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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COMMUNITY REBUILD
PARTNERS, LLC

Plaintiff and Appellant,

v.

SAM CHANIN, et al.,

Defendants and Respondents.

B284632

(Los Angeles County
Super. Ct. No. LC105136)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Elizabeth A. Lippett, Judge. Reversed and remanded with directions.

Law Office of Baruch C. Cohen, Baruch C. Cohen, for Plaintiff and Appellant.

Mesisca, Riley, & Kreitenberg, Dennis P. Riley and Rena E. Kreitenberg, for Defendants and Respondents.

I. INTRODUCTION

Community Rebuild Partners, LLC (seller) entered into a standard form agreement for the purchase of residential property with Sam and Leiba Chanin (buyers). In a separate form occupancy agreement, the parties also agreed buyers could move into and occupy the residence during the 180-day escrow period. When escrow did not close at the expiration of the 180-day period, buyers refused to vacate the property and instead sued seller. In response, seller filed an unlawful detainer action seeking to evict buyers and regain possession of the property.

In seller's unlawful detainer action, the trial court sustained buyers' demurrer without leave to amend, ruling that because buyers took possession under the purchase agreement, seller could not use unlawful detainer to regain possession, and instead must proceed by way of ejectment. On appeal, seller contends that the trial court erred because the relevant transactional documents show that buyers took possession of the property as tenants under a lease, and seller, as landlord, was therefore entitled to sue for unlawful detainer.

We hold that the transactional documents do not unambiguously demonstrate as a matter of law that buyers took possession of the property under the purchase agreement. Instead, a fair reading of the allegations of the operative complaint and attached documents shows seller sufficiently pleaded that buyers initially took possession under a fixed-term lease that expired and that buyers were thereafter subject to eviction under Code of Civil Procedure section 1161 for unlawfully holding over. The trial court therefore erred in sustaining the demurrer.

II. FACTUAL BACKGROUND

On or about May 20, 2016, seller and buyers entered into a California Association of Realtors form “Residential Purchase Agreement and Joint Escrow Instructions” for the purchase of a residence in Sherman Oaks (purchase agreement). The total purchase price was \$2,575,000. The purchase agreement’s financing terms called for an initial deposit in escrow of \$100,000; a first loan in the amount of \$2,060,000; and a balance of \$415,000 to be deposited in escrow. The purchase agreement also provided that escrow would close 180 days from acceptance of the buyers’ offer.

Under “other terms,” the purchase agreement provided: “Buyer shall be moving into the property at the onset of escrow. Buyer shall pay \$18,000 a month for rent. \$6,000 from each month’s rent paid shall be credited towards the purchase price with a cap of \$36,000 to be credited. See attached interim occupancy agreement[.]”¹

On the same day they executed the purchase agreement, seller and buyers entered into a California Association of Realtors form “Interim Occupancy Agreement Buyer in Possession” (occupancy agreement). The occupancy agreement identified seller as the “Seller/Landlord” and buyers as “Buyer/Tenant.” It recited that seller and buyers had “entered into a purchase agreement for the . . . property . . . [and that the] escrow for [that] agreement [was] scheduled to [close in] 180 days.” The occupancy

¹ The purchase agreement also provided that “any dispute or claim” between parties “arising . . . out of this [a]greement or any resulting transaction” would be decided by “neutral, binding arbitration.”

agreement next stated that “Seller, as Landlord, and Buyer, as Tenant, agree as follows: [¶] A. Landlord rents to Tenant and Tenant rents from Landlord [the property] [¶] B. The [property is] for the sole use as a personal residence by . . . [buyers and their children].”

The term of the occupancy agreement was to “begin[] on . . . June 1, 2016 (‘Commencement Date’) . . . and . . . terminate at 5:00 p.m. on the earliest of: (a) the date scheduled for [the] close of escrow of the purchase agreement . . . , or (b) mutual cancellation of the purchase agreement. Tenant shall vacate the [property] upon termination of [the occupancy agreement], unless: (I) Landlord and Tenant have signed a new agreement, (II) mandated by local rent control law, or (III) Landlord accepts Rent from Tenant (other than past due Rent), in which case a month-to-month tenancy shall be created which either party may terminate pursuant to California Civil Code [section] 1946.1”

The occupancy agreement repeated that rent was “\$18,000 per month for the term of [the a]greement.” The first month’s rent of \$18,000 was due by cashier’s check on May 25, 2016. The agreement included a heading, “Possession,” which stated, “Tenant is not in possession of the premises[,]” and listed remedies in the event “Landlord is unable to deliver possession within 5 . . . calendar days.”

Under the heading “Other terms and conditions; Supplements[,]” the occupancy agreement provided “\$6,000 of each month’s rent shall go towards the purchase price with a cap of \$36,000.” The standard security deposit due under most residential leases, however, was not required under the occupancy agreement.

The parties also executed on May 20, 2016, a California Association of Realtors form “Addendum No.1” (addendum), which provided: “The following terms and conditions are hereby incorporated in and made [a] part of the: [purchase agreement] This addendum is not only incorporated into the attached purchase [agreement], but this addendum shall also supercede [sic] anything agreed upon in the purchase contract. [¶] Buyer to deposit \$100,000 at the opening of escrow. This deposit shall be released to the Seller 10 days after opening escrow, at which time Buyer shall remove their inspection contingency. Once a signed contingency removal is received by escrow, it shall serve as instruction to release the non refundable deposit to the Seller. [¶] Buyer to lease the house from Seller until close of escrow. Close of escrow shall occur no later tha[n six] months from the fully executed purchase contract date. Seller offers the Buyer two, one month extensions at the end of [the] lease term, if needed in order to close escrow. [¶] Terms of the lease are as follows: [¶] Monthly rent shall be \$18,000 a month. At the end of the lease term \$6,000 of each month’s rent shall be credited towards the purchase price with [the] cap on the credit of \$36,000. [¶] Tenant/Buyer shall be responsible for all maintenance and wear and tear on the property. [¶] Tenant/Buyer shall be taking full responsibility of the property as if they have taken ownership of the home. Any modifications or repairs will be paid for by the Tenant/Buyer, and approved by the Seller. Buyer/Tenant will carry a homeowners insurance policy/renter’s policy starting from the time of move-in. [¶] Any additional escrow, title costs, or transfer taxes above what would be for a purchase price of \$2,575,000 shall be paid for by the Buyer.” (Original all caps.)

According to seller, buyers paid the rent during the six-month term of their occupancy, or through and including December 1, 2016, but ceased paying rent thereafter. From January through April 2017, buyers tendered \$7,000 checks each month for rent. According to buyers, seller refused to accept those checks. And, according to seller, buyers failed to procure the required financing, failed to close escrow within the required 180 days, and continued to occupy the property “rent free.”

III. PROCEDURAL BACKGROUND

On December 7, 2016, buyers sued seller and others, alleging breach of contract and fraud (buyers’ fraud action).²

On January 9, 2017, seller personally served buyers with a three-day notice to pay rent or quit. The notice sought payment of past due rent of \$12,000 for the month of January 2017.

On January 23, 2017, seller filed an unlawful detainer complaint against buyers seeking to summarily evict them from the property. The complaint attached a copy of the occupancy agreement.

² On March 1, 2017, buyers filed another complaint, bearing a different case number, which buyers describe in their respondents’ brief as a first amended complaint, asserting causes of action against seller for specific performance, fraud, negligent misrepresentation, breach of fiduciary duty, constructive fraud, breach of contract, statutory violations, negligence, trespass, invasion of privacy, and intentional and negligent infliction of emotional distress. According to buyers, their action against seller is currently pending in arbitration, and seller has asserted a cross-complaint in that action seeking, among other things, ejectment.

On February 14, 2017, buyers moved to consolidate the unlawful detainer action with buyers' fraud action, and noticed the motion to be heard on March 23, 2017. The record does not indicate whether the court heard or ruled on this motion.

On March 13, 2017, seller filed a first amended unlawful detainer complaint against buyers, and on March 29, 2017, buyers filed a demurrer to that pleading. On April 28, 2017, the trial court sustained the demurrer with leave to attach to the complaint the purchase agreement and addendum "to allow the court to evaluate whether a landlord tenant relationship exists."

On May 19, 2017, seller filed a second amended unlawful detainer complaint, attaching, among other things, the purchase agreement and addendum. Buyers again demurred, and on June 19, 2017, the trial court sustained the demurrer without leave to amend, ruling that "[t]he complaint shows no landlord tenant relationship. The remedy for [seller] is ejectment."

IV. DISCUSSION

A. Standard of Review

Because this appeal is from a judgment of dismissal following the sustaining of a demurrer without leave to amend, we review the trial court's ruling de novo, considering only the allegations of the operative complaint, its exhibits, and matters that have been judicially noticed to determine whether a viable cause of action has been stated. "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or

conclusions of fact or law. [Citation.] . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

“[In ruling on a demurrer, a] court generally confines itself to the pleading but, as appropriate, may extend its consideration to matters subject to judicial notice. [Citation.] ‘[W]hen the allegations of the complaint contradict or are inconsistent with such facts, we accept the latter and reject the former. [Citations.]’ [Citation.] We give the same precedence to facts evident from exhibits attached to the pleading. [Citations.] Efforts to show *reasoning errors* are beside the point. “Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action.” [Citations.] We do that independently [citation], regardless of reasons stated by the trial court. [Citation.]” (*Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1300.)

B. *Legal Principles*

“Unlawful detainer actions are authorized and governed by state statute. (Code Civ. Proc., § 1161 et seq.) The statutory scheme is intended and designed to provide an expeditious remedy for the recovery of possession of real property.’ (*Larson v. City and County of San Francisco* (2011) 192 Cal.App.4th 1263, 1297 . . . , citing *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 151) ‘The remedy is available in only three situations: to a lessor against a lessee for unlawfully holding over or for breach of a lease; to an owner against an employee, agent, or licensee whose relationship has terminated; and to a purchaser at

an execution sale, a sale by foreclosure, or a sale under a power of sale in a mortgage or deed of trust against the former owner and possessor.’ (*Greene v. Municipal Court* (1975) 51 Cal.App.3d 446, 450 . . . (*Greene*)). Unlike the foregoing situations, ‘[a] vendee in possession of land under a contract of sale who has defaulted in the payment of an installment of the purchase price, is not subject to removal by the summary method of unlawful detainer.’ (*Id.* at p. 451; see *Francis v. West Virginia Oil Co.* (1917) 174 Cal. 168, 169-171 . . . ; *Goetze v. Hanks* (1968) 261 Cal.App.2d 615, 617)” (*Taylor v. Nu Digital Marketing, Inc.* (2016) 245 Cal.App.4th, 283, 288-289 (*Taylor*)).

C. *Analysis: Possession by Lease or Purchase*

Seller contends, among other things, that buyers possessed the property solely under the occupancy agreement which established a landlord-tenant relationship between the parties. Buyers counter that they possessed the property as vendees pursuant to the terms of the purchase agreement. Our analysis of the parties’ relationship at the pleading stage is informed by *Greene, supra*, 51 Cal.App.3d 446, *Provouskivitz v. Snow* (1977) 74 Cal.App.3d 554 (*Provouskivitz*), and *Taylor, supra*, 245 Cal.App.4th 283.

1. *Greene*

In *Greene, supra*, 51 Cal.App.3d 446, the parties entered into a conditional sales contract for real property. (*Id.* at p. 449.) The purchase price was \$49,500 payable as follows: \$2,000 down with the balance payable at \$350 per month plus interest. (*Ibid.*)

The agreement provided that if the buyers defaulted on the monthly installment payments, “all rights of [the] buyer[s] under [the] agreement shall be terminated, [and] all moneys . . . paid by buyer[s] shall belong to seller as rent and compensation for the use and occupancy of [the] real property, and [the] seller shall be entitled to immediate possession” (*Ibid.*)

The seller in *Greene, supra*, 51 Cal.App.3d 446 filed an unlawful detainer action that alleged buyers had defaulted on the monthly payments due under the parties’ lease agreement. (*Id.* at pp. 448-449.) The court in *Greene* held that notwithstanding the language in the parties’ agreement characterizing payments made under the agreement as “rent and compensation for the use and occupancy of [the] property,” the agreement did not “create the relationship of lessor . . . lessee.” (*Id.* at p. 450.) Instead, the court concluded that “[t]he relationship created by the agreement must be characterized by reference to the rights and obligations of the parties and not by labels. [Citation.] The rights and obligations of [the] plaintiff and [the] defendants are those of seller and buyer in a conditional sale of real property. The provision of the agreement allowing [the] plaintiff-seller to retain the down payment and subsequent payments in the guise of rent in the event of default is an unenforceable attempt to specify potentially excessive damages recoverable by [the] plaintiff-seller in the event of breach by defendants-purchasers. [Citation.] [¶] A vendee in possession of land under a contract of sale who has defaulted in the payment of an installment of the purchase price, is not subject to removal by the summary method of unlawful detainer. [Citations.]” (*Id.* at pp. 450-451.)

2. Provouskivitz

In *Provouskivitz, supra*, 74 Cal.App.3d 554, the parties simultaneously entered into a real estate sales agreement and a lease agreement. (*Id.* at pp. 556-557.) The sales agreement called for a total sales price of \$190,000, with a \$45,000 down payment to be paid in two installments, \$15,000 at execution and \$30,000 two months later. (*Id.* at p. 556.) The sales transaction was subject to a substantial contingency—the successful completion of a pending litigation over the seller’s title to the property. (*Ibid.*) The agreement expressly provided that clear legal title could not be passed unless and until the litigation was successfully completed. (*Ibid.*) And, if the sale could not be completed due to the outcome of the litigation, the buyer was entitled to “receive back all monies paid except [monies] paid for rent.” (*Id.* at pp. 556-557) The sales contract also expressly provided that: “Buyer and Seller Agree that Buyer is not entitled to any possession under the contract of sale until its . . . completion. Buyers [sic] possession is by way of the lease which is executed concurrently herewith.” (*Id.* at p. 558.)

The parties’ lease agreement in *Provouskivitz, supra*, 74 Cal.App.3d 554 was open ended, i.e., “the period of time necessary to . . . complete the Agreement of Sale executed concurrently herewith or until its termination by a successful litigant involved in the Les Pendens filed on this property.” (*Ibid.*)

The buyer in *Provouskivitz, supra*, 74 Cal.App.3d 554 paid the down payment under the sales contract and performed under the lease for several months before defaulting. (*Id.* at pp. 557-558.) After serving a three-day notice to pay rent or quit, the

seller filed an unlawful detainer complaint, to which the buyer successfully demurred. (*Id.* at p. 558.) The court in *Provouskivitz*, however, reversed the trial court's order sustaining the demurrer, holding that "[i]n light of the allegations, we cannot say, as a matter of law, that possession was not taken in accordance with a landlord-tenant relationship." (*Id.* at p. 558.) In reaching that conclusion, the court distinguished *Greene, supra*, 51 Cal.App.3d 446, reasoning as follows: "In *Greene* the conditional sales contract constituted a method of sale and possession was accomplished by virtue of that sale. Here possession was specifically limited under the two documents, attached to and made part of the pleading, to the lease agreement. In *Greene* there was provision for forfeiture of down payment. Here there is no such provision, only rent due may be withheld from the down payment. To hold that in any case where there exists a contract to sell there cannot also exist a valid lease agreement is patently erroneous. So long as possession is achieved through the landlord-tenant relationship, unlawful detainer may properly be utilized to regain possession. (Code Civ. Proc., §§ 1161, 1161a.) The fact, if it be a fact, that rent may be credited against a purchase price, in whole or in part, does not, in and of itself, transfer possession from a landlord-tenant relationship to one of purchaser and seller." (*Id.* at p. 533.)

3. Taylor

The buyer and seller in *Taylor, supra*, 245 Cal.App.4th 283, entered into a contract for the sale of residential property for \$1.25 million. (*Id.* at p. 285.) The buyer was required to

“consummate” the transaction within 60 months. (*Ibid.*) The purchase price was comprised of five components: (1) the seller was granted an equity interest in the buyer corporation; (2) the buyer was to pay all property taxes and insurance; (3) the buyer was to pay homeowner’s fees; (4) the buyer was to make a down payment to be credited toward the purchase price; and (5) the buyer was to pay monthly “[p]robationary [p]ayments” of \$2,300 which were not credited toward the purchase price and which could increase if and when the seller’s adjustable mortgage increased. (*Id.* at pp. 285-286.) The buyer also agreed to make additional monthly payments of \$500 which would be credited toward the purchase price. (*Id.* at p. 286.)

The sales agreement also provided: “If, for any reason, Buyer shall fail to make a timely payment of the Probationary Payments, on/or before they are Delinquent, as required by the terms of this Agreement, Seller may, at its sole discretion, serve upon Buyer a Five (5)-Day Notice to Quit. If Buyer has not timely cured the Probationary Payment default set forth in the Five-Day Notice to Quit within Five (5) calendar days of the service of said Notice, Buyer shall immediately and cooperatively vacate the premises” (*Taylor, supra*, 245 Cal.App.4th at p. 286.)

The seller in *Taylor, supra*, 245 Cal.App.4th 283 filed an unlawful detainer action against the buyer, alleging that the agreement between the parties was a lease and the buyer had breached the agreement by failing to make increased monthly probationary payments as required due to the increase in the seller’s adjustable interest rate. (*Id.* at p. 286.) At trial, the buyer argued it was not a tenant, but rather a buyer in possession under a contract of sale. (*Id.* at p. 287.) After taking

extrinsic evidence, the trial court ruled that the contract was a lease “as supported by the evidence” and entered a judgment in favor of the seller. (*Id.* at pp. 287, 291.)

The court of appeal in *Taylor, supra*, 245 Cal.App.4th 283 affirmed the judgment, reasoning as follows: “We conclude the probationary installment payment provisions set forth a 60-month lease. While [the buyer] also agreed to purchase the property within the lease term, possession of the property was conditioned upon payment of the probationary installments, which entitled [the buyer] only to continued possession, and were therefore rent. [Citation.] This conclusion is bolstered by the fact that the agreement provided [the seller], in the event of nonpayment of a probationary installment, with a landlord-tenant remedy of serving defendant with a five-day notice to pay rent or quit the premises.” (*Id.* at pp. 290-291.)

4. Seller Sufficiently Pleaded Landlord-Tenant Relationship

Certain provisions of the transactional documents here suggest that buyers possessed the property as vendees. For instance, similar to the provision of the agreement that allowed seller to retain the down payment in *Greene, supra*, 51 Cal.App.3d 446 which the court criticized as an “unenforceable attempt to specify potentially excessive damages recoverable by [the] plaintiff-seller” (*id.* at p. 451), the addendum provided for forfeiture of the \$100,000 down payment, which became nonrefundable at the outset of the escrow period. Moreover, \$6,000 of each monthly payment was to be credited against the purchase price, which might also suggest the existence of an

installment sale agreement. Finally, unlike in *Taylor, supra*, 245 Cal.App.4th 283, there was no express reference to the seller's ability to serve a notice to pay rent or quit the premises.

On the other hand, the addendum specified that the buyers would "lease the house from seller until close of escrow," and the occupancy agreement also stated it would terminate on the date scheduled for the close of escrow, i.e., within 180 days, which was more suggestive of a fixed term than the open-ended agreement at issue in *Provouskivitz, supra*, 74 Cal.App.3d at page 558. More importantly, the occupancy agreement stated that at the time the parties entered the agreement, buyers were not in possession of the property, but that sellers would deliver possession within 5 calendar days, suggesting that buyers possessed the premises pursuant to the occupancy agreement, that is, as tenants.

The documents attached to the complaint and second amended complaint are thus susceptible to being understood as creating a landlord-tenant relationship. Because "we cannot say, as a matter of law, that possession was not taken in accordance with a landlord-tenant relationship," we reverse the trial court's sustaining of demurrer. (*Provouskivitz, supra*, 74 Cal.App.3d at p. 559; see also *Palacin v. Allstate Ins. Co.* (2004) 119 Cal.App.4th 855, 869-870 [because insurer failed to meet burden on demurrer of showing its policy unambiguously did not cover alleged losses, litigation must proceed beyond pleading stage to allow parties to present extrinsic evidence relevant to resolving ambiguity in policy].)

In finding that buyers have not shown at the pleading stage—as a matter of law—that they took possession under the purchase agreement and that seller has sufficiently pleaded possession pursuant to a lease, we do not express an opinion on

the ultimate merits of the parties' respective contentions or the definitive interpretation of the transactional documents.

D. *Buyers' Other Contentions*

In addition to buyers' primary contention—i.e., the transactional documents unambiguously showed that they were in possession under the purchase agreement—buyers raise a number of other procedural and substantive contentions as alternative support for the trial court's ruling, none of which has merit.

1. Procedural Contentions on Appeal

Buyers contend that seller's opening brief does not adequately set forth the favorable and unfavorable "evidence" as required when an appellant challenges the sufficiency of the evidence in support of a finding of the trial court. But seller does not raise an appellate challenge to the sufficiency of the evidence in support of any factual finding, nor could it. This is an appeal from an order sustaining a demurrer which, as explained above, we review de novo based on the operative pleading and any documents or other matters that were attached or judicially noticed. Because of the procedural posture of the case, there are no factual findings to review on appeal for sufficiency of the evidence, a fact that renders seller's purported noncompliance with the rules governing such review irrelevant to our analysis.

Buyers next contend that seller has failed to show the prejudice required for reversal. (Code Civ. Proc., § 475.) According to buyers, the pendency of the arbitration—in which

seller's title is at issue—shows that, even if the trial court improperly denied seller's right to evict buyers, seller nevertheless has a similar right in the arbitration to obtain the remedy of ejectment against buyers. We disagree. While buyers' argument may be relevant to a motion to consolidate, it does not demonstrate that the judgment did not prejudice seller in *this* action.

Buyers' final procedural argument is that seller failed to identify and discuss the appropriate appellate standard for reviewing a ruling sustaining a demurrer. Although seller's opening brief did not discuss the applicable standard of review, its failure in this regard does not warrant affirmance of the judgment because, among other things, the appropriate de novo standard does not appear to be a matter in dispute between the parties.

2. Substantive Alternative Contentions

Buyers also contend, in the alternative, that even if they took possession as tenants, seller's unlawful detainer action fails as a matter of law because: (1) seller failed to allege that it provided buyers with the 30-day statutory notice required under Civil Code section 789 to terminate an at-will or month-to-month tenancy; (2) seller's theories of eviction—i.e, failure to pay rent under a tenancy at-will and unlawful holding over after the expiration of a fixed-term lease—are irreconcilable; (3) seller's alleged eviction theory for failure to pay rent is not adequately pleaded; (4) seller's three-day notice, required to evict an at-will tenant for failure to pay rent, was void because it overstated the rent due; and (5) seller is judicially estopped by its opposition to

the prior demurrer from asserting a theory of eviction based on unlawful holding over.

Buyers' alternative substantive contentions fall into two categories. The first involves seller's purported failure to provide the required notices to: terminate a tenancy at-will (30-days notice); and evict an at-will tenant who fails to pay rent during the existence of the tenancy (three-days notice). The second category involves seller's purported inconsistent theories of eviction and the assertion that the belated theory based on unlawful holding over cannot plausibly be maintained.

Because we have concluded that seller adequately pleaded its right to unlawful detainer based on buyers' unlawful withholding following the expiration of a fixed-term lease, buyers' first category of contentions based on defective notice have no merit. When a fixed-term lease expires by its own terms, no 30-day notice of termination of an at-will tenancy or three-day notice to pay rent or quit is required before the landlord can sue for unlawful detainer. (*Ryland v. Appelbaum* (1924) 70 Cal.App. 268, 270.) Thus, seller's purported failure to provide a 30-day notice of termination of an at-will tenancy or a three-day notice to pay rent or quit did not affect its right to proceed with the unlawful detainer action based on buyers' alleged unlawful holding over after the expiration of the fixed six-month lease term.

Buyers' second category of contentions is based on seller's purported change in the theories underlying its alleged right of eviction. According to buyers, the first amended complaint was based on the allegation that the six-month lease converted to a tenancy at-will—either because it was extended by agreement of the parties or because buyers tendered monthly rental checks

after expiration of the lease. Buyers maintain that, in response to the demurrer to the second amended complaint, seller changed the theory underlying its alleged right to evict to one based on the expiration of a fixed-term lease. Because seller's first amended complaint was verified, buyers argue that seller is prevented from changing its theory of eviction, either as a matter of pleading practice or by virtue of judicial estoppel.

Buyers' contentions concerning the purported inconsistencies in seller's theories of recovery do not support the ruling sustaining the demurrer to the unlawful detainer complaint. In California, "[t]here is a policy of great liberality in permitting amendments to the pleadings at any stage of the proceedings." (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945 (*Berman*); see also *Steiner v. Rowley* (1950) 35 Cal.2d 713, 719-720.) Pursuant to that policy, "it is irrelevant that new legal theories are introduced as long as the proposed amendments 'relate to the same general set of facts.'" (*Ibid.*) As a result, "after an amended pleading [is] filed, courts [generally] will disregard the original pleading." (*Ibid.*) "Thus, 'unless the alternate pleadings contain antagonistic statements, the statement of facts sufficient to constitute a cause of action in one count is not a bar to the maintenance of a separately stated count in the same pleading based upon inconsistent allegations.' [Citation.] 'In the absence of inconsistent factual allegations, any inconsistenc[ies] between [a] plaintiff's legal theories [are] immaterial.'" (*Ibid.*)

Here, the underlying theory of seller's unlawful detainer action was that buyers were in possession by virtue of a lease, not a sale. That general theory of recovery did not change, and was not inconsistent, as between the first and second amended

pleadings. Instead, seller pleaded alternative, but not necessarily inconsistent, theories of eviction: buyers were either at-will tenants following the expiration of the six-month escrow who had failed to pay rent or they were tenants at sufferance who were unlawfully holding over after the expiration of the six-month lease term.

Moreover, under the liberal pleading policies explained above, seller was permitted to allege inconsistent theories of recovery, such as the existence of a tenancy at-will and the existence of a fixed-term lease that had expired. At the pleading stage, before any significant discovery has been conducted, a plaintiff can plead alternative theories of recovery, subject to proof at trial and an election of remedies. (See, e.g., *Steiner v. Rowley*, *supra*, 35 Cal.2d at p. 720.)

In addition, a plaintiff may change a theory of recovery in an amended pleading “to correct inadvertent misstatements of facts or erroneous allegations of terms. . . .” (*Berman*, *supra*, 56 Cal.App.4th at p. 945.) Such changes are “immaterial” so long as they do not “change[] the fundamental character of [the] transaction.”” (*Id.* at p. 947.) Thus, buyers’ contentions based on the purported inconsistencies in seller’s pleadings are without merit.

Buyers’ related contention based on judicial estoppel is equally flawed. To prevail on such a claim, buyers must show that (1) seller took a position in the trial court upon which it obtained some benefit or advantage; and (2) thereafter took an inconsistent position upon which it sought another benefit or advantage. (*MW Erectors, Inc. v. Neiderhauser Ornamental and Metal Works Co.* (2005) 36 Cal.4th 412, 422.)

Here, even assuming that seller originally pleaded a tenancy at-will and a right to eviction based on failure to pay rent due and owing, seller did not gain any benefit or advantage from taking that position. Instead, in response to that pleading and buyers' demurrer, the trial court merely granted seller leave to amend to submit documents and allegations showing that buyers took possession as tenants under a lease, not as purchasers under the sales agreement. Seller thereafter argued, among other things, that the relevant documents and allegations showed a fixed-term lease that had expired and buyers' subsequent unlawful holding over. Under such circumstances, seller was not judicially estopped by its prior pleading from making those arguments.

V. DISPOSITION

The judgment of dismissal is reversed and the matter is remanded to the trial court with directions to enter a new order overruling the demurrer. Seller to recover costs on appeal.

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KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.