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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

DION ROTTMAN, Plaintiff and Appellant, v. MICHAEL KESLER, et al., Defendants and Respondents.	B286303 (Los Angeles County Super. Ct. No. BC604383)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Reversed.

Early Sullivan Wright Gizer and McRae, Scott E. Gizer and Zachary A. Gidding for Plaintiff and Appellant.

Law Offices of Michael P. Ribons and Michael P. Ribons for Defendant and Respondent.

Dion Rottman purchased what he believed to be a properly permitted and certified "sit-down" restaurant from Michael Kesler. When Rottman re-sold the restaurant years later, he discovered the restaurant only possessed a "take-out" certificate of occupancy, diminishing its resale value. Rottman then sued Kesler, Kesler's broker Fran Wittson, and Wittson's employer Fouquette Commercial Real Estate Services for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation.

The trial court sustained defendants Kesler, Wittson, and Fouquette's demurrer to Rottman's breach of implied covenant claim without leave to amend. The court subsequently granted defendants summary judgment on Rottman's remaining claims on the sole ground of lack of standing, and denied Rottman's new trial motion. On appeal, Rottman challenges the judgment, as well as the denial of leave to amend the breach of implied covenant cause of action.

We reverse the judgment, and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

A. Station's Purchase of the Restaurant

Rottman, through the entity The Station Bar & Grill, LLC (Station), purchased a restaurant called The Smokin' Joint-Fine California BBQ from Kesler in April 2011 for $399,000. As part of the sale, Station acquired The Smokin' Joint's liquor license, conditional use permit, and sit-down restaurant furniture. Rottman alleges that Kesler, along with Wittson—an employee of Fouquette Commercial Real Estate Services (Fouquette) and Kesler's agent in the transaction—represented that Station was

purchasing a "turn-key sit-down restaurant that had all the proper licenses, permits and certificates . . . ."

B. Station's Discovery of the Certificate of Occupancy Issue

Rottman, through Station, operated the restaurant but then decided to sell it. In December 2013, fiveOfour, LLC entered a contract to purchase Station for $300,000.00. After opening escrow, a fiveOfour representative informed Rottman that the restaurant's certificate of occupancy was for a take-out restaurant rather than a sit-down restaurant. As a result, the sale to fiveOfour was cancelled and Rottman was forced to lower the sale price for the restaurant.

C. Station's Re-Sale of the Restaurant

In May 2014, Rottman sold Station to Link Restaurant Group, Inc. (Link) for $150,000.00. The first page of the re-sale's escrow instructions describe the subject of the escrow as "all assets" of Station, and tied the total purchase price to those assets. However, the third page of the escrow instructions allocate the total purchase price to Station's "Membership Interest Purchase."

The instructions expressly state that they are not intended to supersede the parties' Membership Interest Purchase Agreement dated May 23, 2014 and its Amendment 1 as of May 27, 2014, which the instructions incorporate and purport to attach. Neither the purchase agreement nor its amendment is included in the record.[1]

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[1] In support of his new trial motion, Rottman introduced as "newly-discovered evidence" a "Membership Interest Purchase Agreement" dated June 1, 2014 and an undated "Addendum 1,"

As part of Station's sale to Link, "all claims against Defendants were reserved and assigned to [Rottman] by The Station Bar & Grill, LLC and [Rottman] now brings these claims as the assignee."

D. Rottman's Action Against Defendants

In December 2015, Rottman filed suit against defendants Kesler, Wittson, and Fouquette (collectively, Defendants), pleading causes of action for breach of contract, breach of the implied covenant, and negligent misrepresentation. Rottman's first amended complaint alleges Kesler failed to sell him "a properly permitted, licensed and certified sit-down restaurant and, instead, sold [Rottman] a restaurant that was only certified for take-out." In so doing, Kesler breached his contract and the implied covenant. Rottman also alleged Defendants negligently misrepresented that Rottman was purchasing a properly permitted, licensed, and certified sit-down restaurant "without a reasonable basis for such belief," intending that Rottman rely on this misrepresentation during the sale.

1. The demurrer proceedings

Kesler, Wittson, and Fouquette collectively demurred to each cause of action in Rottman's first amended complaint for

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which he claimed to be the documents referenced in the escrow instructions. Defendants objected to these documents. The trial court denied the motion because the documents were not "new," and Rottman had offered no showing that he could not have, with reasonable diligence, discovered and produced these documents prior to the summary judgment hearing. A new trial motion based on newly-discovered evidence is properly denied where movant fails to carry his burden of showing due diligence. (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 153-154.)

failure to state a claim. Defendants argued Rottman's claims were untimely and failed to plead essential elements, and that the breach of implied covenant claim impermissibly relied on the same acts and sought the same relief as the breach of contract claim. Rottman filed an opposition.

The trial court overruled the demurrer to the breach of contract claim, sustained the demurrer to the negligent misrepresentation claim with leave to amend, and sustained the demurrer to the breach of implied covenant claim without leave to amend. The trial court found that Rottman failed to "plead sufficient facts to establish bad faith or wrongful conduct beyond the breach of contract."

Rottman filed a second amended complaint alleging breach of contract and negligent misrepresentation.

2. The summary judgment proceedings

a. Defendants' motion

Defendants filed a motion for summary judgment or, in the alternative, summary adjudication, arguing that: (1) Rottman lacked standing to bring claims based on misrepresentations made to, and a contract executed by, Station; (2) Rottman's claims were untimely and the delayed discovery rule did not apply; (3) Rottman could not establish all the required elements of either his breach of contract or negligent misrepresentation claim; and (4) defendants Wittson and Fouquette owed no duties to Rottman.

Regarding standing, Defendants argued that because Kesler contracted only with Station, Station alone owned the claims pled by Rottman. While Rottman alleged Station had assigned to him all claims against Defendants, Defendants learned through discovery that all of Station's assets, and the

entity itself, had been transferred to Link prior to Rottman's alleged assignment from Station. As evidence, Defendants cited the re-sale's escrow instructions stating in part that the subject of the escrow was "all assets" of Station.

Regarding timeliness, Defendants noted that Kesler sold the restaurant to Station on December 12, 2011, and Rottman's complaint was filed more than four years later. Thus, even the breach of contract claim's four-year statute of limitations had run, and Rottman had not pled his inability to have earlier discovered the basis of his claims despite reasonable diligence.

Defendants argued that Rottman's breach of contract claim failed as a matter of law, because Kesler and Station's fully-integrated contract did not mention a "sit-down" restaurant. Defendants likewise argued that Rottman could not prove essential elements of negligent misrepresentation, including justifiable reliance on Defendants' representations.

Finally, Defendants contended that Wittson and Fouquette were entitled to judgment because neither owed any affirmative duties to Rottman.

b. Rottman's opposition

Rottman opposed Defendants' motion, arguing that Station orally assigned to Rottman all claims against Defendants in November 2015, and that this assignment was "later memorialized in writing"; thus, Rottman had standing. Addressing timeliness, Rottman argued his claims did not accrue, and the statutory periods did not begin to run, until Rottman sustained damages in April 2014 when fiveOfour cancelled escrow. Alternatively, he asserted, application of the delayed discovery rule presented triable issues of material fact. Rottman likewise argued that material disputed facts foreclosed judgment

as a matter of law on either of his remaining claims. Finally, Wittson and Fouquette were not entitled to judgment as a matter of law because they had made affirmative representations to Rottman without reasonable grounds for believing them to be true.

c. The trial court's ruling

The trial court held that Rottman lacked standing, granted Defendants summary judgment, and entered judgment.

3. The new trial proceedings

Rottman moved for a new trial,[2] arguing the trial court erred by granting summary judgment on an untendered ground. Rottman also argued a new trial was appropriate on grounds of newly-discovered evidence contradicting the trial court's ruling.

Defendants opposed the motion and the trial court denied it, finding Defendants' summary judgment motion had "clearly placed standing at issue." The trial court also concluded that most of Rottman's alleged new evidence was not new, and the motion made no showing that Rottman could not have discovered and produced this newly offered evidence prior to the summary judgment hearing with reasonable diligence. The trial court found that the only document created post-judgment—an amended assignment agreement between Rottman and Link—was not material because Rottman could not rely on the unpled theory that Link, rather than Station, had assigned the claims to Rottman.

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[2] Rottman also filed an application for reconsideration after the summary judgment hearing, which was deemed moot and taken off-calendar during the hearing on Rottman's later-filed motion for new trial on essentially the same grounds.

Rottman timely appealed from the judgment, and now challenges the trial court's summary judgment and new trial rulings, as well as its denial of leave to amend Rottman's breach of implied covenant claim following Defendants' demurrer.

DISCUSSION

A. Summary Judgment Standard of Review and Applicable Law

1. Review of Summary Judgment Grant

"'Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Citation.]' [Citation.]" (*Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 432 (*Brown*).) "'"A defendant moving for summary judgment [or adjudication] has the burden of producing evidence showing that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action. [Citations.] The burden then shifts to the plaintiff to produce specific facts showing a triable issue as to the cause of action or the defense. [Citations.] Despite the shifting burdens of production, the defendant, as the moving party, always bears the ultimate burden of persuasion as to whether summary judgment is warranted. [Citation.]" [Citation.]' [Citation.]" (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1443 (*Multani*).)

Our review of summary judgment is de novo. (*Brown*, *supra*, 34 Cal.App.5th at p. 432.) "'We liberally construe the opposing party's evidence and resolve all doubts in favor of the opposing party. [Citation.] We consider all evidence in the moving and opposition papers, except that to which objections were properly sustained.' [Citation.]" (*Ibid.*)

On appeal from an order granting summary judgment, "'[the] reviewing court . . . *should draw reasonable inferences* in favor of the nonmoving party.' [Citations.] '[S]ummary judgment cannot be granted when the facts are susceptible to more than one reasonable inference . . . .' [Citation.]" (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 583.)

2. Rules governing the interpretation of contracts

"The rules governing the role of the court in interpreting a written instrument are well established. The interpretation of a contract is a judicial function. [Citation.] In engaging in this function, the trial court 'give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed. [Citation.] Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. [Citations.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125-1126 (*Wolf*).)

"The court generally may not consider extrinsic evidence . . . to vary or contradict the clear and unambiguous terms of a written, integrated contract. [Citations.] Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous. [Citations.]" (*Wolf, supra,* 162 Cal.App.4th at p. 1126.) "The interpretation of a contract 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.]" [Citation.]'" (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351 (*Wolf II*).)

"When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citations.] . . . . If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury. [Citations.]" (*Wolf*, *supra*, 162 Cal.App.4th at pp. 1126–1127, fn. omitted; see also *Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co.* (1970) 10 Cal.App.3d 206, 216 ["'[W]hen parol evidence is introduced in aid of the interpretation of uncertain or doubtful language in the contract, the question of the meaning [or intent of the parties] is one of fact. If the meaning [or intent] is to be determined one way according to one view of the facts and another way according to another view, the determination of the disputed matter must be left to the jury.' [Citations]"].)

The whole of a contract is to be taken together—each clause helping to interpret the other—and courts must attempt to give effect to all words within a contract so that no language is rendered superfluous. (Civ. Code § 1641; *London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 662 (*London Market*).) "It is thoroughly settled that the implications of a written contract are as impervious to parol evidence as are express terms. [Citation.]" (*Taylor v. Continental Southern Corp.* (1955) 131 Cal.App.2d 267, 280.) "'"[I]mplied covenants are not favored in the law; and courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties to the

contract made" [citation].'" (*People v. Haney* (1989) 207 Cal.App.3d 1034, 1039, citation omitted.)

On appeal, a "trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact. [Citation.] Thus the threshold determination of ambiguity is subject to independent review. [Citation.]" (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

B. Rottman's Standing to Prosecute the Action Presents Triable Issues of Material Fact

The trial court granted summary judgment on the ground that Rottman lacked standing to bring the claims as a matter of law because, prior to Station's alleged claims assignment to Rottman, Station had sold all its assets—including the claims—to Link. Therefore, Station possessed no claims at the time of the alleged assignment, and could not confer standing for those claims on Rottman. The trial court's conclusion relied on the first page of Station and Link's escrow instructions, describing the subject of the escrow as "all assets" of Station.

Rottman contended that he sold only Station's membership interest to Link. Station's assets therefore remained with Station, but subject to the control of Station's new managing member. After the sale,[3] Station, through its new managing

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[3] Defendants suggest Rottman's declaration that the assignment took place after the sale conflicts with the pleading's assertion that the assignment took place "as part of the sale." The language of the unverified pleading is, at best, ambiguous as to the timing of the assignment. However, even if Rottman's

member (Link), assigned Station's claims against Defendants to Rottman. Rottman also cited language in Station and Link's escrow instructions allocating the entire purchase price to Station's "Membership Interest Purchase." Rottman cited additional evidence supporting his interpretation of Station and Link's transaction, including: (1) Rottman's deposition testimony that "Link was buying the LLC" that owned the restaurant"; (2) Rottman's declaration that he "sold Station LLC to [Link] on May 23, 2014 for $150,000.00"; (3) Rottman's declaration that on or about November 30, 2015, the new manager of Station orally assigned Rottman all claims against Defendants, and that this oral assignment was later memorialized in writing; and (4) a memorializing memorandum[4] between Rottman and Henry Costa[5] as Managing Member of Station, which stated that Rottman had sold all of his rights, title, and interest in Station to

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declaration conflicts with his pleading, "' . . . [s]ummary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence." [Citation.] . . . [¶] [Defendant] asks us to give conclusive effect to an ambiguous statement in an unverified complaint and to ignore the explanation of the statement contained in deposition testimony taken under oath . . . .'" (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 427, citation omitted.)

[4] The parties do not dispute that Rottman and Costa prepared and executed this memorandum after Defendants had filed their summary judgment motion.

[5] Costa signed Station and Link's escrow instructions as President of Link Restaurant Group, Inc.

Link on or about May 23, 2014, and which documented Station's November 31, 2015 oral assignment to Rottman of all Station's rights, title and interest in its claims against Defendants. Through this memorandum, "[t]he Parties represent and warrant that they have not signed [*sic*] the Claims to any other party as of the Effective Date or at any other time thereafter."

Citing the escrow instructions, Defendants contend the trial court correctly found that Rottman lacked standing because he had sold both Station's membership interest and Station's assets to Link;[6] this dual sale de-coupled Station's assets from their former entity while transferring both to Link. Accordingly, at the time of Station's purported claims assignment to Rottman, Link directly owned Station's former claims. Station, while controlled by Link, was essentially an empty husk with no assets of its own. Alternatively, Defendants cite Rottman's discovery response that he specifically told Link that he was "reserving and not selling them his claims against Defendants" as evidence that no assignment occurred.

Whether Rottman had standing to bring the claims requires resolution of whether Station still possessed its claims after Link's purchase. Station's post-acquisition holdings, in turn, hinged on the terms of Rottman and Link's purchase agreement—specifically, what Link had purchased. If Link

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6 At summary judgment, Defendants suggested that Station's membership interest and its assets were one and the same. Defendants argued that "'all assets' of [Station] and the entity itself were transferred to Link . . . . It is also worth noting that [Station] sold nothing, instead the sale was a sale of the membership interests in [Station] . . . ."

purchased solely Station's membership interest, then Station retained its claims (and other assets) after the sale, and Station's new managing member was capable of assigning Station's claims to Rottman post-sale. If, on the other hand, Link purchased just Station's assets, or purchased separately both Station's membership interest and Station's assets, then once the sale closed, the entity was separated from its former assets and Station no longer possessed any claims to assign to Rottman.

The escrow instructions reference and integrate a separate "Membership Interest Purchase Agreement Dated May 23, 2014 and Amendment 1 as of May 27, 2014," and state that the escrow instructions are not intended to supersede that agreement's terms. Neither party introduced documents bearing these titles and dates; instead, each party relied on extrinsic evidence of that agreement's terms, including Station and Link's escrow instructions.

These escrow instructions, in turn, are reasonably susceptible to each of the parties' conflicting proffered interpretations. Page one states that the subject of the purchase was "all assets" of Station. However, page three allocates the entire purchase price to a "Membership Interest Purchase" with no separate allocation for the entity's assets. Extrinsic evidence is admissible to resolve the ambiguity and determine the subject of Link's purchase.

The parties offered conflicting extrinsic evidence of the terms of Station and Link's purchase agreement. While the escrow instructions suggest at one point that Station's "assets" were sold, Rottman's declaration and deposition testimony asserted that only the limited liability company was sold. The escrow instructions themselves can be read to support any one of

three possibilities: (1) that Station's assets were the sole target of the sale; (2) that the company's membership interests were the sole target of the sale; or (3) that both the entity and its assets were acquired through the sale but as separate targets. Where, as here, resolving ambiguity in an agreement requires consideration of conflicting extrinsic evidence, interpretation of a contract is not solely a judicial function.

The parties also offered conflicting evidence regarding whether any assignment took place, or if an assignment was necessary. Defendants cited Rottman's discovery response that the claims had been reserved by Rottman and not sold during Link's purchase, rather than assigned post-purchase. However, had the claims been reserved consistent with Rottman's discovery response, it would make little difference what else had been transferred through the sale, as no assignment would have been necessary to confer standing. Rottman, in turn, argued that he did not reserve but rather was assigned the claims. Rottman cited his declaration that Station assigned the claims to him through its post-acquisition new managing member. Station's new managing member and Rottman later executed a written memorandum memorializing the assignment, confirming Station's pre-assignment possession of the claims, and warranting against any earlier transfer of the claims out of Station. Where facts are controverted, or credibility determinations are required, standing becomes a mixed question of law and fact that must go to a jury. (*People v. Superior Court* (*Plascencia*) (2002) 103 Cal.App.4th 409, 424.)

Because triable issues of fact existed regarding whether Rottman had a legally cognizable interest in the claims, the trial court erred in granting Defendants summary judgment based on

the issue of standing. (*Plascencia*, *supra*, 103 Cal.App.4th at pp. 421-422.)

C. Summary Judgment or Adjudication Cannot be Affirmed on Other Grounds

Defendants moved for summary judgment or, in the alternative, summary adjudication on additional grounds not addressed in the trial court's ruling. If summary judgment or adjudication was warranted on any ground, "we affirm 'regardless of the trial court's stated reasons.' [Citation.]" (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 925; *Garret v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181.) Therefore, we consider Defendants' other arguments to assess whether summary judgment or adjudication was proper on alternative grounds. We conclude that triable issues of material fact foreclosed summary disposition of both Rottman's breach of contract and negligent misrepresentation claims.

1. Material issues of disputed fact precluded granting summary judgment based on the running of the applicable statutes of limitations

Rottman contends that his claims did not accrue until he sustained damages in April 2014 when fiveOfour cancelled escrow. Rottman also asserts that he did not discover his injury until December 2013, when fiveOfour first informed Rottman of the defects in the restaurant's certificate of occupancy.

On appeal, Defendants renew their argument that the statute of limitations had run on each of Rottman's claims. Defendants contend that Rottman filed his complaint more than four years after the claims accrued (when Station purchased the restaurant in 2011), rendering each of Rottman's claims untimely. Defendants further contend that Rottman failed to

adequately plead and provide specific evidence of delayed discovery.

a. General Principles Regarding Statutes of Limitations and the Discovery Rule

A cause of action for breach of contract must be brought within four years of its accrual. (Code of Civ. Proc., § 337, subd. (a).) A negligent misrepresentation cause of action must be brought within two years of its accrual. (Code of Civ. Proc., § 338, subd. (d).) A "claim accrues when plaintiff discovers, or should have discovered through reasonable diligence, the injury and its cause." (*Angeles Chemical Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119.)

". . . [U]nder the delayed discovery rule, a cause of action will not accrue until the plaintiff discovers or should have discovered, through the exercise of reasonable diligence, all the facts essential to the cause of action. [Citation.] . . . . '[T]he rule is applied to types of actions in which it will generally be difficult for plaintiffs to immediately detect or comprehend the breach or the resulting injuries.' . . . . [Citations.]" (*Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1246 (*Prudential*).) ". . . [T]here is an underlying notion that plaintiffs should not suffer where circumstances prevent them from knowing that they have been harmed. And often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's ignorance." (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 831.)

To rely on the discovery rule for delayed accrual of a claim, Rottman "must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence." (*McKelvey v. Boeing*

North American, Inc. (1999) 74 Cal.App.4th 151, 160, superseded in part by statute on other grounds as stated in *Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 633 at fn. 3.) Rottman's pleading must articulate "that [he] was not at fault for failing to [earlier] discover" the facts underlying his claims. (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 900.)

b. Rottman Adequately Pled Delayed Discovery

Rottman adequately pled facts permitting application of the delayed discovery rule. Rottman pled the time and manner of his discovery of the certificate of occupancy issue: a prospective buyer uncovered the issue when conducting diligence during escrow, and brought it to Rottman's attention. Rottman also pled facts tending to show that he was not at fault for failing to earlier discover the certificate of occupancy issue, including that Defendants represented to Rottman during the sale that the " . . . Premises were properly permitted, licensed and certified for the operation of a sit-down restaurant." While the restaurant's conditional use permit mentions a 1975 change in occupancy to take-out, Defendants had represented to Rottman that the certificate of occupancy issue had since been "resolved." After the sale, Rottman operated a sit-down restaurant " . . . under the belief that the Premises had a Certificate of Occupancy for a sit down restaurant." When Rottman confronted Kesler after learning of the certificate of occupancy issue in December 2013, Kesler falsely told Rottman that a sit-down restaurant certificate of occupancy was hanging in the restaurant.

c. Rottman's Notice of the Certificate of Occupancy Issue Raises Triable Issues of Material Fact

The balance of Defendants' statutes of limitations argument insists that the evidence uncontrovertibly established Rottman's constructive (if not actual) notice of the certificate of occupancy issue well before 2013. The Smokin' Joint's conditional use permit, which Rottman received prior to December 2011, states that the project site was issued a certificate of occupancy in 1975 "to change a portion of the existing retail store to a to-go food restaurant." Defendants argue that the purchase agreement required Station to investigate the restaurant's government licenses and permits, including the certificate of occupancy. According to Defendants, Station's own subsequently-pulled permits and available public record merely reinforce Rottman's constructive notice.

Rottman argues that the conditional use permit—noting a historical "take-out" certificate of occupancy while permitting on-site alcohol sales for an existing "sit-down" restaurant—is ambiguous, and did not foreclose a reasonable person's belief that the restaurant was in fact properly certified. The rule of constructive notice requires awareness of facts that would make a reasonably prudent person suspicious. (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 438.)

Rottman was not aware of any facts that would have raised his suspicion regarding the restaurant's certificate of occupancy before 2013. Whether the public record should have placed him on inquiry notice is open to dispute. "While public records certainly impart presumptive notice under some circumstances, we decline to hold their mere existence imparts knowledge as a matter of law . . . . """"""[W]here no duty is imposed by law upon a person to make inquiry, and where under the circumstances a prudent man would not be put upon inquiry, the mere fact that

means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery." [Citations.]""" (*Prudential*, *supra*, 66 Cal.App.4th at p. 1248.)

Rottman notes that Station and Kesler's purchase agreement required Station to conduct a "reasonable investigation" of the items Kesler provided to Station during escrow. However, it is undisputed that Defendants never provided Station with a certificate of occupancy.

In light of the evidence offered at summary judgment, whether the delayed discovery rule applies to Rottman's claims requires a fact-finder to weigh evidence and determine credibility. Therefore, summary judgment was not warranted on grounds that the claims were barred by the statute of limitations.

2. Rottman's breach of contract claim raised triable issues

Rottman contends that disputed issues of material fact precluded summary adjudication of his breach of contract claim. Rottman claims the intent behind Station and Kesler's purchase agreement was the sale of a legally operable "sit-down" restaurant, which required a valid sit-down certificate of occupancy; therefore, Kesler breached the contract by not delivering what was promised.

Defendants argued in their motion that the purchase agreement, which includes an integration clause, makes "no mention whatsoever of 'sit-down' or 'take-out', nor Certificate of Occupancy . . . ." Defendants also argued that the agreement imposed on Station an affirmative duty to investigate the restaurant's transferrable government licenses and permits, including the restaurant's certificate of occupancy, and that

Rottman's election to proceed with the purchase waived any breach of contract claim arising from such government documents. However, the parties' agreement did not require Station to investigate documents Kesler failed to provide. Prior to close of escrow, the agreement required Kesler "to provide to [Station]" certain documents, including The Smokin' Joint's "[g]overnment licenses and permits." Station was then obligated to "investigate the items provided to [it by Kesler]." Station's contractual duty to investigate ended there. It is undisputed that Kesler never provided Station with a certificate of occupancy; moreover, Defendants claim that no such document was ever issued to The Smokin' Joint. The parties' agreement did not, as Defendants suggest, require Station to investigate the never provided certificate of occupancy.

In opposition to summary judgment, Rottman introduced extrinsic evidence of the circumstances surrounding Station's purchase of the restaurant and of the parties' conduct before suit, in support of his argument that maintenance of a "sit-down" restaurant certificate of occupancy was an implied provision of the purchase agreement. This evidence included Defendants' marketing materials describing the restaurant's sit-down capacity, and a declaration by Rottman attesting to meetings and conversations during the purchase process.

Because Station and Kesler's purchase agreement is an integrated agreement, we must determine whether provision of a "sit-down" restaurant certificate of occupancy is necessarily implied by language in the parties' purchase agreement, or whether such provision is merely an additional consistent term prohibited by Code of Civil Procedure section 1856, subdivision (b) when the parties' agreement is intended as a complete and

exclusive statement of the terms of the agreement. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 954.)

Section 21 of the parties' express contract, entitled "LIENS; ENCUMBRANCES; RESTRICTIONS," provides: "Seller warrants that, to the best of Seller's knowledge, there are no undisclosed liens, encumbrances or restrictions upon the business." Section 23 of the agreement adds: "Seller's representations and warranties set forth herein, or in any written statements delivered to Buyer, shall be true and correct at Close of Escrow, and shall survive the transfer of ownership of the Business." If possible, the parties' purchase agreement should be construed to give effect to Section 21 and its intended survival as stated in Section 23. (Civ. Code § 1641; *London Market*, *supra*, 146 Cal.App.4th at p. 662.)

Section 21 of the parties' agreement required Kesler to disclose and warrant against any restriction on the restaurant. Whether the Premises' "take-out" restaurant certificate of occupancy constitutes a restriction is a disputed issue of fact. For example, Defendants note that the certificate of occupancy issue in no way affected Station's ability to operate a "sit-down" restaurant on the premises, and thus there was no restriction. Rottman asserted, however, that although the Department of Building and Safety never cited the restaurant for noncompliance with its certificate of occupancy, the certificate of occupancy issue still constituted a restriction on the business that caused fiveOfour to cancel escrow once revealed.

Defendants also claim Kesler adequately disclosed the certificate of occupancy issue by providing to Rottman a copy of The Smokin' Joint's conditional use permit, which states the

premises were issued a certificate of occupancy in 1975 to change a portion of an existing retail store into a to-go food restaurant. Rottman points to other language in that permit that suggests a subsequent legal change in use to a sit-down restaurant.

Defendants also rely on a lease addendum between Station and the landlord of the premises, through which Station pledged to have satisfied itself with the suitability of the premises for its intended use, and accepted the premises in their "as-is" condition, waiving any representations or warranties in the original lease. Defendants argue that they may rely on Station's renunciation of the leases' representations and warranties. They may not; the addendum expressly relates to the lease, and to no other agreements. Defendants are not parties to the lease addendum, nor is there any factual basis to conclude that it was intended to benefit them. "A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him. [Citations.] As to any provision made not for his benefit but for the benefit of the contracting parties or for other third parties, he becomes an intermeddler. Permitting a third party to enforce a covenant made solely to benefit others would lead to the anomaly of granting him a bonus after his receiving all intended benefit." (*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 944)

In the face of this record, whether the take-out certificate of occupancy constitutes a restriction on the business, whether Kesler adequately disclosed this restriction, and whether Rottman had actual or constructive notice of this restriction, remain triable issues of material fact. "Conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences

which reasonably may be drawn therefrom present issues of fact for determination by the trier of fact. [Citations.]" (*Welker v. Scripps Clinic & Research Found.* (1961) 196 Cal.App.2d 338, 342.)

3. Rottman's negligent misrepresentation claim raised triable issues

"The elements of negligent misrepresentation, a form of deceit, are misrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and resulting damage. [Citation.]" (*Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285.)

Rottman alleged Defendants repeatedly represented that Station was purchasing "a properly permitted, licensed and certified sit-down restaurant" and that Defendants made these misrepresentations without reasonable bases for believing them to be true. In fact, he asserted, the restaurant's certificate of occupancy limited its use to take-out; Kesler knew the premises lacked a sit-down certificate of occupancy; and Fouquette and Wittson either knew that or made no inquiry to ensure their representations were truthful. Defendants intended that Station rely on their misrepresentations, aware that if Station knew about the premises' limited certificate of occupancy, Station would have either canceled the purchase or reduced its offer. Station did so rely, and remained ignorant of the certificate of occupancy issue until well after the transaction closed. Station was damaged by its reliance on Defendants' misrepresentations

because it paid at least $150,000 more for the restaurant than was reasonable, given the limited certificate of occupancy.

In support of this claim, Rottman's declaration stated Defendants represented to him that The Smokin' Joint was a sit-down restaurant throughout the purchase process; when Rottman told Defendants he intended to operate a sit-down restaurant, Defendants represented to him that there would be no problem as he would be acquiring a restaurant already organized and permitted with proper paperwork to operate as a sit-down restaurant. Rottman's declaration attested to his ignorance of the certificate of occupancy issue until a prospective buyer brought it to his attention in 2013, and that The Smokin' Joint's conditional use permit, allowing the sale of on-site liquor at the sit-down restaurant, had not alerted him to the issue. When Rottman confronted Kesler about the issue in 2013, Kesler claimed a dine-in certificate of occupancy hung on a wall in the restaurant. Rottman also introduced Defendants' marketing materials stating the restaurant had a full liquor license and could seat 71 patrons.

Defendants argued they were entitled to judgment on the negligent misrepresentation claim because Rottman could not establish Station's ignorance of the certificate of occupancy issue and justifiable reliance on Defendants' misrepresentations.[7]

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[7] Defendants argued for the first time in their summary judgment reply brief that Rottman could not establish the first element of his negligent misrepresentation claim: that Defendants made a misrepresentation of material fact. Defendants contended their representations as to the sit-down status of the restaurant were truthful because Station

Defendants claimed that The Smokin' Joint's conditional use permit, along with the public record, conclusively established Rottman's notice of the certificate of occupancy issue and foreclosed Rottman's reliance on any contrary representations by Defendants. However, as discussed above, the availability of means of knowledge does not categorically establish knowledge where a prudent person under the circumstances, having no duty to make inquiry, would not be put on inquiry notice. (*Prudential*, *supra*, 66 Cal.App.4th at p. 1248.) The parties offered conflicting evidence, and conflicting interpretations of that evidence, raising triable issues of material fact with respect to Rottman's actual or constructive notice of the issue before escrow closed. "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact. [Citation.]" (*Blankenheim v. E. F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1475.)

Defendants next argued concessions in Rottman's pleading estopped him from claiming ignorance of the certificate of occupancy issue, and precluded his justifiable reliance on Defendants' misrepresentations. Rottman's pleading alleged

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subsequently operated a sit-down restaurant on the premises without any issues. Defendants did not challenge this element of the claim in their moving papers, or provide evidentiary support for this argument in their separate statement of undisputed facts. Having failed to meet their initial burden, the burden never shifted to Rottman to establish triable issues regarding the veracity of Defendants' representations. (*Guess v. Bernhardson* (2015) 242 Cal.App.4th 820, 825; (*Multani*, *supra*, 215 Cal.App.4th at p. 1443.)

Wittson and Fouquette either knew of the certificate of occupancy issue or made no inquiry into whether their occupancy representations were accurate because, had they made any inquiry, they would have learned the premises' certificate of occupancy restricted its use to a take-out restaurant. Defendants claim Rottman's allegation amounts to a "conclusive concession," estopping him from reasonably claiming his own ignorance of the certificate of occupancy issue: if Defendants would have discovered the certificate of occupancy issue by consulting public records, then Rottman could have as well, estopping him from arguing otherwise.

However, having made affirmative representations about The Smokin' Joint's legal status, Defendants became duty-bound by tort principles to take reasonable steps to ensure the accuracy of those representations.[8] (Civ. Code, § 1710, subd. (2); Rest.2d

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[8] Defendants argue Wittson and his employer were entitled to judgment on Rottman's negligent misrepresentation claims because real estate brokers have no affirmative duties towards non-clients. In particular, Defendants note a listing agent has no duty to a buyer to independently verify their clients' representations. However, Rottman's claim alleges Wittson, himself, made affirmative representations regarding the restaurant's legal compliance directly to Rottman (and therefore Station). Regardless of Wittson's role in the transaction or his lack of privity with Rottman, Wittson may be liable for harm proximately caused by his "assertion, as a fact, of that which is not true," made with "no reasonable ground for believing it to be true . . . ." (Civ. Code, § 1710, subd. (2).) Moreover, with respect to negligent misrepresentation claims, the California Supreme Court has adopted the analysis of Restatement (Second) of Torts, section 552, "that one who negligently supplies false information

Torts, § 552.) In contrast, Rottman did not have the same duty; the parties' contract required his investigation only of "items provided to Buyer," which did not include the certificate of occupancy. Moreover, Rottman was entitled to rely on Defendants' affirmative representations. "'Even when contracting parties are adverse to each other, either has the right to rely upon an express statement made by the other of an existing fact of which the truth is known to the other and unknown to him.' [Citation.]" (*Stevens v. Marco* (1956) 147 Cal.App.2d 357, 378.) "Furthermore, where one is justified in relying, and does in fact rely, upon false representations, his right of action is not destroyed merely because opportunities for examination or means of knowledge were open to him where no legal duty devolved upon him to employ such means of knowledge. [Citations.]" (*Id*. at pp. 378-379.)

Defendants also argued that Rottman could not establish they made the claimed misrepresentations without reasonable grounds for believing them to be true. Defendants cited Rottman's claim in his demurrer opposition that the contents of the documents provided to him during the purchase process "would lead a reasonable person to conclude that the restaurant

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'for the guidance of others in their business transactions' is liable for economic loss suffered by [intended or targeted] recipients in justifiable reliance on the information. [Citation.]" (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 392, 406-407.) Wittson voluntarily assumed certain duties towards Rottman when he made unfounded representations to Rottman that the restaurant was properly certified. Wittson and Fouquette were therefore not entitled to judgment as a matter of law on Rottman's negligent misrepresentation claim due to lack of duty.

was properly certified as a 'sit-down' restaurant." Defendants urged this claim conclusively established potential grounds on which Defendants might have reasonably relied when making representations to Rottman.

However, Defendants did not claim they actually relied on the parties' exchanged documents when making their representations. Defendants introduced no evidence tending to establish that their representations were, in fact, made based on any documents. If anything, Defendants' semantic argument that Rottman admitted a possible reasonable basis on which to conclude the restaurant was properly certified demonstrates a triable issue of fact. While a reasonable basis might exist for a person to believe the restaurant was properly certified, that does not establish that Defendants had reasonable grounds for believing their specific factual representations were true.

Triable issues of material fact exist regarding Rottman's negligent misrepresentation claim. Accordingly, Defendants were not entitled to summary adjudication of that claim.[9]

D. Demurrer Standard of Review

"We review de novo a trial court's sustaining of a demurrer, exercising our independent judgment as to whether the complaint alleges sufficient facts to state a cause of action. [Citation.] We assume the truth of properly pleaded allegations in the complaint and give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. [Citation.]" (*Van*

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[9] Because we reverse the trial court's summary judgment ruling, any potential error in denying Rottman's new trial motion was not prejudicial. Accordingly, we need not address the merits of Rottman's new trial motion in this opinion.

de Kamps Coalition v. Board of Trustees of Los Angeles Community College Dist. (2012) 206 Cal.App.4th 1036, 1043.) Where the trial court sustains a demurrer without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.)

E. The Trial Court Properly Sustained Defendants' Demurrer to Rottman's Breach of Implied Covenant Claim Without Leave to Amend

Rottman argues the trial court erred when denying him leave to amend his breach of implied covenant claim.[10] On appeal, Rottman asserts that he can allege that (1) Station performed as required under its binding purchase agreement with Kesler; (2) the agreement imposes an implicit duty of good faith and fair dealing forbidding any party from impairing another party's right to receive the intended benefits of the agreement; (3) Kesler interfered with Station's right to receive the benefits of the agreement by failing to disclose or correct the certificate of occupancy issue during escrow; and (4) Kesler's nondisclosure damaged Station, in part because Station paid a

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10 Rottman appeals only the trial court's denial of leave to amend the claim, and not its sustaining of Defendant's demurrer, conceding that the trial court's point that "[t]he claim is not well plead" was "well-taken . . . ."

higher price for The Smokin' Joint than it would have with knowledge of the certificate of occupancy issue.

Rottman's proposed amendment hinges on Kesler's nondisclosure of The Smokin' Joint's "take-out" restaurant certificate of occupancy—the same nondisclosure that grounds Rottman's breach of contract claim.

"'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.' (Rest.2d Contracts, § 205.) . . . . Because the covenant is a contract term, however, compensation for its breach has almost always been limited to contract rather than tort remedies." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-684 (*Foley*); see also *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393 (*Careau*) [enforcement of implied covenant to protect interest in having promises performed "is the traditional function of a contract action."].) In *Foley*, our Supreme Court "impliedly if not expressly[] limit[ed] the ability to recover tort damages in breach of contract situations to those where the respective positions of the contracting parties have the fiduciary characteristics of that relationship between the insurer and insured." (*Mitsui Manufacturers Bank v. Superior Court* (1989) 212 Cal.App.3d 726, 730.)

"[A]bsent those limited cases where a breach of a consensual contract term is not claimed or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery." (*Careau*, *supra*, 222 Cal.App.3d at p. 1395.) Rottman does not allege any special relationship between Station and Kesler that would take their transaction out of the ordinary commercial context. Where,

as here, plaintiff has pled no special relationship affording tort recovery, and plaintiff's breach of implied covenant claim proposes to "rely[ ] on the same alleged acts, simply seek[ing] the same damages or other relief already claimed in a companion contract cause of action, [the claim] may be disregarded as superfluous as no additional claim is actually stated." (*Ibid*.)

Rottman's proposed amendment states a cause of action for simple breach of contract. Because Rottman has "alleged nothing more than a duplicative claim for contract damages, the trial court was correct in sustaining a demurrer to this count without leave to amend." (*Careau*, *supra*, 222 Cal.App.3d at p. 1401.)

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with instructions to enter an order denying Defendants' motion for summary judgment and summary adjudication of Rottman's claims for breach of contract and for negligent misrepresentation. Rottman shall recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.