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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MIDMARKET PROJECT, LLC,

Plaintiff and Respondent,

v.

NEW CENTRAL HOTEL AND HOSTEL,  
LLC,

Defendant and Appellant.

A143902

(San Francisco City & County  
Super. Ct. No. CGC-13-535964)

In this lease dispute, Midmarket Project, LLC, (Midmarket), a commercial tenant, sued the property owner, Central Hotel And Hostel, LLC, (Central), over two issues—the “Commencement Date” of the lease and whether Central is obligated to pay for installation of a separate water meter. Central appeals from a summary judgment in favor of Midmarket. We affirm.

**BACKGROUND**

With the objective of opening a restaurant, Midmarket signed a lease agreement with Central dated February 7, 2013.

***Commencement of the Term***

The term of the lease is a 10-year term begins on the “Commencement Date,” which is defined as the earlier of either “(A) the date next following the expiration of the Construction Period; or (B) the date Tenant opens the Premises for business.” It is undisputed Midmarket opened its restaurant for business on December 5, 2013.

The alternative Commencement Date trigger—“expiration of the Construction Period”—depends on a series of telescoping provisions. The “Construction Period” means the first six months “after Delivery of Possession,” which shall be extended “for any delay in the Delivery of Possession” not attributable to tenant. “Delivery of Possession,” in turn, occurs on the date two conditions are both satisfied or waived by the tenant “in writing.”<sup>1</sup> One condition is Central’s delivery of certain non-disturbance agreements; the other is Central’s delivery of physical possession of the premises pursuant to section 2.2 of the lease. Under section 2.2, the premises must be delivered in “broom clean” condition, with “updates to the building façade completed,” and with “utilities serving the Premises” installed and operating, “subject only to activation of utilities by Tenant.”

Central did not provide non-disturbance agreements before the restaurant opened. The façade work remained incomplete beyond May 2013. Six months later, on November 15, 2013, counsel for Midmarket wrote to Central’s counsel, stating: “[T]he landlord needs to commit to finishing the [façade] work according to a set timeline as well as take immediate efforts [to] obtain the [non-disturbance agreement]. We agreed to forbearance on the [agreement] in good faith that the landlord would complete the work and not interfere with the business.”

### ***Separate Water Meter***

Section 6 of the lease further addresses utilities, and states Midmarket “shall arrange and pay for all utilities . . . including but not limited to water, gas, electricity, internet service, garbage, and telephone charges” while Central “shall have no responsibility for providing utility services . . . nor . . . any financial obligation to pay for such services; provided Landlord shall pay to have the Premises separately metered.”

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<sup>1</sup> Due to apparent oversight or error, the lease listed three conditions, but one of these is essentially a nullity, as it references a section of the lease, and a supposed requirement, that does not exist.

At the time Midmarket entered into the lease, the premises was serviced through a single water utility account in the neighboring tenant's name. Central subsequently explained that when it negotiated the neighboring tenant's lease back in March 2012, it advised that tenant there was a shared water meter for the two spaces and told that tenant it could "install a separate meter through which it could measure its water use." The lease with the neighboring tenant therefore allowed installation of a "separate meter," but at the tenant's expense. It also required Central to insure a cooperation agreement between tenants if a shared meter persisted. In the fall of 2012, the neighboring tenant installed a "submeter" or separate gauge.

Thus, prior to Midmarket signing its lease, there was one water meter and utility account, but by virtue of the submeter, Midmarket and the neighboring tenant could measure their usage and pay their respective shares of the water bill. When Midmarket and Central negotiated the lease, there was no discussion about water meters or water line capacity.

### ***The Lease Dispute***

Central requested rent starting November 1, 2013. Midmarket believed rent payments did not come due, and the lease term did not commence under the terms of the lease, until December 5, 2013, when it opened its restaurant. The two also disagreed over whether Central had provided premises that were "separately metered" for water.

Midmarket sued for declaratory relief on December 6, 2013, asserting two causes of action: one concerning the Commencement Date of the ten-year term and the other concerning the water metering dispute. Midmarket subsequently moved for, and the trial court granted, summary judgment on both causes of action.

The court concluded the lease term commenced on the date Midmarket opened its restaurant for business, rejecting Central's assertion it commenced on an earlier date related to expiration of the Construction Period. The Construction Period never played a role in defining the lease term commencement, the court concluded, because Delivery of

Possession as defined in the lease never occurred. The court further concluded Midmarket was entitled to, but had not received, separate water metering.

## DISCUSSION

### *Principles of Review*

“On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

“In moving for summary judgment, a ‘plaintiff . . . has met’ his ‘burden of showing that there is no defense to a cause of action if’ he ‘has proved each element of the cause of action entitling’ him ‘to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant . . . may not rely upon the mere allegations or denials’ of his ‘pleadings to show that a triable issue of material fact exists but, instead,’ must ‘set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.’ (Code Civ. Proc., § 437c, subd. (o) (1).)” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) “[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Id.* at p. 850, fn. omitted.)

“The parol evidence rule is codified in Code of Civil Procedure section 1856 and Civil Code section 1625. It provides that when parties enter an integrated written agreement, extrinsic evidence may not be relied upon to alter or add to the terms of the writing.” (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174, fn. omitted.) “The rule does not, however, prohibit the introduction of extrinsic evidence ‘to explain the meaning of a written contract . . . [if]

the meaning urged is one to which the written contract terms are reasonably susceptible.’ ” (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343.)

“Accordingly, ‘[e]ven if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.’ [Citation.] ‘The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.’ ” (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391.)

“ ‘Our review of the trial court’s interpretation of a contract generally presents a question of law for this court to determine anew. [Citation.] ‘The trial court’s determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. [Citation.] The trial court’s resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court’s resolution of that conflict is a question of fact . . . .’ ” (*Speirs v. BlueFire Ethanol Fuels, Inc.* (2015) 243 Cal.App.4th 969, 984.) “Furthermore, ‘[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.’ ” (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710.)

### ***Commencement Date***

Midmarket opened its restaurant on December 5, 2013. Under the provisions of the lease, that is the Commencement Date, unless the Construction Period expired sooner.

The Construction Period cannot expire until six months after Delivery of Possession. Delivery of Possession, in turn, cannot occur until several conditions are met

or waived: non-disturbance agreements acquired, façade completed, and utilities installed and operating. Given that the restaurant opened on December 5, every condition would have to have been met or waived before approximately June 4 for there to be an earlier Commencement Date based on the Construction Period.

Starting with the façade, Midmarket's undisputed evidence showed it was not completed in May, and in fact, was still being worked on in October.

Central maintains the façade-completion condition was ambiguous and, in fact, was not a mandatory requirement for Delivery of Possession. Central claims it submitted evidence showing it was "physically impractical and economically insufficient to complete the façade prior to Tenant taking possession." According to the declaration of its contractor, the façade and interior work had to be coordinated, and certain aspects of façade work were in fact delayed to streamline interior work. One deponent testified "the outside couldn't necessarily be completely finished first."

This extrinsic evidence, however, does not suggest an alternate interpretation of the *lease language*, language that clearly and explicitly imposed a façade-completion requirement. Thus, Central's evidence is not " 'relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' " (*Dore, supra*, 39 Cal.4th at p. 391; see *San Pasqual Band of Mission Indians v. State of California* (2015) 241 Cal.App.4th 746, 757 [evidence of subjective view of contract not relevant to meaning of contractual terms].)

Nor can Central point to this extrinsic evidence to *eliminate* a contractual requirement entirely. (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn., supra*, 55 Cal.4th at p. 1174.) While Central conclusorily asserts a hard and fixed façade-completion requirement might impose "an absurd result" and cannot be enforced on that basis, it cites no legal authority concerning the absurdity doctrine. More problematically, it cites to no evidence suggesting completion of the façade before interior construction would be "absurd," as opposed to simply inconvenient or

impractical in some circumstances. That the parties cooperated on construction timing on this project in some respects, and that this cooperation had some benefits for the Midmarket, does not render the façade-completion condition absurd.

For the first time in its reply brief, Central asserts its extrinsic evidence also creates a triable issue as to whether the parties mistakenly added the façade-completion requirement. (See Code Civ. Proc., § 1856, subd. (e).) We generally do not address issues not raised in the trial court, nor issues raised for the first time in a reply brief. (*Rancho Mirage Country Club Homeowners Association v. Hazelbaker* (2016) 2 Cal.App.5th 252, 264 (*Rancho Mirage*); *Crawley v. Alameda County Waste Management Authority* (2015) 243 Cal.App.4th 396, 403 (*Crawley*).) And we decline to do so here.

In short, failure to comply with the façade-completion requirement, alone, means Delivery of Possession did not occur soon enough to trigger a Commencement Date prior to the opening of Midmarket’s restaurant on December 5, 2013.

In addition to façade completion, Delivery of Possession required delivery of non-disturbance agreements. Midmarket’s evidence also showed these were not delivered.

Pointing to the November 15, 2013 email from Midmarket’s lawyer referencing Midmarket’s “forbearance” to allow “in good faith that the landlord would complete the work and not interfere with the business[,]” Central maintains Midmarket waived the non-disturbance agreement requirement. There was, however, no express, written waiver of this condition as required by the lease. To begin with, any forbearance appears to have been, at most, a conditional courtesy to expedite opening of the business on Midmarket’s terms, not an unconditional waiver. Indeed, Midmarket’s attorney, in that same email, revoked the forbearance and demanded immediate production of the agreements, which Central did not deliver. In addition, there is no direct evidence of the forbearance, itself, and thus no evidence of a written waiver as the lease required—even though one would expect Central would have retained and presented such a waiver if it existed. Finally,

there is no date associated with the forbearance, and it appears to have been related to the lawyers' late-stage negotiations near the time of the suit and business opening.

In its reply brief, Central points to a second email, dated November 17, in which Midmarket's lawyer stated if several unresolved issues could be addressed, Midmarket would "deliver the first rent check, and set the date of rent commencement as soon as his contractor is given access to tie into the water." When written, time was of the essence as the "restaurant has a full staff hired and starting on Friday." Even if this email could constitute a written waiver of the forbearance agreement requirement, it came much too late to affect the lease Commencement Date. Furthermore, the email was simply part of ongoing negotiations. It does not agree to a specific rent Commencement Date, does not mention or waive the non-disturbance agreement condition, and merely suggests Midmarket would pay rent shortly since the restaurant would be opening imminently.

Accordingly, Delivery of Possession also did not occur soon enough to trigger a Commencement Date prior to the opening of Midmarket's restaurant on December 5, 2013, due to Central's failure to deliver non-disturbance agreements and the lack of any triable issue of waiver prior to June 4.

### ***Separately Metered Water***

As discussed above, the lease specifies Central need not provide or pay for utilities in general, but the "Landlord shall pay to have the premises separately metered." Midmarket claims this means it is entitled to a separate, physical water meter and its own account with the utility company. Central maintains the lease only "required" it "to pay for the premises to be separately metered, and did not require that the meter in question needed to be associated with a separate SFPUC account." The neighboring tenant's submeter satisfies this lease requirement, urges Central, since it assures Midmarket pays only for the water it consumes.

The language of the lease, however, comports with Midmarket's view of the Central's metering obligation. The premises must be "separately metered," and Central

“shall pay to have” that happen. That Central “shall pay” indicates a future act by Central; it does not suggest inaction by Central (and thus no payment) and continuation of the status quo (the shared meter with submetering). Further, the extrinsic evidence shows Central, as a result of its prior dealings with the neighboring tenant, understood the building had one meter, one account, and an already-installed submeter. If this existing arrangement was all Central intended to provide to Midmarket, it would not have expressly agreed to any *further* payment on its part for separate metering. Thus, the language of the lease, itself, as well as the extrinsic evidence pertinent to this lease, establish that Central had an obligation to provide Midmarket with a separate water meter tied to a separate account.<sup>2</sup>

Further, as to the term “separately metered” in isolation, a California retail leasing treatise states: “When a utility service is separately metered, the tenant has [a] direct contract with the utility provider for the delivery of the utility service to the premises. A separate meter measures the tenant’s usage . . . and the tenant pays the utility provider

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<sup>2</sup> At oral argument, Central pressed for a different reading of section 6 of the lease—that it can elect between (a) not paying to have the premises separately metered, in which case it must provide and pay for all utilities, or (b) paying to have the premises separately metered, in which case Midmarket must pay for its utilities. Central never proffered this interpretation in the trial court, and in its opening brief on appeal, Central acknowledged it “was required to pay for the premises to be separately metered.” Only in its reply brief did Central first suggest paying or not paying for a separate water meter provided an election as to whether or not it paid for utilities. Central’s failure to raise this assertion in the trial court and in its opening brief forfeited its ability to pursue this contention on appeal. (*Rancho Mirage, supra*, 2 Cal.App.5th at p. 264; *Crawley, supra*, 243 Cal.App.4th at p. 403.) In any event, such an interpretation is in conflict with (1) the preceding portion of section 6 that states the tenant, Midmarket, shall, without exception, “arrange and pay for all utilities” and (2) the inclusion of the word “shall” in the phrase “provided Landlord shall pay to have the Premises separately metered,” a phrase that implies a future act by Central which is an exception to the proviso that it otherwise has no obligation to pay for any utilities. There is, moreover, no hint in the record evidence that either party ever thought Central would, under any circumstance, be paying for Midmarket’s utilities.

directly. . . ¶[W]here utility services cannot be, or are not, separately metered to each tenant’s premises, they are often submetered instead. When a utility is submetered, the landlord usually has a direct contract with the utility provider . . . and then resells the utility service.” (See Retail leasing: Drafting and Negotiating the Lease (Cont.Ed.Bar 2007), § 13.2, p. 13-2, rev. 11/15.)

Central points to evidence that Midmarket did not, while negotiating the lease, express concern or interest in the metering of the premises. For instance, Central’s managing member states the subjects of a separate water meter, submeter, or capacity needs, were never discussed during lease negotiations. Midmarket, in its principal’s deposition, testified it did not recall raising the issue of water supply and the water line size before leasing the property. Midmarket also never made any mention of a separate water meter until September 2013, nearly seven months after signing the lease. The desire for a water meter seems to have arisen at this time, well after lease signing, because it might facilitate greater water capacity.

This extrinsic evidence, however, offers no insight into the meaning of the term “separately metered” as used in the lease, which as we have discussed contemplates a future act by Central, not merely maintenance of the status quo. That the parties did not outwardly discuss or focus on separate metering does not mean they intended a meaning of the term other than what the plain language reflects. Indeed, it is more likely there was no discussion on Midmarket’s part because it viewed the language as articulating its view of the separate metering requirement, particularly given what appears to be the common understanding of such a requirement in retail leasing. (See Retail leasing: Drafting and Negotiating the Lease, *supra*, at § 13.2, p. 13-2, rev. 11/15.)<sup>3</sup>

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<sup>3</sup> The separate metering issue as raised in the trial court does not include issues pertaining to water capacity, such as whether there are different sized water meters with different costs and different sized water lines with different costs, and, if so, who is going to bear any additional costs associated with greater capacity. The trial court concluded

**DISPOSITION**

The judgment is affirmed. Costs to Midmarket.

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only that the lease requires a separate meter from the utility company, and that is the ruling we affirm on appeal.

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Banke, J.

We concur:

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Humes, P. J.

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Dondero, J.