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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SAMUEL SANDERS et al., Plaintiffs and Appellants, v. SUNG I. CHUN et al., Defendants and Respondents.	B284704 (Los Angeles County Super. Ct. No. BC605191)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Law Offices of Robert K. Kent and Robert K. Kent; Law Offices of Steven Wolfson and Steven Wolfson for Plaintiffs and Appellants.

Baute Crochetiere & Harley and Scott J. Street; Safarian Choi & Bolstad and David Bolstad for Defendants and Respondents.

INTRODUCTION

Plaintiffs Samuel and Shawn Sanders sued defendants Sung and Jung Chun, alleging that defendants did not disclose important facts about a real property that defendants sold to plaintiffs' mother, which plaintiffs later inherited. According to plaintiffs' allegations, defendants represented that the property was permitted to include four rental units, when in fact it was permitted to include only two rental units. After plaintiffs discovered the permitting problem, they sued defendants for fraud and misrepresentation.

Defendants moved for summary judgment, asserting that the entire time they owned the property they believed it had been permitted for four rental units, and therefore they did not misrepresent any facts to plaintiffs. The court granted the motion, and plaintiffs appealed.

We affirm the judgment. Defendants' evidence was sufficient to demonstrate that defendants understood the property to be permitted for four units, and they did not receive any information that suggested otherwise. Plaintiffs did not produce evidence suggesting that defendants knew or should have known the actual permitting status of the rental units, and therefore they did not establish a triable issue of material fact. Summary judgment was therefore warranted.

Plaintiffs also assert that the trial court erred in granting defendants' post-judgment motion for attorney fees. However, plaintiffs did not file a notice of appeal relating to that order, and therefore we do not have jurisdiction to consider that issue.

FACTUAL AND PROCEDURAL BACKGROUND

A. Allegations

Plaintiffs filed a complaint on December 23, 2015 against defendants Sung Chun and Jung Chun, as well as several other

defendants.[1] A first amended complaint, second amended complaint, and third amended complaint added additional defendants and causes of action, but did not substantially change the allegations against the Chuns. Because this appeal involves only the Chuns and not the other defendants, we focus on the allegations only against them, and refer to them hereafter as "defendants."

Plaintiffs alleged that defendants owned the property at issue, and listed it for sale in 2005. Defendants represented that the property included four rental units. Plaintiffs' mother, Gloria Araujo, purchased the property in 2005 from defendants.[2] Plaintiffs inherited the property in June 2012, after their mother's death.

Plaintiffs alleged that in May 2013, they learned for the first time that the property was permitted to include only two rental units, not four. As a result, the fair market value of the property was much lower than the defendants had represented.

Plaintiffs asserted three causes of action against defendants: the first cause of action for "fraud—intentional misrepresentation," the second cause of action for "fraud—fraudulent concealment," and the third cause of action for "fraud—negligent misrepresentation." For each cause of action, plaintiffs alleged that defendants represented that the property

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[1] The complaints included as named defendants the real estate agent and related company, the title insurers, and the listing agent and agency.

[2] The brothers had a partial interest in the property at the time of the sale, and inherited the remainder after Araujo died. There appears to be no dispute that the Sanders brothers are appropriate plaintiffs in this case. For ease of reference, we refer to Araujo as the purchaser.

consisted of four legally permitted rental units, and "the gross rental income from said four (4) rental units was $58,020 per year." Because as plaintiff later discovered, two of the units were not permitted, the true value of the property was significantly less than defendants represented it to be. Plaintiffs alleged that defendants knew the representations about the rental units were not true, and Araujo relied on those representations in choosing to purchase the property and pay the price she did. Plaintiffs' prayer for damages included loss of value of the property, loss of rental income, the cost of renovations that would allow the additional units to be permitted, attorney fees, and punitive damages.

B. Motion for summary judgment

On March 29, 2017, defendants filed a motion for summary judgment. Defendants contended that as to the first cause of action for intentional misrepresentation and the second cause of action for fraudulent concealment, plaintiffs could not establish that defendants knew the property was not permitted for four units, or that they concealed such information from Araujo. Defendants also requested an award of attorney fees as prevailing parties pursuant to the 2005 sale agreement. In addition, defendants also asserted that all three causes of action alleged against them were time-barred, a contention that is not at issue on appeal. We therefore do not summarize the arguments and evidence relevant to that issue.

Defendants each submitted a declaration. Defendants purchased the property in 2000 from the United States Department of Housing and Urban Development, which obtained the property through a foreclosure. Defendants stated that they understood the property contained four rental units when they purchased it, and they did not receive any information while they

owned the property that suggested otherwise. They lived in one unit and rented the other three. Defendants each stated that they did not recall making any representations about the property to Araujo.

Defendants' attorney submitted a declaration stating that he had subpoenaed hundreds of pages of business records from the City of Los Angeles, including from the Los Angeles Housing and Community Investment Department (LAHCID). City inspectors had visited the property multiple times while defendants owned it, and never suggested that any of the rental units were unpermitted. In July 2004, for example, an inspector stated in the inspection log that he "inspected the three rental units of the four units (one is owner occupied) on the property." The units were very well maintained and I "found no violations." Between 2000 and 2005, defendants received rental registration certificates from the City of Los Angeles showing that four units were registered to the property. Defendants argued that based on this evidence, the motion for summary judgment should be granted on the first and second causes of action because plaintiffs could not prove that defendants intentionally misled Araujo.

C. Opposition

In their opposition, plaintiffs asserted that in the escrow instructions for the sale to Araujo, defendants "warranted" that the property had four rental units. Plaintiffs attached a copy of escrow instructions dated August 11, 2005, which states, "Seller warrants that the Property is legally approved as 4 units." Although the escrow instructions have a space on each page for initials and a signature page, the version attached to the opposition is unsigned. Samuel Sanders stated in his declaration that he, Shawn, and Araujo relied on this statement to mean that all four units were permitted and approved. Plaintiffs argued

that through this language, "[t]he Chuns made an absolute guaranty that the Property had four (4) legally approved and permitted units." They also asserted, "Inherent in this statement is that [defendants] had the requisite knowledge to make what was in essence an affirmative representation concerning the number of legal units in the Property, and if they in fact did not have such knowledge as they claim in the moving papers, this was fraudulent concealment on their part."

Plaintiffs each stated in their declarations that from the time Araujo purchased the property, it had four street addresses—one for each unit. Plaintiffs acknowledged that city inspectors visited the property while defendants owned it and found no violations, but they asserted that this did not imply "that the City made some finding as to the number of legally permitted units in the Property." Plaintiffs submitted the testimony of a LAHCID inspector, Raimundo Farmer, who stated that such inspections do not address permits for a property. They argued, "A finding of 'no violations' would refer only to the physical inspection of the property as the inspector . . . has no information concerning the permit status." They also contended that defendants' "self-serving" claims that they were not aware that the property was permitted for only two units were insufficient to warrant summary judgment, and a factfinder should determine defendants' true intent.

Plaintiffs submitted evidence demonstrating that Farmer noted during an inspection in November 2012 that there was a potential fifth unit on the property, a garage conversion, that was being used as an unpermitted dwelling unit. Plaintiffs' aunt, Marsha Araujo, was present for the November 2012 inspection, and noted that Farmer did not say anything about the permit status of the four units on the property. The possibility of an

unpermitted fifth unit caused Farmer to inquire as to the permit status of the property, which apparently revealed that the property had been permitted for only two units. As a result of this inquiry, in May 2013 plaintiffs received a letter from the City of Los Angeles stating that only two of the four units were legally permitted.

D. Reply

In their reply, defendants asserted that "[t]he undisputed evidence shows defendants believed the Property was approved for four units. Even the inspectors from the City of Los Angeles believed the Property was approved for four units when [defendants] owned it." Therefore, there was no evidence to support any intentional fraud or misrepresentation. In addition, defendants contended that "there is no evidence that [defendants] actively concealed or suppressed" any information about a two-unit permit status for the property, because "[t]hey did not know it." Defendants also pointed out that plaintiffs did not assert any breach of warranty claims, and therefore their assertions that there was some sort of contractual guaranty in the escrow instructions was a red herring.

E. Hearing and ruling

Before the hearing, the court issued a tentative ruling to grant the motion. At the hearing, plaintiffs' counsel said it was undisputed that the property was sold as if it included four units, and in fact it was permitted to include only two units. Thus, the relevant question was, "What did [defendants] know or what should they have known?" Plaintiffs' counsel asserted that "thousands" of cases hold that fraud is "a question of fact. It cannot be resolved on a motion for summary judgment." He reasoned that the party accused of fraud will always simply deny

the allegation, and "it is appropriate" for the trier of fact "to judge the credibility of the parties."

Plaintiffs' counsel also asserted that defendants' evidence was misleading, because none of the inspections defendants discussed in their motion related to the permit status of the units. In addition, plaintiffs' counsel asserted that in their separate statement and declarations, defendants stated that "they believed it was approved for four units when they purchased it in the year 2000. They don't tell us what happens after 2000 in that statement." Therefore, counsel reasoned, defendants failed to establish that they lacked knowledge about the permits for the entire time they owned the property. The court asked whether plaintiffs had deposed defendants, and plaintiffs' counsel said yes, "And he basically doesn't remember very much."[3]

Plaintiffs' counsel pointed to the warranty in the escrow instructions; the court noted that the version submitted was unsigned, and asked when defendants signed it. Plaintiffs' counsel said he was not sure and the escrow company did not have complete records. The court said, "In other words, this is a roundabout way you're saying you have no signed warranty either." Defense counsel also stated that the escrow instructions were not signed, they were dated months before escrow actually closed, and the copy submitted to the court was a version defendants produced in discovery, but no other party was able to locate a similar copy. Defense counsel also stated that the defendants' assertions of their own lack of knowledge provided

[3]By saying "he," it appears counsel was referring to defendant Sung Chun.

sufficient evidence to shift the burden on summary judgment, and plaintiffs had not submitted evidence to rebut that evidence.

The court granted the motion and adopted the tentative ruling as its final ruling. In the written ruling, the court denied the motion for summary judgment on the first, second, and third causes of action based on the statute of limitations. The court then turned to the substance of those causes of action, setting out the elements for fraud, concealment, and negligent misrepresentation. The court referenced defendants' evidence, including their statements and the inspection documents that suggested the property included four units, and stated, "Defendants' evidence is sufficient to meet their initial burden of showing that there are no triable issues of fact that they knew that the property was not approved for four units, or they had reasonable ground for believing that the property was approved for four units. Plaintiffs do not provide evidence which suggests that defendants knew or should have known in 2005 that the property was not approved for four units." The court concluded, "Plaintiffs have not met their burden. Plaintiffs fail to raise a triable issue of fact. [¶] The Motion for Summary Judgment is GRANTED."[4] A judgment was entered in favor of defendants.

Plaintiffs appealed.[5] Defendants moved for attorney fees under Civil Code section 1717 and a provision in the purchase

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[4] Both parties submitted written evidentiary objections. The court declined to rule on these objections because the parties failed to comply with the requirements for evidentiary objections under California Rules of Court, rule 3.1354. The parties do not challenge that holding on appeal, and therefore we do not address the objections.

[5] Plaintiffs filed their notice of appeal on August 23, 2017, before judgment was entered on August 29, 2017. We exercise

agreement for the property stating that in any proceeding arising out of the agreement, the prevailing party is entitled to attorney fees. Plaintiffs opposed the motion, asserting that defendants refused to engage in mediation, and under the purchase agreement that refusal nullified any right to attorney fees. The court granted the motion, awarding defendants $130,710.71 in attorney fees. Plaintiffs did not file a separate notice of appeal for the attorney fee order.

DISCUSSION

A. Standard of review

On appeal following a motion for summary judgment, "'[w]e review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

"A defendant 'moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that [the defendant] is entitled to judgment as a matter of law.' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, [107 Cal.Rptr.2d 841, 24 P.3d 493] (*Aguilar*).) A defendant's initial burden in moving for summary judgment is to come forward with evidence to make a prima facie showing that there is no triable issue of material fact (*ibid.*), where the material facts are determined by the pleadings. (*Fisherman's Wharf Bay Cruise*

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discretion pursuant to California Rules of Court, rule 8.104(d)(2) to deem the notice of appeal filed immediately after entry of judgment.

Corp. v. Superior Court (2003) 114 Cal.App.4th 309, 320, [7 Cal.Rptr.3d 628].) If the defendant meets that burden of production, the burden shifts to the plaintiff to make a showing that there is a triable issue of material fact. (*Ibid*.) 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' (*Aguilar, supra*, at p. 850, [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (*Pacific Gas and Electric Company v. Superior Court* (2018) 24 Cal.App.5th 1150, 1158; see also Code Civ. Proc., § 437c, subd. (p)(2).)

B. Summary judgment was appropriate

In their motion for summary judgment, defendants asserted that plaintiffs could not prove the essential elements of knowledge relating to their fraud causes of action. "The essential elements of a count for intentional misrepresentation are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage." (*Chapman v. Skype Inc*. (2013) 220 Cal.App.4th 217, 230-231.) "The required elements for fraudulent concealment are: (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact." (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606.) The elements for a cause of action for negligent misrepresentation are the same as those for intentional misrepresentation, except that negligent misrepresentation "does

not require intent to defraud but only the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.)

Plaintiffs contend that the motion for summary judgment should have been denied. They argue that "actual fraud is always a question of fact." They cite Civil Code section 1574, which states in full, "Actual fraud is always a question of fact." Plaintiffs assert that "the Trial Court ignored this controlling statute," and that the court "failed to address statutory and case law that states that 'actual fraud' is always a question of fact to be resolved by the trier of fact."

Plaintiffs appear to be mistaking a "question of fact" for a "triable issue of material fact." The two phrases are not synonymous. A summary judgment motion "shall be granted 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." (Code Civ. Proc., § 437c, subd. (c).) Although fraud is a question of fact, where there is insufficient evidence to allow a factfinder to find in favor of the plaintiff, summary judgment is appropriate. The statute declaring that fraud is "always a question of fact" is not a legislative requirement that every allegation of fraud must proceed to trial.

Plaintiffs cite *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, but this case does not support their argument. There, the Court of Appeal held that "a triable question of fact exists as to the causes of action for fraud and negligent misrepresentation." (*Id.* at p. 86.) However, this holding was based on the court's finding that there was conflicting evidence about whether the statements were accurate: "Whether these statements were false is a triable question of material fact,

because the [statements] are arguably false and misleading in light of [other] evidence. . . ." (*Id.* at p. 87.) Thus, this case does not support plaintiffs' contention that fraud and misrepresentation claims may never be adjudicated on summary judgment.

Plaintiffs also assert that the trial court erred in granting summary judgment because "fraudulent conduct may be inferred from the totality of the circumstances and is an issue for the trier of fact to determine." They assert that the trial court "simply blindly accepted the self-serving if not superficial contentions by [defendants] that they believed the property had four legally approved units." Plaintiffs argue that this evidence showed that defendants' "purported beliefs were based on information they received in 2000" when they bought the property, and did not address what defendants knew in 2005, when they sold the property.

Defendants' declarations stated that they "did not have any reason to believe that the property was approved for less than four units." They also said that they "did not receive any information that suggested" the property was approved for less than four units. Defendants referenced the inspections that were completed while they owned the property, and said none of these inspections gave them reason to question whether the rental units were not properly permitted. This evidence was sufficient to establish that defendants did not know the permitting status of the four units, and did not receive information suggesting that not all of the units were permitted.

Plaintiffs argue that evidence of the inspections "had no bearing on the number of legally approved units" on the property, because "[t]he routine inspections . . . were not related to determining the number of legally permitted units. [Defendants]

misled the Trial Court by arguing that the absence of any citations during this time related to permit issues provided [defendants] with a reasonable ground for their claimed belief that there were four legally approved units. There is no connection between the two." Plaintiffs also point to defendants' registration certificates for four rental units on the property, and stated, "[T]he certificates do not state that the property is approved for four units, only that a registration fee has been paid for four units, a totally different connotation than the implication that [defendants] tried to convey to the court."

Defendants did not assert that the City's inspections related to the permitted status of the units, or that the registration certificates proved that the units were permitted. Indeed, the actual permit status of the units was not in dispute. Instead, this evidence suggests that during these routine inspections and in registering the rental units, defendants and the City assumed that the property contained four rental units, and there was no indication that the units were not permitted. This evidence supports defendants' contention that they—like plaintiffs from 2005 to 2012—received no information that caused them to doubt their initial understanding that the property was permitted for four units. This evidence was sufficient to shift defendants' burden. Plaintiffs' evidence did not rebut this contention, because they offered no evidence that defendants knew the permit status of the units, or that under the circumstances they should have known.

Plaintiffs assert that defendants "failed to present evidence refuting each element of fraud alleged in the operative Complaint." However, defendants moving for summary judgment need not refute each element of the plaintiffs' causes of action. "All that the defendant need do is to 'show[ ] that one or more

elements of the cause of action . . . cannot be established' by the plaintiff." (*Aguilar, supra,* 25 Cal.4th at p. 853; Code Civ. Proc., § 437c, subd. (o)(1) ["A cause of action has no merit if . . . One or more of the elements of the cause of action cannot be separately established."].) That defendants did not refute *each* element of fraud, therefore, is not a valid claim of error.

Plaintiffs also assert that the trial court "did not specifically distinguish its ruling granting [defendants'] Motion for Summary Judgment with respect to the cause of action for Negligent Misrepresentation from the ruling concerning the causes of action for Intentional Misrepresentation and Fraudulent Concealment." They continue, "In addressing a cause of action for Negligent Representation [*sic*], the key element is whether the subject representation concerning the number of legally approved units was made without a reasonable ground for believing said representation to be true. [Citation.] [Defendants] presented no evidence on this issue and the Trial Court made no finding thereon in its ruling. The Court could not grant Summary Judgment without specific findings on this cause of action."[6]

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[6] In their respondents' brief, defendants address a somewhat related issue that plaintiffs did not raise on appeal: the court granted summary judgment on the third cause of action on substantive grounds, but defendants did not actually seek summary judgment on that basis. Defendants' motion for summary judgment on substantive grounds addressed only the first two causes of action for fraud and concealment; the third cause of action was included only in defendants' argument regarding the statute of limitations. Such a ruling can be problematic under some circumstances. (See, e.g., *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316 ["Where a remedy as drastic as summary

This argument does not comport with the record. The court's findings for this cause of action are the same as for the other causes of action: Defendants presented evidence that they assumed the property was permitted for four units, and nothing occurred in the five years they owned the property that suggested otherwise. The court stated that defendants presented evidence showing that they did not have "reasonable ground[s] for believing" that the property was not permitted for four units. This is a negligent misrepresentation standard. (See, e.g., *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252 [the elements of a negligent misrepresentation include a misrepresentation of fact "without reasonable ground for believing it to be true"].) The court therefore did make findings as to this cause of action.

Plaintiffs also contend that the trial court erred by "ignoring" the written warranty included in the escrow instructions that the property included four legally permitted

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judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail."]; but see *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 70 ["the trial court has the inherent power to grant summary judgment on a ground not explicitly tendered by the moving party when the parties' separate statements of material facts and the evidence in support thereof demonstrate the absence of a triable issue of material fact put in issue by the pleadings and negate the opponent's claim as a matter of law."].) However, because plaintiffs assert only that the court's ruling was substantively erroneous, and they have not asserted that the court's authority to make that ruling was constrained by defendants' motion, we do not address this issue.

units.[7] Plaintiffs assert that this warranty was binding on defendants, regardless of whether they had actual knowledge about the permit status of the units. As defendants correctly point out, however, plaintiffs did not assert a breach of contract or breach of warranty claim against defendants. Thus, even if the unsigned escrow instructions could be deemed a binding contract, plaintiffs did not allege in any of their complaints that defendants breached a contract. At best, the escrow instructions could be considered evidence that defendants made a representation to plaintiffs that was false. But such evidence cannot overcome the lack of evidence that defendants knew or should have known that all four units were not permitted—a critical element for each of the causes of action plaintiffs asserted against defendants.

C. Evidentiary objections

The trial court refused to consider plaintiffs' evidentiary objections for failure to comply with the applicable procedural rules. In their opening brief, plaintiffs assert that this was error because courts have a "duty" to rule on evidentiary objections. Indeed, "when evidentiary objections *are in a proper form*, a trial court must rule on the objections." (*Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642 [emphasis added].) Here, the court held that the objections were not presented in proper form, and on appeal plaintiffs make no effort to demonstrate that their objections were, in fact, compliant with the applicable authorities. As such, plaintiffs have not

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[7]In their opening brief, plaintiffs assert that a similar "warranty" is included in the purchase and sale agreement, citing only their first amended complaint. It does not appear that plaintiffs relied on this document as a warranty in the trial court; in any event, it does not change the analysis here.

demonstrated that the trial court erred by deeming the objections waived. (See *Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 192-193 [a party waives its objections to evidence in relation to a motion for summary judgment by "failing to timely object in the manner required by the California Rules of Court."].)

D. Attorney fees

In their opening brief, plaintiffs also assert that the trial court erred by granting defendants' motion for attorney fees. They ask that the attorney fee award be reversed or reduced. Defendants assert that because plaintiffs did not file a separate notice of appeal from the attorney fee award, which was included in a post-judgment order entered months after plaintiffs' notice of appeal was filed, we do not have jurisdiction to consider that order. We agree that we lack jurisdiction to consider this portion of plaintiffs' appeal.

At the end of the hearing on the summary judgment motion, on July 13, 2017, defendants' counsel stated that "there's a basis to seek attorneys' fees under the purchase and sale agreement," and defendants "intend to file" a motion on that matter. Defense counsel and the court discussed a date for that hearing, but did not discuss the merits of the request. The minute order granting defendants' motion for summary judgment was entered later the same day. It does not include an award of attorney fees or any statement that defendants were entitled to attorney fees. Plaintiffs filed their notice of appeal on August 23, 2017—before judgment was entered. They stated that they were appealing from the "Order granting the Motion for Summary Judgment of Defendants . . . dated July 13, 2017, and entered on or about August 4, 2017." (There does not appear to be a separate August 4, 2017 order in the record on appeal.)

An order granting a motion for summary judgment is not appealable. (Code Civ. Proc., § 437c, subd. (m)(1); *Saben, Earlix & Associates v. Fillet* (2005) 134 Cal.App.4th 1024, 1030 ["a summary judgment is appealable, but an order granting summary judgment is not."].) As noted in footnote 5, *supra*, we have exercised our discretion to treat plaintiffs' premature notice of appeal as filed after entry of judgment. (See Cal. Rules of Court, 8.104(d)(2) ["The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment."].) Although we deem the notice of appeal filed after the date of the judgment, we decline plaintiffs' invitation to deem the appeal to encompass an issue the court did not address in the ruling plaintiffs appealed.

The judgment in favor of defendants was entered August 29, 2017. The judgment signed by the court was on a proposed judgment form submitted by defendants, and includes the statement, "The Chuns are the prevailing parties in their dispute with Plaintiffs and are entitled to recover a reasonable amount of costs and attorneys' fees, according to the 2005 purchase and sale agreement between them and Plaintiffs, the exact amount of which shall be set in a separate order after the Chuns file their motion for attorneys' fees."

Defendants filed their motion seeking attorney fees on August 14, 2017. They asserted that the purchase and sale agreement included an attorney fee provision stating that in any action arising out of that agreement, the prevailing party "shall be entitled to reasonable attorneys' fees and costs." They included declarations and evidence supporting the entitlement to fees and the amount of fees requested. Plaintiffs opposed the motion, asserting that defendants were not entitled to attorney

fees because they had refused to participate in mediation as required by the contract, and failed to present sufficient evidence to support their request. Plaintiffs also argued that the fees requested were excessive, and submitted declarations and evidence in support of their arguments.

The court granted defendants' motion on October 23, 2017. In a 24-page written order, the court considered whether defendants were entitled to contract-based fees, even though plaintiffs had asserted non-contract causes of action. Finding that the contract's attorney fee provision was broad enough to encompass the action, the court considered plaintiffs' argument that defendants had forfeited entitlement to fees by failing to mediate. The court found that defendants had not unreasonably refused to mediate, and also that plaintiffs had filed the action without first requesting mediation, as required by the contract. The court concluded, "The Court therefore holds that Defendants' [*sic*] may recover their reasonable attorney's fees as the prevailing parties in this action." The court went on to reject plaintiffs' challenges to the amount of fees requested, and awarded defendants attorney fees in the amount they requested: $130,710.71. Plaintiffs did not file a notice of appeal following entry of the attorney fee award.

As defendants point out, "'[a]n appellate court has no jurisdiction to review an award of attorney fees made after entry of the judgment, unless the order is separately appealed.' [Citation.] "'[W]here several judgments and/or orders occurring close in time are separately appealable (e.g., judgment and order awarding attorney fees), each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal.'"" (*Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1171.)

Plaintiffs did not file a reply brief and therefore did not address defendants' jurisdiction argument.[8] At oral argument, however, plaintiffs' counsel asserted that the attorney fee award was subsumed in the judgment and is therefore appealable under the reasoning of *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993 (*Grant*). In that case, following a four-month trial, judgment was entered in favor of the respondents and attorney fees were awarded to some parties under Civil Code section 1717. (*Id*. at p. 996.) "The amounts of the various awards were left blank by the trial judge, presumably for later insertion by the clerk." (*Ibid*.) The appellants filed a notice of appeal. The respondents filed memoranda of costs that included attorney fees, the appellants moved to tax costs, and the trial court issued an order setting the amount of costs and fees awarded. The appellants did not separately appeal the court's fee order. (*Ibid*.)

The respondents challenged the appellants' ability to appeal from the court's postjudgment fee order. The Court of Appeal held that the fee order was subsumed in the judgment and therefore encompassed by the original notice of appeal: "[W]hen a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award." (*Grant, supra*, 2 Cal.App.4th at p. 998.)

At oral argument plaintiffs' counsel also cited *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28 (*DeZerega*), although its holding does not support plaintiffs' position. In that case, the judgment

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[8] Plaintiffs filed a request to file a late reply brief approximately six weeks after their reply brief was due (following a stipulated extension of 30 days), and two weeks after responding to the court's notice placing the case on the oral argument calendar. The motion was denied.

awarded "costs of suit" but did not award attorney fees; notice of appeal was filed shortly thereafter. (*Id*. at p. 43.) The defendant then filed a memorandum of costs seeking attorney fees, and the trial court entered an order awarding fees. (*Ibid*.) The Court of Appeal held that it did not have jurisdiction to consider the fee award: "Here the initial judgment said nothing about fees. The entire litigation of that issue occurred after the entry of the judgment from which the appeal was taken. Accordingly the judgment cannot be said to 'subsume' the later fee award." (*Id*. at p. 44.)

The *DeZerega* court also rejected the appellant's contention that the award of "costs" included the award of fees, and was therefore appealable under the reasoning of *Grant*. "The issue, however, is not whether fees were ultimately recovered 'as costs' but whether the *entitlement* to fees was *adjudicated* by the original judgment, leaving only the issue of amount for further adjudication. The answer to this question is clearly negative. Plaintiffs' opposition to the motion for fees scarcely addressed the issue of amount, relying instead on the argument that 'defendant is not entitled to attorney's fees in this matter,' . . . . In the trial court, no one treated the original judgment as having determined any entitlement to fees. The parties' conduct and the written record belie counsel's assertion at oral argument that after judgment was entered, nothing remained to be determined but the amount of the fee to be allowed. It follows that the order granting the motion for fees was the only one from which an appeal challenging the award would lie." (*DeZerega, supra*, 83 Cal.App.4th at p. 44.)

Other cases have also noted that the holding of *Grant* is limited. In *Colony Hill v. Ghamaty*, *supra*, 143 Cal.App.4th 1156, for example, the judgment stated, "'Award of attorney's fees and

costs shall be determined by post-judgment application.'" (*Id*. at p. 1171.) The notice of appeal—like the notice here—did not mention any attorney fee award. The court granted the attorney fee award, and the appellant did not separately appeal that order. Relying on *DeZerega*, the Court of Appeal rejected the appellant's claim that under the reasoning of *Grant* the attorney fee award was subsumed in the judgment: "Were we to extend *Grant* in the manner [appellant] urges, a prevailing party would never have to file a separate appeal from a postjudgment order granting attorney fees. That of course, would be contrary to law." (*Id*. at 1172.)

Similarly, in *Silver v. Pacific American Fish Co., Inc*. (2010) 190 Cal.App.4th 688 (*Silver*), the judgment stated that "Pacific 'shall recover . . . attorney fees and costs of suit,' but left a blank space for the amount." (*Id*. at p. 692.) The Court of Appeal held that the reasoning of *Grant* did not apply because "it is clear that the parties subsequently litigated in a separate postjudgment proceeding not only the reasonableness of the amount of the attorney fees Pacific was claiming, but also the threshold issue of Pacific's *entitlement* to such fees." (*Ibid*.) Thus, the "postjudgment order awarding attorney fees was separately appealable and therefore required Silver to file a separate, timely notice of appeal. His failure to do so deprives this court of jurisdiction over his purported appeal from that order and mandates dismissal of that portion of his appeal." (*Id*. at p. 694.)

This case is much more like *DeZerega, Colony Hill*, and *Silver* than *Grant*, because entitlement to attorney fees was separately litigated and determined after judgment was entered and after the notice of appeal was filed. Thus, we are not persuaded by plaintiffs' contention that the attorney fee award was subsumed in the judgment under the reasoning of *Grant*.

Because plaintiffs did not separately appeal from the court's post-judgment award of attorney fees, we do not have jurisdiction to consider that order.[9]

DISPOSITION

The judgment is affirmed. Sung Chun and Jung Chun are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.

[9]In their respondents' brief, defendants assert that we should sanction plaintiffs for filing a frivolous appeal and for their "unprofessional attacks on the Chuns and their counsel." This request is denied; sanctions may not be requested in a brief. (Cal. Rules of Court, rule 8.276; *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919 ["Sanctions cannot be sought in the respondent's brief."].)