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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SUPERIOR PROPERTY OF 10621 SEPULVEDA, LLC, Plaintiff and Appellant, v. HOME DEPOT, U.S.A., INC., Defendant and Respondent.	B227690 (Los Angeles County Super. Ct. No. BC408902)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Reversed.

Stuart Miller; Wellman & Warren and Scott Wellman for Plaintiff and Appellant.

Sedgwick, Steven D. Roland and Gail E. Kavanagh for Defendant and Respondent.

INTRODUCTION

Landlord, Superior Property of 10621 Sepulveda, LLC (Superior), entered into a 20-year ground lease with tenant Home Depot, U.S.A., Inc. (Home Depot) to construct and open a big box store. Home Depot timely exercised its right under the agreement to terminate the lease and Superior sued seeking contract and fraud damages. The trial court granted Home Depot's motion in limine to limit the contract damages to a $200,000 Termination Fee defined in the lease. Superior appeals from the $253,892 judgment in its favor. Superior contends the trial court erred in interpreting the contract to limit damages to $200,000. While we disagree with Superior's construction of the lease, we agree with Superior that the trial court's interpretation was error. Accordingly, we reverse the judgment for a new trial on the issue of damages.

FACTUAL AND PROCEDURAL BACKGROUND

Superior owns approximately 6.68 acres of land on Sepulveda Boulevard in the San Fernando Valley. In 2006, Superior and Home Depot executed an amended and restated ground lease (the lease). Section 22.18 of the lease establishes its effective date as September 22, 2006.

Section 18 of the lease, entitled "Contingencies; Tenant's Rights to Terminate Lease," provided that "Tenant shall have the right to terminate the Lease if the following contingencies have not been satisfied or waived[.]" The relevant contingency, section 18.3,[1] is entitled "Approvals." In particular, section 18.3(a) of the lease provides that

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[1] Section 18.3 of the lease reads in pertinent part: "(a) Tenant shall, at Tenant's sole cost and expense, attempt to obtain, by the date that is eighteen (18) months after the Effective Date (said period being herein referred to as the 'Approval Period'), the valid and irrevocable grant, on terms and conditions satisfactory to Tenant, in its sole and absolute discretion, of those permits, licenses and approvals necessary to permit Tenant to construct and operate the Retail Store, from all governmental and quasi-governmental authorities with jurisdiction including, without limitation, permits, licenses and approvals pertaining to demolition, zoning, building, detention and environmental matters, grading, curb cuts, zero curb lines (i.e., construction of store without curbs between storefront and parking lot), Tenant's beverage and food operations, . . . and other permits, licenses and approvals as Tenant determines are needed in Tenant's sole and absolute discretion for the operation of the Retail Store (collectively, 'Approvals'). . . . [¶] (b) The obligations

Home Depot must attempt to obtain the permits, licenses and approvals necessary to enable it to construct and operate the store, called the " 'Approvals,' " by 18 months after the effective date of September 22, 2006, the " 'Approval Period.' " Home Depot's obligations are conditioned on all of the Approvals being validly granted and no longer subject to suit, the " 'Final Approvals.' "

The lease next provides in the fourth sentence of section 18.3(b), "If Tenant does not obtain the Final Approvals prior to the expiration of the Approval Period, then Tenant may *by notice* to Landlord terminate this Lease, whereupon this Lease shall be of no further force or effect and neither party hereto shall have any further rights, duties or liabilities hereunder *other than those rights, duties and liabilities which have arisen or accrued hereunder prior to the effective date of such termination*." (Italics added.) (Hereinafter referred to as sentence No. 4.)

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of Tenant hereunder shall be conditioned upon all of such Approvals being validly granted on terms and conditions satisfactory to Tenant, without qualification, limitation or restriction, except such qualifications, limitations and restrictions as shall be acceptable to Tenant in its sole and absolute discretion, and no longer being subject to . . . such suit shall have been dismissed with prejudice ('Final Approvals'). Landlord shall cooperate in good faith with Tenant to obtain such Final Approvals in accordance with this Section 18.3. Landlord hereby authorizes Tenant to seek and apply for all Approvals in Landlord's name and on Landlord's behalf, at Tenant's sole cost and expense. If Tenant does not obtain the Final Approvals prior to the expiration of the Approval Period, then Tenant may by notice to Landlord terminate this Lease, whereupon this Lease shall be of no further force or effect and neither party hereto shall have any further rights, duties or liabilities hereunder other than those rights, duties and liabilities which have arisen or accrued hereunder prior to the effective date of such termination. Notwithstanding anything to the contrary contained in this Section 18.3, the parties acknowledge and agree that at any time prior to the expiration of the Approval Period, Tenant shall have the right, exercisable in its sole discretion, to terminate the Lease and all of its obligations thereunder, for any reason or for no reason, upon payment of a termination fee equal to Two Hundred Thousand and No/100 Dollars ($200,000.00) ('Termination Fee'), and upon delivery of the Termination Fee to Landlord, this Lease shall terminate and be of no further force or effect and neither party shall have any liability or obligation thereunder, except as may otherwise be expressly provided in this Lease."

In sentence No. 5 of section 18.3(b), the lease reads, "Notwithstanding anything to the contrary contained in this Section 18.3, the parties acknowledge and agree that at any time prior to the expiration of the Approval Period, Tenant shall have the right, exercisable in its sole discretion, to terminate the Lease and all of its obligations thereunder, for any reason or for no reason, *upon payment of a termination fee equal to Two Hundred Thousand and No/100 Dollars ($200,000.00)* ('Termination Fee'), and upon delivery of the Termination Fee to Landlord, this Lease shall terminate and be of no further force or effect and neither party shall have any liability or obligation thereunder, except as may otherwise be expressly provided in this Lease." (Italics added.) (Hereinafter sentence No. 5.)

On January 28, 2008, during the approval period, Home Depot emailed Superior that "We have desided [*sic*] to drop this project. The prposed [*sic*] site plan was rejected by operations and the City issues are simply to [*sic*] risky for us at this time[.]"

On January 31, 2008, Home Depot's attorneys gave Superior formal written notice "[p]ursuant to Section 18.3(b) of the Lease" and then quoted sentence No. 4, that Home Depot could terminate the lease if it was "unable to obtain Final Approvals by the expiration of the Approval Period."

Superior brought the instant action against Home Depot seeking damages for breach of contract, intentional and negligent misrepresentation, and false promise. In its breach of contract cause of action, Superior alleged that despite its repeated demands, Home Depot never paid Superior the $200,000 Termination Fee as required by sentence No. 5 of the lease's section 18.3(b). As the result of the failure to pay the $200,000 Termination Fee, Superior alleged, Home Depot had failed to activate the termination and consequently had a continuing obligation to pay rent under the lease's default provision.

Home Depot moved in limine to exclude evidence or argument about Superior's claim for contract damages in excess of $200,000. Home Depot argued the terms of section 18.3(b) limited the damages arising from Superior's contract cause of action to $200,000. Home Depot stated it "was entitled to terminate the Lease within the Approval Period and the maximum amount that it could be required to pay for exercising that right

was $200,000." Home Depot reasoned that an award of damages over $200,000 "would give [Superior] far more than the benefit of its bargain."

The trial court granted Home Depot's motion based on its reading of section 18.3(b). Accordingly, the verdict form asked the jury to determine whether Home Depot made a reasonable attempt under the circumstances to obtain the approvals necessary to build and operate a store. The verdict form next read, if the jury determined that question in the negative, then Superior "is entitled to $200,000 in damages for breach of contract."

The jury returned a verdict finding that Home Depot did not make a reasonable attempt under the circumstances to obtain the necessary approvals. The jury then found in favor of Home Depot on all of Superior's fraud claims. The trial court entered judgment in favor of Superior for $200,000, plus $46,626.29 in interest and $7,266 in costs, for a total of $253,892.29. Superior filed its timely appeal.

CONTENTIONS

Superior contends the trial court erred in (1) its interpretation of section 18.3(b) to mean that Home Depot could terminate the lease upon notice but without payment of the Termination Fee, and (2) limiting Home Depot's damages to $200,000.

DISCUSSION

"The interpretation of a written instrument is solely a judicial function unless the interpretation turns upon the credibility of extrinsic evidence. We are not ' "bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation]." [Citations.]' [Citation.]" (*RC Royal Development & Realty Corp. v. Standard Pacific Corp*. (2009) 177 Cal.App.4th 1410, 1418.) Here, the lease is written and its meaning does not turn on extrinsic evidence. Consequently, interpretation of section 18.3(b) is a matter of law for our independent determination.

Our construction of the lease, however, is very different than that espoused by either party, either in the trial court or on appeal. Accordingly, we invited the parties to

file supplemental briefs addressing our interpretation. (Gov. Code, § 68081.)[2] We have reviewed the supplemental briefs and are not persuaded by the arguments.

1. *Home Depot terminated the lease under sentence No. 4 of section 18.3(b).*

Superior contends "the lease does not provide for termination upon notice, but only upon payment. The termination provision makes no reference to *notice*." Not so.

As we read this lease, it provides for two methods of termination: One method is set forth in sentence No. 5, which allowed Home Depot to terminate any time before expiration of the Approval Period, in its sole discretion for any reason or no reason, upon payment of the $200,000 Termination Fee. The other method is provided for in sentence No. 4, under which Home Depot could terminate the lease "by notice" to Superior, "[i]f Tenant does not obtain the Final Approvals prior to expiration of the Approval Period."

Superior argues the only manner in which Home Depot could have terminated was under sentence No. 5 (termination by payment of Termination Fee) because, as the jury found that Home Depot did not make a reasonable attempt under the circumstances to obtain the necessary approvals, sentence No. 4 (termination by notice) is inapplicable.

We conclude that Home Depot purported to terminate the lease under sentence No. 4. That the jury made a finding after the termination that Home Depot did not make a reasonable attempt to obtain the permits, does not vitiate the fact that Home Depot gave notice within the timeframe set forth in sentence No. 4, and hence intended to terminate the lease under the notice provision. In short, Home Depot exercised its right under sentence No. 4, to terminate the lease by notice. Indeed, Superior does not claim the

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[2] Government Code section 68081 reads, "Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

lease is ambiguous and offers no extrinsic evidence to support a contrary interpretation of this integrated lease.[3]

2. *The lease was not an option contract; section 18.3(b) gave Home Depot the right to terminate the lease*.

Next, Superior cites *Bekins Moving & Storage Co. v. Prudential Ins. Co*. (1985) 176 Cal.App.3d 245 and *Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, to contend that options to terminate leases must be strictly construed and so we must strictly construe section 18.3(b) to require that Home Depot pay the Termination Fee in order to validly terminate the lease. *Bekins* stated, "a lessee must exercise his option within the time, in the manner and upon the terms stated in the lease." (*Bekins Moving & Storage Co. v. Prudential Ins. Co*., *supra*, at p. 253.) The contention fails.

An option "is a *right* acquired by contract to accept or reject a present offer within a limited time in the future." (*County of San Diego v. Miller* (1975) 13 Cal.3d 684, 688; see *Palo Alto Town & Country Village, Inc. v. BBTC Company*, *supra*, 11 Cal.3d at p. 502.) It is a contract, made for consideration, to keep an *offer open* for a prescribed period. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 168, p. 204.) This lease is not an offer, nor a right to accept an offer, nor a promise that will ripen into a bilateral contract in the future. It is a fully executed, bilateral contract for the lease of real property. Therefore, the lease is not an option.

Also, California does not require strict compliance to exercise an option or a *right to terminate a contract*. (*Western Camps, Inc. v. Riverway Ranch Enterprises* (1977) 70 Cal.App.3d 714.) The *Western Camps* court explained, "a provision requiring notice of the exercise of an option to terminate a lease is not construed strictly, but it is sufficient if the intention of the party to exercise the option is fairly communicated. [Citation.]" (*Id*. at p. 723, fn. 4, citing *Zumwalt v. Hargrave* (1945) 71 Cal.App.2d 415,

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[3] As our review is de novo (*RC Royal Development & Realty Corp. v. Standard Pacific Corp*., *supra*, 177 Cal.App.4th at p. 1418), it is of no moment that this interpretation was not espoused by either party below.

420.) Superior attempts to distinguish *Western Camps* and *Zumwalt* by arguing that "the present case does not involve 'a provision requiring *notice* of the exercise of an option to terminate.' Rather, Home Depot's *sole means of terminating its lease was the timely payment of the termination fee*." (Italics added.) Superior is wrong. As explained, sentence No. 4 of section 18.3(b) authorized the termination of the lease by notice, and so strict compliance with the notice provision was not required.

However, this discussion about strict compliance with the termination provision is beside the point. Here, Home Depot complied to the letter with the *method* of terminating contained in sentence No. 4. Home Depot gave Superior notice in writing that it was terminating the lease and gave its notice "prior to the expiration of the Approval Period," as required by section 18.3(b), sentence No. 4. Home Depot breached the lease, as the jury found, by failing to "make a reasonable attempt under the circumstances to obtain the approvals necessary to build and operate a store . . . ."[4] Thus, it wrongly relied on sentence No. 4 to terminate. Stated otherwise, Home Depot did strictly comply with the method of terminating the lease provided in section 18.3(b), sentence No. 4[5] even if it wrongly exercised the right under that sentence.

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[4] The parties provided supplemental briefs discussing application of the implied covenant of good faith and fair dealing, the notion being that the requirement that Home Depot obtain the permits was an implied covenant of the lease. After review of the supplemental briefing, we conclude that the implied covenant of good faith and fair dealing has no place in our analysis. Superior did not allege a cause of action for breach of the implied covenant of good faith and fair dealing. Superior's theory of the case was that by failing to act reasonably under the circumstances to obtain the approvals necessary to construct and open a store, Home Depot breached *an express* term of the lease. Therefore, there is no finding of a breach of the implied covenant such as would support a damage award on that basis.

[5] Because Home Depot actually terminated the lease pursuant to sentence No. 4 of section 18.3(b), Superior's argument is irrelevant that Home Depot's renunciation of the lease entitled Superior to the monetary remedies listed in section 13 of the lease (damages for tenant's *default*) and Civil Code section 1951.2 (statutory remedies for lessee's *breach and abandonment*).

3. *The trial court erred in limiting Superior's damages to the $200,000 Termination Fee in sentence No. 5 where Home Depot purported to terminate under sentence No. 4.*

Turning to the determination of damages, Home Depot took the position in the trial court that the $200,000 Termination Fee was the appropriate measure under section 18.3(b). The court agreed and utilized Home Depot's interpretation in the jury verdict form.

" 'Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract. [Citations.] Damages must be reasonable, however, and the promisor is not required to compensate the injured party for injuries that he had no reason to foresee as the probable result of his breach when he made the contract. [Citations.]' [Citations.]" (*Martin v. U-Haul Co. Of Fresno* (1988) 204 Cal.App.3d 396, 409.)

Pecarovich v. Becker (1952) 113 Cal.App.2d 309 concerned an employment contract for the plaintiff coach of the defendants' San Francisco Clippers professional football team. (*Id*. at p. 310.) The defendant-employer informed the plaintiff they would no longer be operating the football team and so they would no longer perform their part of the plaintiff's contract. The trial court computed the plaintiff's damages based on the entire unexpired three-year term of the parties' agreement. (*Id*. at pp. 316-317.) The *Pecarovich* court reversed holding it was error to award damages for the entire unexpired term of the contract. Instead, *Pecarovich* limited the damages to the termination clause of the agreement. (*Id*. at p. 317.) That clause gave the defendant-employer the option of terminating the contract on a 90-day written notice and set out specified payments the defendant-employer would make to the plaintiff.

Following *Pecarovich*, the court in *Martin* held that, when the termination clause does not specify the payments required in the event of termination (see *Martin v. U-Haul Co. Of Fresno*, *supra*, 204 Cal.App.3d at p. 407), the "termination clause limits recoverable damages to the notice period," which rule "is consistent with the general

requirement that contract damages are limited to those foreseeable by the parties at the time of contracting." (*Id*. at p. 409.) The plaintiff in *Martin*, operated an equipment rental dealership for the defendant. The parties' contract allowed either party to terminate " 'on thirty days' " notice " 'upon violation by the opposite party of any promise or condition. . . .' " (*Id*. at p. 405.) Wrongly claiming the plaintiff had been renting equipment in violation of the contract, the defendant terminated the agreement. The jury awarded the plaintiff $29,000. (*Id*. at p. 400.) However, relying on the 30-day termination clause, the trial court conditionally granted the defendant a new trial unless the plaintiff agreed to reduce the damage recovery to $725. (*Ibid*.)

In affirming the trial court, *Martin* explained, " '[t]he requirement of *knowledge or notice* as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting.' [Citation.]" (*Martin v. U-Haul Co. Of Fresno*, *supra*, 204 Cal.App.3d at p. 409.) Thus, *Martin* held, "Because of the 30-day notice provision neither party to the dealership contract could reasonably anticipate that damages resulting from a breach of that contract would exceed those potentially accruing during a 30-day period after the breach. Furthermore, awarding the wronged party damages which exceed those attributable to the 30 days immediately following the breach would place that party in a better position than that resulting if the breaching party had performed in accordance with the terms of the agreement." (*Id*. at pp. 410-411.)

As in this case, Pecarovich's contract provided for its termination upon *notice* and specified a sum to be paid by the defendants upon exercise of the termination clause. Likewise, as in this case, the defendant in *Martin* had wrongly exercised the termination clause. (See *Martin v. U-Haul Co. Of Fresno, supra*, 204 Cal.App.3d at p. 407.) It matters not to the outcome that *Pecarovich* and *Martin* did not involve a lease, Superior's contention to the contrary notwithstanding. Citing out of state authorities and general contract law principles, *Pecarovich* held, and *Martin* seconded, "if a person refuses to

perform a contract which is terminable by him upon certain conditions, the amount of money he would have to pay in exercising his election to terminate becomes the measure of damages for his breach." (*Pecarovich v. Becker, supra,* 113 Cal.App.2d at p. 317; *Martin v. U-Haul Co. Of Fresno*, *supra*, 204 Cal.App.3d at p. 408.)

Turning to sentence No. 4 of section 18.3(b), it provides upon notice, "this Lease shall be of no further force or effect and neither party hereto shall have any further rights, duties or liabilities hereunder *other than those rights, duties and liabilities which have arisen or accrued hereunder prior to the effective date of such termination*." (Italics added.) As in *Pecarovich*, this clause defines the payments that would become due to Superior by Home Depot's termination pursuant to sentence No. 4. This also defines the damages owed Superior in the event that, as the jury found here, Home Depot breached the termination clause by failing to make "a reasonable attempt under the circumstances to obtain the approvals necessary to build and operate a store on the Mission Hills property." (*Martin v. U-Haul Co. Of Fresno, supra,* 204 Cal.App.3d at p. 407.)

Based on the foregoing principles, the trial court here erred by limiting Superior's damages to $200,000 Termination Fee in sentence No. 5. First, Home Depot did not purport to terminate under sentence No. 5, and so that provision's payment is irrelevant to the analysis. Turning to sentence No. 4, however, Superior is entitled to all "*rights, duties, and liabilities which have arisen or accrued hereunder prior to the effective date of such termination*." (Italics added.) Superior argued to the trial court that in reliance on the lease and Home Depot's promises, it expended in excess of $600,000 in, among other things, (1) taking the property off the market; (2) transferring possession to Home Depot; (3) purchasing the leasehold interests of remaining, existing tenants; (4) refusing to extend expired leases; and (5) continuing to acquire title to adjacent property to satisfy Home Depot's square footage requirements. All of this expenditure was clearly foreseeable by Home Depot. Stated differently, upon remand, the payment Home Depot should be required to make for exercising the termination clause of sentence No. 4 includes the amount Superior can demonstrate on retrial it expended or that accrued to it before Home Depot gave notice of its termination.

DISPOSITION

The judgment is reversed for a new trial on the issue of damages in accordance with the views expressed herein. Superior is to recover costs on appeal.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.