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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

CACIQUE, INC., Plaintiff, Cross-defendant and Appellant, v. PROCTOR INDUSTRIAL INVESTMENTS, LLC, Defendant, Cross-complainant and Respondent.	B288213 (consolidated w/B289335) (Los Angeles County Super. Ct. No. BC589523)

APPEAL from judgments of the Superior Court of Los Angeles County, Debre Katz Weintraub and Randolph Hammock, Judges. Affirmed in part and reversed in part with directions (case No. B288213); reversed with directions (case No. B289335).

Grodsky & Olecki, Allen B. Grodsky, John J. Metzidis and Tim B. Henderson for Plaintiff, Cross-defendant and Appellant.

Freedman + Taitelman, Michael A. Taitelman, Bradley H. Kreshek; Greines, Martin, Stein & Richland, Robin Meadow and Meehan Rasch for Defendant, Cross-complainant and Respondent.

This case involves a contract between a seller (respondent Proctor Industrial Investments, Inc. (Proctor)), a buyer (appellant Cacique, Inc. (Cacique)), and a construction company (nonparty Chalmers Corporation (CEG)) for the sale of real property and construction of a warehouse thereon. The warehouse was already under construction at the time the parties executed the contract. Under the contract, CEG agreed to complete construction according to certain plans and specifications attached to the agreement, as well as any modifications to those plans approved by both Cacique and CEG, and in compliance with all applicable laws. Proctor agreed to sell Cacique both the land and a code-compliant warehouse, once CEG had substantially completed construction.

Cacique had a right to a refund of the majority of its initial deposit and to terminate the contract if, after a period during which Cacique could inspect all plans and other documents regarding the warehouse construction, Cacique did not approve contingencies. During this contingency period, Cacique raised concerns that the structural drawings and calculations CEG had prepared according to the plans and specifications attached to the agreement were not code compliant. Proctor made some adjustments, but generally insisted that the plans were structurally sound and that the warehouse would be built to code. Cacique several times requested that Proctor extend the contingency period or address Cacique's concerns about the plans and specifications so that the parties could move forward with the transaction. Proctor agreed to a brief extension of the diligence period, but ultimately demanded Cacique either approve contingencies or terminate the contract. Cacique did not explicitly do either. Instead, it sued Proctor (but not CEG) for breach of contract, alleging that, by refusing to revise the plans or associated design documents, Proctor had repudiated a duty to deliver a code-compliant warehouse to Cacique. Proctor cross-complained, alleging Cacique breached the contract when Cacique

failed to make an additional deposit due at the conclusion of the contingency period.

The trial court granted Proctor's motion for summary judgment of Cacique's complaint. It also denied Cacique's motion for summary judgment of Proctor's cross-complaint and granted Proctor's motion for summary judgment on Proctor's cross-complaint.

Cacique appealed, raising several distinct arguments. First, Cacique argues the court incorrectly interpreted the agreement as placing the duty to build the warehouse to code exclusively on CEG, not Proctor. Cacique contends that the court erred when, on this basis, it granted Proctor's motion for summary judgment of Cacique's complaint. But even if Cacique is correct as to the scope of Proctor's duty, there is no triable issue of fact as to whether Proctor repudiated. The communications on which Cacique relies to establish repudiation reflect not an unequivocal refusal to deliver a code-compliant building, but rather a dispute over what "code compliance" requires. The contract contemplates and addresses the possibility of such a dispute, but does not deem it a breach. Proctor also repeatedly indicated that it had performed and would continue to perform as set forth in the agreement. We find no error in the trial court's summary judgment of Cacique's complaint.

Cacique also argues the trial court erred in resolving both Proctor's and Cacique's respective cross motions for summary judgment on Proctor's cross-complaint in Proctor's favor, and entering judgment for Proctor on its cross-complaint. In so ruling, the trial court rejected Cacique's argument that Cacique's repeated requests to extend the contingency period and expressions of concern about the plans and related design documents relieved Cacique of its obligation to pay the additional deposit. We conclude that, as a matter of law, Cacique's communications reflect a conditional approval of contingencies, which, under the contract,

terminated both the agreement and Cacique's obligation to pay the second deposit—the only obligation Proctor alleges Cacique breached. Therefore, the trial court erred in ruling in Proctor's favor on the summary judgment motions regarding the cross-complaint. We reverse the trial court's order to the extent it adjudicates Proctor's cross-complaint, as well as the post judgment award of attorney fees and prejudgment interest, and instruct the trial court to enter summary judgment in favor of Cacique on the cross-complaint. We further instruct the trial court to determine whether and to which party, if any, attorney fees are due in the wake of our decision.

We do not consider Cacique's appellate arguments separately challenging the award of prejudgment interest to Proctor, as our decision regarding the cross-complaint renders that appeal moot.

In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Parties and the Property at Issue*

Cacique is a specialty food company headquartered in the City of Industry. Proctor is an entity created for the purpose of selling a piece of real property in the City of Industry (the land). In 2014, Proctor's general contractor, CEG, began constructing a warehouse facility on the land (the warehouse) according to plans drafted by Proctor and CEG's "in-house" engineering and architectural team, O.C. Engineering ("OCE"), and approved by City of Industry authorities.

Proctor, CEG, and OCE are closely related entities: A single individual owns both Proctor and CEG, and the two companies share a chief financial officer (CFO). OCE's offices are in the same building as CEG's offices, and the two companies share support staff.

B. *The Agreement*

In June 2015, Proctor, CEG, and Cacique entered into a "purchase and sale agreement and escrow instructions" involving the sale of the land and a completed warehouse. (Capitalization omitted.) John Devling, the CFO for both Proctor and CEG, signed the agreement on behalf of both companies. Attached as exhibits to the agreement were the plans and specifications, pursuant to which CEG had been constructing the warehouse, as well as additional plans and specifications to which the parties had agreed (collectively, the Agreement plans).

1. *Proctor's obligations under the agreement*

The parties' arguments on appeal reflect a dispute regarding the scope of Proctor's obligations under the agreement. The following are the agreement provisions, the interpretation of which underlies that dispute:

- Proctor "agree[d], subject to the provisions of [the] [a]greement and the procurement of all necessary permits and approvals," to, "with reasonable diligence," "cause CEG to construct or cause to be constructed" the "Improvements," defined to include the warehouse, "in 'turn key' condition and built/modified according to" the "Plans and Specifications" and all applicable laws in a workmanlike manner. "Plans and Specifications" are defined as the Agreement plans, any other "plans, drawings and specifications[,]" that are "expressly approved by [Cacique]," and "existing and future related change orders, changes, amendments, revisions and modifications that are approved by [Cacique] and [CEG]."
- Proctor "agree[d] to sell and convey to [Cacique] . . . subject to the terms and conditions set forth [in the agreement]" the land and the warehouse, "in 'turn key' condition and

built/modified according to" the "Plans and Specifications" (as defined in the agreement) and all applicable laws in a workmanlike manner.

- "[Proctor] specifically negate[d] and disclaim[ed] any representations, warranties or guaranties of any kind or character whatsoever" regarding the land or warehouse, including regarding compliance with any applicable laws or regulations. (Capitalization omitted.) In this context, the agreement notes that "the sale of the property [land and warehouse] is and will be made on an 'AS IS, WHERE IS' basis, subject to the completion of the improvements in accordance with applicable law and the applicable permits, and in accordance with this agreement." (Capitalization partially omitted.)
- Finally, the agreement recognizes Proctor's "right to consider concurrent offers for the sale of the [p]roperty (provided that any such offers shall at all times be subject and subordinate to [Cacique]'s rights under [the] [a]greement and shall automatically terminate upon the [c]lose of [e]scrow.)"

2. *Cacique's obligations under the agreement and rights during the contingency period*

The agreement provided that Cacique would purchase the land and warehouse "in 'turn key' condition and built/modified according to" the plans and specifications and all applicable laws in a workmanlike manner. Cacique agreed to deposit into escrow a $500,000 initial "earnest money deposit."

The agreement also created a process by which, at any point during a 45-day contingency period concluding on the "[c]ontingency [d]ate," Cacique was entitled to relieve itself of its obligation to

purchase the property and recoup the majority of its initial deposit.[1] Specifically, during this contingency period, Cacique "ha[d] the right to complete and disapprove or approve all [d]ue [d]iligence [m]aterials," including all plans, specifications and reports for the warehouse.

Any "disapproval or conditional approval" by Cacique would "act to terminate th[e] [a]greement, upon which termination, the [initial] [d]eposit [of $500,000] (other than the [r]etained [a]mounts) and any other [Cacique] monies held [in escrow would] be released to [Cacique]."

On the other hand, Cacique's approval of contingencies on or before the contingency date would trigger Cacique's immediate obligation to pay into escrow a second deposit of $1.5 million. Upon payment of this amount, both it and the entire initial $500,000 deposit would become nonrefundable.

Notably for purposes of this appeal, the agreement also contemplated Cacique's approval of contingencies via a failure to *dis*approve. Specifically, under section 3.1(b), "unless [Cacique] shall have disapproved its contingencies and terminated th[e] [a]greement, [Cacique] shall deposit into [e]scrow" the second deposit of $1.5 million. Section 5.1 provides that Cacique's "failure to deliver a disapproval notice on or prior to the [c]ontingency [d]ate, or any extension thereof, shall conclusively constitute [Cacique's] unconditional approval of all contingencies under th[e] [a]greement."

Any approval or disapproval had to be "in writing to [Proctor] and [the] [e]scrow [h]older."

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[1] Section 3.1(a) provides that a portion of the initial deposit not to exceed $50,000 (the "[r]etained [a]mount") may become nonrefundable, to the extent Proctor claims reimbursement costs and/or expenses in connection with planning and construction.

If the deal survived the contingency period, the parties would move towards completing the transaction on the "[c]losing [d]ate." "Closing [d]ate" is defined in relation to CEG's "[s]ubstantial [c]ompletion" of the project. "Substantial [c]ompletion" includes construction of the warehouse "substantially in accordance with" the "Plans and Specifications" as defined in the agreement, "in a good and proper workmanlike manner," and "in accordance with all applicable laws, codes, regulations, customs, [and] standards." Once CEG "[s]ubstantially [c]ompleted the [i]mprovements" and Proctor "materially complied with the provisions of th[e] [a]greement," Cacique would be obligated to deposit in escrow the remainder of the purchase price one day prior to the closing date, and to purchase the land and warehouse.

3. *Binding dispute resolution procedure*

In the event of "any dispute as to whether" CEG has "[s]ubstantially [c]ompleted" its work, the agreement requires the "written opinion of a neutral architect or a[n] engineer mutually agreeable to [Proctor] and [Cacique]," and that such opinion "shall be binding on" both Proctor and Cacique. Through the definition of "Substantially Completed," this provision covered, *inter alia*, "any dispute as to whether" CEG had built the building in accordance with all applicable laws. The agreement does not set any time frame in which this dispute resolution process must or may be invoked.

4. *Liquidated damages provision*

In the event Cacique defaulted, the agreement provided Proctor the "sole and exclusive remedy" of recovering "an amount equal to the sum of all amounts deposited . . . into escrow," plus attorney fees and costs. (Capitalization omitted.) This liquidated damages provision was initialed by Cacique and Proctor.

C. *Events During the Contingency Period*

1. *Initial deposit*

Cacique made the required initial deposit of $500,000 upon the opening of escrow. At that point, only up to $50,000 of the deposit became nonrefundable, and only to the extent Proctor incurred certain costs. (See *ante*, fn. 1.)

2. *Engineer review and discussion of the Agreement plans and related design documents*

During the contingency period, Cacique hired a structural engineering firm to review OCE's structural drawings and calculations pursuant to the Agreement plans. The firm issued an opinion letter (the Stantec report), which states that these drawings and calculations were "not complete and in some cases, the calculations do not consider other main design requirements of the new building code. Some of the roof and floor steel beam[ ] connections of the seismic load-resisting systems of the building appear to be structurally deficient or inadequate." Cacique sent a copy of the Stantec report to Proctor and CEG's in-house engineering team, OCE. OCE responded with point-by-point "[p]eer [r]eview [r]esponses."

Cacique then hired a second engineering firm to review the Stantec report and OCE's responses. This resulted in a second opinion letter identifying four outstanding issues (the Ficcadenti report). As to three of these issues, the Ficcadenti report recommended OCE provide additional information or clarification and "revised detail if required." As to the fourth issue, the Ficcadenti report recommended OCE obtain and provide certain documentation from the truss manufacturer to facilitate a complete review. Cacique sent the Ficcadenti report to OCE, and OCE provided (1) a second set of peer review responses,

which acknowledged certain adjustments were necessary and (2) modified calculations. Ficcadenti viewed the modified calculations as adequate to resolve some, though not all, of the issues. OCE also provided the contact information for the truss manufacturer. The engineers from Ficcadenti and OCE met in person and corresponded via email regarding these issues, and their correspondence continued several days after the contingency period had concluded.

3. *Communications regarding extensions of contingency period*

From July 24, 2015 to August 5, 2015, Cacique requested several contingency period extensions in light of Cacique's concerns regarding various issues, including but not limited to the structural issues the parties' respective engineers were discussing in tandem. Proctor agreed to extend the period twice, ultimately moving the contingency date to August 5, 2015, but denied Cacique's additional requests to prolong the period beyond that. In the course of these communications, Cacique and Proctor made statements, the characterization of which is central to their respective claims in the litigation below. We therefore describe them in some detail as follows.

- **July 22, 2015:** Cacique's chief operating officer, Gilbert de Cardenas, met with John Devling, CFO of both CEG and Proctor. De Cardenas reiterated that two structural engineering firms had offered opinions that certain aspects of the building's plans were not code compliant, that "the building needs to be . . . to code," and that "from what [Cacique] see[s] here, it [was] not." Devling insisted the plans were code compliant, reiterated that the City of Industry authorities had approved the plans, based on which CEG had begun construction prior to the agreement,

and told Devling that if Cacique believed there was a problem, it should "[c]lose the [deal and] [f]ix it yourself."

- **July 24, 2015:** Cacique wrote to Devling in Devling's capacities as both CEG's and Proctor's CFO, copying representatives of both OCE and Old Republic Title (the escrow holder), regarding "various matters prevent[ing] Cacique from issuing a complete contingency release," including "material code violations in the structural design" that "remain unresolved." The letter enclosed copies of the Stantec and Ficcadenti reports. Cacique wrote that it was "willing, ready and able to move forward and make every reasonable effort to resolve the last remaining contingency items, including the design defects, and successfully close this transaction," and to that end requested an extension of the contingency date to August 31, 2015. In connection with its request for extension, Cacique also proposed amending the agreement with an escrow instruction that would still require Cacique make the $1.5 million second deposit as scheduled, but would permit release of those funds to Proctor only upon Cacique's written release of all contingencies.
- **July 28, 2015:** Proctor declined to extend the contingency period or amend the agreement. As to Cacique's structural concerns, Proctor responded that "[w]e are confident that there are no structural or other defects in the design or construction of the building. All issues of concern to our engineers have been addressed." Proctor further stated that "[w]e remain prepared to continue with the transaction as agreed, but if Cacique is not ready to move forward and waive contingencies and proceed as set forth in the sale agreement, we are going to head in a different direction."

- **July 29, 2015:** Cacique wrote to Devling, in Devling's capacity as both Proctor's and CEG's CFO, copying the escrow holder, accusing Proctor and CEG of breaching the agreement "as a result of the design defects [Cacique had] identified" and stating that Cacique "need[ed] assurances [that] [Cacique is] not purchasing a dangerous building." Cacique described the responses from OCE and the materials Proctor and OCE had provided as inadequate to address Cacique's concerns. Cacique reiterated that it was "ready, willing and able to move forward and resolve the last remaining contingency items, including the design defects, and successfully close this transaction," and that "[a]t this point and in so long [*sic*] as the design deficiencies and other issues are resolved expeditiously, we do not see these matters altering the closing date." Cacique renewed its request for an extension of the contingency period to August 31, without which Cacique would pursue legal action "to protect its interests." Cacique repeated its earlier proposal that the parties amend the agreement and escrow instructions, such that the escrow holder would keep Cacique's $1.5 million second deposit in escrow until Cacique removed contingencies, and return both the first and second deposits to Cacique if Proctor could not "clear contingencies."
- **July 29, 2015:** Devling, writing from his CEG email address and copying CEG and Proctor representatives, agreed to extend the contingency period to August 3, 2015 to facilitate a meeting between the engineers.
- **July 31, 2015:** Cacique sent two emails proposing another extension of the contingency period. The first email noted that "Cacique is ready to move forward and remove all contingencies, including the design defects,

and successfully close this transaction," but that the parties needed more time to allow the engineers to meet and resolve the design issues. When Proctor failed to respond, Cacique emailed again, attaching a lis pendens and complaint for breach of contract, and threatened to file both if Proctor refused to extend the contingency period. Cacique stated that "[w]e believe if the parties are reasonable and work diligently, all contingencies can be removed on or by August 21," Cacique's proposed extended contingency date. Cacique copied the escrow holder on both emails.

- **August 3, 2015:** In an email from his CEG email address and signed in his capacity as CEG's CFO, Devling agreed to extend the contingency date to August 5, 2015.
- **August 4, 2015:** In an email to Devling on which the escrow holder was copied, Cacique again requested an extension to August 21, without which "Cacique will pursue its legal claims." Devling denied the request, stating Cacique "needs to decide to waive contingencies and proceed with the transaction or cancel the agreement and move on. The sale is on an 'AS IS' basis, and the buyer's agreed upon contingency period is at an end. The seller is not obligated to do anything further, nor to grant extensions of time."
- **August 5, 2015:** Cacique responded in an email to Devling, on which the escrow holder was copied, stating that the warehouse "has <u>multiple</u> design defects, is out of code, and [Proctor's] proposed repair (which you conveyed) is inadequate." The letter complained that Devling had not given Cacique adequate time to complete diligence, and proposed "two immediate options": (1) extend the contingency period to August 21; or (2) get sued. Proctor

and CEG's shared counsel rejected this final request for an extension on Proctor's behalf.

D. *Cacique and Proctor Sue Each Other for Breach of Contract*

On August 5, 2015, Cacique sued Proctor for specific performance, breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief. Cacique alleged that Proctor had a duty to build the warehouse to code, and that Proctor's refusal to sufficiently address the Cacique's concerns about the Agreement plans reflected both an anticipatory and actual breach of that duty. The complaint sought specific performance—that Proctor "complete fully" the warehouse and convey the land and warehouse to Cacique—and, in the alternative, damages. Cacique alleged it was "ready, willing and able to perform" its obligations under the agreement but for Proctor's actual and anticipatory breach. On the same day it filed its complaint, Cacique also recorded a lis pendens on the land.

On October 1, 2015, Proctor cross-complained for breach of contract. The cross-complaint alleged that, by failing to expressly disapprove contingencies, Cacique had approved them, that Cacique was therefore obligated to make the second deposit of $1.5 million on the contingency date, and that Cacique breached the agreement by failing to do so. Proctor further alleged that this failure reflected a default by Cacique, and terminated Cacique's right to purchase under the agreement. Proctor sought damages of $2 million—the total amount it alleged Cacique should have deposited in the escrow account—pursuant to the liquidated damages clause of the agreement.

E. *Proctor Sells to An Alternative Buyer*

On Proctor's motion, the court expunged the lis pendens Cacique had recorded on the property. In March 2016, Proctor sold the land and warehouse to a third party for $900,330 higher than the purchase price in the agreement.[2] This alternative buyer had submitted an offer for the property approximately a week before the agreement with Cacique was executed, and Proctor had declined. The alternative buyer's initial offer was likewise for a higher price than Cacique's purchase price.

F. *Relevant Trial Court Proceedings and Decisions*

1. *Summary judgment of Cacique's complaint in Proctor's favor*

Proctor moved for summary judgment of Cacique's complaint, arguing that delivery of a code-compliant warehouse was a closing condition, not an obligation that could be breached during the contingency period, and that Proctor neither breached nor repudiated the agreement by refusing to extend the diligence period or revise the Agreement plans or related design documents.

At the initial hearing on Proctor's motion for summary judgment/adjudication, the trial court discussed with counsel Cacique's proposed interpretation of section 5.6 as requiring that Proctor assure code compliance. Although Cacique's complaint quotes all of section 5.6, the complaint does not expressly allege this interpretation. Before ruling on Proctor's motion, the trial court permitted Cacique to move for leave to file an amended complaint that more specifically alleged Proctor had a covenant to assure CEG built the warehouse to code. Cacique moved to

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[2] In April 2017, pursuant to Cacique's request, the trial court dismissed the specific performance and declaratory relief causes of action.

amend its complaint to include additional details regarding the agreement's provisions, as well as Proctor's interrogatory response that Proctor's "contractual obligation was to deliver a code-compliant building to Cacique at close of escrow." (Italics omitted.)

The court ultimately denied Cacique's motion for leave to amend and granted Proctor's motion for summary judgment. The court concluded that the plain language of the agreement unambiguously obligated only CEG—not Proctor—to build to code, and thus Proctor could not have breached or repudiated any such obligation. The court further explained that Cacique's proposed amendments would be "futile," as they would not affect the court's conclusion that the contract language was unambiguous or the court's interpretation of that unambiguous language. In short, the trial court "determin[ed] that the undisputed evidence—the written contractual language—does not support [Cacique's] theory of breach of contract based on Proctor's obligation to deliver a code-compliant building—the same theory which [p]laintiff seeks to advance in the proposed first amended complaint."

2. *Summary adjudication and summary judgment decisions regarding Proctor's cross-complaint*

The trial court ruled on two rounds of motions for summary judgment/adjudication regarding Proctor's cross-complaint.

First, the trial court granted in part Cacique's initial motion for summary adjudication on Proctor's cross-complaint to the extent the motion sought to limit the damages Proctor could recover via the cross-complaint. Specifically, the court ruled that the damages Proctor could seek were limited to $500,000, because the liquidated damages clause in the agreement limited recovery to the amount Cacique had actually deposited in escrow. This aspect of the court's ruling is not at issue on appeal.

Proctor and Cacique later filed cross-motions for summary judgment/adjudication on Proctor's cross-complaint, and the trial court ruled in Proctor's favor on both.

The court denied Cacique's cross-motion for summary judgment on Proctor's cross-complaint. Cacique's motion argued that the cross-complaint was barred as a matter of law, because permitting Proctor to retain any portion of Cacique's deposit in the context of a "rising market" reflected an unlawful forfeiture. The court concluded that the code permits such recovery in the context of a valid liquidated damages provision, and that Cacique had failed to create a triable issue as to whether the liquidated damages clause in the agreement was invalid.

The court granted *Proctor*'s motion based on an interpretation of section 3.1(b) of the agreement as requiring both disapproval or conditional approval of contingencies *and* a separate, written termination of the agreement in order for Cacique's second deposit not become due on the contingency date. The court concluded that, although "there *may* be an argument by Cacique that it had 'disapproved' the contingencies[] by means of" certain of the parties communications between July 24 and August 5, and although "there *may* be a triable issue of fact in that regard, the simple *undisputed* material fact remains that Cacique had not also 'terminated' the agreement. Under section 3.1(b), Cacique was required to do *both*." On this basis, the court concluded that Cacique remained obligated to pay the second deposit on the contingency date, and that its failure to do so constituted a breach as a matter of law.

3. *Judgment and post-judgment award of prejudgment interest and attorney fees*

Following the court's summary judgment decisions on Proctor's cross-complaint, Proctor prepared a proposed judgment that included an award of prejudgment interest. Cacique objected that Proctor had not separately moved for prejudgment interest.

On December 5, 2017, the court entered final judgment in favor of Proctor and against Cacique on both the complaint and cross-complaint, awarding Proctor $500,000 in liquidated damages, "plus any pre-judgment interest which may be allowed by law in the total amount of $_____." The judgment further provided that "[t]he court has read and considered 'Cacique's objections to Proctor's [proposed] [j]udgment,' " and that "Proctor may seek any award of attorney's fees, costs and/or prejudgment interest, which may be allowed by law, per noticed motion and/or memorandum of costs, as required by law."

Thereafter, Proctor moved for prejudgment interest and attorney fees, which the trial court awarded in a separate, postjudgment order dated March 16, 2018.

G. *Cacique's Appeals*

Cacique timely appealed the court's December 5, 2017 judgment. Cacique separately appealed from the March 16, 2018 postjudgment order as well. On the parties' joint motion, this court consolidated the appeals.

On appeal, Cacique challenges the trial court's (1) summary judgment of Cacique's complaint in Proctor's favor; (2) denial of leave to amend Cacique's complaint; (3) denial of Cacique's motion for summary judgment of Proctor's cross-complaint in Cacique's favor; (4) grant of Proctor's motion for summary judgment of Proctor's cross-complaint in Proctor's favor; and (4) award of prejudgment interest to Proctor.

DISCUSSION

A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and independently determine whether the record presents any triable issues of material fact. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) In so doing, we " 'consider[] all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained,' " and "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, quoting *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1035.) "We are obligated to uphold the trial court's decision if it is correct on any ground, regardless of the reasons the trial court gave." (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 975.)

I. Summary Judgment of Cacique's Complaint

Cacique argues the trial court's summary judgment of Cacique's complaint was erroneous because it was based on an erroneous interpretation of the agreement as obligating only CEG—not Proctor—to assure the warehouse was built to code. But even if Cacique is correct that the agreement imposed a duty on both CEG and Proctor to assure code compliance, the evidence does not create a triable issue as to whether Proctor breached or repudiated any such duty.[3]

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[3] Because, as discussed below, we reach this same conclusion regardless of whether Proctor, CEG, or both has or have a duty to build the warehouse to code, we need not address Cacique's

A. *Actual Breach*

"There can be no *actual* breach of a contract until the time specified therein for performance has arrived." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 (*Taylor*).) Proctor was not obligated to fulfill any duty it may have had to deliver a code-compliant warehouse until closing. Proctor thus could not have committed a breach of such a duty during the contingency period.

B. *Repudiation and Anticipatory Breach*

"Anticipatory breach occurs when one of the parties to a bilateral contract repudiates the contract." (*Taylor, supra,* 15 Cal.3d at p. 137.) Such repudiation may be express or implied. (*Ibid.*)

"An express repudiation is a clear, positive, unequivocal refusal to perform." (*Taylor, supra,* 15 Cal.3d at p. 137.) Cacique argues that, by refusing to agree that the Agreement plans or the design documents OCE prepared pursuant to those plans had code-compliance issues, and by refusing to take additional steps to address Cacique's code-compliance concerns, Proctor "effectively" repudiated its duty to deliver a code-compliant building. We disagree.

First, Proctor's obligation to deliver a code compliant warehouse did not include an obligation that CEG or Proctor revise the Agreement plans or related design documents to comport with *Cacique*'s view of code compliance—let alone that Proctor or CEG do so on the particular timetable Cacique demanded. To the contrary, the agreement requires a neutral third party with the requisite engineering experience to resolve any disconnect in the

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arguments challenging the court's refusal to permit Cacique to amend its complaint with additional allegations regarding which party had a duty to build to code.

parties' views regarding code compliance. Thus, Proctor's refusals to prepare revisions on which CEG and Cacique had not yet agreed, or to extend the contingency period for the purpose of preparing such revisions, do not reflect a repudiation of any duty under the agreement.

Second, as to the duty to deliver a code-compliant warehouse, even interpreting all of the communications Cacique identifies in the light most favorable to Cacique, they cannot be reasonably interpreted as Proctor indicating it "would not deliver at closing a building that was code-compliant."[4] To the contrary, Proctor indicated at least twice that it was confident the Agreement plans and associated structural drawings and calculations *were* code-compliant. Proctor also offered additional calculations and information from its engineers—though perhaps not to the extent or on the timetable Cacique requested—to support its position that the plans and associated design documents were compliant. Cacique disagreed. But such disagreement is not tantamount to Proctor stating it will not deliver a warehouse built according to code-compliant plans—let alone an "unequivocal" statement to that effect.

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[4] Cacique relies heavily on deposition testimony of Cacique's chief operating officer, Gilbert de Cardenas, that, while meeting with Proctor's John Devling on July 22, 2015, Devling stated that if Cacique believed there was a problem, it should "[c]lose the [deal and] [f]ix it yourself." Even taking all inferences in favor of Cacique, we cannot reasonably interpret that statement as an unequivocal refusal to deliver a code-compliant building, given that Proctor assured Cacique in writing after the July 22 meeting that Proctor intended to build to code and to perform under the agreement. Indeed, Devling expressed his view *during* the July 22 meeting that he did not believe there was a code-compliance issue to be fixed.

Thus, none of the communications or conduct Cacique identifies create a triable issue as to whether Proctor expressly repudiated any aspect of its duty to deliver a code-compliant warehouse.

Cacique's argument that Proctor "wanted out of the deal" so that it could sell the property to another buyer for a higher price per square foot than was reflected in the agreement is of no moment. Whatever Proctor's intent, absent an unequivocal refusal to perform, there can be no express repudiation. Moreover, the agreement expressly permitted Proctor to consider other offers.

Cacique next urges that whether the evidence supports an unequivocal refusal to perform is a question of fact to be presented to the jury and should not be decided on summary judgment. Were the question one of degree, Cacique might be correct. But the record contains *no* statements or actions that, considering the record as a whole, can be reasonably interpreted as indicating that Proctor intended to ignore any duty to deliver a code-compliant warehouse—indeed, it contains statements to the contrary. We recognize that the issue of anticipatory repudiation does not generally lend itself to determination on a summary judgment motion. Nevertheless, where, as here, "uncontradicted facts . . . are susceptible of only one legitimate inference" that is inconsistent with any viable claim, "summary judgment is proper." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.)

Finally, Cacique characterizes the agreement as unique in that, although the warehouse was already under construction before Cacique and Proctor executed the agreement, Proctor and CEG were nevertheless to deliver a warehouse "built to Cacique's unique specifications." Cacique argues that this unique structure supports its argument that Proctor's refusal to revise the Agreement plans and associated design documents constitutes a repudiation. This view of the agreement ignores the fundamental

roles of the Agreement plans and the contingency period in the agreement. True, the agreement defines the "Plans and Specifications," based on which the warehouse must be built, as plans and specifications "that have been expressly approved by [Cacique]." But that definition further explains that such plans Cacique has expressly approved "includ[e] but [are] not limited to [1] the [Agreement plans, attached to the] Agreement . . . and [2] any and all other existing and future related change orders, changes, amendments, revisions and modifications *that are approved by [Cacique] and [CEG]*." (Italics added.) In this way, the agreement expressly contemplates construction based on two types of plans: (1) the Agreement plans and (2) revisions and modifications to those plans that *both* CEG and Cacique approve.

Cacique thus signed an agreement that requires CEG to build the warehouse using the Agreement plans, at least in part. Upon Cacique's closer inspection of CEG/OCE's structural calculations pursuant to those plans, however, Cacique became unhappy with the manner in which CEG was doing so. The agreement provides Cacique with a single mechanism for resolving such concerns during the contingency period: disapproving contingencies, unilaterally terminating the contract, and retrieving at least the vast majority of its deposit. (See *ante*, fn. 1.) The agreement further provides that, if Cacique instead approves contingences, Proctor and CEG's obligation to deliver a code-compliant warehouse remains intact and unchanged, and the parties move forward under the terms of the agreement. These terms include the definition of "Plans and Specifications" that assumes Cacique has accepted the Agreement plans, unless and until *both* CEG and Cacique agree to revise them. The agreement does not contemplate any obligation that CEG or Proctor revise the Agreement plans or related design documents as Cacique demands, or that CEG or Proctor revise them to comport with Cacique's view of code compliance. And although,

under the definition of "Plans and Specifications" quoted above, Cacique was free to seek CEG's approval for any revisions or modifications to the plans—based on code compliance concerns or for any other reason—nothing in the agreement *entitled* Cacique to such approval, or to extension of the contingency period in the hopes of achieving such consensus before Cacique was required to make a non-refundable deposit. The "unique" structure of the agreement notwithstanding, it simply does not contain an obligation that, through actions or words, Proctor unequivocally indicated it would not perform.

C. *Repudiation by Failure to Give Adequate Assurances*

Cacique urges this court to adopt the doctrine of adequate assurances as reflected in the Restatement Second of Contracts, and to permit Cacique's breach of contract claim to be presented to the jury on this theory. Under this doctrine, if one contracting party has a reasonable basis to question whether the other party intends to perform, the latter party's failure to give adequate assurance of performance upon request can reflect a repudiation. (See Rest.2d Contracts, § 251; 1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 890, pp. 936–937; see also U. Com. Code, § 2609 [applicable to sale of goods].) Under the Restatement Second of Contracts, this requires (1) a reasonable basis for insecurity as to the other party's ability or willingness to perform; (2) a request for assurance of performance; and (3) a failure to provide reasonably adequate assurance. (See Rest.2d Contracts, § 251.) Reasonableness of both the insecurity and the assurance is a question of fact to be determined "in light of all circumstances." (*Id.*, com. c.)

Cacique acknowledges that this doctrine has yet to be accepted or rejected under California law, but urges that "[t]his

case presents compelling reasons for resolving this open question of law in favor of the Restatement's view, and for applying the doctrine to the facts of this case." We disagree that this case presents any such opportunity. The facts in the record would not satisfy the requirements of the doctrine, and we thus need not address the broader issue of whether, under different circumstances, we might adopt the restatement view.

Cacique argues that by repeatedly requesting that Proctor resolve Cacique's concerns regarding "design defects" in the Proctor plans, Cacique was requesting Proctor's assurance that Proctor would cause CEG to build the warehouse in compliance with all applicable laws. But in these communications, Cacique never requested assurances that Proctor would deliver a code-compliant building. Rather, it sought assurances that CEG would built the warehouse in a particular way Cacique deemed to be code compliant, based on reports from engineers Cacique alone engaged. This is vastly different from the alleged contractual obligation to deliver a code-compliant warehouse.[5] Cacique's theory of inadequate assurances thus relies on Cacique's argument that a dispute between the parties regarding what constitutes code compliance is tantamount to an unwillingness to build to code. For the reasons discussed above, it is not. Thus, even viewing the evidence in the light most favorable to Cacique, such a dispute no more reflects an inadequate assurance than it does a repudiation.

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[5] Even assuming (without concluding) that Cacique's July 29, 2015 request for assurance Cacique was "not purchasing a dangerous building" was a request for an assurance that Proctor would cause CEG to build to code, such a request was unreasonable. The day before, Proctor explicitly stated that "[w]e are confident that there are no structural or other defects in the design or construction of the building."

II. Summary Judgment of Proctor's Cross-Complaint

Cacique challenges the trial court's rulings on both Cacique's and Proctor's respective motions for summary judgment of Proctor's cross-complaint. Cacique argues that the trial court erred in resolving both summary judgment motions regarding Proctor's cross-complaint in Proctor's favor. Specifically, Cacique argues the court erred in concluding that, as a matter of law, Cacique's actions during the contingency period did not relieve Cacique of the obligation to pay the second deposit. Cacique's argument presents two issues: (1) what the agreement required in order for Cacique to relieve itself of the obligation to pay the second deposit on the contingency date, and (2) whether the evidence presents a triable issue of fact as to whether those requirements were met.[6]

A. *Conditional Approval or Disapproval of Contingencies Is Alone Sufficient to Terminate the Agreement*

Section 3.1(b) provides that, "unless [Cacique] shall have disapproved its contingencies and terminated [the] [a]greement, [Cacique] shall deposit into [e]scrow" the second deposit of $1.5 million. The trial court interpreted this provision as requiring Cacique to *both* (1) conditionally approve or disapprove contingencies *and* (2) separately terminate the agreement in order to relieve itself of the obligation to pay the second deposit at the conclusion of the contingency period.

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[6] As noted in our summary of the procedural background, although Proctor's cross-complaint alleged Cacique breached the agreement by failing to pay the second deposit of $1.5 million, the trial court—in a decision not on appeal—limited the potential damages Proctor could recover as a result of this alleged breach to the $500,000 Cacique actually deposited in escrow. (See Factual and Procedural Background *ante*, part B.2.)

In interpreting a contract, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) The trial court's interpretation of section 3.1(b) is untenable when the provision is considered in the context of the agreement as a whole, in particular section 5.1, which establishes that any "disapproval or conditional approval" by Cacique "act[s] to terminate th[e] [a]greement, upon which termination, the [initial] [d]eposit [of $500,000] (other than the [r]etained [a]mounts) and any other [Cacique] monies held [in escrow] [would] be released to [Cacique]." Were the trial court's interpretation correct, section 3.1(b) would require two separate actions that section 5.1 deems to be the same action. The court's interpretation would also mean section 3.1(b) and section 5.1 set forth conflicting sets of requirements for Cacique to relieve itself of the obligation to pay the second deposit.

By contrast, interpreting section 3.1(b) as providing that Cacique's disapproval or conditional approval of contingencies automatically operates to terminate the agreement is consistent with section 5.1. We therefore conclude that the trial court erred in its interpretation of the agreement as requiring a separate act of termination beyond disapproval or conditional approval of contingencies in order to relieve Cacique of its obligation to make the second deposit. Disapproval or conditional approval submitted in writing to Proctor and the escrow holder is sufficient under the contract to achieve this. We therefore consider whether a triable issue of fact exists as to whether Cacique issued such a disapproval or conditional approval.

B. *Cacique Conditionally Approved Contingencies Before the Contingency Date*

Cacique repeatedly indicated in its communications with Proctor during the contingency period that Proctor needed to resolve what Cacique viewed as "design defects" in the Agreement plans and related design documents before Cacique could remove contingencies and move forward with the transaction. Cacique repeatedly expressed a willingness to move forward under the agreement, but always conditioned these statements on Proctor first resolving what Cacique described as serious deficiencies. In addition, Cacique repeatedly proposed moving forward under a payment structure for the second deposit that was different from what appears in the agreement. Thus, even taking all inferences in favor of Proctor as the party opposing Cacique's motion for summary judgment, Cacique's communications during the contingency period can be reasonably interpreted only as expressions of Cacique's willingness to move forward, *if certain conditions were met* (i.e., perceived design deficiencies addressed and/or an alternative payment structure adopted). As a matter of law, this is a conditional approval. That Cacique filed suit seeking specific performance after making these statements does not change the nature of Cacique's statements or recast them as something other than a conditional approval under the agreement.

Per that agreement, a conditional approval automatically disapproves contingencies and terminates the contract. The only reasonable interpretation of the totality of the evidence—even taking all inferences in favor of Proctor as the party opposing summary judgment in Cacique's favor—is that the communications at issue reflect conditional approvals that terminated the contract.

Finally, Proctor argues that even if Cacique's written communications do reflect conditional approval, they cannot terminate the agreement, because they do not comply with the

agreement's general notice provision stating that "[a]ny notice required or permitted to be given under th[e] [a]greement shall be in writing and sent by United States mail, registered or certified mail, postage prepaid, return receipt requested or overnight courier." Cacique sent written notice by email. Nevertheless, because no dispute exists as to whether Proctor received the communications at issue, the general notice provision cannot invalidate any legal effect such written communication has under the agreement. (See *Estate of Crossman* (1964) 231 Cal.App.2d 370, 371–373 [interpreting a virtually identical general notice provision as permitting notice by regular, as opposed to registered or certified, mail to constitute sufficient notice under the contract].) The text of the notice provision here is directed both to notices "required" and notices "permitted to be given." This "broad inclusion of all notices" implies the notice provision is permissive, not mandatory. (*Id.* at p. 373.) That the contract section requiring notices of disapproval or conditional approval sets forth its own notice requirements—namely, written notice to Proctor and the escrow holder—further supports this view.

There is thus no triable issue of fact as to Cacique's conditional approval defense to Proctor's cross-complaint. As a matter of law, Cacique conditionally approved contingencies during the contingency period, thereby effectively disapproving contingencies and automatically terminating the agreement. This relieved both parties of any further obligations, including the obligation on which Proctor bases its breach of contract cross-claim. Thus, the court should have granted Cacique's motion for summary judgment on Proctor's cross-complaint and denied Proctor's motion.[7]

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[7] Following our decision on appeal, both the complaint and the cross-complaint will be dismissed. Thus, this litigation does not

III. Postjudgment Order Awarding Prejudgment Interest and Attorney Fees

Cacique separately appealed the postjudgment order awarding Proctor $104,936.82 in prejudgment interest on the damages it recovered via its cross-complaint, as well as $249,062.50 in attorney fees Proctor incurred in "this action." Cacique argues that the damages sought by Proctor were too uncertain to provide a basis for prejudgment interest, and that Proctor's motion for prejudgment interest was untimely. This issue is moot, given our reversal of the damages award on which prejudgment interest could accrue. Nevertheless, because Proctor cannot receive interest on a damages award we now reverse, the award of prejudgment interest likewise must be reversed.

As to the attorney fees portion of the postjudgment order, "[a]n order awarding costs falls with a reversal of the judgment on which it is based." (*Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402, citing *Purdy v. Johnson* (1929) 100 Cal.App. 416, 421.) Thus, to the extent the attorney fees Proctor incurred in "this action" are associated with work on the cross-complaint, they cannot stand following our partial reversal of the judgment as described above.

This does not resolve the issue of attorney fees entirely, however. "The costs to which a prevailing party [is] entitled include

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provide a forum for adjudicating the fate of the $500,000 initial deposit Cacique placed in escrow.

In addition, because we conclude the trial court should have granted Cacique's summary judgment motion regarding Proctor's cross-complaint on the basis of Cacique's conditional approval, we need not and do not reach Cacique's additional argument that Proctor's cross-complaint improperly seeks damages reflecting an unlawful forfeiture unrelated to whether or to what extent Proctor suffered any actual loss.

attorney's fees authorized by statute." (Code Civ. Proc., § 1033.5.) The statute authorizes "the party prevailing on [a] contract" to receive "reasonable attorney's fees" where a contract provides for an award of fees "incurred to enforce that contract." (Civ. Code, § 1717, subd. (a).) The agreement here contains such a provision. Thus, in order to award any attorney fees, we must first determine which party is the "prevailing party." (See Code Civ. Proc., § 1032 [" '[p]revailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant"].) The trial court is best equipped to determine whether there is a prevailing party in the wake of our partial reversal, and, if so, which party that is. We therefore reverse the postjudgment order awarding fees and prejudgment interest in its entirety, with instructions that the trial court determine which party, if any, is the "prevailing party" in this action, and award any attorney fees it deems appropriate.

DISPOSITION

The judgment is reversed to the extent it denies Cacique's motion for summary judgment on Proctor's cross-complaint, grants Proctor's motion for summary judgment on Proctor's cross-complaint, and awards Proctor relief based thereon. The court's postjudgment order awarding Proctor attorney fees and prejudgment interest is also reversed. In all other respects, we affirm.

Upon remand, the court is instructed to enter summary judgment in favor of Cacique on the cross-complaint and, to the extent necessary, hold further proceedings consistent with this opinion.

The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.