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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MILTON CREWS CLARK,

Plaintiff and Appellant,

v.

GOLDEN TICKET REAL ESTATE  
II, INC., et al.,

Defendants and Respondents.

G063139, G063722, G064100

(Super. Ct. No. 30-2020-  
01137497)

O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Judgment is affirmed.

Law Office of Roger E. Naghash and Roger E. Naghash for Plaintiff and Appellant.

Lagasse Branch Bell + Kinhead, Traci S. Lagasse, Ara Baghdassarian and Jeffrey Tsao for Defendants and Respondents Golden Ticket Real Estate II, Inc. and David Michael Delaney.

Stone Kalfus, Sara L. Rasmussen and Thomas A. Scutti for Defendant and Respondent Staged Now, Inc.

Plaintiff Milton Crews Clark (Clark) sued defendants Golden Ticket Real Estate II, Inc. (Golden Ticket), real estate agent David Michael Delaney (Delaney), and Staged Now, Inc. (Staged Now) following the straight sale of his home from which Clark received over \$400,000 in proceeds. Although Clark signed and initialed various documents provided to him by Delaney to sell his property (including a listing agreement and ultimately, a sale agreement), participated in the staging of his home by Staged Now, knew Delaney and/or Golden Ticket hosted multiple open house events at the property, and observed the “for sale” sign posted in front of his house, Clark alleged he never intended to sell the property but instead had always desired to obtain a reverse mortgage he never asked Delaney to procure for him.

In these consolidated appeals, Clark challenges the trial court’s rulings on demurrers, a motion for summary judgment, and a motion for summary adjudication. He contends the trial court made erroneous rulings pertaining to the jury trial on the claims that survived demurrer and summary adjudication, and later, also wrongfully denied his motion for a new trial on similar grounds. Finally, Clark contends the trial court erred in awarding Golden Ticket and Delaney \$351,742.80 in prevailing party attorney fees.

For the reasons we explain *post*, we reject each of Clark’s contentions of error. We therefore affirm the judgment.

## FACTUAL AND PROCEDURAL HISTORY

### I.

#### CLARK INITIATES THIS ACTION AND THE TRIAL COURT SUSTAINS DEFENDANTS' DEMURRER TO THE COMPLAINT WITH LEAVE TO AMEND

In March 2020, Clark initiated this action by filing a complaint against Golden Ticket, Delaney, and Staged Now (collectively, defendants). Clark asserted against defendants claims for (1) breach of contract and implied warranties of good faith and fair dealing; (2) negligence/legal and professional malpractice; (3) fraud and concealment; (4) breach of fiduciary duty; (5) trespass to land; (6) conversion and embezzlement; and (7) theft by false pretenses.

Defendants demurred to the entire complaint on the ground it was uncertain. The trial court sustained the demurrer as to the entire complaint with 30 days leave to amend. The court explained “that the operative pleading is indeed uncertain” and it indicated [t]he next pleading must provide far more precision as to the wrongdoing.”

### II.

#### THE TRIAL COURT SUSTAINS DEFENDANTS' DEMURRER AS TO SEVEN OF THE EIGHT CLAIMS ASSERTED IN THE FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND

Clark filed the first amended complaint in which he reasserted against defendants the same claims asserted in the original complaint and added an eighth claim for “Elder Abuse (Financial) and Breach of Fiduciary Duty.” Defendants demurred to the first amended complaint, arguing it too was uncertain and otherwise failed to state any claim except for the cause of action for trespass to land.

The trial court sustained the demurrer in its entirety with leave to amend, noting in its minute order: “Despite the Court’s prior ruling

granting leave to amend, the [first amended complaint] shows little improvement” as it “continues to make vague, conclusory, and apparently conflicting claims and, for many [causes of action], improperly attempts to assert distinct legal theories in a single [cause of action], none of which are adequately pled.”

The court identified specific deficiencies in each cause of action. The court also pointed out none of the parties were alleged to have been attorneys and yet the pleading purported to assert a legal malpractice claim against them; no facts articulated what each had a duty to do, but failed to do, in support of the negligence claim; and the pleading lacked the requisite specificity for a fraud claim.

The court also explained the first amended complaint failed to “articulate the basis for the claimed fiduciary duty as to each of the [defendants], refer[ring] vaguely to contractual duties without identifying the terms of and nature of the contract(s) at issue, and ma[de] vague claims of ‘de facto attorneys’ without stating the factual basis for the claim.” The court noted in the sixth cause of action, Clark “attempts to assert both an elder abuse claim and a claim for breach of fiduciary duty” but does not adequately allege either. The separate breach of fiduciary duty claim, the court explained, was “similarly unsupported,” as the first amended complaint made the conclusory and unexplained claim each defendant was a fiduciary to Clark.

As to the cause of action “purport[ing] to assert claims for both conversion and embezzlement,” the court noted the lack of factual support for either. The court stated: “No facts are alleged to articulate an embezzlement claim.”

Finally, as to the claim for theft by false pretenses in violation of Penal Code section 496, the court stated the claim “appear[ed] . . . also to be directed to [Clark]’s personal property (furniture etc.), but then argues about a promised reverse mortgage. The basis for the claim is thus, again, unclear and unsupported.”

The court concluded: “As [Clark] may be able to articulate a coherent and cognizable claim despite the substantial pleading defects here, the Court will provide leave to amend one more time. [Clark] should carefully consider the elements of each claim for each intended cause of action and clearly state facts to support them, without extraneous argument, for each.”

### III.

#### THE TRIAL COURT SUSTAINS THE DEFENDANTS’ DEMURRER TO THE SECOND AMENDED COMPLAINT, GRANTING FURTHER LEAVE TO AMEND AS TO SOME CLAIMS AND DENYING LEAVE TO AMEND AS TO THE OTHERS

Clark filed a second amended complaint asserting the following 12 claims against defendants: breach of oral contract (first cause of action); breach of implied warranties of good faith and fair dealing (oral contract) (second cause of action); breach of written contract (third cause of action); breach of implied warranties of good faith and fair dealing (written contract) (fourth cause of action); legal and professional malpractice (fifth cause of action); negligence (sixth cause of action); fraud and concealment (seventh cause of action); breach of fiduciary duty and constructive fraud (eighth cause of action); trespass to land (ninth cause of action); elder abuse (financial and breach of fiduciary duty) (10th cause of action); conversion and embezzlement (11th cause of action); and theft by false pretenses (Pen. Code, § 496) (12th cause of action).

Defendants demurred to the second amended complaint pursuant to section 430.10, subdivisions (e) and (f) of the Code of Civil Procedure on the grounds the pleading was uncertain and none of its 12 causes of action stated sufficient facts to allege a claim against defendants. The court sustained defendants' demurrer as to all 12 causes of action and granted leave to amend, as specified in its minute order: **"only for [causes of action] 7-12, and only to the extent permitted in this ruling for those [causes of action] as noted below, and without further leave to amend for [causes of action] 1-6."** The minute order further directed: **"In any amended complaint, no new [causes of action] are permitted."**

The trial court explained its rulings as follows: "As a threshold matter, the [second amended complaint] has failed to cure most of the defects previously identified, despite two prior rulings which granted leave to amend. The [second amended complaint] again lumps all of the 'Defendants' together on every claim, even where that combination patently makes no sense, and fails to articulate how each is alleged to be liable on that claim. It also again asserts vague, conclusory, and apparently conflicting claims and, for several [causes of action], still attempts to combine distinct legal theories into a single claim, none of which are adequately pled. To the extent that leave to amend is granted for [causes of action] 7–12 as noted below, [Clark] is to plead separately for each defendant included in that [cause of action], and is to state specific facts rather than conclusory assertions."

This time, the court also sustained the defendants' demurrer to the trespass claim, explaining it was "based on 'Defendants' use of the 'lockbox' on the house, claiming that 'they' used it without his consent to do staging for the property and to 'cultivate' plants and other vegetation" when the second amended complaint did "not explain how the lockbox got there

without [Clark]’s permission, what he did when he discovered it, how all three defendants allegedly knew they were not authorized to use it to enter the property, or what ‘cultivation’ [was] allegedly at issue.”

With respect to the other causes of action, the court otherwise largely reiterated many of the defects it had identified in its prior ruling on defendants’ demurrer to the first amended complaint. With respect to the elder abuse claim, the court observed that although the pleading asserted defendants gained Clark’s trust to entrust defendants with title to the property, the pleading inconsistently alleged Clark “knew what he was signing when he executed documents to sell the property” and also did not allege “how [Clark] was damaged by the conduct alleged, despite obtaining the proceeds from the sale.”

As to the conversion claim, the court added that in failing to allege about the subject property’s ultimate disposition, Clark “fail[ed] to present facts as to what happened to that property, whether he demanded its return, and whether it was in fact returned.” The court also stated that because no facts had been alleged to state an embezzlement claim with respect to the 11th cause of action for “conversion and embezzlement,” “the Court decline[d] to grant leave to amend for that claim.”

#### IV.

#### THE TRIAL COURT SUSTAINS DEFENDANTS’ DEMURRER TO THE THIRD AMENDED COMPLAINT

Notwithstanding the trial court’s ruling sustaining the defendants’ demurrer to the second amended complaint, Clark filed a third amended complaint containing all 12 causes of action as were contained in the second amended complaint. Defendants again demurred. The trial court sustained the demurrer as to the first through sixth causes of action, without

leave to amend, and further struck those causes of action from the third amended complaint, “as pled in violation of this Court’s 9/20/21 ruling.”

The court overruled the demurrer to the third amended complaint as to the seventh, ninth, 11th, and 12th causes of action as to all defendants. The court overruled the demurrer to the eighth and 10th causes of action as to Golden Ticket and Delaney, but sustained the demurrer to those two causes of action, without leave to amend, with respect to Staged Now.

The court explained: “For [causes of action] 7–12, although the claims as pled in the [third amended complaint] do not fully comply with the Court’s prior directions, the Court finds that they are now adequately pled for purposes of Demurrer for [causes of action] 7, 9, 11 and 12, and for [causes of action] 8 and 10 except as to [Staged Now]. For [cause of action] 8, although the [third amended complaint] at ¶ 187 attempts to include [Staged Now] by claiming that it ‘ratified the actions’ alleged, no facts are alleged to show how that entity could have ever had a fiduciary duty to Plaintiff, and none is apparent. [Cause of action] 8 is thus sustained without further leave to amend as to [Staged Now], but otherwise overruled. For [cause of action] 10, no facts are alleged to state a basis for the claim against [Staged Now]. [Cause of action] 10 is thus sustained without further leave to amend as to [Staged Now], but otherwise overruled.”

The court ordered Clark’s counsel “to write a 4th Amended Complaint strictly complying with the Court’s Ruling within 10 days” and further ordered defendants to file an answer to that complaint within 20 days.



V.

CLARK FILES THE OPERATIVE PLEADING: THE FOURTH AMENDED COMPLAINT

Clark's fourth amended complaint asserted claims against all defendants<sup>1</sup> for (1) fraud, concealment, and intentional deceit (first cause of action); (2) breach of fiduciary duty and constructive fraud (second cause of action); (3) trespass to land (third cause of action); (4) elder abuse (financial) and breach of fiduciary duty (fourth cause of action); (5) conversion (fifth cause of action); and (6) theft by false pretenses (sixth cause of action). Golden Ticket and Delaney filed an answer and Staged Now filed a separate answer.

VI.

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND/OR  
SUMMARY ADJUDICATION

Golden Ticket and Delaney filed a motion for summary judgment or, in the alternative, for summary adjudication of issues. They argued each cause of action alleged against them in the fourth amended complaint failed as a matter of law (issue Nos. 1–6), Golden Ticket and Delaney could not be held vicariously liable for any alleged conduct of Staged Now (issue No. 7), and Clark's prayer for punitive damages failed as a matter of law (issue No. 8).

A couple of days later, Staged Now filed its own motion for summary judgment or, in the alternative, summary adjudication challenging

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<sup>1</sup> In granting Staged Now's motion for summary judgment discussed *post*, the trial court stated: "[A]lthough 6 [causes of action] are asserted against [Staged Now] in the Fourth Amended Complaint, on 11/22/21, the Court sustained [Staged Now]'s demurrer as to the prior [causes of action] 2 and 4—without leave to amend. Those claims, to the extent reasserted against [Staged Now], were thus asserted in violation of this Court's 11/22/21 Order and are thus stricken."

the four remaining causes of action against them as well as Clark's prayer for punitive damages.

The trial court denied Golden Ticket and Delaney's motion for summary judgment but granted summary adjudication in their favor as to issue Nos. 1 (fraud, concealment, and intentional deceit), 3 (trespass to land), 5 (conversion), and 6 (theft by false pretenses). The court otherwise denied their motion for summary adjudication. The trial court granted Staged Now's motion for summary judgment.<sup>2</sup>

## VII.

### THE JURY TRIAL AND CLARK'S MOTION FOR A NEW TRIAL

Following the court's ruling on the motions for summary judgment and summary adjudication, the only claims remaining in the case were Clark's second cause of action for "breach of fiduciary duty and constructive fraud" and fourth cause of action for "elder abuse (financial) and breach of fiduciary duty" against Golden Ticket and Delaney.

After the completion of Clark's case-in-chief, Golden Ticket and Delaney filed a motion for nonsuit as to both causes of action. The court granted the motion in part, "granting the motion on the first cause of action for breach of fiduciary duty, but allowing the issues of constructive fraud and financial elder abuse to be decided by the jury." The defense then moved orally for nonsuit as to punitive damages; the trial court granted the motion.

The jury returned a defense verdict. The special verdict form had two sections. In the first section entitled "Financial Abuse" the jury answered

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<sup>2</sup> The trial court also ruled on evidentiary objections the parties made in connection with the motions. None of those objections is at issue in this appeal.

“No” to the question: “Did Defendants take, appropriate, or obtain Plaintiff’s property with the intent to defraud or by undue influence?”

As to the second section entitled “Constructive Fraud,” the jury found Golden Ticket and Delaney had served as Clark’s real estate agent/broker, they acted on Clark’s behalf for the purpose of selling his home, and they knew or should have known they were selling Clark’s home and not getting him a reverse mortgage. In answer to the question, “Did Defendants mislead Plaintiff by failing to disclose this information or providing Plaintiff with information that was inaccurate or incomplete?” the jury responded, “No.” (Boldface omitted.)

In July 2023, the trial court entered judgment in favor of defendants. The judgment provided “Defendants shall recover from Plaintiff their costs of suit to be determined by a memorandum of costs that Defendants may hereafter submit.”

The trial court later denied Clark’s motion for a new trial, addressing and rejecting each of the grounds asserted in Clark’s motion in a detailed minute order.

Clark filed a notice of appeal, stating he was challenging the trial court’s summary judgment ruling, the judgment after jury trial, and the postjudgment order denying his motion for new trial (appeal No. G063139).

## VIII.

### CLARK’S MOTION TO STRIKE OR TAX COSTS

Staged Now filed a memorandum of costs seeking total costs in the amount of \$7,311.41 which Clark did not challenge. The court awarded Staged Now its requested costs in the amount of \$7,311.41.

Golden Ticket and Delaney filed a memorandum of costs seeking an award of \$80,693.47 in costs. The court granted in part and denied in part

Clark's motion to strike and/or tax costs concerning the memorandum of costs submitted by Golden Ticket and Delaney and awarded them costs in the reduced amount of \$52,642.55. (The court did not rule on Golden Ticket and Delaney's then pending motion for an award of attorney fees.)

Clark appealed from the order granting in part and denying in part his motion to strike and/or tax costs as to Golden Ticket and Delaney's memorandum of costs (appeal No. G063722).<sup>3</sup>

## IX.

### GOLDEN TICKET AND DELANEY'S MOTION FOR ATTORNEY FEES

While Clark's motion to strike and/or tax costs was pending, Golden Ticket and Delaney filed a motion for an award of attorney fees "in the amount of \$440,189.80 pursuant to Civil Code section 1717, or in the alternative, \$414,744.80 pursuant to Code of Civil Procedure section 2033.420." In support of their motion, they submitted almost 250 pages of billing records. Staged Now did not file a motion for an award of attorney fees.

Pursuant to the court's request, Golden Ticket and Delaney provided a clarifying supplemental information table identifying each attorney and paralegal who performed work on this matter, the date such

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<sup>3</sup> Although Clark filed a notice of appeal from this order, he has abandoned any challenge to it in his appellate briefs. In the procedural history section of his opening brief, Clark makes reference to his filing of a motion to strike and/or tax costs in regard to the memorandum of costs and the trial court's order with respect to such. But Clark did not otherwise mention that order in his appellate briefs, much less present any argument showing how the trial court might have erred in making its rulings on Clark's motion to strike and/or tax costs. As Clark abandoned his argument on this point, we do not address it further.

work was performed, the rate at which work was billed, and the total number of hours billed at each rate.

The trial court granted in part Golden Ticket and Delaney's motion and awarded them a total of \$351,742.80 in attorney fees.

X.

AN AMENDED JUDGMENT IS ENTERED, CLARK FILES A THIRD NOTICE OF APPEAL, AND WE CONSOLIDATE CLARK'S THREE APPEALS

An amended judgment was entered in which the court provided that judgment be entered in favor of Golden Ticket, Delaney, and Staged Now, awarding Staged Now costs in the amount of \$7,311.41, Golden Ticket and Delaney costs in the amount of \$52,642.55, and Golden Ticket and Delaney attorney fees in the amount of \$351,742.80. Clark filed a notice of appeal from the amended judgment (case No. G064100).

On our own motion, we ordered case Nos. G063139, G063722, and G064100 consolidated for all purposes.

## DISCUSSION

I.

THE TRIAL COURT DID NOT ERR IN ITS DEMURRER RULINGS

Clark does not argue in this appeal that the trial court erred in sustaining defendants' demurrers to the first six claims of the second amended complaint (which claims he reasserted in the third amended complaint); he thus does not challenge the court's determination he failed to state a cause of action with respect to those claims. Instead, with respect to those claims, he contends the trial court erred by failing to grant him further leave to amend.

Clark also challenges the court's ruling sustaining the demurrer to his claims for "breach of fiduciary duty and constructive fraud" and "elder

abuse (financial) and breach of fiduciary duty” as alleged against Staged Now in the third amended complaint and further argues the court erred by failing to grant him leave to amend those claims.

*A. The Trial Court Correctly Sustained the Demurrer to the First Six Claims of the Second Amended Complaint Without Leave to Amend*

“A plaintiff against whom a demurrer is sustained is entitled to leave to amend the defective complaint if she can ‘prov[e] a reasonable possibility that the defect can be cured by amendment.’ [Citations.] The onus is on the *plaintiff* to articulate the ‘specifi[c] ways’ to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend ‘only if a potentially effective amendment [is] both apparent and consistent with the plaintiff’s theory of the case.’” (*Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145; see *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162 [when a demurrer is sustained without leave to amend, “[t]he plaintiff bears the burden of proving an amendment could cure the defect”].)

Here, the trial court concluded Clark “ha[d] not shown that these claims could be amended to state a valid claim.” In its order, the court identified significant general defects that reappeared in the second amended complaint. The court observed Clark “again lumps all of the ‘Defendants’ together on every claim, even where that combination patently makes no sense, and fails to articulate how each is alleged to be liable on that claim.” The court also noted that in the second amended complaint, Clark “also again asserts vague, conclusory, and apparently conflicting claims and, for several [causes of action], still attempts to combine distinct legal theories into a single claim, none of which are adequately pled.”

In addition, the trial court addressed how the second amended complaint does not allege facts to state a claim with respect to the first six causes of action, explaining: (1) the breach of oral contract claim “lacks adequate specificity to be an enforceable oral contract” (first cause of action); (2) with respect to the breach of written contract claim, Clark “fails to state the material terms of the listing agreement” or attach a copy of it, “claims a breach of an agreement he specifically denies having ever agreed to,” and “cannot allege that he never consented to the agreement, and yet assert claims for breach thereof” (third cause of action); (3) the breach of implied covenant of good faith and fair dealing claims as to oral and written contract, “are dependent upon the existence of a valid express contract,” which have not been pleaded for the reasons cited *ante* (second and fourth causes of action); (4) there is no cognizable basis for malpractice as none of the defendants were alleged to have been attorneys (fifth cause of action); and (5) Clark fails to identify the factual basis for any claimed duty and the general allegations do not otherwise provide a basis for his negligence claim (sixth cause of action).

Clark does not identify any alternative theory of liability (whether in connection with a cause of action he had already asserted or with respect to a new cause of action) he claims could have been pleaded in a further amended complaint. Instead, he provides the following narrative in his opening brief: “[T]he alleged listing agreement and oral agreement to obtain a reverse mortgage, include Implied Warranties of Good Faith and Fair Dealing. Prior to close of unwanted escrow of sale of [Clark]’s Subject Property, [Clark] discovered that [Defendants] were actually selling his house. [Clark] told them to stop. [Defendants] allegedly conferred with an attorney, who told them . . . to tell [Clark], that if he refuses to sign the close

of escrow documents, he would lose his house and would [not] receive any money or his house. [Defendants] were providing legal advice to [Clark] to scare him into continuing with signing the closing escrow documents for the unwanted sale of Subject Property. Based on factual circumstances, [Defendants] owed a duty, as real estate agents, real estate brokers, and attorneys to [Clark] to act reasonably, and inform him that they were selling his house and NOT obtaining a Reverse mortgage. [Defendants] delayed posting a “for Sale” sign in front of [Clark]’s Subject Property, until shortly before the close of escrow, when [Clark] discovered that [Defendants] were actually selling his home and NOT obtaining a Reverse Mortgage. The trial court, erred in sustaining the demurrer without leave to amend.”

Clark fails to connect the facts contained in his narrative with any relevant legal analysis showing how he would have been able to allege facts sufficient to state any of the first six claims of the second amended complaint. Clark has otherwise failed to explain how, after having been given two prior opportunities to amend, there is a reasonable possibility he could cure his pleading defects if given yet another opportunity to do so.

““[T]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. [Citation.] Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend.”” (*Murphy v. Twitter, Inc.* (2021) 60 Cal.App.5th 12, 42.)

Because Clark has not explained how he would be able to amend his pleading to allege facts that, according to cited legal authority, would



result in him stating viable claims, there is no basis for finding the trial court abused its discretion when it sustained the demurrer as to the first six claims without leave to amend.

*B. The Trial Court Did Not Err by Sustaining the “Breach of Fiduciary Duty and Constructive Fraud” and “Elder Abuse (Financial) and Breach of Fiduciary Duty” Claims Asserted Against Staged Now in the Third Amended Complaint, and Doing So Without Granting Leave to Amend*

“In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.’ [Citation.] ““We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . . We also consider matters which may be judicially noticed.” . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.”” (Mathews v. Becerra (2019) 8 Cal.5th 756, 768.)

The trial court sustained without leave to amend defendants’ demurrer to Clark’s claims for “breach of fiduciary duty and constructive fraud” and “elder abuse (financial) and breach of fiduciary duty” as alleged against Staged Now in the third amended complaint. In disregard of the trial court’s instruction from its order sustaining the demurrer to the second amended complaint, both of these claims “attempt[ ] to combine distinct legal theories into a single claim.” The titles of these two causes of action implicate three different causes of action—claims for breach of fiduciary duty, constructive fraud, and financial elder abuse.

“The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages.” (Knutson v. Foster (2018) 25 Cal.App.5th 1075, 1094 (Knutson).) A claim for constructive fraud also requires proof of a fiduciary relationship.

(*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1249–1250.) To prove such a claim, a plaintiff must also establish a nondisclosure, intent to deceive, reasonable reliance, and resulting injury. (*Ibid.*) “Like any action for fraud, constructive fraud must be pled with specificity.” (*Id.* at p. 1250.) Finally, “[c]ivil liability for financial abuse of an elder may be established by proof that a person ‘[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder . . . for a wrongful use or with intent to defraud, or both.’” (*Kerley v. Weber* (2018) 27 Cal.App.5th 1187, 1194, quoting Welf. & Inst. Code, § 15610.30, subd. (a)(1).)

In support of his claims for “breach of fiduciary duty and constructive fraud,” Clark alleged in the third amended complaint Delaney and another representative from Golden Ticket were licensed real estate agents, licensed brokers, and fiduciaries to Clark because “they undertook, to provide true, correct, truthful, accurate, and profitable investment advice (obtaining a Reverse Mortgage), and expressly agreed to be the licensed Real Estate agents and brokers representing . . . Clark’s interest in obtaining a Reverse Mortgage.” He alleged Delaney and the Golden Ticket representative owed Clark a duty to refrain from doing anything which would render performance of “the contract impossible by an act of his own,” from “selling the Subject Property without informed authorization and consent of Clark,” and from “taking any action that would cause any financial losses or harm.” He further alleged defendants breached their fiduciary duty “by engaging in self-dealing, causing significant financial losses to . . . Clark, and receiving secret money and other benefits from the unlawful sale of the Subject Property without . . . Clark’s informed consent, authorization or knowledge.”

In support of his claim for “Elder Abuse - (Financial) and Breach of Fiduciary Duty,” Clark alleged in the third amended complaint Delaney

and Golden Ticket were in a fiduciary relationship with Clark and claimed to be experts in obtaining reverse mortgages for homeowners. He further alleged they gained Clark's trust to entrust them with the title of the subject property, which they used to market and sell the property instead of searching and obtaining a reverse mortgage.

These allegations describe Delaney and Golden Ticket's acts and omissions and not those of Staged Now. The third amended complaint alleged Staged Now is a separate entity—a corporation—engaged in the business of providing staging services for properties. The third amended complaint did not allege Staged Now itself ever had a fiduciary relationship with Clark. Instead, it alleges that, based on the representations of Delaney and Golden Ticket, Clark agreed to the provision of services by Staged Now “to rearrange his furniture and improve the Subject Property, for increase[d] value of the Subject Property for appraisal purposes.” Nothing in the third amended complaint suggests Staged Now provided Clark with investment advice, is qualified to serve as a licensed real estate agent and/or broker for Clark, worked to obtain a reverse mortgage for him, or had any part in selling Clark's property. Consequently, the third amended complaint failed to allege facts to state a claim for breach of fiduciary duty, constructive fraud, or financial abuse against Staged Now.

In his opening brief, Clark argues: “The trial court improperly sustained [the] demurrer without leave to amend against [Staged Now]. At all times, mentioned in the operative complaint, [Staged Now] was simply an extension of Respondents, Golden Ticket and David Delaney. Even though [Staged Now] is a separate entity, its conduct and liability is imputed because they were actively concealing the improvements to the Subject Property for increased value of appraisal for the Reverse Mortgage, whereas in reality,

[Staged Now], pursuant to the [defendants'] instructions, [was] improving the Subject Property for sale and NOT appraisal for Reverse Mortgage.”

As to the claim for breach of fiduciary duty and constructive fraud, the trial court explained in its order, “although the [third amended complaint] at ¶ 187 attempts to include [Staged Now] by claiming that it ‘ratified the actions’ alleged, no facts are alleged to show how that entity could have ever had a fiduciary duty to [Clark], and none is apparent.” We agree with the trial court. As the third amended complaint fails to allege facts showing Staged Now stood in a fiduciary relationship with Clark, the breach of fiduciary duty and constructive fraud aspects of his claims fail.

With regard to the financial elder abuse claim, as pointed out by the trial court, “no facts are alleged to state a basis for the claim against [Staged Now].” Nothing in the third amended complaint suggests Staged Now took, secreted, appropriated, obtained, or retained Clark’s property within the meaning of Welfare and Institutions Code section 15610.30, subdivision (a)(1).

We therefore conclude the trial court did not err in sustaining the demurrer to the claims for “breach of fiduciary duty and constructive fraud” and “elder abuse - (financial) and breach of fiduciary duty.” Clark does not suggest in his opening brief how he might further amend to state a claim with respect to these theories of liability. Therefore, we conclude the demurrer to those claims were properly sustained without leave to amend.

## II.

### MOTIONS FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Clark argues the trial court erred in granting in part and denying in part Golden Ticket and Delaney’s motion for summary adjudication of

issues, and in granting Staged Now’s motion for summary judgment. For the reasons we explain, the trial court did not err in its rulings.

*A. Governing Legal Standards and Standard of Review*

“We review orders granting [or denying] summary judgment or summary adjudication de novo. [Citations.] A motion for summary judgment or summary adjudication is properly granted if the moving papers establish there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law.’ [Citation.] “‘The moving party bears the burden of showing the court that the plaintiff ‘has not established, and cannot reasonably expect to establish, a prima facie case . . . .’ [Citation.]” [Citation.] “[O]nce a moving defendant has ‘shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,’ the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff ‘may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .’” [Citation.] We “‘liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.’” (*Taswell v. Regents of University of California* (2018) 23 Cal.App.5th 343, 350.)

*B. The Trial Court Did Not Err in Granting in Part Golden Ticket and Delaney’s Motion for Summary Adjudication*

1. Summary of undisputed material facts<sup>4</sup>

Golden Ticket and Delaney presented the following undisputed material facts in support of their motion for summary adjudication. Delaney,

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<sup>4</sup> As noted by the trial court in its order granting in part and denying in part the motion for summary adjudication, Golden Ticket and

a real estate agent, worked as an independent contractor for Golden Ticket. He represented Clark in connection with the sale of the property. Before meeting Delaney, Clark had contacted reverse mortgage company American Advisors Group (AAG) to discuss obtaining a reverse mortgage on the property. AAG informed Clark he needed to get an assessment of the property, AAG needed to send inspectors to the property, and the property needed to be in good shape. Clark met with an AAG representative at the property; the representative provided Clark with a brochure and a handout and worked with him to put together a proposal for a reverse mortgage. Also before meeting Delaney, Clark discussed potentially selling the property with three other real estate agents and even met with some of them at the property. Clark's accountant referred Clark to Delaney after Clark told him he was looking for a reverse mortgage.

Clark met with Delaney. During their initial conversation, Clark asked Delaney how much the property was worth and Delaney provided Clark with information regarding the sales prices of houses in his neighborhood. While Clark informed Delaney he was also interested in a reverse mortgage, he did not ask Delaney to prepare documents for a reverse mortgage—he “just assumed that he was doing it.” Clark did not ask Delaney about a reverse mortgage because, Clark explained, he “pretty much knew the concept.” He did not ask Delaney for documents related to a reverse mortgage. He never received reverse mortgage documents from Delaney like he had received from AAG, and he therefore never attempted to compare

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Delaney based their motion primarily on admissions Clark made during his deposition. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12 [a party cannot create a triable issue of material fact by submitting a party declaration in opposition to a motion for summary judgment, which directly contradicts party admissions made during discovery].)

those documents with any documents provided to him by Delaney. Clark never asked Delaney the terms of any reverse mortgage. Clark does not recall Delaney ever telling him Delaney was working to obtain a reverse mortgage for him; Clark assumed he was.

Delaney provided Clark with documents for the listing and sale of the property, which documents Clark produced during discovery. Delaney had left the documents with Clark at his home for Clark to read through or sign at his leisure. Clark decided not to read them or take the time to do so. Clark admitted he could have signed those documents and checked boxes. He said he did not know what the papers were for. He could not deny the signatures on the documents for the sale of the property were his.

During the cleaning and staging of the property, Delaney told Clark his belongings needed to be moved to a storage unit Clark needed to obtain. Clark obtained a storage unit in the City of Orange and gave the unit's keys to Delaney and two men who moved his furniture, appliances, and personal property into the storage unit. Clark witnessed his belongings being moved out of the property and new temporary furniture being moved into property.

As of the date of his deposition, Clark had a key to the storage unit and still had access. All of Clark's belongings that were removed from the property were successfully transferred to the storage unit with one exception: a stained four and one half by six foot "throw-down carpet" Clark's ex-wife had bought 15 years earlier; Clark had no idea how much his ex-wife spent on that rug. The men moving his belongings to storage told Clark the rug was irreversibly stained and "Let's just throw this away." About an hour later, Clark "changed his mind" and went out front and said to the men,

“Wait a minute. I want that carpet” and asked where it was but was told it had already been taken to the dump.

Clark did not specifically recall providing Delaney with a key to the property but he testified at his deposition he must have given Delaney a key to the front door. Clark never told Delaney to stop using the lockbox at the property.

Before the property was sold, Clark was aware it was on the market. For one or two weeks, he saw a for sale sign in his front yard with Delaney’s name. Clark “talked to Delaney about it” but “somehow got lost in the conversation” and did not know what Delaney’s response was. Clark was also aware of open houses at the property.

At some point, Delaney advised Clark he had received an offer to buy the property for \$825,000. Clark signed and initialed more papers and later that night Delaney called Clark and congratulated Clark on selling his house. Clark told Delaney he did not want to sell the property. Delaney told Clark he was under contract to sell and the buyer was not willing to cancel the contract.

Clark never thereafter sought advice from anyone regarding how to retain the property at that point. After the sale, Delaney delivered the proceeds to Clark (over \$400,000) after paying off the principal balance of existing mortgage which, according to the fourth amended complaint, was \$317,000.

2. Issue No. 1: Clark’s first cause of action for fraud, concealment, and intentional deceit fails as a matter of law

The elements of a claim for fraud include that the defendant made a false representation as to a past or existing material fact. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) “[T]he elements of an action for



fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.”” (Knutson, *supra*, 25 Cal.App.5th at p. 1091.)

In the fourth amended complaint, Clark’s claim for fraud, concealment, and intentional deceit was based on alleged false representations and omissions by Delaney related to the procurement of a reverse mortgage for Clark. To the extent that claim is based on any affirmative false representation that Delaney would secure for him a reverse mortgage, Clark’s claim fails because Clark unequivocally testified in his deposition that Delaney never made any such representation to him, but instead, Clark assumed Delaney would secure one for him. As Clark also confirmed he did not speak to anyone else at Golden Ticket about a reverse mortgage, no triable issue of material facts exists to support a fraud or deceit claim based on an affirmative misrepresentation.

To the extent Clark’s claim is based on the theory Delaney concealed that he was preparing the property for sale, as pointed out by the trial court, Clark admittedly signed the listing agreement which he failed to read even though Delaney had left copies of it for him to read. In addition, as pointed out by the trial court in its minute order granting summary adjudication as to this cause of action: “Clark also admitted that he discovered—before any offer was accepted and before the property was sold—that [Golden Ticket and Delaney] were marketing the home for sale, rather

than seeking a reverse mortgage for Clark. [Citation.] Yet Clark continued to sign documents presented to him by Delaney, including a purchase agreement.” As no triable issue of material fact exists supporting Clark’s fraud, concealment, and intentional deceit claim, the trial court did not err by granting summary adjudication as to that claim.

3. Issue No. 3: Clark’s third cause of action for trespass to land fails as a matter of law

The elements of a cause of action for trespass include: “(1) the plaintiff’s ownership or control of the property; (2) the defendant’s intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant’s conduct was a substantial factor in causing the harm.” (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 262.)

The undisputed evidence showed Clark provided Delaney a key to the property which was kept in a lockbox, never told Delaney to stop using the lockbox, and agreed that work could be done to improve the appearance of the property. As the undisputed evidence shows Clark had granted permission for Golden Ticket and Delaney’s entries upon the property, no triable issue of material fact existed as to Clark’s trespass claim against them.

4. Issue No. 5: Clark’s fifth cause of action for conversion fails as a matter of law

““The elements of a conversion claim are: (1) the plaintiff’s ownership or right to possession of the property; (2) the defendant’s conversion by a wrongful act or disposition of property rights; and (3) damages.”” (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208 (*Welco*).)

In the fourth amended complaint, Clark's conversion claim is based on allegations that personal property belonging to Clark went missing in the staging process. But Clark admitted he maintained possession of his personal property before and after it was put into a storage locker, except for the 15-year-old stained "throw down rug." Clark admitted the men moving his furniture to storage told Clark that the rug should be thrown out. When Clark "changed [his] mind" maybe 40 minutes later and asked the men where the rug was, he was told it had already been taken to the dump. Even if a triable issue of material fact exists as to whether the rug had been taken by a wrongful act or disposition of Clark's property rights, he admitted he could not attribute any value to the rug and thus could not prove up the element of damages.

To the extent the conversion claim was based on his alleged dispute with Golden Ticket and Delaney regarding the amount of commissions they claimed on the sale of the property, it fails because "[a] cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff's possessory interest in a specific, identifiable sum, such as when a trustee or agent misappropriates the money entrusted to him." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 284 (*Kim*), italics omitted.) As pointed out by the trial court, Clark's dispute regarding the payment of commissions on the sale "may be addressed" in his claims for breach of fiduciary duty and constructive fraud and elder abuse (financial) and breach of fiduciary duty (the trial court denied Golden Ticket and Delaney's motion for summary adjudication as to those claims). The trial court did not err by granting Golden Ticket and Delaney's motion for summary adjudication as to the conversion claim.

5. Issue No. 6: Clark’s sixth cause of action for theft by false pretenses (Pen. Code, § 496) fails as a matter of law

The California Supreme Court explained: “Section 496, subdivision (a) (section 496(a)) defines the criminal offense of what is commonly referred to as receiving stolen property. As amended in 1972 [citation], it provides in relevant part: ‘Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained,’ is subject to incarceration. [¶] Section 496[, subdivision] (c), similar to some provisions in other statutory schemes, articulates a right to special civil remedies when a violation of section 496(a) has occurred. Subdivision (c), as also amended in 1972, states that any person who has been injured by a violation of section 496(a) ‘may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney’s fees.’” (*Siry Investment, L.P. v. Farkhondehpour* (2022) 13 Cal.5th 333, 346–347, fns. omitted.)

We agree with the trial court that, as a matter of law, Clark’s claim for theft by false pretenses in violation of Penal Code section 496 fails for the same reasons his conversion claim fails. Summary adjudication was therefore properly granted in favor of Golden Ticket and Delaney on this claim as well.

*C. The Trial Court Did Not Err in Granting Staged Now’s Motion for Summary Judgment*

1. Summary of undisputed material facts

Staged Now relied upon the following undisputed material facts in support of its motion for summary judgment as to Clark's remaining claims against it for fraud, concealment, and intentional deceit; trespass to land; conversion; and theft by false pretenses. Staged Now is a California corporation owned by Megan Delaney that performs staging services for individuals seeking to place their property on the real estate market. Staged Now is not involved in the listing, marketing, or sale of the properties for which Staged Now performs staging services.

Between the middle of October and the middle of November 2019, Staged Now was hired to perform staging services at the property. Those services included arranging to have the property cleaned and arranging to have Clark's belongings boxed up and taken to a storage facility paid for by Clark.

As advised by Clark's real estate agent, Clark obtained a storage unit in the City of Orange for his belongings. Clark supervised, oversaw, and directed others as to what furniture should be removed from the property and into the storage unit in preparation for Staged Now to stage the property. Some of Clark's furniture was moved to the garage of the property. Clark provided the keys to the storage unit to his real estate agent and two other men who moved his furniture, appliances, and other personal property to the storage unit. Staged Now did not rent the storage unit or the truck used to transport Clark's belongings. Staged Now did not have a key to access Clark's storage unit.

In the middle of November 2019, Staged Now brought in furniture it owned for the purpose of showing the property. That furniture remained at the property until January 2020, when Megan Delaney was advised by Clark's real estate agent that it could be removed.

At no time did Clark voice any objection to the invoices prepared by Staged Now for services rendered at the property. Clark never complained to Megan Delaney about any of Staged Now's work or Megan Delaney's presence at the property to perform staging services. At all applicable times, Staged Now had permission to be at the property. No one at Staged Now removed any of Clark's belongings without his permission and consent, nor did anyone from Staged Now keep any of Clark's belongings that were moved. Staged Now was not involved once personal property was taken to the storage unit of which Clark always had and continued to have access.

Megan Delaney never misrepresented the tasks Staged Now was contracted to perform or actually performed at the property. Megan Delaney did not discuss reverse mortgages with Clark.

2. No triable issue of material fact existed as to Clark's claim for fraud, concealment and intentional deceit against Staged Now

As discussed *ante*, Clark's fraud, concealment and intentional deceit claim was based on alleged false representations and omissions *by Delaney* related to the procurement of a reverse mortgage for Clark. It is undisputed Megan Delaney never discussed reverse mortgages with Clark. As pointed out by the trial court, Clark admitted in his deposition that he never had any communications with Megan Delaney or the two women who worked with her to clean and stage Clark's property.

Furthermore, the undisputed evidence shows Staged Now is a separate corporate entity which is owned and operated by individuals distinct from Delaney and Golden Ticket. Therefore, a claim for fraud, concealment, or intentional deceit cannot be made against Staged Now based on any misrepresentation or fraudulent omission made by Delaney. Even if Staged Now could be held liable for Delaney's acts or omissions, the claim fails

against Staged Now because, for the reasons we discussed *ante*, Clark's claim for fraud, concealment, or intentional deceit against Golden Ticket and Delaney failed as a matter of law.

3. No triable issue of material fact existed as to Clark's claim for trespass to land against Staged Now

It is further undisputed, as stated by the trial court, "Clark understood there would be work done to improve the appearance of the property, and [Staged Now] was on the property based on Clark's permission to undertake such efforts." The trial court therefore properly granted summary adjudication as to Clark's trespass claim against Staged Now.

4. No triable issue of material fact existed as to the claims for conversion and theft by false pretenses against Staged Now

As for Clark's claims for conversion and theft by false pretenses alleged against Staged Now, the trial court explained both claims fail because Clark admitted in his deposition "he maintained possession of his own property before and after it was put into a storage locker that he procured." In his opening brief, Clark does not challenge this aspect of the court's ruling.

As discussed *ante*, the undisputed evidence shows Clark initially acquiesced to the movers' suggestion that the 15-year-old stained rug be thrown out. By the time he changed his mind about keeping the rug, it had already been taken to the dump. And, in any event, Clark could not assess any value to the rug. Even assuming, albeit without evidence, Staged Now was involved in the disposal of that rug, no triable issue of fact exists showing Staged Now converted the rug by a wrongful act or disposition of property rights or caused Clark any damage. (See *Welco, supra*, 223 Cal.App.4th at p. 208.)

Furthermore, contrary to Clark’s suggestion in his opening brief, as discussed *ante*, the disputed amount of commission paid to Delaney and Golden Ticket (out of which Staged Now was paid for its services) cannot support a claim for conversion. (See *Kim, supra*, 201 Cal.App.4th at p. 284.)

As explained *ante* with respect to Golden Ticket and Delaney’s motion for summary adjudication challenging the theft by false pretenses claim, Clark’s claim for theft by false pretenses claim against Staged Now fails for the same reason his conversion claim fails.

### III.

#### CONTENTIONS OF JURY TRIAL ERROR

Clark does not challenge the sufficiency of the evidence supporting the jury’s defense verdict in favor of Golden Ticket and Delaney on the claims against them that survived demurrer and summary adjudication. Instead, he argues “irregularities during the jury trial violated [his] right to due process of law and having his meaningful day in court” as the trial court: (1) held an unlawful *ex parte* conference with defense counsel; (2) improperly trifurcated trial issues; (3) excluded Clark’s proffered evidence of a proposed reverse mortgage package; (4) improperly advocated for Golden Ticket and Delaney by recommending and providing guidance in their pursuit of motions for nonsuit; and (5) erred in instructing the jury with a special instruction on constructive fraud.

For the reasons we explain, none of Clark’s contentions of trial error has merit.

#### *A. The Alleged Ex Parte Conference*

Clark contends that during trial, the trial court had an unlawful *ex parte* conference with defense counsel without Clark’s counsel present. Clark previously raised this issue in moving for a new trial. In denying that



motion, the trial court addressed and rejected this contention of trial error as follows: “Before one of the chambers conferences during the trial, a mistake occurred, and the clerk invited only defense counsel to go into chambers for the conference. When defense counsel reported to chambers, the court, not knowing of the mistake, continued to do other work while waiting—in absolute silence—for plaintiff’s counsel. Once the mistake became clear, plaintiff’s counsel was invited into chambers and the conference began. At trial, plaintiff’s counsel moved for a mistrial on this ground. With both defense counsel and the court making it clear on the record that the situation was a misunderstanding and that nothing had been said before plaintiff’s counsel arrived, the court denied the motion. The court’s ruling on the motion was entirely correct. No *ex parte* conference occurred and, thus, the court did not err in denying a mistrial. Nor could the court’s ruling on this motion have affected plaintiff’s substantial rights because, again, no *ex parte* conference occurred.”

The record supports the trial court’s explanation. It shows that immediately after the chambers meeting in question, Clark’s counsel asserted an objection about what he perceived had been an improper *ex parte* conference with defense counsel. The court then engaged in a colloquy with the parties’ attorneys as to what had transpired just prior to and during the chambers meeting, providing the same information detailed *ante*.

In the portion of the opening brief addressing the contention the court held an unlawful *ex parte* conference with defense counsel, Clark does not address this colloquy, reference his motion for mistrial or the court’s ruling on that motion, or acknowledge the court’s above-quoted written response in its order denying Clark’s motion for a new trial.

The record establishes no improper ex parte communication occurred between the trial court and defense counsel. Clark's contention of trial error on this basis therefore fails.

*B. Trifurcation of Trial Issues*

Clark challenges the court's trifurcation of trial issues in this case as designed "to provide Defendants with unfair advantage, and to the detriment of [Clark]." The record shows, before trial, the trial court granted the defense's written motion in limine to bifurcate the punitive damages phase of the trial from the remainder of the trial pursuant to Civil Code section 3295, subdivision (d), which "preclude[s] the admission of evidence of [a] defendant's . . . financial condition until after the trier of fact returns a verdict for plaintiff."

The trial court thereafter, on its own motion, and after hearing argument from counsel, further bifurcated the first part of the trial into a liability and damages phase. Section 598 of the Code of Civil Procedure authorizes the trial court to order "that the trial of any issue . . . shall precede the trial of any other issue." Here, the trial court determined "the damages issue was the subject of several complex and contentious motions in-limine and would have added substantial time to an already lengthy trial."

In his opening brief, Clark argues the trifurcation of the trial "was highly prejudicial and almost forced the jury to vote in favor of NOT finding liability, in order to refrain from appearing as a jury for the second and third phases of the trial." Clark had asserted this argument in his motion for new trial as well. In rejecting that argument, the trial court explained: "At jury selection, the court qualified the jury for a trial longer than the one which actually occurred. In essence, the jurors agreed to serve longer and

could have done so, if necessary. Thus, [Clark]’s unsupported assertion that the jurors were somehow ‘forced’ to find for the defense is without foundation in the record, and the bifurcations ordered by the court provide no basis for a new trial.”

The record shows the trial court acted well within its authority in trifurcating trial issues. We find no error.

*C. Exclusion of Evidence of the Proposed Reverse Mortgage Package*

Clark argues the trial court erred by preventing him from introducing evidence of the proposed reverse mortgage package he had received from a loan broker shortly before the close of escrow of the sale of the property. Clark does not offer any legal analysis or citations to legal authority in support of his argument.

As we explained *ante*, the trial court did not err by trifurcating trial issues in this case. The proffered evidence of a proposed reverse mortgage package was presumably intended by Clark to be used to prove damages. But trial never progressed to the damages phases because the jury returned a defense verdict in the liability phase of trial. The exclusion of the proffered evidence therefore could not constitute error.<sup>5</sup>

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<sup>5</sup> At the end of the section of the opening brief in which Clark argues the trial court improperly precluded the admission of evidence of the proposed reverse mortgage, Clark added the following paragraph: “At trial the court overruled Plaintiff’s objections to inadmissible documents, that was based on hearsay, lacked foundation, unauthenticated, violated best evidence rule, that included but not limited to the false and fraudulent grand deed, invoices, photographs, and others.” This paragraph is not supported by any analysis or with citations to relevant legal authority. Clark has therefore forfeited the challenges to evidentiary rulings referenced therein. (Cal. Rules of Court, rule 8.204(a)(1)(B) [each point in an appellate brief must be supported by argument and, if possible, by citation to authority]; *Martine v. Heavenly Valley Limited Partnership* (2018) 27 Cal.App.5th 715, 728

In any event, the trial court, in ruling on Clark’s motion for a new trial in which he cited the exclusion of this evidence, the court noted that although the lengthy reverse mortgage package was excluded, “there was a great deal of *undisputed* evidence that plaintiff *considered* obtaining a reverse mortgage on his home, but never actually went through the steps necessary to apply for one.” The court further noted the package was “properly excluded . . . as hearsay and confusing to the jury because no witness (expert or otherwise) testified to the exact terms of any reverse mortgage plaintiff might have sought.” Even if the court’s exclusion of the package was error, it was harmless, not only in light of the great deal of evidence admitted showing Clark’s consideration of a reverse mortgage, but also because the subject loan packet was dated January 10, 2020—and thus after Clark entered the agreement to sell his home. Hence, no reverse mortgage proposed at that point in time could have prevented the sale from occurring. We find no error.

#### *D. Motions for Nonsuit*

Clark argues the trial court improperly advocated for the defense by allegedly recommending and providing guidance in its pursuit of motions for nonsuit. The record does not support Clark’s contention.

The record shows that shortly before Clark rested his case in chief, defense counsel informed the court the defense would be “moving for nonsuit on multiple grounds . . . when plaintiff rests.” After Clark rested his case, the trial court stated its understanding that defense counsel wished to make a nonsuit motion. Defense counsel confirmed the defense was moving

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(*Martine*) [“When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration”].)

for nonsuit on Clark's remaining claims against Golden Ticket and Delaney for "breach of fiduciary duty and constructive fraud" and "elder abuse (financial) and breach of fiduciary duty" and had filed a motion accordingly.

The trial court granted the motion in part by granting nonsuit as to the breach of fiduciary duty theory. The court denied the nonsuit motion as to the issues of constructive fraud and financial elder abuse, which claims were given to the jury to decide. The defense then moved orally for nonsuit on the issue of punitive damages. The trial court accepted the oral motion and granted nonsuit on punitive damages on the ground insufficient evidence supported a finding, by clear and convincing evidence, Clark was entitled to punitive damages.

Clark does not challenge the trial court's rulings on the motions for nonsuit on their merits. Instead, he argues the trial court advocated and assisted defendants and their counsel by "recommend[ing] to Defendants' counsels that Defendants should move for splitting the cause of action for breach of Fiduciary Duty and constructive fraud [and] move for nonsuit on breach of fiduciary duty." He further argues: "In addition, the court recommended Defendants to move to split the punitive damages from constructive fraud and breach of fiduciary duty and move for nonsuit on punitive damages."

But the record does not support Clark's arguments. After the court explained its rulings on the motions for nonsuit, Clark's counsel stated he wanted to be sure the record reflected "the fact that it was the court's motion to move for nonsuit on the punitive damages, as well as it was the court's motion to move for splitting the cause of action on the constructive fraud as well as the breach of fiduciary duty." The court responded stating, "Well, I don't think so." The court explained the defense made an oral motion

for nonsuit with respect to punitive damages, which the court allowed. The court also pointed out Golden Ticket and Delaney challenged the causes of action in their written motion for nonsuit.

We find no error. The record does not show the court in any way advocated for Golden Ticket or Delaney by guiding them in their efforts to move for a nonsuit or otherwise.

*E. Special Jury Instruction on Constructive Fraud*

Clark raises a contention of instructional error with respect to the special instruction on constructive fraud that was proposed by the defense, approved by the court, and given to the jury. Clark's challenge to that instruction is two-fold. First, he argues the special instruction should not have been given because it refers to a rebuttable presumption of reasonable reliance that does not appear in the standard CACI instruction on constructive fraud. Second, he argues he was prejudiced when a version of the special instruction that contained a citation to controlling, neutral case law was inadvertently and briefly displayed to the jury before being corrected to remove the citation. For the reasons we explain, Clark's arguments are without merit.

The special instruction in question stated: "Plaintiff's reliance on the misleading information or omission is presumed to be reasonable. If Defendants prove Plaintiff's reliance was unreasonable, then Defendants' conduct was not a substantial factor in causing Plaintiff's harm." In denying Clark's motion for a new trial, the trial court addressed why the subject special instruction was properly given in this case: "The court did not err in providing this instruction as it set forth a theory of the defense, was supported by the evidence, and was a correct statement of the law not contained in CACI 4111, the basic constructive fraud instruction which the

court also provided. The defense proposed this instruction based on their position that, given all of the indications plaintiff's home was being sold, plaintiff could not have relied on any indications to the contrary. In their closing, the defense argued this theory to the jury. Coming directly from *Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1301–1302 (*Edmunds*), a case expressly cited in the CACI “Directions for Use,” the instruction was a correct statement of the law. For these reasons, the provision of the instruction could not have been erroneous.”

The trial court was correct on all counts. The notes for “Directions on Use” for CACI No. 4111 on constructive fraud provide in relevant part: “In a fiduciary relationship, there is a rebuttable presumption of reasonable reliance. The defendant bears the burden of rebutting the presumption by proving by substantial evidence that the plaintiff could not have reasonably relied on the misleading information or omission. (*Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1301–1302.)” The trial court did not err by instructing the jury with this correct statement of law that pinpointed the theory of defense. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

In any event, the trial court also correctly noted: “[E]ven if providing this instruction was error, it could not have affected plaintiff's substantial rights as this instruction had to do with causation—an element on the special verdict form which the jury did not reach having already determined that defendants did not mislead plaintiff.”

Finally, Clark's argument the brief display before the jury of a version of the special instruction that correctly stated the law but inadvertently included the citation to *Edmunds, supra*, 16 Cal.App.4th 1290 as supporting authority could not possibly have caused Clark any harm. The

version containing the reference to the *Edmunds* case was taken down and corrected. The jury was ultimately provided with a version of the special instruction that did not include the *Edmunds* case citation. To the extent this event constituted error, it was harmless under any standard.

#### IV.

##### DENIAL OF MOTION FOR NEW TRIAL

Clark argues the trial court erred in denying his motion for a new trial. “An order denying a motion for new trial will not be set aside unless there was an abuse of discretion that resulted in prejudicial error.’ [Citation.] We accord great deference to the trial court’s exercise of its wide discretion in ruling on a motion for a new trial. [Citation.] In reviewing an order denying a motion for a new trial, we review the entire record, including the evidence, and independently determine whether any error was prejudicial.” (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1018.)

Clark asserts the trial court improperly denied his motion for a new trial, which he argues he brought on all seven grounds listed in section 657 of the Code of Civil Procedure. He does not, however, address any of the specific arguments he made in his motion and does not address any portion of the trial court’s ruling in which the court explained, in detail, why the court denied the motion as to each of his arguments. Instead, Clark spends two pages in his opening brief summarizing law relevant to orders *granting* motions for new trial.

Clark’s motion for new trial raised several of the arguments we have already addressed *ante* in our discussion of Clark’s contentions of trial error. For the same reasons we concluded the trial court did not commit trial error with respect to those arguments, the trial court did not err by denying the motion for new trial.



Although Clark’s motion for new trial also identified other “alleged irregularities and errors at law” (e.g., the court permitted the defense to play video clips of plaintiff’s deposition during its opening statement, admitted evidence of the ‘for sale’ sign photograph, and admitted evidence of the grant deed and invoices), Clark did not include in his appellate briefs argument or relevant citations to legal authority with respect to those additional grounds of his motion for new trial.

A core principle of appellate procedure is to “presume the trial court result is correct. [Citation.] The one contesting that result thus bears the burden of showing legal error. That requires legal authority.” (*Singman v. IMDB.com, Inc.* (2021) 72 Cal.App.5th 1150, 1151.) “[A]n appellant must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim. The appellant must present an adequate argument including citations to supporting authorities and to relevant portions of the record. [Citations.]’ [Citation.] Accordingly, the California Rules of Court expressly require appellate briefs to ‘[s]tate each point . . . and support each point by argument and, if possible, by citation of authority’ and to ‘[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.’” (*L.O. v. Kilrain* (2023) 96 Cal.App.5th 616, 619–620.)

Moreover, as discussed *ante*: “When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration. [Citations.] In addition, citing cases without any discussion of their application to the present case results in forfeiture. [Citations.] We are not required to examine undeveloped claims or to supply arguments for the litigants.” (*Martine, supra*, 27 Cal.App.5th at p. 728.)

Clark has failed to demonstrate the trial court abused its discretion in denying the motion for a new trial, much less that the denial of a new trial resulted in substantial prejudice to Clark. We find no error.

V.

#### THE ATTORNEY FEES AWARD

Clark also challenges the trial court's order awarding Golden Ticket and Delaney a total of \$351,742.80 in attorney fees. "We review attorney fee awards on an abuse of discretion standard. 'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'" [Citation.] 'Fees approved by the trial court are presumed to be reasonable, and the objectors must show error in the award.'" (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 488.)

Clark does not challenge Golden Ticket and Delaney's entitlement to an attorney fees award and does not challenge defense counsel's billing rates. Instead, he argues the trial court awarded an "unreasonable wholesale and b[u]lk attorney's fee."

In granting, in part, Golden Ticket and Delaney's motion for attorney fees, the court acknowledged: "The court must apportion fees when claims for which fees are recoverable are combined with others where they are not. [Citation.] But apportionment is not required where the prevailing party is forced to prove its contract claim to defend against a tort claim, or on distinct causes of action where the plaintiff's claims involved a common core of facts or were based on related legal theories, or where all of the issues were so inextricably intertwined that it would be impractical or impossible to separate time into compensable and noncompensable units."

The court went on to explain: “[B]ecause the validity of the listing agreement was in dispute throughout the case, and that issue was inextricably intertwined with [Clark]’s claims, it appears that it would be effectively impossible to separate all of the time billed into compensable and noncompensable units. However, some of the issues addressed during the litigation were plainly distinct from the dispute over the validity of the listing agreement. [Citations.] Some allocation thus appears appropriate here. [Golden Ticket and Delaney] have not addressed or proposed any potential allocation based thereon, but for the reasons noted above, it appears that it would be effectively impossible to separate all of the time billed in that manner.”

In finding certain fees claimed to be reasonable, the court found “on balance, 80% of the fees claimed here should be recoverable on this Motion, to offset for work performed on issues distinct from the validity of the contract at issue, while taking into account that a portion of that work was devoted to issues as to which [Code of Civil Procedure section] 2033.420<sup>[6]</sup> would apply. The Court therefore finds that [Golden Ticket and Delaney] may recover \$351,742.80 for fees in this action.”

Clark challenges the trial court’s award of attorney fees on the following grounds: (1) Golden Ticket and Delaney did not submit “detailed

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<sup>6</sup> Section 2033.420, subdivision (a) provides: “If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, *including reasonable attorney’s fees.*” (Italics added.)

billing and description of work” for the claimed fees; (2) the billing records were not sufficiently authenticated; (3) the court “improperly issued a minute order providing detailed instructions for Defendant[s] to correct the deficiencies in their motion for attorney’s fees and file it in the form of a supplemental brief”; (4) the request for attorney fees is based in part on work performed by paralegals; and (5) Golden Ticket and Delaney failed to prove the right to attorney fees under Code of Civil Procedure section 2033.420, subdivision (a) with respect to requests for admissions which Clark denied.

Our record shows Golden Ticket and Delaney’s motion for an award of attorney fees was supported by the declaration of counsel of record, Traci S. Lagasse, who authenticated, and attached as exhibit 8 to her declaration, almost 250 pages of billing records from July 31, 2020 through August 31, 2023. The billing records include dates of services rendered, the initial of the attorney or paralegal rendering service, a description of the service, the number of hours spent, and the applicable billing rate. In authenticating those records, Lagasse declared: “I reviewed all of the time billed by our firm to this action and have determined that all of the time was reasonable and necessary to defending against [Clark]’s action and prove the truth of the matters [Clark] denied in response to [Golden Ticket and Delaney]’s [request for admissions].”

Before ruling on the motion, the trial court asked Golden Ticket and Delaney to provide the following clarification with respect to their motion: “For the court to rule on the merits some additional information is required. The fee setting inquiry ordinarily begins with the lodestar analysis. [Citations.] Here, [Golden Ticket and Delaney] have presented detailed billing records and a declaration from counsel to support the fee request. [Citation.] However, the Motion does not provide totals as to how many hours

were spent, by whom, and at what rate, to adequately demonstrate that those records comport with the total sum requested—and the totals for each month have been redacted.” The court continued the hearing on the motion to allow for the requested supplementation “on this subject only,” and invited Clark to file a response, “as to that supplementation only.”

In response to the court’s request, Golden Ticket and Delaney filed the declaration of another of their attorneys, Ara M. Baghdassarian, who provided a table which identified “each attorney and paralegal who performed work on this matter, the dates such work was performed, the rate the work was billed at, and the total number of hours billed at each rate being sought through Moving Defendants’ Motion.” Clark filed a response as to that supplementation. The record thus shows the motion for attorney fees was properly supported by sufficient billing records. Clark does not explain the basis for his contention the court’s request for clarification on total amounts billed by each attorney and paralegal was improper.

To the extent Clark challenges the award on the ground it was based in part on the work of paralegals, as pointed out by the trial court in its minute order, fees incurred by paralegals may be awarded as attorney fees if the trial court deems it appropriate. (*Roe v. Halbig* (2018) 29 Cal.App.5th 286, 312.)

Finally, Clark argues Golden Ticket and Delaney failed to provide any evidence to establish the truthfulness of matters Clark denied in response to requests for admission. But Lagasse’s declaration also authenticated (and attached as exhibits) the 35 requests for admissions Golden Ticket and Delaney propounded on Clark, Clark’s responses denying each of the requests for admissions, and excerpts from Clark’s deposition transcript in which he admitted the truth of the substance of many of those

requests. In their motion's accompanying memorandum of points and authorities, Golden Ticket and Delaney explain how they prevailed with respect to certain requests for admission (e.g., request Nos. 6–8, 11–25, 34) which Clark denied. Clark has failed to address any of these requests in his appellate briefs.

For these reasons, the trial court did not abuse its discretion in awarding Golden Ticket and Delaney attorney fees.

#### DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

MOTOIKE, ACTING P. J.

WE CONCUR:

MOORE, J.

SANCHEZ, J.