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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

LAMAR CENTRAL OUTDOOR, LLC, Plaintiff, Cross-defendant, and Respondent, v. YOUNG HE HWANG Defendant, Cross-defendant, and Appellant; MILAN TOWN HOMES, L. P., Defendant, Cross-complainant, and Respondent.	B266070 (Los Angeles County Super. Ct. No. BC528226)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Elizabeth Lippet, Judge. Affirmed.

Gresham, Savage, Nolan, and Tilden, PC, Theodore K. Stream, Mario H. Alfaro, and Andrea Rodriguez for plaintiff, cross-defendant, and respondent.

Kim, Shapiro, Park & Lee, Paul Park for defendant, cross-defendant, and appellant.

Crawford & Bangs, LLP, Theresa Crawford Tate and E. Scott Howard, Jr., for defendant, cross-complainant, and respondent.

INTRODUCTION

Defendant and cross-defendant Young He Hwang (Hwang) appeals from a judgment entered in favor of plaintiff Lamar Central Outdoor, LLC (Lamar) and defendant and cross-complainant Milan Town Homes, L.P. (Milan). In essence, Lamar sought to recover from Hwang and Milan the value of two of its billboards located on a parcel of land sold by Hwang to Milan in 2006, which billboards were demolished by Milan in 2010 without Lamar's knowledge or consent.

On the judgment in Lamar's favor on its complaint, Hwang contends that: (i) the trial court abused its discretion by excluding from evidence a trustee's deed upon sale showing that the property in issue had been foreclosed upon before Hwang or her husband owned it; (ii) there was insufficient evidence to support the trial court's finding that Hwang was bound by the billboard lease in question; (iii) there was insufficient evidence to support the trial court's implicit finding that Lamar was entitled to enforce the lease; (iv) the trial court erred by finding Hwang liable for conversion and fraud; and (v) all of Lamar's claims were barred by the statutes of limitations.

On the judgment for attorney fees in Milan's favor on its cross-complaint, Hwang contends that the trial court erred in awarding Milan attorney fees because the purchase agreement under which the fees were awarded required Milan to mediate its dispute with Hwang prior to filing suit and because Milan was not entitled to attorney fees under its implied equitable indemnity cause of action.

On Hwang's appeal from the judgment in Lamar's favor, we hold that the trial court did not abuse its discretion by excluding the trustee's deed and that there was sufficient evidence to support the trial court's finding that Hwang was bound by the lease. We further hold that Hwang has forfeited her claims based on the sufficiency of the evidence in support of the finding that Lamar was entitled to enforce the lease and the statute of limitations. And we hold that the claimed errors on the liability findings on the conversion and fraud claims were harmless.

On the judgment awarding Milan attorney fees, we hold that, under the procedural posture of this case, mediation was not required under the purchase agreement between

Hwang and Milan. Therefore**,** any claimed error concerning the attorney fee award based on Milan's cause of action for implied equitable indemnity was harmless because Milan was nevertheless entitled to an award of attorney fees based on the purchase agreement between the parties.

FACTUAL BACKGROUND

In September 1975, Lamar's predecessor-in-interest, Independent Outdoor Advertising, Inc., entered into a lease (the lease) with the owner of an undeveloped parcel of real property located at 10006 South Broadway, Los Angeles (the property) "for the purpose of erecting and maintaining advertising signs [on the property] for a term of ten years from the date of completion of construction of said advertising signs." The lease provided that it would renew at the end of the ten-year term for another ten years unless terminated by either party in a written notice served 30 days before the end of the term. In addition, the lease provided that Independent, as leasee, retained ownership of the billboards; the lease was binding on all successors-in-interest of the parties; and a subsequent purchaser of the property had the right to terminate the lease upon service of written notice within 30 days of the recording of the deed. Based on the lease, Independent constructed two billboards on the property.

In May 1982, Independent's successor-in-interest, Winston Network, Inc., received notice of a change in ownership of the property and began issuing checks under the lease to the new owner, Milk Palace. In November 1982, Winston Network began holding the monthly rent checks due under the lease because the address of the current owner of the property was "unknown."

In September 1986, Hwang's husband, Thomas Hwang, contacted Winston Network and advised that his company, C&B Properties (C&B), acquired the property in June 1985, and that C&B had not been receiving rent checks for the billboards. Winston Network released the back rent to C&B in September 1986 and thereafter made monthly rent payments under the lease to C&B.

In 1992, Hwang took over management of C&B and operated it continuously through the time of trial. Although Hwang claimed at trial that she did not discover the billboards and the lease until June 2006, she admitted during her deposition that she was aware of the billboards in 1990 before she took over management of C&B in 1992.

In January 1992, Winston Network's successor-in-interest, Metropolitan Outdoor Advertising, sent a letter to, inter alia, C&B asking it to agree to an abatement of rent under the lease during 1992 due to financial issues. Metropolitan requested that C&B contact it if C&B objected to the abatement, but Metropolitan received no objection from C&B.

In June 2007, Metropolitan's successor-in-interest, Vista Media, sent Hwang a letter informing her that it was issuing a check in the amount of $1,560.00 for back rent from January 2000 to June 2006. The letter enclosed a new lease agreement providing for, inter alia, an increase in rent for the billboards. Hwang did not respond to Vista Media's request and instead, in August 2006, she sent Vista Media a letter informing it that she personally owned, inter alia, the property and that she had "not been paid for [Vista Media's] use of [her] properties for the last 21 years. So [she] . . . claim[ed] all the lease payments [Vista Media] owe[d] her."

In December 2006, C&B deeded the property to Hwang and her sister-in-law as joint tenants. Hwang's husband also quit claimed any interest he had in the property to Hwang that same day. Four days later, Hwang and her sister-in-law sold the property to Milan's predecessor-in-interest, Milan Town Homes, LLC. Hwang, however, did not inform Vista Media of the transfers of the property. Instead, notwithstanding her sale of the property to Milan in December 2006, Hwang continued to receive and cash the rent checks for the billboards—made payable to her—over the following seven years.

Lamar acquired all of Vista Media's assets in February 2008. Although Lamar notified all of its landlords of the change in ownership, Hwang did not contact Lamar to advise it that she had sold the property to Milan. In January 2010, Hwang advised Lamar of a change of address and Lamar began sending the rent checks to the new address.

In September 2013, Lamar sent Hwang a letter informing her that Lamar had discovered that its billboards had been removed from the property and demanding an explanation. Hwang did not respond to the letter demand. As a result, in November 2013, Lamar filed a complaint against Hwang and Milan. In August 2014, Hwang sent a letter to Lamar informing it that the property had been sold a "few years ago." Hwang claimed that she had cashed the monthly checks under the lease by mistake, returned three uncashed monthly rent checks, and offered to "pay back the amount [she] cashed in full," but apparently did not do so.

PROCEDURAL BACKGROUND

Lamar's complaint asserted causes of action against Hwang and Milan[1] for breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, wrongful eviction, and fraud. Milan answered and filed a cross-complaint against Hwang for breach of contract, unjust enrichment, conversion, and implied equitable indemnity. Milan also asserted claims against Hwang and Lamar for trespass and negligence. Hwang answered the complaint and cross-complaint.

Following a four-day bench trial, the parties submitted closing briefs on April 6, 2015. On April 13, 2015, the trial court issued joint special verdicts on the complaint and cross-complaint. On the complaint, the trial court found Hwang liable to Lamar for breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, and fraud. As to each claim, the trial court found identical damages of $38,301.91. On the cross-complaint, the trial court found Hwang liable to Milan for breach of contract, conversion, negligence, and implied equitable indemnity. As to the breach of contract, conversion, and negligence claims, the trial court awarded identical damages of $920 plus "attorney fees/costs per memo." The joint special verdict form on

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[1] Lamar also sued Milan's predecessor-in-interest, Milan Town Homes, LLC, but that entity is not a party to this appeal.

the cross-complaint did not include any question concerning the amount of damages to which Milan was entitled on the implied equitable indemnity claim.

On April 30, 2015, Milan filed a motion for attorney fees seeking a total fee award of $65,535. Milan claimed entitlement to fees based on the property purchase agreement between the parties and on the trial court's liability finding on the implied equitable indemnity claim.

On May 5, 2015, the trial court entered a form judgment on the complaint and cross-complaint based on its verdicts. The judgment included an award of costs as to the complaint and cross-complaint "per memo of costs."

On May 15, 2015, Hwang filed her opposition to Milan's motion for attorney fees. Hwang contended that Milan was not entitled to attorney fees based on the attorney fees clause in the purchase agreement because it failed to participate in the contractually-required mediation prior to filing its cross-complaint. Hwang also contended that Milan could not recover attorney fees on its implied equitable indemnity claim because the trial court did not answer the first two questions of the joint special verdict form relating to that claim and Milan never demanded that Hwang defend it prior to filing its cross complaint.

On May 29, 2015, the trial court held a hearing on Milan's motion for attorney fees and thereafter issued a minute order granting the motion and awarding Milan $64,535 in attorney fees.

DISCUSSION

A. Exclusion of Trust Deed

1. Background

On the last day of trial, Hwang's trial counsel attempted to introduce the trustee's deed upon sale by which California Commerce Bank acquired title to the property in a foreclosure sale prior to C&B's purchase of the property from the bank. According to

Hwang's counsel, his attorney service had "uncovered" the trustee's deed the day before and provided it to him that morning. The deed had not been included by Hwang in the joint exhibit list, identified in response to special interrogatories, or produced in response to document demands. Accordingly, Lamar objected to the admission of the deed. Following argument on Lamar's objection, the trial court indicated that its tentative ruling was to sustain the objection because Hwang's attempt to introduce the deed was untimely, but granted the parties leave to brief the issue.

Hwang filed a posttrial brief that included briefing on the objection to the trustee's deed upon sale. Lamar filed a brief in response arguing that the deed should be excluded because: Hwang had not been diligent in locating the deed; Hwang failed to identify or produce the document in discovery; and the deed was more prejudicial than probative under Evidence Code section 352. Following another hearing on whether to exclude the trustee's deed, the trial court excluded it because Hwang's attempt to introduce it was untimely and because the deed did not state that it extinguished the lease, making it irrelevant.

2. Standard of Review

Hwang's contention concerning the trial court's order excluding the trustee's deed is reviewed for abuse of discretion. "Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197 [66 Cal.Rptr.2d 123, 940 P.2d 710] ['In determining the admissibility of evidence, the trial court has broad discretion. . . . On appeal, a trial court's decision to admit or not admit evidence, whether made *in limine* or following a hearing pursuant to Evidence Code section 402, is reviewed only for abuse of discretion.']; accord, *People v. Alvarez* (1996) 14 Cal.4th 155, 203 [58 Cal.Rptr.2d 385, 926 P.2d 365] ['appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion']; *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476 [69 Cal.Rptr.3d 273].) 'The trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a

"miscarriage of justice"—that is, that a different result would have been probable if the error had not occurred.' (*Zhou*, at p. 1480; see Evid. Code, § 354; Code Civ. Proc., § 475.)" (*Pannu v. Land Rover North America, Inc*. (2011) 191 Cal.App.4th 1298, 1317.)

3. Analysis

Hwang contends that the trial court abused its discretion by excluding the trustee's deed based on the timing of its production. According to Hwang, the foreclosure sale by which California Commerce Bank acquired the property from Milk Palace was a complicated transaction involving approximately 16 properties located in three different counties. In addition, Hwang contends that Lamar was not prejudiced by the timing of the production of the deed because it was well aware of the foreclosure transaction by which California Commerce Bank acquired the property.

Trial courts have broad inherent authority to control litigation before them, including the authority to exclude evidence if its introduction would create an unfair advantage for the party offering the evidence. "'"Our Supreme Court has recognized that California courts have inherent powers, independent of statute, derived from two distinct sources: the courts' 'equitable power derived from the historic power of equity courts' and 'supervisory or administrative powers which all courts possess to enable them to carry out their duties.'" [Citation.] "The court's inherent power to curb abuses and promote fair process extends to the preclusion of evidence. Even without such abuses the trial court enjoys 'broad authority of the judge over the admission and exclusion of evidence.' . . . [T]rial courts regularly exercise their 'basic power to insure that all parties receive a fair trial' by precluding evidence."' (*Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 107-108 [37 Cal.Rptr 2d 843], quoting *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288 [245 Cal.Rptr. 873].)" (*Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 425,)

Here, Hwang did not provide a satisfactory explanation in the trial court for why she did not locate and obtain the trustee's deed earlier in the litigation. Lamar filed this action in November 2013, but Hwang did not produce the trustee's deed until over a year

later on March 27, 2015—the last day of trial. Hwang's husband, through his company, C&B, purchased the property from California Commerce Bank and therefore presumably would have had access to a copy of the deed evidencing the Bank's ownership through the escrow for the transaction. Moreover, the deed was a public record maintained in the San Bernardino County recorder's office and therefore was readily available to the public. Given these facts, the trial court was well within its discretion in excluding the deed based on the unfair timing of its production.

In any event, the exclusion of the trustee's deed did not cause a miscarriage of justice. Hwang wished to argue that the billboard lease was extinguished by that foreclosure sale, even before C&B, and later Hwang, owned the property. After C&B acquired the property, however, it asked for and received rent checks in 1986 and then either it or Hwang continued to receive and cash rent checks during much of the next 27 years. Hwang herself sent an August 2006 letter personally claiming the rent payments, and she continued to cash the rent checks from that point until 2013. In light of this performance on the contract over this extended period, the exclusion of the trustee's deed was not a miscarriage of justice.

B. Sufficiency of Evidence in Support of Finding that Hwang Was Bound by Lease

Hwang contends there was insufficient evidence to support the trial court's finding that she was bound by the lease. According to Hwang, the lease was extinguished by the foreclosure sale by which California Commerce Bank acquired the property because the lease was not recorded and, therefore, the bank had no notice of its existence.

1. Standard of Review

Hwang's contention that there was insufficient evidence to support the trial court's finding that she was bound by the lease is reviewed under the substantial evidence standard of review. "The application of the substantial evidence standard of review has been summarized as follows: '"Where findings of fact are challenged on a civil appeal,

we are bound by the 'elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." [Citation.] "Substantial evidence" is not synonymous with "any" evidence; rather, it means the evidence must be of ponderable legal significance, reasonable, credible, and of solid value. [Citation.] An appellate court presumes in favor of the judgment or order all reasonable inferences. [Citation.] If there is substantial evidence to support a finding, an appellate court must uphold that finding even if it would have made a different finding had it presided over the trial. [Citations.] An appellate court does not reweigh the evidence or evaluate the credibility of witnesses, but rather defers to the trier of fact. [Citations.] "The substantial evidence [standard of review] applies to both express and implied findings of fact made by the superior court in its statement of decision rendered after a nonjury trial." [Citation.]' (*Cahill v. San Diego Gas & Electric Co*. (2011) 194 Cal.App.4th 939, 957, 958 [124 Cal.Rptr.3d 78].)" (*City of Glendale v. Marcus Cable Associates, LLC* (2014) 231 Cal.App.4th 1359, 1385.)

2. Analysis

The September 1975 lease provided that it was binding on all successors-in-interest of the parties. When California Commerce Bank thereafter acquired the property by foreclosure, it was undisputed that the billboards were on prominent display on the property, and there was evidence that they were being regularly maintained during that time. There was also evidence that the logo of Lamar's predecessor-in-interest was conspicuously displayed on the billboards. A reasonable trier of fact therefore could have inferred from that evidence that the bank had notice of the billboards and the lease under which they were being operated and maintained.

But even if California Commerce Bank did not have notice of the lease at the time it acquired the property, there was ample evidence that Hwang was not only aware of the lease, but had repeatedly demanded and accepted monthly rent payments under the lease, even after she sold the property. That evidence was sufficient to support a reasonable inference that Hwang had ratified the lease by her conduct and was therefore bound by it. (Civ. Code, § 1589 ["A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting"]; *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 753 ["essence of ratification is that it is done with full knowledge of the party's rights; 'ratification will be strongly presumed against one who has accepted and had the beneficial use of the property or money involved in the transaction'"] quoting *Brown v. Rouse* (1894) 104 Cal. 672, 676.)

C. Sufficiency of Evidence in Support of Finding that Lamar Was Entitled to Enforce Lease

Hwang contends that there was insufficient evidence to support the trial court's implicit finding that Lamar was entitled to enforce the lease. According to Hwang, to be entitled to recover under the lease, Lamar was required to show that it had a valid written assignment of the lease. Because Lamar did not present any evidence of such an assignment, Hwang maintains that it failed to prove entitlement to enforce the lease.

Lamar counters that Hwang forfeited this contention by failing to raise it in the trial court. In support of its forfeiture assertion, Lamar points out that Hwang did not raise the assignment issue in either its trial brief or closing brief.

We agree that the issue has been forfeited. "The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 37, pp. 497-500.) The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon* (2001) 25 Cal.4th 1082 [108 Cal.Rptr.2d 385, 25 P.3d 598] (*Simon*): '''''The purpose of the general doctrine of waiver [or forfeiture] is to

encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .'" [Citation.] '"No procedural principle is more familiar to this Court than that a *constitutional* right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." . . .' [Citation.] [¶] 'The rationale for this rule was aptly explained in *Sommer* v. *Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . . : "'In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'"' [Citation.]" (Fn. omitted; [citations].)' (*Simon, supra,* 25 Cal.4th at p. 1103, italics added.)" (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265.)

Based on the record, it does not appear that Hwang adequately raised the assignment issue in the trial court. Neither her trial brief nor closing brief mentions the issue. Absent some argument in the trial court that a written assignment of the lease was required before Lamar was entitled to enforce it, neither Lamar nor the trial court had adequate notice of the issue, much less a reasonable opportunity to address it. We therefore conclude that Hwang forfeited this issue on appeal.

In her reply brief, Hwang asserts, without citation to authority, that it was Lamar's burden, as part of its breach of contract case-in-chief, to plead and prove a valid written assignment of the lease. But even assuming, arguendo, that it was Lamar's burden to plead and prove a written assignment, it appears from the record that Hwang conceded the issue at trial. In the joint special verdict form on Lamar's breach of contract claim, the parties agreed to the elements necessary for a finding of liability on that claim. The form did not include a question as to whether Lamar had a valid written assignment of the lease that entitled it to enforce the lease. As a result, Lamar's entitlement to enforce the lease was presumed by the parties and implicit in the trial court's findings. It cannot be

reversible error for the trial court to fail to decide an issue that it was not asked to consider or determine.

D. Statute of Limitations on Contract Claims

Hwang contends that each of Lamar's causes of action against her is barred by the respective statutes of limitation applicable to those claims. But our review of the record revealed that Hwang may have forfeited her statute of limitations defenses by either failing to argue the defenses in the trial court or, in the case of the conversion claim, failing to obtain a ruling on her statute of limitations defense to that claim. We therefore asked the parties to submit letter briefs on whether Hwang had forfeited her contentions based on the statute of limitations defenses. After reviewing the parties' letter briefs, we conclude that Hwang forfeited her contentions based on those defenses.

Hwang pleaded an affirmative defense based on an unspecified statute of limitations, but that defense was defective on its face under Code of Civil Procedure section 458[2] which requires a party to specify the code section that supports the defense. (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 573, fn. 4 ["According to long-standing case law, the failure to allege the appropriate subdivision of the statute of limitations waives the defense"].) Even assuming that this omission did not forfeit the defenses, Hwang failed to press them during trial. With the exception of a brief argument on the statute of limitations for conversion in her motion for nonsuit and her closing brief, Hwang did not argue the statute of limitations defenses to Lamar's claims in either her trial brief or closing brief. Then, she failed to include any question pertaining to any of those defenses in the joint special verdict form. Again, the trial court cannot have

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[2] Code of Civil Procedure section 458 provides: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section _____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred."

committed reversible error by failing to rule on issues that it was not asked to consider or determine. (*Keener v. Jeld-Wen, Inc.*, *supra*, 46 Cal.4th 247, 264-265.)

E. Harmless Error as to Conversion and Fraud Claims

In addition to challenging the sufficiency of the evidence in support of the finding that she was bound by the lease, Hwang challenges the trial court's adverse rulings on the conversion and fraud claims. According to Hwang, she cannot be liable for conversion based on the demolition of the billboards because Milan was the party that demolished them; and she cannot be liable for fraud because she did not make any affirmative misrepresentations upon which Lamar relied to its determent. We conclude, under the authorities discussed below, that Hwang cannot obtain a reversal of the trial court's rulings on the conversion and fraud claims because she cannot show the required prejudice from those claimed errors

1. Legal Principles

The asserted errors as to the conversion and fraud claims would be "grounds for reversing a judgment only if the party appealing demonstrates a 'miscarriage of justice'—that is, that a different result would have been probable if the error had not occurred. [Evid. Code,] § 354 ['[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice']; Code Civ. Proc., § 475 ['[n]o judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed]; [fn. omitted] *Pool v. City of*

Oakland (1986) 42 Cal.3d 1051, 1069 [232 Cal.Rptr. 528, 728 P.2d 1163]; see *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 51-52 [115 Cal.Rptr.2d 151] [prejudice will not be presumed; burden rests with party claiming error to demonstrate not only error, but also a resulting miscarriage of justice].)" (*Zhou v. Unisource Worldwide, supra,* 157 Cal.App.4th at p. 1480.)

2. Analysis

As discussed above, the trial court awarded Lamar damages on its breach of contract claim that were identical to the damages awarded for conversion and fraud, and we have concluded that substantial evidence supported the trial court's findings on the contract claim. Therefore, even assuming, arguendo, that the trial court erred in finding Hwang liable for conversion and fraud, those errors would be harmless because, regardless of the rulings on those claims, Hwang would still be liable to Lamar for an identical amount of damages based on the ruling on the contract claim, i.e., a reversal of the conversion and fraud claims would not result in a more favorable outcome for Hwang.

F. Award of Attorney Fees to Milan

Hwang contends that the attorney fees award in favor of Milan should be reversed for two reasons: (i) the award based on the attorney fees provision in the parties' purchase agreement should be reversed because Milan did not participate in the contractually-required mediation with Hwang before filing its cross-complaint against her; and (ii) the award under Code of Civil Procedure section 1021.6 based on Milan's equitable indemnity claim should be reversed because the trial court did not answer the first two special verdict questions relating to that claim and Milan never demanded that Hwang defend it prior to filing its cross-complaint for indemnity as required under section 1021.6.

1. Fees Awarded on Contract

As in the trial court, Hwang does not challenge on appeal the *amount* of the attorney fees requested by and awarded to Milan under the attorney fees clause in the parties' purchase agreement.[3] Instead, she challenges only the legal basis for the award, i.e., she contends that Milan was not legally entitled to an award of fees under the parties' purchase agreement because Milan did not satisfy a contractual condition precedent to such an award. We therefore review that challenge de novo. (*Cullen v. Corwin* (2012) 206 Cal.App.4th 1074, 1078 ["We review the trial court's determination of the legal basis for an award of legal fees de novo as a question of law"]; *Leamon v. Kragjkiewcz* (2003) 107 Cal.App.4th 424, 431 ["An appellate court reviews a determination of the legal basis for an award of attorney fees independently as a question of law"].)

The parties do not dispute that their purchase agreement provided that the prevailing party *in a dispute arising between them out of that agreement* was entitled to an award of attorney fees or that Milan's cross-claim against Hwang arose, at least in part, under that agreement. Nor do the parties dispute the general proposition that participation in mediation prior to filing suit based on such a dispute was a condition

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3 The standard California residential purchase agreement bars recovery of attorney fees that would otherwise be available to one of the contracting parties who commences litigation of a dispute arising out of the agreement without first attempting to mediate the dispute. (*Lange v. Schilling* (2008) 163 Cal.App.4th 1412, 1414.) The vacant land purchase agreement at issue in this case was a California Association of Realtors standard form agreement that contained a mediation requirement in paragraph 22A that was similar to the mediation requirement at issue in *Lange* and the other cases discussed below. "Mediation: Buyer and seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. . . . If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. . . ."

precedent to a fee award under the purchase agreement.[4] (See *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1100.)

Milan, however, does dispute that mediation was contractually required based on the procedural posture of this case. Milan contends, inter alia, that the mediation requirement in the purchase agreement did not apply to this case because Lamar's action against it was not an action the arose between the parties to the purchase agreement.

Given the unique procedural posture of this case, which was initiated against Hwang, not by Milan, but rather by Lamar—a nonparty to the mediation and attorney fees clauses—Milan's failure to fulfill the mediation condition, prior to cross complaining against Hwang, was not a complete defense to its claim for attorney fees under the purchase agreement. The dispute initially arose between Lamar and Milan. Pursuant to Code of Civil Procedure section 426.30,[5] once Milan was sued by Lamar, Milan was *required* to file its cross-complaint against Lamar at the time it answered Lamar's complaint. And, although Milan's cross-complaint against Hwang may not have been compulsory, it was permissive pursuant to Code of Civil Procedure section 428.10[6]

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4 In support of its motion for attorney fees, Milan submitted a declaration from one of its attorneys asserting that all the parties did, in fact, mediate their dispute on February 20, 2015, after Milan filed its cross-complaint against Hwang, on January 22, 2014, and that the majority of the fees claimed by Milan were incurred after that mediation. According to that declaration, the parties were unsuccessful in settling the case. Thus, Milan did not fail to mediate; it merely delayed a mediation that was unsuccessful in any event.

5 Code of Civil Procedure section 426.30, subdivision (a) provides: "Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded."

6 Code of Civil Procedure section 428.10 provides: "A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth either or both of the following: [¶] (a) Any cause of action he has against any of the parties who filed the complaint or cross-complaint against him. Nothing in

and, given the procedural posture of this case, its filing was consistent with the policies of judicial economy that underlie the compulsory and permissive cross-complaint statutes. (See, e.g., *Flickinger v. Swedlow Engineering, Inc*. (1955) 45 Cal.2d 388, 393 ["The law abhors a multiplicity of actions . . ."].)

The mediation provision in the purchase agreement between Hwang and Milan contemplated a lawsuit based on *a dispute arising between the parties to that agreement* and required mediation of the contracting parties' dispute prior to the filing of any such a lawsuit. Here, the lawsuit that gave rise to the parties' dispute was not between the parties to the purchase agreement. It was between nonparty Lamar, on the one hand, and Hwang and Milan, on the other.

In light of that fact, reading the mediation clause to require a mediation before the filing of Milan's permissive cross-complaint against Hwang would have defeated the policies of judicial economy that underlie the cross-complaint statutes. Under such a reading, Milan would have been forced to file forthwith its cross-complaint against Lamar in this action, but to forego its right to file a cross-complaint against Hwang and instead participate in a mediation with Hwang, but not necessarily Lamar, that presumably would have failed to resolve the dispute underlying Milan's cross-complaint. Such a mediation of a cross-complaint seeking indemnity would have been difficult without either Hwang's liability or the amount thereof being established. Milan would then have been required to file *a separate action* against Hwang to preserve its right to indemnity from Hwang. But, where a party is entitled to pursue a claim for indemnity by way of either a cross-complaint or a separate action, "purposes of judicial economy and efficiency militate in favor of a cross-complaint so the rights and liabilities of the parties

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this subdivision authorizes the filing of a cross-complaint against the plaintiff in an action commenced under Title 7 (commencing with Section 1230.010) of Part 3. [¶] (b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him."

can be resolved in one proceeding rather than through successive lawsuits." (*Black Diamond Asphalt, Inc. v. Superior Court* (2003) 114 Cal.App.4th 109, 115.)

Here, instead, Milan and Hwang (along with Lamar) mediated their dispute after the cross-complaint was filed, though they were unsuccessful in resolving any part of the case. Hwang never indicated that the timing of the mediation was an impediment to the resolution of the cross-complaint, and, indeed, she did not raise the claim that earlier mediation was a condition precedent to the fee award even when she submitted the joint special verdict form on which the trial court both found liability and awarded attorney fees as damages to Milan. It was only after the trial court actually found Hwang liable for attorney fees in its special verdict that, in a posttrial opposition to the amount of the fees, Hwang raised a challenge to the trial court's awarding of fees in the first place. Hwang's failure to object earlier to the award of fees supports our conclusion that, where this lawsuit arose initially between Lamar and Milan, it was not unreasonable under the purchase agreement to mediate the case with all three parties after the cross-complaint was filed.

We recognize that courts have strictly construed similar mediation clauses in cases arising between the parties to the purchase agreement and denied attorney fees to parties who sued without first complying with the mediation requirement. (See, e.g., *Lang v. Schilling, supra,* 163 Cal.App.4th p. 1414 ["We agree with other courts that the [mediation] agreement means what it says: plaintiff's failure to seek mediation precludes an award of attorney fees"]; *Frei v. Davy* (2004) 124 Cal.App.4th 1506, 1516 ["To recover attorney fees under [a real property purchase agreement with a mediation requirement], a party cannot commence litigation before attempting to resolve the matter through mediation"]; accord, *Van Slyke v Gibson* (2007) 146 Cal.App.4th 1296, 1299; and *Johnson v. Siegel, supra,* 84 Cal.App.4th at p. 1101 ["seeking mediation is a condition precedent to the recovery of attorney fees"].) But in those cases, the dispute that gave rise to the litigation arose between the parties to the purchase agreement that required mediation as a condition precedent to an award of attorney fees. Here, as explained, the lawsuit that gave rise to the dispute between and among Lamar, Hwang,

and Milan was initiated by a nonparty to the operative purchase agreement. Until it was sued by Lamar, Milan had no dispute with Hwang, and its cross-complaint against Hwang was triggered, not by any preexisting dispute between Milan and Hwang about some aspect of their purchase agreement, but instead by Lamar's complaint and the procedural requirements and policies discussed above. Under such circumstances, it would have been unreasonable to require Milan to mediate before seeking to preserve its right to indemnity from Hwang, as Milan did not create the underlying dispute, Lamar did. We therefore conclude that the trial court did not err in awarding Milan attorney fees under the purchase agreement with Hwang.

2. Fees Awarded on Implied Equitable Indemnity Claim

In light of our holding affirming the attorney fee award under the purchase agreement, we do not need to determine whether the trial court erred by also awarding fees under Milan's alternative implied equitable indemnity theory. Even if the trial court erred in awarding fees based on the implied equitable indemnity claim pursuant to Code of Civil Procedure section 1021.6, any such error would be harmless because Hwang cannot show that, but for that error, she would have obtained a more favorable outcome on the attorney fees issue.

DISPOSITION

The judgment in favor of Lamar on its complaint and the order awarding attorney fees to Milan are affirmed. Lamar and Milan are awarded costs on appeal.

RAPHAEL, J.*

We concur:

TURNER, P. J.

BAKER, J.

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* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.