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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JEFFREY K. HITZ, Plaintiff and Respondent, v. ALTA INVESTMENT COMPANY et al., Defendants and Appellants.	B241680 (Los Angeles County Super. Ct. No. LC081919)

APPEAL from a judgment of the Superior Court of Los Angeles County. Russell S. Kussman, Judge. Affirmed.

Akin Gump Strauss Hauer & Feld, L. Rachel Lerman, Susan K. Leader, Orly Degan; Law Offices of Richard P. Keavney and Richard P. Keavney for Defendants and Appellants.

Gray•Duffy, John D. Duff, Kevin H. Park; Pollak, Vida & Fisher and Daniel P. Barer for Plaintiff and Respondent.

Jeffrey K. Hitz doing business as Level One Commercial Real Estate Services (Hitz) sued Alta Investment Company (Alta) for failing to pay a $597,732 a broker commission for the lease of its property located on La Tienda Drive in Westlake Village (La Tienda Property) to Oaks Christian School (Oaks Christian), and a $175,000 broker commission for Alta's purchase of property owned by USA Rancho Conejo LLC (USA) and located on Rancho Conejo Boulevard in Thousand Oaks (Rancho Conejo Property). In addition, Hitz sued Sidney Meltzner (Meltzner) and Lionel B. Sanders (Sanders) for interfering with the broker agreement for the La Tienda Property (La Tienda Broker Agreement), and Vincent Hall (Hall), Sam Wagner (Wagner) and TOLD Partners, Inc. (TOLD) for interfering with the broker agreement for the Rancho Conejo Property (Rancho Conejo Broker Agreement).

After hearing evidence in the first trial, Judge Richard B. Wolfe ruled that Hitz was not entitled to any damages on his breach of contract and interference with contract claims. With respect to the La Tienda Broker Agreement, a pivotal issue was the meaning of an addendum indicating that Oaks Christian was an "excluded party" per form language in section 7.1. Judge Wolfe gave the word "excluded" its common meaning, as defined in Dictionary.com, and concluded that Oaks Christian was excluded from the terms and conditions of the La Tienda Broker Agreement and Hitz was not entitled to a commission. In doing so, he discounted the specialized meaning given to the phrases "excluded person" and "excluded transaction" in section 7.1, a term that limited Hitz to half his commission if certain conditions were met. Judge Wolfe entered a defense judgment, and Hitz appealed.

In *Hitz v. Meltzner* (June 23, 2011, B222882) [nonpub. opn.] (*Hitz I*), we reversed in part, affirmed in part, and remanded the matter for a new trial on Hitz's claim for a commission pursuant to the La Tienda Broker Agreement. We specifically concluded that the addendum was ambiguous but not reasonably susceptible to Judge Wolfe's interpretation that Oaks Christian was excluded from the La Tienda Broker Agreement and Hitz had no claim to a commission.

Upon remand, the case was assigned to Judge Russell S. Kussman. Following the second trial, Judge Kussman entered judgment in favor of Hitz for his full commission of $597,732 due under the La Tienda Broker Agreement for the lease to Oaks Christian (Oaks Christian Lease). In addition, Judge Kussman awarded Hitz prejudgment interest and attorney fees.

Alta appeals and contends: (1) Judge Kussman exceeded his jurisdiction by ignoring the directions in *Hitz I* and failing to adhere to the law of the case; (2) Judge Kussman's judgment was not supported by substantial evidence; (3) even if Alta failed to pay a commission on the Oaks Christian Lease, Hitz is entitled to no more than half of it; (4) Hitz is not entitled to any commission on the Oaks Christian Lease because there is no evidence that Alta breached the La Tienda Broker Agreement or caused Hitz any damages; (5) Judge Kussman's award of prejudgment interest should have been based on half of Hitz's commission instead of his full commission; and (6) when Judge Kussman awarded attorney fees to Hitz, Alta should have received a set-off for the attorney fees it incurred in connection with Hitz's unsuccessful claim that Alta had breached the Rancho Conejo Broker Agreement.

We find no error and therefore affirm.[1]

FACTS[2]

The La Tienda Property

Alta is a partnership that manages the La Tienda Property through Meltzner's nephew, Charles Shuman (Shuman). The La Tienda Property is adjacent to Oaks

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[1] The complaint named 30 Doe defendants, but none of them were identified as defendants in any of the causes of action. Hitz eventually filed Doe amendments to substitute The Aaron Meltzner Family Trust and The Olympic Investment Trust (the two trusts) in for two Does. But it is unclear from the pleadings where they fit in. Before the second trial began, counsel for both sides agreed that the only remaining defendants were Alta and the two trusts. Defense counsel explained that Alta is a partnership and the two trusts are the partners. This is echoed in the opening brief. We therefore accept that the appellants in connection with this appeal are Alta and the two trusts.

[2] In part, we rely on the statement of facts in *Hitz I*.

Christian. Beginning in 2003, Oaks Christian expressed interest in buying or leasing the La Tienda Property, but Alta was never able to consummate a deal. Meltzner, who created Alta and now works for it as a consultant, selected Hitz as the broker to market the La Tienda Property.

The La Tienda Broker Agreement

On December 1, 2006, Alta and Hitz entered into the La Tienda Broker Agreement using a form created by the AIR Commercial Real Estate Association. The La Tienda Property was identified as "the property." Section 1.4, entitled "Transaction," stated that "[t]he nature of the transaction concerning the property for which [Hitz] is employed . . . is" a "lease or other tenancy[.]" In section 2.1, Alta employed Hitz as its "sole and exclusive agent to represent [Alta] in the Transaction[.]" Moreover, Alta agreed that "[a]ll negotiations and discussions for a Transaction shall be conducted by [Hitz] on behalf of [Alta]. [Alta] shall promptly disclose and refer to [Hitz] all written or oral inquiries or contacts received by [Alta] from any source regarding a possible Transaction."

Section 5.1 provided that if Hitz secured a lease, Alta would pay Hitz in accordance with a commission schedule. The schedule was defined as the "Agreed Commission." In addition, Hitz was entitled to the Agreed Commission if Alta "acts as if the Property is not available for a Transaction," "treats the Property as not available for a Transaction," or "breaches, terminates, cancels or repudiates" the La Tienda Broker Agreement.

Section 7 the La Tienda Broker Agreement was entitled "EXCLUDED AND REGISTERED PERSONS." In section 7.1, the parties agreed to the following terms: "[Alta] shall, within five business days after the date hereof, provide [Hitz], in writing, with the names of those persons or entities registered with [Alta] by any other broker under any prior agreement concerning [the La Tienda Property] ('Excluded Persons,' see paragraph 7.5). [Alta] shall also specify for each Excluded Person the type of transaction the consummation of which during the Term of [the La Tienda Agreement] entitles such other broker to any compensation ('Excluded Transaction'). If [Alta] timely provides

[Hitz] with the names of the Excluded Persons and specifies the Excluded Transaction for each Excluded Person, then the Agreed Commission paid to [Hitz] with respect to consummation of such an Excluded Transaction with an Excluded Person shall be limited as follows: If such Excluded Transaction is concluded within the first thirty days of the commencement of the Term hereof, then [Hitz] shall be paid a commission equal to the reasonable out-of-pocket expenses incurred by [Hitz] . . . during said thirty days; or if such Excluded Transaction is concluded during the remainder of the Term hereof, then [Hitz] shall be entitled to a commission equal to one-half of the Agreed Commission. If the specified information concerning Excluded Persons and Transactions is not provided as set forth herein, then it shall be conclusively deemed that there are no Excluded Persons."[3]

Section 7.5 defined "Excluded Persons." It provided that "[i]n order to qualify to be an Excluded Person . . . the individual or entity must have: toured [the La Tienda Property], submitted a letter of interest or intent, and/or made an offer to buy or lease [the La Tienda Property]. In addition, Excluded Persons may only be registered by a broker who previously held a valid listing agreement covering [the La Tienda Property], and such broker may only register individuals and entities actually procured by such listing broker."

The term of the La Tienda Broker Agreement ran from December 1, 2006, to May 30, 2007. The parties attached an addendum that provided: "7.1 Continued. Excluded and Registered Persons. [¶] [Alta] identifies the following parties as excluded per paragraph 7.1: [¶] . . . [Oaks Christian]."

The Oaks Christian Lease

In March 2007, Hitz contacted Oaks Christian about leasing the La Tienda Property. In April 2007, Sanders met with officials from Oaks Christian and eventually worked out a lease. Oaks Christian signed a letter of intent, paid a nonrefundable deposit

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[3] We sometimes refer to the commission called for by section 7.1 of the La Tienda Agreement as a reduced commission.

of $150,000 and, in 2008, eventually signed the Oaks Christian Lease. Hitz was never paid a commission.

USA and TOLD; the Rancho Conejo Broker Agreement

John Moller (Moller) was a principal of USA, and USA owned the Rancho Conejo Property. At the time, TOLD was a real estate company, and Hall owned a majority of the stock. Wagner was a TOLD agent. Moller hired TOLD to market the Rancho Conejo Property for sale. Alta offered to purchase it for $6 million. As part of that offer, Alta agreed that Hitz would be the buyer's broker and thereby entered the Rancho Conejo Broker Agreement. Moller rejected Alta's offer.

Alta's purchase of the Rancho Conejo Property

Eventually, Moller agreed to lease the Rancho Conejo Property to Condor Pacific Industries of California, Inc. (Condor Pacific) with an option to purchase for $6.825 million. Condor Pacific is Meltzner's company. Subsequently, Condor Pacific assigned its option to purchase to Alta, and Alta exercised it. In August 2009, Alta purchased the Rancho Conejo Property. Despite the Rancho Conejo Broker Agreement, Alta refused to pay Hitz his $175,000 commission.

The lawsuit; the first trial

Hitz sued Alta for failing to pay commissions under the La Tienda Broker Agreement and the Rancho Conejo Broker Agreement. In addition, Hitz sued Meltzner and Sanders for interfering with the La Tienda Broker Agreement, and USA, Hall, Wagner and TOLD for interfering with the Rancho Conejo Broker Agreement. Alta eventually paid Hitz the $175,000 commission he was owed for Alta's purchase of the Rancho Conejo Property.

The matter went to trial. Subsequently, Judge Wolfe entered a defense judgment on all causes of action. In his statement of decision, he interpreted the addendum. He cited Dictionary.com and concluded that the plain meaning of the word "excluded" is to shut or keep out; prevent the entrance of; to shut out from consideration, privilege, etc.; to expel and keep out; eject. Next, Judge Wolfe stated: "[Hitz] claims and contends that the contract language requires that in order for those contractually identified parties to be

excluded, [Alta] must comply with the other provisions set forth in paragraphs 7.1 (and 7.5). . . . [T]he [trial court] believes that such a construction is misplaced. . . . [T]he Addendum is clear and unambiguous. [Oaks Christian] is expressly listed as an excluded party per paragraph 7.1 and **not subject to** the other provisions of paragraph 7.1. . . . Indeed, the parties, by agreeing to and accepting the Addendum, stipulated that the entities listed thereon were expressly excluded entities—per the contract[.]" With regards to the Rancho Conejo Property, Judge Wolfe concluded that Hitz had received a $175,000 commission and therefore was not entitled to receive anything more.

Hitz I

Hitz appealed and argued that the judgment should be reversed in all respects. However, he failed to develop his arguments regarding his claim for interference with the La Tienda Broker Agreement and his claim for interference with the Rancho Conejo Broker Agreement, so we concluded that Hitz had waived any challenge to the defense judgment on those claims. (*Hitz I, supra,* B222882, at p. 12.) Regarding his claim based on the failure to pay a commission under the Rancho Conejo Broker Agreement, he asked us to declare that he was the prevailing party because he would not have been paid if he had not sued. This argument was not sufficiently developed, and it was raised for the first time on appeal, so we once again found a waiver. (*Hitz I, supra,* B222882, at p. 12.) We reversed and remanded for a new trial on all issues in connection with Hitz's claim for breach of the La Tienda Broker Agreement because Alta did not pay him a commission for the Oaks Christian Lease.[4] In doing so, we held that the addendum was not reasonably susceptible to Judge Wolfe's interpretation. (*Hitz I, supra,* B222882, at pp. 12–13.) Because Judge Wolfe did not interpret section 5 and resolve whether it allowed Hitz to recover his commission even though the Oaks Christian Lease was signed long after the La Tienda Broker Agreement had expired in May 2007, we clarified

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[4] The disposition in *Hitz I* stated, in part: "The judgment is reversed and remanded for a new trial with respect to Hitz's claim for a commission in connection with the [Oaks Christian Lease]." (*Hitz I, supra,* B222882, p. 13.)

that Hitz was nonetheless "entitled to litigate the meaning of section 5 of the La Tienda [Broker] Agreement and any issues of breach or repudiation." (*Hitz I, supra,* B222882, p. 11.)

The new trial; Judge Kussman's statement of decision

After remand, the case was assigned to Judge Kussman and the matter proceeded to a second trial.

Following trial, Judge Kussman issued a statement of decision dated March 7, 2012. He concluded that Alta repudiated the La Tienda Broker Agreement and otherwise breached it by cutting Hitz out of the negotiations, and therefore Hitz was entitled to a commission under section 5. In addition, in the factual background, Judge Kussman stated that section 7 "excluded certain transactions from Hitz's agreement and provided him with a limited commission <u>if, and only if</u>, Alta gave him a list of parties and transactions registered with Alta by a prior broker who'd had a valid listing covering the property, and who had actually been procured by such listing broker. And even then, there had to be indicia of actual, significant interest by the potential lessee in the property." In his analysis section, he concluded that the addendum did not automatically render Oaks Christian an excluded person, nor did it render a lease between Alta and Oaks Christian an excluded transaction. Judge Kussman restated his interpretation of section 7 and the addendum in the Findings section of the statement of decision and stated: "The parties listed in the Addendum do not qualify as Excluded Parties under the entirety of Section 7, even if they were to be 'deemed' excluded per [section] 7.1[,]" and "the [Oaks Christian Lease] does not qualify as an excluded transaction."

Judgment was entered for Hitz in the principal amount of $597,732. He was awarded $6,500 in costs, $236,308 in prejudgment interest, and $333,616 in attorney fees. Judge Kussman denied Alta's request for an off-set based on the attorney fees that Alta claimed it was entitled to recover after prevailing on Hitz's cause of action for breach of the Rancho Conejo Broker Agreement in which he sought to recover a $175,000 commission.

This timely appeal followed.

DISCUSSION

I. Hitz's Cause of Action for Breach of the La Tienda Broker Agreement was Remanded for a New Trial on All Issues.

Alta argues that *Hitz I* limited the new trial to the interpretation of section 5 of the La Tienda Broker Agreement and any issues of breach or repudiation. After de novo review (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 859), we conclude that Alta's argument lacks merit.

In *Hitz I*, we reversed the portion of the judgment pertaining to Hitz's claim for a commission under the La Tienda Broker Agreement and remanded for a new trial without qualification. Generally, an unqualified reversal vacates the appealed judgment and "remands the case for a new trial . . . as though it had never been tried or heard. On remand, the parties are placed in the same positions and have the same rights as before rendition of the reversed judgment[.] [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 14:141, p. 14-46.) All issues are placed at large and the parties are "entitled to retry the issues anew—meaning they [could] present any evidence in support of or against the allegations in the complaint. An unqualified reversal cannot restrict the presentation of evidence on remand. [Citation.]" (*Id*. at ¶¶ 14:142-14:143, p. 14-46.) Here, the parties were permitted to once again offer evidence on the meaning of the La Tienda Broker Agreement, including sections 7.1 through 7.5 and the addendum, as well as any issues pertaining to contract performance, breach, causation and damages. Accordingly, Judge Kussman was vested with the power to resolve all of those issues anew.

It is true, as Alta points out, that *Hitz I* stated that Hitz was entitled to litigate the meaning of section 5 of the La Tienda Broker Agreement and any issues of breach or repudiation. We made this statement in response to Alta's argument that Hitz was not entitled to a commission because the Oaks Christian Lease was executed after the La Tienda Broker Agreement had expired. Our point was simply that even if the La Tienda Broker Agreement had expired, Hitz might still be entitled to a commission under the terms of section 5 if Alta was guilty of a breach or repudiation, and that Hitz

was free to pursue that possibility on remand. Contrary to what Alta suggests, we in no way constrained the new trial to those specific issues.

II. The Law of the Case.

In Alta's view, we affirmed Judge Wolfe's interpretation of the La Tienda Broker Agreement, and our holding is the law of the case. (*Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 308–309 ["[a]n appellate decision on the sufficiency and effect of trial court findings becomes the law of the case and must be adhered to throughout the subsequent progress of the case both in the trial court and on appeal"].) We disagree. In *Hitz I*, we reversed Judge Wolfe. As a result, the law of the case is the opposite, i.e., the evidence presented during the first trial does not support Judge Wolfe's interpretation of the La Tienda Broker Agreement.

III. The Record Supported Judge Kussman's Finding that Oaks Christian was not an Excluded Person.

According to Alta, the only reasonable interpretation of the addendum was that Oaks Christian was automatically an excluded person.

We disagree.

"'Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. [Citations.] . . . [I]t is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. . . . [Citations.]'" (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350–1351, fn. omitted.) The decision whether to admit extrinsic evidence "'involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. [Citation.]'" (*ASP*

Properties Group, L.P. v. Fard, Inc. (2005) 133 Cal.App.4th 1257, 1267, citing *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

We review express and implied factual findings in a statement of decision under the substantial evidence rule. Legal issues are subject to de novo review. (*Fink v. Shemtov* (2012) 210 Cal.App.4th 599, 609.) We analyze a contract "de novo where '(a) the trial court's contractual interpretation is based solely upon the terms of the written instrument without the aid of extrinsic evidence; (b) there is no conflict in the properly admitted extrinsic evidence; or (c) the trial court's determination was made on the basis of improperly admitted incompetent evidence. [Citation.]' [Citations.]" (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1180.) When interpretation turns upon the credibility of conflicting extrinsic evidence, an appellate court must determine whether the interpretation is supported by substantial evidence and then uphold that interpretation if it is reasonable. (*Ibid.*) There is no conflict in extrinsic evidence when the facts are undisputed but nonetheless give rise to competing inferences. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, fn. 2 ["it is only when conflicting inferences arise from conflicting evidence, not from uncontroverted evidence, that the trial court's resolution is binding"].)

Alta has not cited any conflicting evidence related to the meaning of the addendum or sections 7.1 and 7.5. Consequently, we are required to interpret these provisions from a blank slate.

According to the plain language of sections 7.1 and 7.5, for an entity to qualify as an excluded person, the following conditions must be met: (1) within five days of the La Tienda Broker Agreement being executed, Alta must provide, in writing, the name of the entity; (2) the entity must be registered with Alta by a broker who previously held a valid listing agreement covering the La Tienda Property; and (3) the entity must have toured the La Tienda Property, submitted a letter of interest or intent, and/or made an offer to buy or lease. The addendum stated that Alta "identifies" Oaks Christian as one of the "parties . . . excluded per section 7.1." Thus, as to Oaks Christian, the addendum satisfied the first condition. Contrary to Alta's position, the addendum did not exempt

Oaks Christian from the second and third condition. We therefore conclude, as did Judge Kussman, that the plain meaning of the addendum established that Oaks Christian was not automatically an excluded person.

None of the extrinsic evidence suggests that the parties negotiated the addendum or sections 7.1 and 7.5. Nor does it suggest that the parties used language with technical or specialized meaning that might otherwise support the interpretation urged by Alta. (Civ. Code, §§ 1644, 1645.) Thus, even in light of the extrinsic evidence, the addendum is not reasonably susceptible to the interpretation that Oaks Christian was exempt from the conditions in sections 7.1 and 7.5.

The only evidence suggesting that the addendum and sections 7.1 and 7.5 should not be taken at face value came from Alta's expert, David Wallace (Wallace). He opined that pursuant to the custom and practice in the industry, whenever an owner has a preexisting relationship with an entity and then leases to that entity, the broker gets no commission. The problem for Alta is that Wallace's opinion was inadmissible parol evidence. Pursuant to the parol evidence statute, the terms in an integrated agreement "may be explained or supplemented by . . . usage of trade[.]" (Code Civ. Proc., § 1856, subd. (c).) But even though "[t]echnical words are to be interpreted as usually understood by persons in the profession or business to which they relate," that rule does not apply if the words are "clearly used in a different sense." (Civ. Code, § 1645.) Moreover, "[p]arol evidence is not admissible 'to flatly contradict the express terms' of an agreement. [Citation.]" (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 75.) Wallace's opinion flatly contradicted the contractual terms.

In *Hitz I*, we stated in dicta that the addendum was reasonably susceptible to the interpretation that Hitz was automatically entitled to only half his commission. In no way did we indicate that this was the only interpretation, nor could we have. Because the issue was reopened upon remand, we did not elaborate. Suffice it to say, we wanted to alert the parties to the possibility that Hitz's commission was not necessarily an all or nothing proposition. Also, we were cognizant of Civil Code section 1640, which

provides: "When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded." The record in *Hitz I* suggested the possibility that through fraud, mistake or accident, the addendum failed to express the parties' intention to limit Hitz to a half commission for a lease to Oaks Christian, and that perhaps that intention should be honored. But Alta has not pursued a fraud, mistake or accident theory. More importantly, there was no evidence that Alta representatives manifested an intention to limit Hitz to a half commission, nor was there evidence that Shuman did not understand the La Tienda Broker Agreement. Thus, we have no basis to depart from the plain meaning of the contractual language.[5]

IV. Alta Breached section 2.1 of La Tienda Broker Agreement.

Regardless of the meaning of the addendum, Alta insists that there is no evidence of breach. In support of its position, Alta maintains that it did not breach the terms of sections 2.1 by cutting Hitz out of the negotiations for the Oaks Christian Lease because the La Tienda Broker Agreement permitted Alta to negotiate directly with Oaks Christian. We disagree.

Section 2.1 provided: "[Alta] hereby employs [Hitz] as [Alta's] sole and exclusive agent to represent [Alta] in the Transaction and to find buyers or lessees/tenants ('lessees'), as the case may be, for the Property. [Hitz] shall use reasonably diligent efforts to find such buyers or lessees. All negotiations and discussions for a Transaction shall be conducted by [Hitz] on behalf of [Alta]. [Alta] shall promptly disclose and refer to [Hitz] all written or oral inquiries or contacts received by [Alta] from any source regarding a possible Transaction." As previously indicated in the Facts part of our opinion, a "Transaction" was defined as a lease of the La Tienda Property. Based on

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[5] Alta suggests that if the addendum is just a list of excluded parties subject to proof, then it is meaningless. We disagree. It would operate to formalize the identification so that there would be no dispute later on as to whether an identification was made, and whether it was timely.

these provisions, Judge Kussman concluded that the La Tienda Broker Agreement was an exclusive right to sell listing.

Alta argues that the La Tienda Broker Agreement was modified to grant Alta the right to lease the La Tienda Property to Oaks Christian without any involvement from Hitz. In other words, Alta contends that the La Tienda Broker Agreement was an exclusive agency listing instead of an exclusive right to sell listing. These terms are defined by Civil Code section 1086. An exclusive right to sell listing "is a listing whereby the owner grants to an agent, for a specified period of time, the exclusive right to sell or to find or obtain a buyer for the property, and the agent is entitled to the agreed compensation if during that period of time the property is sold, no matter who effected the sale, or the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner. The exclusive right to sell listing may provide for compensation of the listing agent if the property is sold within a specified period after termination of the listing to anyone with whom the agent has had negotiations before that termination." (Civ. Code, § 1086, subd. (f)(1).) "An 'exclusive agency listing' is the same as an 'exclusive right to sell listing,' except that the owner reserves the right to sell directly but not through any other agent and, in that event, without obligation to pay compensation to the agent." (Civ. Code, § 1086, subd. (f)(2).) We must examine whether Alta's position is supported by the evidence and law.

As always, we must ask whether section 2.1 is ambiguous in any respect. Because it is clear on its face—it is an exclusive right to sell listing—ambiguity can be revealed only through extrinsic evidence. Alta contends that its prior negotiations with Oaks Christian reveal an ambiguity in section 2.1 and make it reasonably susceptible to the interpretation that as to Oaks Christian, the La Tienda Broker Agreement was an exclusive agency listing. To bolster its position, Alta relies on Hitz's conduct and the testimony of Wallace. Hitz sent an e-mail on April 23, 2007, asking to be listed as a dual agent on any lease with Oaks Christian. He also stated, "Once again, I offer my services in the continued development of documentation related to a possible transaction." At

trial, Hitz testified that he considered the e-mail to be a demand that he be involved in the negotiations. Wallace testified that the La Tienda Broker Agreement is an exclusive right to sell listing but the interplay between section 7.1, section 7.5 and the addendum created an exclusive agency listing with respect to Oaks Christian.

None of this evidence establishes an ambiguity. Hitz's e-mail did not convey a mutual understanding that his exclusive right to sell listing had been modified by the addendum and sections 7.1 and 7.5. Wallace's opinion was not admissible to contradict the plain meaning of section 2.1. Simply put, the language of section 2.1 is not reasonably susceptible to Alta's interpretation. The language is clear and precise; it creates a straightforward exclusive right to sell listing. Nor is section 2.1 modified by section 7.1, section 7.5 or the addendum. They do not reference section 2.1, nor do they reserve Alta's right to negotiate a lease with Oaks Christian. Rather, section 7.1, section 7.5 and the addendum establish a reduced commission in certain situations. And in situations in which there is a reduced commission, they do not interfere with Hitz's exclusive right to negotiate. Because the language of the La Tienda Broker Agreement is so clear, the only way that extrinsic evidence could create an ambiguity is if it showed a fraud, mistake or accident. It does not.

Shifting its focus, Alta avers that the Oaks Christian Lease was not a "transaction" under the La Tienda Broker Agreement. This argument is one we cannot accept. The La Tienda Broker Agreement clearly and unambiguously defines a transaction as a lease of the La Tienda Property.

In the alternative, Alta states: "[E]ven if the [Oaks Christian Lease] was a Transaction within the meaning of [section] 2.1, [Judge Kussman] ignored . . . language in [section] 5.1 stating that such a Transaction might be 'consummated as a result of the efforts of [Hitz], [Alta], or some other person or entity.' [Citation.] At the very least, this additional language implies that the parties contemplated that a Transaction might be consummated by Alta, without Hitz's participation, and creates an ambiguity as to whether Alta's direct negotiations with [Oaks Christian], to the exclusion of Hitz,

constituted a breach or repudiation of the [La Tienda Broker Agreement]—an ambiguity which [Judge Kussman] neither recognized nor resolved."

This argument is unavailing. Section 5.1 provides, in part: "[Alta] shall pay [Hitz] a commission . . . in accordance with the commission schedule attached hereto ('Agreed Commission') for a Transaction, whether such Transaction is consummated as a result of the efforts of [Hitz], [Alta] or some other person or entity." This language does not qualify section 2.1 in any respect. It merely provides that Hitz must be paid for a transaction regardless of who negotiates it. We therefore perceive no ambiguity supporting Alta's interpretation.

Alta does not dispute that it cut Hitz out of the negotiations. Thus, there can be no dispute that Alta breached section 2.1.

V. Alta Caused Hitz to Suffer Damage.

In Alta's final attack on the breach of contract award, Alta states: "In any event, even if [Judge Kussman] were correct that the [La Tienda Broker Agreement] was an exclusive right-to-sell listing and Alta breached it by excluding Hitz from the negotiations with [Oaks Christian], [Judge Kussman] still erred in summarily concluding, without any analysis whatsoever, that under [section] 5.1, 'Hitz is entitled to his commission, even though the [Oaks Christian Lease] was not executed during the [t]erm of the [La Tienda Broker Agreement]." Refining the issue and approaching it from a different angle, Alta argues that "there was no evidence that Alta's refusal to permit Hitz to conduct the negotiations with [Oaks Christian] prevented timely consummation of the [Oaks Christian Lease]. Hitz presented no evidence that, if allowed to participate, he would have concluded the lease within [the term of the La Tienda Broker Agreement]. Nor did he present any evidence that Alta intentionally or in bad faith thwarted or delayed execution of the [Oaks Christian Lease]. [Citation.] The only available evidence was that it took Alta and [Oaks Christian] a full year to iron out their differences and execute [the Oaks Christian Lease], which they ultimately did in April 2008, long after [the La Tienda Broker Agreement] with Hitz expired."

These arguments lack merit. They are an attempt to reargue the issue, not an attempt to show reversible error on appeal.

Section 5.1(b) established that the Agreed Commission was payable if a lease was executed or "a lessee [was] procured who [was] ready, willing and able to lease the Property on the terms stated [in the La Tienda Broker Agreement], or on any other rent and/or terms agreeable to [Alta][.]" In addition, section 5.1(c) made the Agreed Commission payable if Alta "breaches, terminates, cancels or repudiates [the La Tienda Broker Agreement][.]" Judge Kussman's statement of decision concluded that Hitz was entitled to a commission under section 5. That conclusion, however, was ambiguous as to whether it was based on a finding that Hitz produced a ready, willing and able lessee or that Alta was guilty of a breach. Because Alta failed to bring this ambiguity and/or omission to Judge Kussman's attention, we are permitted to infer that Judge Kussman based his ruling on both grounds.

Alta ignores the implied finding that Hitz produced a ready, willing and able lessee sufficient to meet the terms of section 5.1(b). Consequently, the issue has been forfeited. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366.) Regardless, there is substantial evidence that Hitz met this condition because Oaks Christian signed a letter of intent in June 2007 and eventually entered into the Oaks Christian Lease.

With respect to section 5.1(c), Alta's argument sidesteps the pivotal issue, which is this: If Hitz was improperly cut out of negotiations, does section 5.1 entitle Hitz to a commission for a "transaction" regardless of when it was consummated, or did the transaction still have to be consummated by May 30, 2007? Judge Kussman did not expressly decide this issue. But he impliedly decided it in Hitz's favor when he concluded in his statement of decision that Hitz was entitled to his commission pursuant to section 5. Alta fails to engage in contract interpretation to demonstrate that the implied interpretation was faulty. We easily find a forfeiture. (*Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811.) Indeed, "[i]t is not our responsibility to

develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

Because Alta forfeited its arguments, we are left with the conclusion that Alta caused Hitz damage. As explained by our Supreme Court, "'[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

VI. Prejudgment Interest.

Alta challenges the prejudgment interest only insofar as it should have been calculated based on a reduced commission instead of the Agreed Commission. Because we uphold Judge Kussman's determination that Hitz was entitled to the Agreed Commission, the challenge is moot.

VII. Offset for Attorney Fees.

After the first trial, Judge Wolfe entered a judgment against Hitz on his claim for a $175,000 commission for Alta's purchase of the Rancho Conejo Property. In *Hitz I*, Hitz argued that he should be declared the prevailing party because the $175,000 commission would not have been paid if he did not file a lawsuit. We found that Hitz waived his claim because he did not cite any authority, and he failed to establish that he presented his argument to Judge Wolfe. (*Hitz I*, *supra*, B222882, at p. 12.) In a corresponding footnote, we stated that "Alta is not precluded from filing an appropriate motion and asking the trial court to make a prevailing party determination." (*Id.* at p. 12, fn. 4.)

Following the second trial, Hitz filed a motion for attorney fees under the La Tienda Broker Agreement. In its opposition, Alta requested a set-off in the amount of attorney fees it was entitled to recover as the prevailing party on Hitz's claim for a commission for the purchase of the Rancho Conejo Property. In his written ruling, Judge Kussman stated: "After remand, . . . [Alta] filed no . . . motion. Therefore, no post-

appeal determination was made regarding the prevailing party on the [claim for breach of the Rancho Conejo Broker Agreement]. Absent that, there is no basis for a set-off."

Now, on appeal, Alta contends that Judge Kussman abused his discretion when he failed to consider the off-set request. This argument appears to be premised on the idea that Judge Wolfe declared Alta the prevailing party after the first trial. At least for purposes of this appeal, the premise fails because the joint appendix is inadequate. (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 ["Appellant must affirmatively show error by an adequate record; error is never presumed"].) More precisely, the joint appendix does not contain a copy of an order in which Judge Wolfe declared Alta a prevailing party. Alta tries to shore up this deficiency by citing to statements in two briefs it filed below and statements made by Judge Kussman in his ruling on Hitz's motion for attorney fees. Statements by Alta in briefs do not qualify as a record of what Judge Wolfe did. Neither do statements made by Judge Kussman, especially because we do not know what he was relying on. Consequently, we cannot accept Alta's assertion that it was ever found to be the prevailing party. In addition, we must acknowledge that the appellate record contains a letter from Hitz to Alta predating our opinion in *Hitz I* and stating that "we have agreed that the ultimate resolution of the judgment related to attorney's fees and costs will be governed by the decision in the Court of Appeal. In this way we can avoid filing a second appeal when an amended judgment becomes available." Alta fails to explain how this agreement impacts any prior determination.

For the sake of argument, we will presume that Judge Wolfe found Alta to be the prevailing party. How is that ruling still valid after we reversed part of Judge Wolfe's judgment in *Hitz I*? Alta never says. Even supposing it is still valid as to claims related to the Rancho Conejo Property, what is the set-off? Did Judge Wolfe apportion attorney fees between the claim related to the Rancho Conejo Property and the claim related to the La Tienda Property? If so, what was the attorney fee award with respect to the Rancho Conejo Property? Each of these questions is left unanswered by Alta's appellate briefs. Presumably, this is because Judge Wolfe did not apportion attorney fees. If that is the

case, then our reversal in *Hitz I* undid the attorney fee award and, following remand, Alta was required to seek a new attorney fee award. In the absence of an attorney fee award related to Rancho Conejo Property, Alta had no set-off.

A question immediately rears its head. What were Alta's options for obtaining a new attorney fee award? Once again, Alta is mum. This results in yet another forfeiture. To be complete, we have consulted Code of Civil Procedure section 1033.5, subdivision (c)(5), which provides that attorney fees recoverable under a contract and allowable as costs may be fixed as follows: "(A) upon a noticed motion, (B) at the time a statement of decision is rendered, (C) upon application supported by affidavit made concurrently with a claim for other costs, or (D) upon entry of default judgment. Attorney's fees allowable as costs pursuant to [a contract] shall be fixed either upon a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties." The record reveals that Alta did not obtain an attorney fee award using any of these methods. In the absence of an attorney fee award, Judge Kussman did not err by refusing to recognize a set-off that was inchoate at best.

In support of its position, Alta relies on Civil Code section 3528, which provides: "The law respects form less than substance." Alta then cites *Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1539, which explained: "When determining the prevailing party under [Civil Code] section 1717, the trial court 'is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.' [Citation.] Additionally, 'in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by "equitable considerations." For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective. [Citations.]' [Citation.] A trial court has wide discretion in determining which party is the prevailing party under [Civil Code] section 1717, and we will not disturb the trial court's determination absent 'a manifest abuse of discretion, a prejudicial error of law, or

necessary findings not supported by substantial evidence.' [Citation.]" Neither authority provides Alta with aid because they do not establish that a litigant can bypass Code of Civil Procedure section 1033.5, subdivision (c)(5) and obtain an attorney fee award for use as a set-off simply by making a set-off request when opposing an adversary's motion for attorney fees.

Having failed to properly develop its argument regarding a set-off, Alta cannot be heard to complain that we found its argument lacking. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862 ["'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.] [Citation.]'")

DISPOSITION

The judgment is affirmed. Hitz is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ