Code Civ. Proc., § 634.)

Konce contends the trial court committed per se reversible error, relying on *Raville v. Singh* (1994) 25 Cal.App.4th 1127 (*Raville*) and *Miramar, supra,* 163 Cal.App.3d 1126. In *Raville*, this court reversed a judgment signed by the

supervising judge after the trial judge died without issuing a statement of decision. (*Raville*, at p. 1129.) In *Miramar*, the appellate court held that the issuance of a summary minute order as a "Statement of Decision" in response to a timely request for a written statement of decision constituted per se reversible error, as the minute order failed to "explain[] the factual and legal basis for its decision as to each of the principal controverted issues at trial." (*Miramar*, at pp. 1129-1130.) Here, in contrast, the judge who presided over the bench trial issued a formal statement of decision and judgment, setting forth in detail the basis for its decision as to each cause of action. Thus, *Raville* and *Miramar* are inopposite.

Far more instructive in the instant case is *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278 (*Western Aggregates*). There, the trial court ordered both parties (Western and the County) to file a proposed statement of decision. The court then issued a tentative statement of decision by modifying the County's proposed statement of decision. Four days later, Western filed a request for a formal statement of decision and included "proposals." In response, the trial court entered an order treating the filing as objections to the tentative decision. The trial court then filed its statement of decision and judgment, and later denied a motion for a new trial. (*Id*. at pp. 309-310.) On these facts, the appellate court held that "Western ha[d] not demonstrated that it was deprived of a fair trial by the trial court's procedures culminating in the issuance of the statement of decision." (*Id*. at p. 311.)

Similarly, the court below issued its tentative decision, ordered Fishman to prepare the proposed statement of decision, and informed Konce that he would have 10 days to file objections. Fishman filed a proposed statement of decision, along with his objections, and Konce filed a request for a formal statement of decision, accompanied by a request for findings on 98 issues. As in *Western Aggregates*, the trial court treated Konce's filing as containing objections; its

subsequent order reflected that it had considered "the objections submitted by both counsel" before issuing its final statement of decision. Konce filed several postjudgment motions, which included objections to the statement of decision. The trial court denied the motions, except to the extent it granted prejudgment interest. On this record, it is clear Konce was allowed an opportunity to bring to the court's attention any perceived deficiencies in its proposed statement of decision, and the court had an opportunity to consider them before entering the final statement of decision. Thus, Konce was not denied a full and fair trial by the trial court's procedure in issuing the statement of decision.[6]

We also reject Konce's argument that the judgment must be reversed because the trial court failed to make specific findings on all 98 of his requested findings. We conclude that "[t]he trial court's statement of decision addressed the substance of all of the matters raised by [appellants'] request for specific findings." (*Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118.) We note that "[a] trial court is not required to make an express finding of fact on every factual matter controverted at trial, where the statement of decision sufficiently disposes of all the basic issues in the case." (*Ibid*.) Indeed, "the law is well settled that if findings are made on issues that determine the case, other issues become immaterial and a failure to make additional findings does not constitute prejudicial error [citations]." (*Division of Labor Law Enforcement v. Transpacific Transportation Co*. (1977) 69 Cal.App.3d 268, 278.) In addition, "a specific finding is not required on an issue where it follows by necessary implication from a general finding [citation]." (*Bley v. Ad-Art, Inc*. (1967) 250 Cal.App.2d 700, 712.) Here, the trial court's

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[6] To the extent that the trial court's statement of decision is ambiguous on an issue of fact, Konce's numerous objections have preserved his right to have a more favorable standard of review on appeal. (Code Civ. Proc., § 634.)

statement of decision sufficiently addressed all the basic issues in the case. Accordingly, there was no reversible error.[7]

2. Contractual Obligation to Build Car Washes

Konce contends the trial court erred when it determined he was obligated to pay the $775,000 promissory note because "the TIC Agreements unambiguously guarantee[d] construction of car washes within 18 months of the issuance of building permits and not from the date the agreements were signed." The failure to build the car washes is also the basis for Konce's breach of contract claim against the Fishman parties.

"A trial court's ruling on the threshold question of ambiguity presents a question of law subject to our independent review (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165) and the interpretation of a contract presents a legal question when no extrinsic evidence is introduced, or the competent extrinsic evidence is not conflicting (*id*. at p. 1166)." (*Galardi Group Franchise & Leasing, LLC v. City of El Cajon* (2011) 196 Cal.App.4th 280, 287.) "[W]here extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts, a reasonable construction of the agreement by the trial court which is supported by substantial evidence will be upheld." (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747.)

In interpreting the contracts at issue, we are guided by several maxims of interpretation. First, "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) If the contract is reduced

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[7] For example, Konce faults the trial court for not expressly finding that Ardake, CWNO1, SE3CW, and Peninsula Partners were alter egos of Fishman. However, the court's factual determination that the Fishman parties made no misrepresentation makes any such findings irrelevant.

to writing, the mutual intention of the parties is to be ascertained from the writing alone, if possible. (Civ. Code, § 1639.) The words in a written contract must be understood in their ordinary and popular sense, and if the language of a contract is clear and explicit, the language governs the interpretation of the contract. (Civ. Code, §§ 1638, 1644.) Finally, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other," and interrelated contracts must be interpreted together. (Civ. Code, §§ 1641, 1642.) In addition, we are guided by two maxims of jurisprudence: first, that an "[i]nterpretation must be reasonable," and second, that "[p]articular expressions qualify those which are general." (Civ. Code, §§ 3542, 3534.)

Konce contends the TIC Agreements imposed an 18-month construction deadline from their execution, based upon the provision in the TIC Agreements that "[t]he Property Manager will also guarantee that all construction is completed within 18 months of this agreement." After independently reviewing the written contracts, we disagree.

First, the term "agreement" refers to the "entire agreement" between the parties. As stated in the integration clause of the Winston Salem TIC Agreement, "[t]his Agreement, together with the Management Agreement . . . , constitutes the *entire agreement* between the parties hereto pertaining to the subject matter hereof." (Italics added.)

Second, the construction deadline provision appears in a paragraph entitled "Management" and is followed immediately by language expressly incorporating the management agreement into the TIC Agreement. Thus, we look to the management agreement to resolve any ambiguity in the words "18 months of this agreement," keeping in mind that "[p]articular expressions qualify those which are general." (Civ. Code, § 3534.) The management agreement elaborates on the 18-month time within which the car washes must be developed and after which

penalties accrue for noncompletion. It provides that the property manager will oversee construction for "any" tenant and "[a]ny tenant shall have a period of 18 months to complete construction upon issue from all federal, state, and local municipalities of all necessary building permits needed to commence construction." Thus, by the terms of the integrated agreement, the 18-month construction deadline must be interpreted by reference to the specific 18-month deadline imposed in the management agreement, viz., 18 months from the date of issuance of all necessary building permits.[8]

Moreover, to the extent the construction deadline guarantee is ambiguous, "[t]he conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions" as to that provision. (*Kennecott Corp. v. Union Oil Co*. (1987) 196 Cal.App.3d 1179, 1189.) The extrinsic evidence admitted at trial shows the parties behaved as if there were no 18-month construction deadline from the date of execution of the TIC Agreements. The record supports the trial court's finding that despite numerous e-mails exchanged among Fishman, Serna, Konce, and Juskys, no one mentioned a construction deadline. In addition, Konce paid a promissory note *after* the purported 18-month deadline had passed. Thus, the trial court properly interpreted the construction guarantee in the TIC Agreement to be a

[8] Konce contends this interpretation is flawed because there is no evidence there was a management agreement with respect to the Stone Mountain transaction. Ardake's complaint, however, is based upon the Winston Salem transaction. A management agreement for the Winston Salem transaction is in the appellate record.

guarantee that the property manager would complete all construction with 18 months from the date of the issuance of all necessary building permits.[9]

3. Fraud Claims

Next, Konce contends the trial court erred in denying rescission of the written agreements on basis of: (1) fraud in the execution, because Fishman concealed the management agreements from Konce; (2) promissory fraud, because Fishman spent only $64,000 on Built Green and abdicated his responsibilities to Serna; and (3) material failure of consideration, because no car washes were built. Konce also contends the court erred in granting the Fishman parties' motion in limine to exclude evidence of a "previous failed effort to develop two of the three lots with financiers Robert Barth and Darren Weinstock." We conclude there was no error.

First, Konce's contention that Fishman concealed the management agreements is a new allegation, raised for the first time on appeal. It was never alleged in the cross-complaint, the first amended cross-complaint, or the SACC. It was not raised in the opening statement or the closing argument. Thus, it is forfeited. (See *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167 [failure to raise point in the trial court constitutes waiver].)

Even were we to find no forfeiture, we would conclude Konce failed to show intentional concealment. (*Asnon v. Foley* (1930) 105 Cal.App. 624, 631 [defendant had burden of proof on issues raised in counterclaim].) For example, he did not allege that he requested to see the management agreement but was refused.

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[9] Konce also contends that the failure to apply for building permits within two years of the execution of the TIC Agreement was unreasonable and rendered the construction deadline guarantee "illusory." Fishman testified, however, that the submission of blueprints and architectural drawings was a prerequisite to obtaining the permits, and the court found the Fishman parties "acted in good faith at all times" and "worked diligently" to build the car washes.

Indeed, the evidence is to the contrary. The management agreement is referenced 17 times in the TIC Agreement, and Fishman testified that everyone had access to every document. Moreover, Konce's assertion that his lawyer, Blum, asked Fishman for, but never received, the management agreement does not support an inference of intentional concealment. Blum himself never testified, and there is no evidence he was denied access to any document. Rather, the evidence supports the trial court's finding that Konce was ready to do the deal regardless of any concerns of his attorney.

The trial court concluded there was no promissory fraud because "the Fishman Parties fully intended to build car washes from the very beginning and over two years worked diligently to build them, as reflected in a long and consistent chain of emails and correspondence admitted during the court of the trial." Substantial evidence in the record -- the e-mails and correspondence referenced by the trial court -- supports the court's findings that the Fishman parties intended to build the car washes and made a good-faith effort to perform. The correspondence between Fishman, Serna, and Built Green over several months documents Fishman's frustration with Built Green's failure to timely produce the necessary blueprints and architectural drawings for the building permits. The fact that Fishman "only" spent $64,000 on Built Green does not render Fishman's efforts lacking in good faith. A specific amount of money, standing alone, does not determine whether a party made a good faith attempt to fulfill a promise. In this case, it can be inferred that Fishman did not pay Built Green more money because Built Green had delayed completing the initial phase of work.

Konce also contends that Fishman did not make a good faith attempt to build the washes because he abdicated his responsibilities to Serna, who lacked expertise in developing car washes. The record contradicts this contention. The evidence shows that Fishman worked *with* Serna to oversee the development of the car

washes. There was no abdication. In a related argument, Konce contends that Fishman was responsible for the actions of Serna and Built Green, as they were his agents. As this is a new argument raised on appeal, it is forfeited. (See *Redevelopment Agency v. City of Berkeley*, *supra*, 80 Cal.App.3d at p. 167.) In addition, Konce has not met his burden of proof to show that Serna and Built Green were Fishman's agents. No evidence was produced to show that Fishman had control over Serna or Built Green. Rather, the evidence indicated that it was the *lack* of control over Built Green that led to the delay in obtaining building permits because Fishman could not get Built Green to prepare blueprints and architectural drawings.

Finally, Konce contends there was a material failure of consideration as to the written contracts because the construction of car washes on the land went to the "essence" of the written agreements. (See *Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 403-404 [rescission is appropriate where failure of consideration is "material" or go to the "essence" of the contract].) We disagree. The essence of the written agreements was the purchase of vacant land as part of a Section 1031 exchange. As noted, the written agreement of sale for the Winston Salem property expressly disclaimed any guaranty regarding "any uses to which [the property] may or may not be put. . . ." The parties intended that the land would be developed, hopefully with car washes, but there was no express provision in any written contract stating that car washes would be built on the land.

We also conclude the trial court did not abuse its discretion in excluding proposed testimony that Konce asserts would prove intent or show a common plan or scheme under Evidence Code section 1101, subdivision (b). Konce's brief on appeal fails to explain the purported common plan or scheme, except to argue that Fishman previously had failed in his attempt to build car washes on two of the three parcels. A previous failed effort to develop two parcels of land does not

show fraudulent intent, let alone a common plan or scheme to defraud investors. Additionally, the offer of proof in the trial court did not show fraudulent intent or a common plan or scheme. Finally, the trial court was well within its discretion in determining that Konce's request to call Barth and Weinstock would lead to evidence of little probative value and result in an undue consumption of time. Accordingly, the trial court did not err in denying Konce's request under Evidence Code section 352.

B. *Fishman Parties' Cross-appeal*[10]

1. Rescission of Oral Agreement to Invest in Car Wash Businesses

The trial court determined that the oral agreement for Konce to invest $600,000 for a 20 percent profit participation in the three car washes should be rescinded for failure of consideration. The Fishman parties contend there was no material failure of consideration, as Konce received a 20 percent equity interest in the car wash businesses, which expended money for development expenses, but ultimately failed. They contend there was adequate consideration based upon the businesses' promise to build car washes. The trial court also determined that the $600,000 should be offset by the $247,210 in rental payments paid to Konce. Konce contends there should be no offset because he was entitled to the rental payments as an owner of the land.

As discussed previously, a contract may be rescinded where the failure of consideration is material or goes to the "essence" of the contract. (*Wyler v. Feuer*, *supra*, 85 Cal.App.3d at pp. 403-404; see also Civ. Code, § 1689, subd. (b)(4) [a party may rescind a contract "[i]f the consideration for the obligation of the

[10] Konce also appealed from the trial court's decision to offset the return of his $600,000 investment in the car wash businesses. For convenience, we address this issue in connection with the Fishman parties' cross-appeal from the trial court's grant of rescission of the oral agreement.

rescinding party, before it is rendered to him, fails in a material respect from any cause"].) Thus, we must determine the "essence" of the oral agreement.

Because the oral agreement was never reduced to writing, the terms of the oral contract must be determined from the parties' trial testimony. "[T]he appellate court must defer to a trial court's assessment of the extrinsic evidence, as it defers to other factual determinations." (*Solis v. Kirkwood Resort Co*. (2001) 94 Cal.App.4th 354, 361.) Moreover, "where the interpretation of [a] contract turns upon the credibility of conflicting extrinsic evidence which was properly admitted at trial, an appellate court will uphold any reasonable construction of the contract by the trial court." (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 913.)

Here, Fishman admitted he received "$600,000 for 20 percent profit interest in the three car washes that were never built." Konce testified he invested $600,000 for "20 percent of the profits" of the operating car wash businesses. A wire transfer instruction indicated that each of the $200,000 investment was for a "20% interest in the . . . carwash operating business[es]." On this record, substantial evidence supports the trial court's determination that Konce invested the money in exchange for 20 percent of the profits from operating car wash businesses. Under this construction, the "essence" of the oral agreement was a 20 percent profit participation in businesses that operated actual car washes. Because no car washes were built, Konce was entitled to rescind the oral agreement for material failure of consideration. (Cf. *Benson v. Andrews* (1955) 138 Cal.App.2d 123, 132 [failure of consideration occurred where defendant had agreed to "'construct and complete' a five-unit apartment building," but then ceased work on the building and abandoned the contract].)

2. Offset of Konce's Recovery by Rental Payments

Upon rescission of a contract, each party must restore to the other "everything of value which he has received from him under the contract." (Civ.

Code, § 1691, subd. (b).) Here, the trial court ordered the return of Konce's $600,000 investment, but offset that amount by the $247,210 in rent paid to Konce by the car wash operating businesses. At trial, Fishman testified that the money used to make these payments came from Konce's $600,000 investment. On appeal, Konce contends the rental payments should not be used as an offset because the money was not a benefit conferred under the oral agreement, but rather a benefit conferred by Konce's ownership of the land. We agree.

Konce invested in the car wash operating businesses after the land purchase transactions closed. The TIC Agreements, executed prior to or contemporaneously with the closings, provided that the real properties were "currently under a that [*sic*] certain 20 year lease agreement with Speedway for use as a carwash." Konce, therefore, was entitled to rental payments from Speedway -- the car wash business entity -- before he invested his $600,000. Thus, the rental payments were not a benefit conferred by the oral agreement. Accordingly, the trial court erred in offsetting the return of Konce's investment with the rental payments.

3. Awards of Prejudgment Interest

On Ardake's complaint, the trial court awarded the full amount of the $775,000 note, plus costs and attorney fees, and awarded prejudgment interest using a 7.5 percent interest rate. On appeal, the Fishman parties contend the interest rate should be 14 percent as provided in the promissory note because of Konce's default. Alternatively, they contend the interest rate should be the legal maximum rate under California law, or 10 percent. On Konce's rescission claim, the trial court awarded prejudgment interest using a 10 percent interest rate from the date of the filing of the cross-complaint. The Fishman parties contend the trial court should have used the seven percent interest rate provided under California law for fraud claims, and that it should have calculated the interest from the filing of the SACC, which was the first time Konce expressly sought rescission of the

oral agreement. Because the facts are undisputed, we review de novo the interest rate and time period used to calculate these awards of prejudgment interest.

a. Interest on the Award Based on the Promissory Note

The promissory note provides that the interest rate following a default is 14 percent. It further provides that the note would be interpreted under Georgia law. The Fishman parties contend -- and Konce does not contest -- that the 14 percent interest rate is not usurious under Georgia law. The interest rate, however, is usurious under California law, which generally limits an interest rate to 10 percent. (*Regents of University of California v. Superior Court* (1976) 17 Cal.3d 533, 536; see also Civ. Code, § 3289, subd. (b) ["If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach."].) A contract incorporating an interest rate valid under the law of a chosen state but usurious under California law is not invalid if the chosen state has a substantial relationship to the parties or their transactions, or there is any other reasonable basis for the parties' choice of law. (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 464.) Here, both Konce and Fishman are California residents, and the corporate entities are Delaware residents. Ardake sued on the promissory note in a California court, and sought to enforce a guarantee governed by California law. In addition, the promissory note is secured by a deed of trust on a property located in North Carolina, not Georgia. Finally, the other written contracts (the agreements of sale, the TIC Agreements, and the management agreements) in the land transactions are governed by California law. In short, Georgia has no substantial relationship to the parties or their transactions. Moreover, we see no reasonable basis for the parties' choice of Georgia law for a promissory note secured by real property not located in Georgia. Thus, the note is governed by California law, and a 14 percent prejudgment interest rate would be usurious.

The promissory note, however, also provided that "[a]ny interest rate provided for [in the note] which exceeds the maximum rate provided by applicable law shall instead be deemed to be such maximum rate." Under this contractual provision, the Fishman parties would be entitled to a 10 percent prejudgment interest rate. Konce contends that California has a public policy that "anyone who attempts to collect a usurious interest rate should recover no interest whatsoever." He cites no case law supporting this proposition. Moreover, we discern no public policy to be served by permitting Konce to benefit from his own default. (See *French v. Mortgage Guarantee Co*. (1940) 16 Cal.2d 26, 33 ["[A] debtor cannot by his voluntary act render a transaction usurious which, but for such circumstance, would be entirely free from a claim of usury."].) Accordingly, we conclude that the Fishman parties are entitled to a 10 percent interest rate, as the parties contractually agreed that in the event of a default, the interest rate would be the legal maximum.[11]

b. Interest on the Award Based on Rescission of the Oral Agreement

We reject the Fishman parties' contention that interest on the award resulting from Konce's successful rescission claim should have been calculated at seven percent, the applicable rate for fraud claims. The trial court granted rescission of the oral agreement on the basis of a material failure of consideration, not on the basis of fraud. Thus, the rescission was based upon a contract claim, not a tort claim, and the relief granted was rescissionary relief, not tort damages. (See *Whistler v. Ondulando Highlands Corp*. (1970) 13 Cal.App.3d 108, 118 [plaintiff must elect between "remedy of rescission . . . [or] remedy against [defendant]

[11] Our holding is further supported by the fact that if the parties had not stipulated to a specific interest rate, the applicable interest rate on a successful contract claim would be 10 percent. (Civ. Code, § 3289.)

under the causes of action in tort"].) As the oral agreement was not alleged to specify a stipulated interest rate, the trial court correctly applied the statutorily prescribed rate of 10 percent. (Civ. Code, § 3289.)

We further conclude that the trial court properly calculated the prejudgment interest from the filing of the cross-complaint. Prejudgment interest on a claim for rescission runs from the "date of rescission." (*Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 376.) It is true that the first explicit reference to the oral agreement appeared in the SACC. However, in the original cross-complaint, Konce sought to rescind "every agreement he entered into with the Cross-Defendants," including "the agreement by which [he] would acquire interests in the real estate and *planned car washes*." (Italics added.) This was sufficient to show that Konce demanded rescission of the oral agreement from the date of the filing of the cross-complaint.

DISPOSITION

The Fishman parties are entitled to prejudgment interest at the rate of 10 percent. Konce is entitled to a return of his $600,000 investment without an offset for rental payments. In all other respects, the judgment is affirmed. The matter is

remanded for a recalculation of the monetary awards and interest. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.