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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

CITY AND COUNTY OF SAN
FRANCISCO,

Plaintiff and Respondent,

v.

MARK O'FLYNN,

Defendant and Appellant.

A130693

(City and County of San Francisco
Super. Ct. No. CGC 09-487539)

The City and County of San Francisco (the City) operates a Lead Hazard Reduction Program (the lead program), and Mark O'Flynn applied for a grant in this program. The City and O'Flynn entered into an agreement and the City promised to pay a contractor to remove lead from O'Flynn's rental property. In exchange, O'Flynn agreed to rent the property to low- or moderate-income tenants for five years or to opt out of this obligation by paying the City the entire grant amount. The City paid a contractor to remove lead from O'Flynn's property and, prior to the expiration of the five-year period, O'Flynn evicted his low-income tenant and refused to return the grant money to the City.

The City sued O'Flynn and, subsequently, filed a motion for summary adjudication on its breach of contract claim against O'Flynn. The trial court granted City's motion and entered judgment in the amount of \$27,215 plus interest in favor of the City. O'Flynn appeals and contends that he presented sufficient evidence to raise a

triable issue of fact that his performance was excused because the lead remediation work that was managed and overseen by the City was deficient. We conclude that the lower court correctly granted summary adjudication on the City's breach of contract claim because O'Flynn breached the contract and the City fulfilled all of its obligations under the agreement.

BACKGROUND

The City operates the lead program through its Mayor's Office of Housing (MOH). Myrna Melgar is currently the director of the MOH, and she was the manager of the lead program from 2004 until 2007.

As part of the lead program, the City provides grant funds to qualified property owners for the purpose of performing lead hazard reduction work on their rental properties and owner-occupied properties. In exchange, each participating property owner agrees to rent the property to low- or moderate-income tenants for five years or to opt out of the agreement by paying the City the entire grant amount.

On June 9, 2005, the Department of Housing and Urban Development (HUD) sent a monitoring review letter to the City setting forth problems with the City's lead abatement program. HUD identified areas where the grant program could be improved.¹

In 2005, O'Flynn applied for a grant under the lead program to have lead removed from his property at 1672 and 1674 Great Highway (the property or O'Flynn's property). At the time he received the grant, he was renting 1672 Great Highway to Susan Suval, a disabled, low- or moderate-income senior citizen. Another tenant was occupying 1674 Great Highway.

¹ O'Flynn submitted the HUD letter dated June 9, 2005, in support of his opposition to the City's motion for summary adjudication and the City objected to this evidence. The City argued that the letter was inadmissible because it was not signed under penalty of perjury. The City also asserted that the HUD review letter had no bearing on the project regarding O'Flynn's property since the letter was based on a review of projects completed before the lead removal project on O'Flynn's property. Moreover, O'Flynn, according to the City, did not submit any admissible evidence linking any of the perceived deficiencies in the HUD letter with any problem experienced with the remediation project at his property.

On July 7, 2005, O’Flynn entered into an agreement regarding the property with the City entitled, “Agreement with Owner Regarding Lead Hazard Reduction Activities” (the grant agreement). The grant agreement was divided into two sections: “Recitals” and “Agreement.” In the “Recitals” section, paragraph A. specified that “[t]he property is leased to a tenant who meets the definition of low or moderate income under the guidelines established by HUD, and a child under the age of 6 years old resides at or spend 6 hours a week or more on the premises.” Paragraph C., under “Recitals,” provided the following: “Owner has reviewed proposals of a number of licensed, lead contractors . . . to perform the lead hazard reduction activities described in the Scope of Work (the “Services”). The City has agreed to provide a grant to Owner in the amount of \$27,215.00 . . . (the Grant) to pay for the costs of the Services in whole or in part.” Paragraph D. stated that O’Flynn was to contribute \$10,000.

The second, longer, section, “Agreement,” had the following five parts: “1. Agreement and Consent,” “2. Funding for Services,” “3. Access to the Property and Notice,” “4. Owner’s Waiver,” and “5. Miscellaneous.” Paragraph e.1. under “Agreement and Consent” stated the following: “The property will remain rented to persons who are low and moderate income as defined by [HUD] for a period of five (5) years from the date of signature of this agreement. Owner may cho[o]se to opt out of this requirement at an earlier date by paying back to the City the entire grant amount” of \$27,215.

Under “2. Funding for Services,” the grant agreement declared: “a. Owner acknowledges that performance of the Services is to be funded in whole or in part by the City through this Agreement, and that the City requires Owner to enter into this Agreement as a condition of providing the Grant. Owner further acknowledges that the City’s agreement to provide the Grant does not obligate the City to provide additional funds under this agreement if the cost of the Services exceeds the amount of the Grant. Costs included in the Scope of Work include bid costs, contingency, risk assessment services, lead abatement and temporary relocation services.

“b. The Services will be performed by the Contractor unless another party is designated by the City in a written notice to Owner. Owner shall be fully responsible for payment for any services or activities performed by Contractor or other parties that are not included in the Services.

“c. As a condition to the City’s disbursement of the Grant, all funds identified in Recital D must be deposited into a construction escrow account in a financial institution acceptable to the City, and the amount on deposit, including the Grant, must cover the cost of the Services. The City will authorize the disbursement of the funds to Contractor upon the City’s determination that the remediation work has been completed satisfactorily, as evidenced by the results of a clearance test. In the event that the final cost bill submitted by Contractor is less than the amount on deposit, the remainder will be considered Grant funds that will be returned to the City for use on other properties with lead based paint hazards.”

The grant agreement provided near the end, under the heading of “Miscellaneous,” that “[t]his Agreement is binding on and shall inure to the benefit of owner and the City and their respective successors and assigns.”

The City approved the bid of Rhapsody Painting and Environmental Services (Rhapsody) and Rhapsody entered into an agreement with the City to provide work on O’Flynn’s property. The City deposited the grant for O’Flynn’s property into an escrow account. Rhapsody’s bid stated that the “[c]ontractor shall remedy any defect due to faulty material or workmanship and pay for all damage to other work resulting from work per the scope of work, which, appear within one (1) year from final payment.” The bid set forth the scope of the work or the services to be provided and it specified the numbers that the lead levels on the on the exterior surfaces and interior surfaces would be less than. With regard to the exterior cleaning and clearance, the bid provided that “[t]he Housing Specialist will conduct a final inspection in accordance to HUD protocols. Clearance of the work areas of the project is mandatory and must be completed prior to preoccupancy. The results must meet HUD standards in order for the project to be closed.” Similarly, it specified with regard to the interior cleaning and clearance, the

following: “The Housing Specialist will collect and submit for analysis dust wipe samples in accordance to HUD protocols. Clearance of the work areas of the project is mandatory and must be completed prior to reoccupancy. The results must be below HUD’s minimum standards in order for the project to be closed.”

Subsequently, O’Flynn requested and received a second installment of grant funds, in the amount of \$10,950, for additional lead abatement work at the property. Thus, he received a total grant of \$38,165. On August 25, 2005, the escrow funds were disbursed to Rhapsody for the work performed on the property.

On September 21, 2005, the City completed a “Lead Hazard Evaluation Report” regarding the property, which was a “[c]learance inspection.” This report contained a box next to “[n]o lead hazards detected” and an “X” was marked in the box. However, the printed text under this box stated: “Lead-based paint and/or lead hazards were detected.”

Under the terms of the grant agreement, O’Flynn was obligated to rent the property to low- or moderate-income tenants through July 7, 2010. In September 2006, O’Flynn and his wife instituted an unsuccessful owner-move-in eviction against Suval from 1672 Great Highway. They instituted a second unsuccessful unlawful detainer suit to evict Suval in December 2006. On January 9, 2007, O’Flynn wrote a letter to the manager of the lead program and stated that he was in the process “of pursuing an owner-move-in eviction” of 1672 Great Highway “and if successful[,] will opt out pursuant to the grant agreement.”

In July 2007, O’Flynn served notices of termination of tenancy based on the Ellis Act on Suval and the tenant at 1674 Great Highway. The tenant at 1674 Great Highway surrendered possession of the unit on August 31, 2007, and O’Flynn did not rent that unit to another tenant.

On August 1, 2008, O’Flynn and his wife filed a third unlawful detainer suit against Suval based on the Ellis Act.² O’Flynn and his wife obtained a judgment against Suval based on the Ellis Act on January 7, 2009. O’Flynn recovered possession of 1672 Great Highway on February 5, 2010.

One week later, on February 12, 2010, O’Flynn and his wife met with Stephen C. Davis of LaCroix Davis LLC at the property. On March 28, 2010, Davis wrote a letter to O’Flynn regarding his preliminary observations and opinions regarding the lead hazard abatement performed by Rhapsody on the property. Davis concluded that the lead hazard abatement program had not removed all of the lead on the property. He indicated that the City’s “Lead Hazard Evaluation Report” completed on September 21, 2005, had been “modified without agency authorization.” Davis wrote that the form indicated that no lead hazards had been detected but the form was modified to state, “ ‘Lead-base paint and/or lead hazards were detected.’ ” Davis also noted that other forms had been altered and misrepresented the conditions of the two units on the property.³

O’Flynn never paid the City any of the funds provided to him under the grant agreement and the City filed a first amended complaint against O’Flynn for, among other things, breach of contract. The City alleged that O’Flynn violated the grant agreement by

² The unlawful detainer suit and judgment were against Susan Suval and Rebecca Suval.

³ O’Flynn submitted Davis’s letter in support of his opposition to the City’s motion for summary adjudication and the City objected to this evidence and claimed that Davis’s letter was inadmissible hearsay. The City claimed that the letter was not a declaration signed under penalty of perjury and was introduced for the truth of the matters asserted. The City also asserted that Davis’s speculation was based on a single visit to the property. Davis criticized the scope of work of the lead removal project but the City contends it was not required to adopt a scope of work that addressed all conceivable hazards. The City further pointed out that Davis emphasized conditions in the rear unit of the property while the scope of work in the original grant agreement did not authorize any work in the interior of the rear unit. This work was not authorized until the second installment of grant funds were added to the project, and the City did not seek reimbursement of the second grant.

evicting Suval pursuant to the Ellis Act prior to July 7, 2010, and not returning the grant funds.

The City moved for summary adjudication. It requested the trial court find that O’Flynn was liable to the City for breach of contract in the amount of \$27,215.00. The City also asked for prejudgment interest on this amount at the legal rate of 10 percent from February 5, 2010, until the date of entry of judgment. Alternatively, the City requested a ruling that O’Flynn breached the grant agreement by evicting Suval. O’Flynn filed opposition and argued that he did not have to perform because the City did not properly administer the project and the lead removal on the property was deficient.

After a hearing on the summary adjudication motion, the superior court issued its order granting the City’s motion for summary adjudication of issues. The court stated that the City was entitled to \$27,215 on its first cause of action for breach of contract against O’Flynn, because there was no dispute that: “1) O’Flynn entered into the grant agreement in July 2005, and promised to rent his property out for five years or return the \$27,215 in grant funds . . . ; 2) San Francisco funded the grant and paid more than \$27,215 for work done at the property by Rhapsody Painting . . . ; and 3) O’Flynn breached the agreement by evicting the Suvals on or before February 5, 2010, and refusing to return the \$27,215 to [the City].” The court found that the City was entitled to prejudgment interest at the legal rate of interest of 10 percent from February 5, 2010, to the date of entry of judgment because “O’Flynn became liable to [the City] for a sum certain by February 5, 2010, at the latest” The court ruled that the request for a declaration that O’Flynn breached the grant agreement by evicting his tenant was moot. The court noted that the City agreed to waive any claim under the grant agreement for any principal amount in excess of \$27,215.

The superior court entered judgment in favor of the City and against O’Flynn on October 6, 2010.

O’Flynn filed a timely notice of appeal.

DISCUSSION

I. *Standard of Review*

A defendant moving for summary judgment or summary adjudication bears the initial burden to show that the cause of action has no merit—that is, “that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2).) We review an order granting summary judgment or summary adjudication de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We independently review the record and apply the same rules and standards as the trial court. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) Appellate courts (1) take the facts from the record that was before the superior court when it ruled on the motion; (2) consider all the evidence set forth in the moving and opposing papers, unless the superior court sustained objections to that evidence; and (3) resolve doubts concerning the evidence in favor of the party opposing the motion. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717.)

II. *Breach of Contract*

The trial court ruled in favor of the city on its breach of contract claim against O’Flynn. O’Flynn maintains that the court’s ruling was incorrect because he presented sufficient evidence to raise a triable issue of fact that the City did not perform under the contract and therefore his performance was excused.

The elements of a breach of contract are the existence of the contract, the plaintiff’s performance or excuse for nonperformance, the defendant’s breach, and resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) In the present case, it is undisputed that the City and O’Flynn entered into an agreement providing for the City to award O’Flynn \$27,215 in grant money for a contractor selected by the City to remove the lead from O’Flynn’s property. In exchange for this grant, O’Flynn agreed to rent the property to a person with a low or moderate income for five years or return this grant money to the City. It is undisputed that the City deposited \$27,215 into escrow and then approved the disbursement of these

funds to Rhapsody for the lead abatement work done on O’Flynn’s property. It is also undisputed that O’Flynn did not rent the property for five years to a person with a low or moderate income; he also did not return the grant money to the City.

O’Flynn insists that he presented sufficient evidence to raise a triable issue of fact that the lead hazard on the property was not remediated to the levels set forth in the “scope of project” and therefore the City should not have dispensed the money to Rhapsody. In support of this argument, O’Flynn submitted the letter written by Davis in 2010 after he examined the property and the HUD monitoring review letter written in 2005 to the City.

Even if we were to consider the letter written by Davis and the HUD letter admissible evidence, O’Flynn cannot prevail on appeal. These letters may raise a triable issue of fact as to whether the remediation project removed the lead to a specific level, or whether the City’s lead management program had some irregularities, but such evidence is irrelevant to the City’s claim of breach of contract against O’Flynn. Even if we presume this evidence was admissible, O’Flynn’s performance would be excused only if the City had an obligation to O’Flynn to ensure that the lead removal was completed to a particular standard. As we discuss below, O’Flynn’s remedy under the grant agreement for substandard lead removal on the property was against Rhapsody, not the City.

O’Flynn asserts that the City admitted in its first amended complaint that it “managed and oversaw the grant process, including the disbursement of funds, the completion of the lead hazard reduction work, and the temporary relocation of some of the tenants living at the Property.” This statement in the pleading combined with the plain language of the grant agreement indicated that the City, according to O’Flynn, “covenanted to ensure that the lead hazard had been remediated.” O’Flynn contends that paragraph 2.c. in the grant agreement obligated the City to oversee the entire remediation process and to release the funds from the escrow account only when the lead was

remediated to the levels set forth in the bids by the contractors.⁴ Paragraph 2.c. declared: “As a condition to the City’s disbursement of the Grant, all funds identified in Recital D must be deposited into a construction escrow account in a financial institution acceptable to the City, and the amount on deposit, including the Grant, must cover the cost of the Services. The City will authorize the disbursement of the funds to Contractor upon the City’s determination that the remediation work has been completed satisfactorily, as evidenced by the results of a clearance test. In the event that the final cost bill submitted by Contractor is less than the amount on deposit, the remainder will be considered Grant funds that will be returned to the City for use on other properties with lead based paint hazards.” O’Flynn concludes that his evidence showed that the City released the funds even though the lead had not been satisfactorily removed and therefore the City did not fulfill its obligations under the grant agreement.

The City counters that paragraph 2.c. in the grant agreement did not expressly state or imply that it had an obligation to refrain from releasing funds until the property’s lead level was completely remediated.⁵ The City maintains that this provision gave it complete discretion as to whether to disburse the funds. The City explains that the purpose of this provision is to give the City discretion to refuse to issue the funds in the event the contractor’s work was unrelated to lead abatement, such as building a spa for the homeowner.

⁴ The bids stated that the lead would be removed to particular levels described in the “Scope of Project”; the grant agreement used the term “the Services” to refer to the “Scope of Project.” We use both “scope of work” and “the services” to refer to that section in the bids that sets forth the levels of lead to be removed from the property.

⁵ The City interpreted O’Flynn’s argument as stating that the City could not release the funds until the lead had been removed from the property to the property owner’s satisfaction. In his reply brief, O’Flynn clarifies that he was not asserting that the City could not release the money to the contractor until a subjective standard had been met. Rather, he contends that the City had a duty to ensure that Rhapsody removed the lead to the levels set forth in the scope of work section in the bid signed by Rhapsody on July 8, 2005.

When interpreting the grant agreement, we apply the well-settled rules of contract construction. “ ‘The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the “mutual intention” of the parties. “Under statutory rules of contract interpretation the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The ‘clear and explicit’ meaning of these provisions, interpreted in their ‘ordinary and popular sense,’ unless ‘used by the parties in a technical sense or a special meaning is given to them by usage’ (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)” [Citations.] A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. [Citation.] But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract.’ [Citation.]” (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 647-648.)

In the present case, O’Flynn grasps onto the words in the grant agreement stating that the City will authorize the disbursement of the funds to the contractor “upon the City’s determination that the remediation work has been completed satisfactorily” to argue that the grant agreement obligated the City not to pay the contractor the grant money until it determined that the lead on the property had been reduced to a particular level. This interpretation, however, ignores that paragraph 2.c. is under the heading, “Funding for Services.” This section did not discuss the quality of the work to be performed and this paragraph did not condition the disbursement of funds on the contractor’s removal of the lead to a particular level.

The section under “Recitals” set forth the obligations of the City to the property owner. In this section, the grant agreement provided that “[t]he City has agreed to provide a grant to Owner in the amount of \$27,215.00 . . . to pay for the costs of the Services in whole or in part.”

Various provisions in the grant agreement undermine O’Flynn’s argument that the City promised to refrain from paying the contractor the funds until it determined that the

lead remediation had met a particular standard. As already noted, the provision obligating the City to provide a grant to the property owner specified that this sum would pay for the costs of the lead remediation “in whole or in part.” Paragraph 2.a in the “Funding for Services” section in the grant agreement stated that the “[o]wner acknowledges that performance of the Services is to be funded in whole or in part by the City through this Agreement” These paragraphs made it clear that the removal of lead to the levels specified in “the services” or “scope of project” could require funds in excess of the sum in the grant and therefore the agreement expressly stated that the City was not guaranteeing that the work paid for by the grant would remove all of the lead.

Additionally, paragraph 4.a. under “Owner’s Waiver” specified that the property owner had no claim against the City for substandard work done by the contractor. This agreement required O’Flynn to waive any claims against the City for “any claims, damages, liabilities, losses or any other matters arising in connection with or as a result of the Grant or any activities funded by it.”

Thus, the interpretation of the agreement urged by O’Flynn would require us to interpret paragraph 2.c. in a manner that conflicts with other provisions in the agreement. Such an interpretation would violate the rule that we must harmonize the provisions of an agreement. Courts must interpret contracts to try to give effect to every clause and harmonize the various parts with each other. (See, e.g., *Friedman Prof. Management Co., Inc. v. Norcal Mutual Ins. Co.* (2004) 120 Cal.App.4th 17, 33.)

We also do not agree with O’Flynn’s assertion that paragraph 2.c. is ambiguous and therefore must be construed against the City, the drafter of the agreement. Paragraph 2.c. stated that the money will be disbursed when the City determined that the remediation “work has been completed satisfactorily, as evidenced by the results of a clearance test.” In the present case, it is undisputed that a clearance test was completed. There is nothing in the record to indicate that the City was dissatisfied with the work or that it believed lead remediation had not been done. There is nothing in the language of this provision that conditioned the release of the funds to the removal of level to a particular standard.

O’Flynn argues that the City should have made it clear its certification was solely for the City’s benefit. However, as already discussed, the section cited by O’Flynn, paragraph 2.c., was not related to the City’s obligations to the property owner but explained the funding of the project.

The interpretation advocated by the City, according to Flynn, would result in a one-way agreement. He appears to be arguing that this would be a one-sided agreement because the City had the sole discretion to determine whether to pay the contractor the grant money and he could not object to the disbursement of funds. The grant agreement, however, did not deprive O’Flynn of any remedy for flawed work. Although the grant agreement expressly stated that the property owner waived any claim against the City for substandard work by the contractor, the grant agreement provided the property owner with an action against the contractor for deficient work. Paragraph 4.c. stated that O’Flynn waived any claims he had against the contractor in connection with the contractor’s performance of the services “except where the claim, loss damage, injury, expense, judgment or direct or vicarious liability is caused by Contractor”

O’Flynn insists that the City’s interpretation of the grant agreement would deny him any recourse in a situation where the City refused to pay the contractor and the contractor filed a claim against the property owner under the doctrine of quantum meruit. This argument has little merit. Under the grant agreement, the City was obligated to provide the property owner with the funds if the contractor did lead remediation on the property. If the City did not perform as promised or unreasonably withheld the grant money, O’Flynn would have a breach of contract claim against the City.

Furthermore, here, the record is devoid of any evidence that O’Flynn ever expressed any dissatisfaction to the City after Rhapsody performed the work or ever requested that the City not disburse the funds. To the contrary, O’Flynn did not complain about the lead remediation in 2005 when the work was completed. In 2006, O’Flynn filed his first unsuccessful unlawful detainer action against Suval. On February 5, 2010, after he had filed his third unlawful detainer action against Suval, he succeeded in evicting Suval pursuant to the Ellis Act. It was not until February 12, 2010, after

O’Flynn had evicted Suval and was no longer renting his property to a low-income tenant, and more than four years after he had received the benefit of the grant money, that he had LaCroix Davis LLC evaluate his property for lead contamination.

O’Flynn claims that the City had a duty to ensure that the lead work met a specific standard before paying the contractor the grant money under what he refers to as an “implied stipulation.” O’Flynn writes in his brief that the City “covenanted to manage and oversee the remediation, so as to ensure that it was done to minimally required standards.” Subsequently, he argues that “the covenant is an implied stipulation required for the contract to be reasonable” and cites Civil Code section 1655. O’Flynn does not explain how Civil Code section 1655 applies to the present case.

Civil Code section 1655 states: “Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention.” Civil Code section 1655 is inapplicable. O’Flynn has completely failed to show that the interpretation that he is promoting is necessary to make the grant agreement reasonable or conformable to usage. Furthermore, there can be no such implied covenant because that would result in reading into the contract a covenant that is contrary to the express terms of the agreement. The agreement expressly stated that the grant money might be insufficient to remove the lead from the property. Moreover, O’Flynn waived any claim against the City for “claims, damages, liabilities, losses or any other matters arising in connection with or as a result of the Grant or any activities funded by it.”

Accordingly, we conclude that the lower court correctly found that the City performed its obligations under the grant agreement and O’Flynn breached the contract. O’Flynn received the benefit of the bargain and must return the grant money since he evicted Suval pursuant to the Ellis Act (Gov. Code, § 7060 et seq.) and did not rent to a low-income tenant for five years. As the City argues: “He cannot accept public grant funds dedicated to reducing the risk of lead exposure in affordable rental housing, and later seek to convert the housing to his own use, unless he exercises his option under the [grant agreement] and repays the [g]rant [a]mount.”

III. *Condition Precedent*

O’Flynn argues that remediation of the lead hazard on the property to a particular standard constituted a condition precedent to his performance. Since the lead was not completely removed or removed to the level set forth in the description of the “scope of work,” he maintains that his performance was excused.

“Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313; see, e.g., Civ. Code, § 1434 et seq.) “Thus, a condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.” (*Platt*, at p. 313; Civ. Code, § 1436.) O’Flynn argues that performance of all lead remediation work was a “condition precedent” to his obligation to rent the property for five years or refund the grant amount.

“As a general rule of contract construction conditions precedent are not favored and an agreement will be strictly construed against a party asserting that its provisions impose a condition precedent. [Citations.] Normally, provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such a construction. [Citations.]” (*Helzel v. Superior Court* (1981) 123 Cal.App.3d 652, 663.) In making this determination, courts search for words such as “ ‘subject to’ ” or “ ‘conditioned on’ ” in relation to the contractual obligation in question. (*In re Marriage of Hasso* (1991) 229 Cal.App.3d 1174, 1181.)

In the present case, not only is there no provision in the grant agreement that creates the condition precedent urged by O’Flynn, such a provision would be contrary to the express terms of the grant agreement. As already stressed, provisions in the agreement made it clear that the property owner was responsible for any costs above the amount of the grant awarded that were necessary to eradicate the lead on the property. The agreement also specified that the City was not liable to the property owner for claims related to the lead remediation.

IV. Rescission

O'Flynn contends that the grant agreement cannot be enforced because the City made material misrepresentations. He also asserts that he is "not obligated to make repayment as contemplated in the [grant agreement] because the consideration offered for his obligation was materially defective." He claims that the remedy for a material representation or "materially defective" consideration is rescission.

“ ‘The general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding.’ ” (*Jefferson v. Department of Youth Authority* (2002) 28 Cal.4th 299, 303.) However, when a person is induced to give his or her consent based upon intentional and material misrepresentations by the party seeking his or her agreement, the contract is voidable and may be rescinded at the request of the person whose agreement was fraudulently obtained. (*Ibid.*; Civ. Code, § 1689, subd. (b).)

Here, there was no material misrepresentation or inadequate consideration as there is no evidence in the record that the City promised to remediate all of the lead from the property or that the City promised to warranty the contractor's work. To the contrary, the grant agreement made it clear that the City was not liable for deficiencies in the contractor's work and that O'Flynn could pursue a claim against the contractor for faulty work.

Furthermore, O'Flynn's argument that he is entitled to rescission makes no sense. Rescission is a remedy that disaffirms the contract. (Civ. Code, § 1688 et seq.) The party seeking rescission must "[r]estore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so."

(Civ. Code, § 1691, subd. (b).) Thus, rescission would require O’Flynn to return the grant money, and the grant money is precisely the sum sought by the City in its breach of contract claim.⁶

V. Estoppel

O’Flynn argues that the City should be estopped from demanding repayment.⁷ O’Flynn did not plead estoppel as an affirmative defense to the City’s breach of contract claim. He also did not raise it as a defense in opposition to the City’s motion for summary adjudication.⁸ The question of estoppel is generally a factual question (*Albers*

⁶ We do not address O’Flynn’s argument that the lead on his property was a latent defect and therefore the statute of limitations on his claim of substandard work had not run. This argument is immaterial to the City’s breach of contract claim.

We also do not address O’Flynn’s argument under the heading, “The Court Erred in Granting the Motion for Summary Adjudication because there were Triable Issues of Material Fact as to Whether the City Breached its Contractual Duties and the Implied Covenant of Good Faith and Fair Dealing,” to the extent he simply reiterates his discussion of the City’s failure to ensure that the lead was properly removed from the property. As already stressed, O’Flynn’s obligation to repay the grant money was independent of any performance by the contractor or the City’s oversight of the contractor and this obligation was unconditional. Indeed, O’Flynn repeats this same argument under various headings. All of his arguments are based on an interpretation of the grant agreement that the City was obligated to warranty that the lead was removed to the levels set forth in the description of the “scope of work” in the contractor’s bid. As repeatedly emphasized in this opinion, we reject O’Flynn’s interpretation of the grant agreement.

⁷ O’Flynn’s argument on estoppel is under the heading, “If the Lead Hazard Was Not Remediated, Then the City Has No Remedy in Equity.” This heading is inexplicable since the City never pursued a remedy in equity and California does not recognize an independent cause of action for equitable estoppel. (See, e.g., *Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1463.) In actuality, he is not arguing that the City has no remedy but that he has a defense in equity to the City’s legal claim of a breach of contract.

⁸ In his first amended answer to the City’s first amended complaint, O’Flynn raised the following affirmative defenses to the breach of contract claim: “no breach of contract”; “failure to join necessary and/or indispensable [parties]”; “cannot ascertain whether agreement is written, oral or implied”; “enforcement barred by statute of limitations”; “enforcement barred by statute of frauds”; “lack of consideration”; “no contract”; “enforcement barred by modification, alteration and change of terms”;

v. County of Los Angeles (1965) 62 Cal.2d 250, 266) and, consequently, O’Flynn cannot raise this issue for the first time on appeal. (See, e.g., *Central National Ins. Co. v. California Ins. Guarantee Assn.* (1985) 165 Cal.App.3d 453, 460 [equitable estoppel “must be pleaded, either as a part of the cause of action or as a defense”].)

Furthermore, O’Flynn is attempting to invoke equitable estoppel against a government entity, which is improper in the present situation. Although the government is not immune from the doctrine, as it may be applied “ ‘where justice and right require it,’ ” (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493), the doctrine must not be “ ‘invoked against a governmental body, where it would operate to defeat the effective operation of a policy adopted to protect the public.’ ” (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 239.) Here, as the City points out, the opt-out provision in the grant agreement serves the important public purposes of increasing the stock of lead-safe rental housing, and preventing public funds from being converted to private use.

Even if O’Flynn’s argument were not barred procedurally, it fails on the merits. O’Flynn cannot establish estoppel. “ ‘Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be [*sic*] acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.’ [Citations.]” (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1359.)

“contract is unlawful”; “contract is contrary to policy of express law”; “contract is contrary to good morals”; “breach of plaintiff’s fiduciary and confidential duties”; “intentional misrepresentation”; “negligent misrepresentation”; “concealment or suppression of facts”; “constructive fraud”; “fraud in the execution”; nonperformance . . . by plaintiff”; “damages sought violate the rule against penalties”; “setoff”; “plaintiff has not suffered damages or injury” “violation of the home solicitation sales act”; “latches”; and “mistake.” He raised estoppel as a defense to other causes of action but not to the breach of contract claim.

This record is devoid of any facts showing that the City knew that the work on the property was deficient. O’Flynn argues that actual knowledge is not necessary, and knowledge may be imputed. (See, e.g., *Feduniak v. California Coastal Com.*, *supra*, 148 Cal.App.4th at p. 1361.) “[K]nowledge of the pertinent facts may be imputed where the circumstances show that one ought to have known them, and this is especially so when the party to be estopped was negligent or made affirmative representations related to those facts.” (*Ibid.*) Here, as already discussed, the grant agreement made it clear that the City was not promising that a specific amount of lead was going to be removed from the property. Moreover, as already discussed, O’Flynn cannot demonstrate reasonable reliance because the grant agreement clearly stated that he was responsible for any additional costs necessary to remediate the problem. Thus, there were no promises that this grant money would be sufficient to remove all of the lead. Finally, O’Flynn cannot demonstrate that he relied on any statement or alleged misrepresentation to his detriment, since there is no allegation that the project did not remove some of the lead from his property. Indeed, in his brief in this court, he writes: “O’Flynn may have benefited by virtue of remediation of the lead hazard in particular areas of the home”

In his reply brief, O’Flynn argues that it would be “manifestly inequitable” and harsh and oppressive to require him to pay the entire grant after he complied with the terms of the grant agreement for most of the five-year term. The record establishes that he first attempted to evict Suval less than one year after receiving the grant money. Furthermore, the express terms of the agreement required rental of the property for five years and it is not inequitable to enforce the express terms of the agreement.

O’Flynn has waived raising the defense of equitable estoppel and his argument that the City should be estopped from enforcing the grant agreement is entirely without merit.

VI. Implied Covenant of Good Faith and Fair Dealing

O’Flynn contends that he did not need to perform on the grant agreement because the City breached the implied covenant of good faith and fair dealing.

“Every contract contains an implied covenant of good faith and fair dealing providing that no party to the contract will do anything that would deprive another party of the benefits of the contract. [Citations.] The implied covenant protects the reasonable expectations of the contracting parties based on their mutual promises. [Citations.] The scope of conduct prohibited by the implied covenant depends on the purpose and express terms of the contract. [Citation.]” (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885.) The covenant of good faith and fair dealing operates as “ ‘a kind of’ “safety valve” to which judges may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language.’ ” (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 684.)

O’Flynn argues that the fact that the grant agreement permitted the City to distribute the grant funds at its own discretion violated the implied covenant of good faith and fair dealing. He argues that the City undertook to manage and oversee the abatement process and the City selected Rhapsody to perform the work. He claims that his evidence shows that the City dispensed the money even though the work was inadequate and the City’s procedures violated HUD regulations.

As already discussed, the grant agreement stated that “[t]he City will authorize the disbursement of the funds to Contractor upon the City’s determination that the remediation work has been completed satisfactorily, as evidenced by the results of a clearance test.” “[A]s a general matter, implied terms should never be read to vary express terms.” (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374.) Here, “completed satisfactorily” is defined as the City’s determination that the work was completed satisfactorily, not that the work resulted in specific maximum lead levels on the property. Furthermore, the record indicates that a clearance test was done. The City owed no duty to O’Flynn to ensure that the lead would be remediated to particular maximum levels.

O’Flynn received the benefit of the agreement. In 2005, a contractor performed work on his property and the City paid the contractor \$27,215. O’Flynn expressly waived holding the City liable for any deficiencies in the work performed by the

contractor and never voiced any discontent with the work within one year of the completion of the work. He also never pursued a remedy against the contractor. Furthermore, the record indicates that O’Flynn’s decision to opt out was not related to the inadequate removal of lead from his property; indeed, he evicted his tenant prior to learning that there still was lead on his property. In any event, the City completely fulfilled its obligations and implied obligations under the grant agreement.

VII. *Partial Performance*

Alternatively, O’Flynn argues that if this court concludes that the City’s performance was a partial rather than a complete breach of the grant agreement, the City is not entitled to full repayment. As already stressed, the City did not completely or partially breach the agreement. The City performed all of its obligations under the agreement.

VIII. *Prejudgment Interest*

O’Flynn does not mount any specific challenge to the award of prejudgment interest and has therefore waived any objection to the trial court’s award of interest. Moreover, the record supported the award. The record establishes that O’Flynn breached the grant agreement on February 5, 2010, when he recovered possession of the property from Suval. He did not repay the \$27,215 to the City as required by the grant agreement and this amount is a sum certain. Accordingly, the City was entitled to prejudgment interest on this amount at the legal rate of 10 percent per annum (Civ. Code, § 3289, subd. (b)) from February 5, 2010, until the date of entry of judgment. (Civ. Code, § 3287, subd. (a); see also *Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 375 [“prejudgment interest is allowable where the amount due plaintiff is fixed by the terms of a contract, or is readily ascertainable” and it “is not allowable where the amount of the damages depends upon a judicial determination based upon conflicting evidence”].)

DISPOSITION

The judgment is affirmed. O’Flynn is to pay the costs of appeal.

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.