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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SCOTT SHORE,

Plaintiff, Cross-defendant and
Appellant,

v.

GINO RUSSO et al,

Defendants, Cross-complainants and
Respondents.

D058305

(Super. Ct. No. 37-2009-00066550-
CU-FR-EC)

APPEAL from a judgment of the Superior Court of San Diego County, Randa Trapp, Judge. Affirmed.

Scott Shore appeals a judgment following a bench trial wherein the trial court found Shore entered into an enforceable option agreement to purchase real property and the \$62,500 payment he made upon signing the option was nonrefundable. Shore contends the option agreement was too uncertain to be enforced. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Gino Russo, John Russo, and Frank Russo (collectively the Russos) are the owners of real property containing a gas station located at 4404 Ingraham Street in the Pacific Beach neighborhood of San Diego (the Property). The Russos own the Property through their interest in Pacific Beach Fuel Properties, LLC.¹ Shore is the Trustee for the "La Salle Bank and Trust No. PT 1480" (the Trust), which owned a neighboring parcel on the same block during the relevant time periods. The Russos and Shore were acquainted for several years prior to the instant dispute.

Shore, a licensed real estate agent and developer, had been interested in the Property since 2002. In 2005, Shore engaged his real estate broker to gather information on the Property. However, another real estate developer, Terry Sheldon, had gone into escrow with the Russos for the purchase of the Property before Shore could make an offer. Shore was upset with the Russos when he learned that the Property was in escrow with Sheldon as the purchaser. Sheldon ultimately did not complete the purchase, but kept the Property tied up in escrow for a lengthy period of time.

After Sheldon failed to buy the Property, Shore expressed renewed interest in acquiring the Property. In May 2007, Shore and his business partner, Michael Katz, met the Russos at a Wendy's restaurant to negotiate a possible purchase of the Property. The Russos told Shore they were unhappy with the delays suffered during their prior dealings with Sheldon and did not want the Property to be tied up without receiving compensation.

¹ Pacific Beach Fuel Properties, LLC is a named defendant and respondent in this matter.

On May 25, 2007, shortly after the first meeting, the Russos met with Shore and Katz at the Catamaran Hotel restaurant to finalize terms for the sale of the Property. Prior to the meeting, Katz drafted a document entitled "Leter of Intent" [sic] (the Letter) memorializing terms Shore believed he had previously agreed to with the Russos. The Letter included a variety of terms, consisting of the property address, purchase price based on date of sale, \$125,000 nonrefundable option money due each six months, and a provision for a 30-day due diligence period before the money became nonrefundable. The Letter also stated that the "nonrefundable" deposits should be credited toward the purchase price, the buyer could assign the escrow to another party, and that escrow would be opened with Allison McCloskey Escrow. Finally, the Letter indicated that a "more formal Letter of Intent and purchase contract" would "follow within 10 days."

At the May 25 meeting, the Russos were upset because they believed the 30-day waiting period before the \$125,000 payment became nonrefundable contained in the Letter was inconsistent with their previous discussions. The Russos had told Shore that they were going to list the Property for sale. Shore indicated he did not want the Property listed because it would cost an additional \$180,000 to ultimately complete the purchase.² In response, the Russos made it clear they wanted compensation to keep them from listing the Property for sale.

² Although not thoroughly explained in the record, this \$180,000 appears to be derived from six percent of a \$3.2 million purchase price that would be owed to the real estate agents associated with the listing and sale of the Property.

After some additional discussions at the May 25 meeting, John Russo made the following handwritten changes to the Letter: "Item #1 \$62,500 – Non Refund(able) Deposit 1st – 30 day balance of \$62,500 option – or quit." With these changes, the Russos believed the Letter required Shore to make a nonrefundable payment of \$62,500 for the option, with an additional \$62,500 due 30 days thereafter if the option was to continue. None of the typewritten lines were crossed out.

John Russo initialed the amended terms, and the Letter was signed by the Russos and Katz on behalf of the Trust. At this time, Shore gave the Russos a check for \$62,500.

Shore and Katz testified that they understood the difference between a non-refundable option deposit and a refundable earnest money deposit. Shore had been involved with owning and operating real estate since 1974, including the Promenade in Pacific Beach. Katz, a Stanford educated CPA, had handled his own real estate affairs for about 25 years and served in an advisory capacity to the Trust for over 20 years. His real estate interests included shopping centers, a hotel, and apartment complexes.

After signing the Letter, Shore sought to enter into option agreements for the neighboring properties. Unbeknownst to the Russos, Shore was interested in selling the corner of Ingraham and Grand, which included the Property, to another developer. Shore spent approximately two months trying to secure options for the neighboring properties. During this time period, Shore did not seek to acquire the Property from the Russos nor did he make any further payments to the Russos.

Shore subsequently began negotiating additional terms for the purchase and sale of the Property. Shore was surprised that the Property's deed contained certain use

restrictions and established liability for any future environmental problems on the Property. Many of these deed restrictions were included in a draft purchase agreement that Shore found unacceptable. The Letter, however, contained no mention of environmental concerns or certain terms that were to be negotiated in the future.

Except for Shore's concerns about liability for future environmental problems as set forth in the Property's deed, there apparently were no environmental concerns with the Property. The Russos offered to do environmental testing. The Property previously had been environmentally tested and was deemed to be clean. The Russos were able to obtain a loan on the Property.

After failing in his efforts to acquire options on the surrounding parcels, Shore, through counsel, sent a letter to the Russos' attorney claiming the draft purchase agreement included "vastly different economic terms" than the Letter and the "title to the [P]roperty was heavily encumbered by potential environmental risks, buyer indemnities and development constraints." Shore demanded the return of his \$62,500 payment. The parties could not come to an agreement and Shore sued the Russos for fraud, breach of contract, money lent, and money had and received. The Russos cross-complained for breach of contract and declaratory relief.

The Russos successfully demurred to Shore's complaint. Shore filed a first amended complaint, and after filing a general denial, the Russos brought a motion for summary judgment on all causes of action in the first amended complaint and prevailed.

Shore filed a second amended complaint for declaratory relief, seeking a judicial declaration that the Letter was not an enforceable option agreement. The declaratory

relief action proceeded to trial. The court found in favor of the Russos. It determined that the Letter was an enforceable option agreement and awarded the Russos \$62,500, the amount of Shore's payment upon signing the Letter. The court concluded that the Russos were not entitled to the additional \$62,500 that the Letter stated was due at the end of the 30-day due diligence period, because "both parties failed to comply with the term of the [Letter] in that the 'more formal Letter of Intent and purchase contract' was not produced within a reasonable amount of time after execution of the [Letter]."

Shore timely appealed.

DISCUSSION

Shore challenges the judgment on the grounds that the Letter was too uncertain to be enforced as an option to purchase real property. However, Shore's contentions do not weigh on the certainty of the Letter as much as whether the parties intended to enter into a contract and the court's interpretation of an ambiguous term in the Letter.

"Whether a contract is certain enough to be enforced is a question of law for the court." (*Patel v. Liebermensch* (2008) 45 Cal.4th 344, 348, fn. 1 (*Patel*)). "[T]he modern trend of the law favors carrying out the parties' intention through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty. . . . The defense of uncertainty has validity only when the uncertainty or incompleteness of the contract prevents the court from knowing what to enforce." [Citation.]" (*Blackburn v. Charnley* (2004) 117 Cal.App.4th 758, 766.)

The Letter concerns an option to purchase real property. "An option to purchase real property, supported by consideration, is a contract by which the owner of the

property (the optionor) gives another (the optionee) the exclusive right to purchase the property in accordance with the terms of the option." (*Wachovia Bank v. Lifetime Industries, Inc.* (2006) 145 Cal.App.4th 1039, 1049.) " [A]n option based on consideration contemplates two separate [contracts], i.e., the option contract itself, which for something of value gives to the optionee the irrevocable right to buy under specified terms and conditions, and the mutually enforceable agreement to buy and sell into which the option ripens after it is exercised. Manifestly, then, an irrevocable option based on consideration is a contract. . . .' [Citation.]" (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 420.)

The essential material terms of a contract to purchase real property include the identity of the buyer, the identity of the seller, the identity of the property, and the purchase price. (*Patel, supra*, 45 Cal.4th at p. 349.) Here, the Letter contained these terms. It sufficiently identified the Property by address. It listed the purchase price. The letter also named the buyer and seller.

Shore does not dispute that the Letter contained these required terms. Instead, he asserts the Letter was uncertain because the responsibility for any potential environmental contamination on the Property was a material term that the parties intended to negotiate in the future. Although Shore is correct that a promise cannot give rise to a legal obligation if the parties reserved an essential element for future negotiation (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 812), here there is little evidence in the record that the parties considered environmental liabilities to be a material term to be addressed in the future when they negotiated and signed the Letter.

Shore emphasizes the Letter specifically stated that a more formal option and purchase agreement were to be drafted in the future. Moreover, he points out the parties did not complete the purchase largely because they disagreed about environmental liability issues. As such, he concludes environmental liability must have been a material term. We are not persuaded.

Although the Letter states that a more "formal" option and agreement will be drafted, it is silent as to any open issues these subsequently drafted documents were meant to address. Put differently, the Letter provides no indication that there are any additional material terms for the parties to negotiate. In addition, there is no evidence that Shore expressed any concern about the Property's condition or any liability arising from its condition when the parties negotiated and signed the Letter. Nevertheless, Shore insists it was apparent to both parties that environmental liability would be an issue because the Property consisted of a gas station. However, we see nothing in the record that indicates there were any issues with the environmental condition of the Property. The Russos offered to conduct environmental testing. The Property had been tested and was deemed clean. The Russos had obtained a loan on the Property.

Instead, Shore seemed to be troubled that the Property's deed contained use restrictions and conferred legal obligations to address environmental contamination arising out of any successive ownership of the Property. Apparently, these restrictions were nonnegotiable and thwarted Shore's plan to bundle the multiple properties and sell them to a third party.

The Letter contemplates that Shore would conduct due diligence on the Property. The restrictions in the Property's deed are precisely the type of information a would-be purchaser like Shore would investigate and discover prior to completing the purchase. Further, as the deed is a publically recorded document, Shore could have inspected the deed prior to signing the Letter. Although he was an experienced real estate developer and had been interested in purchasing the Property for several years, he chose not to do so. Merely because he finally reviewed the deed after signing the Letter does not prove that the Letter was uncertain or that there existed material terms to be negotiated in the future. If environmental liability and use restrictions were material terms to be negotiated in the future, we would expect to find a reference to them in the Letter. At the very least, we would anticipate some testimony that these concerns were discussed at the meeting at Wendy's or the subsequent meeting where the Letter was signed. Shore has cited to no such evidence.

Shore also argues that the discrepancies between the Letter and the more "formal" draft agreements show the Letter was too uncertain to be enforced. We disagree.

The fact that there might have been discrepancies in a subsequently drafted, formal agreement does not somehow render the Letter uncertain. Here, "[t]he essential terms of [the] option are easily ascertainable." (*Patel, supra*, 45 Cal.4th at p. 352.) The discrepancies may indicate that at least one of the parties wanted to modify the terms of the option, but we fail to see how this makes the Letter uncertain.

At best, these discrepancies might raise the issue of contract formation: whether the parties intended to enter into a contract when they signed the letter. Shore does not raise this issue on appeal, but even if he had, he would not have been successful.

The trial court, as the fact finder, specifically addressed this issue in its statement of decision. In finding the parties intended to enter into an option contract in signing the Letter, the court considered and weighed conflicting evidence. "Where the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the trier of fact to determine whether the contract actually existed." (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.) Thus, in evaluating a challenge to the court's finding that the parties intended to enter into a contract when they signed the Letter, we review the record to determine whether substantial evidence, even if contradicted, supports the court's finding there was a contract. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Here, substantial evidence supports the court's finding of the existence of a contract. The court found the Russos' witnesses credible in establishing that they did not want to "tie up" the Property without compensation and conveyed as much to Shore during the negotiations that led to the signing of the Letter. Shore wanted to purchase the Property as part of a collection of adjacent properties that he could then bundle and sell to a third party. In other words, Shore wanted to prevent the Russos from selling the Property to another buyer, signed the Letter, and paid \$62,500 upon signing it to achieve his objective. In addition, we agree with the trial court that the Letter contains the

essential and material terms of the purchase. In short, discrepancies between the Letter and subsequent "formal" draft agreements do not make the Letter uncertain.

Finally, Shore maintains that the parties disagreed regarding whether the \$62,500 payment made at the time of the signing of the Letter was nonrefundable. He reasons that this disagreement renders the Letter uncertain and unenforceable as well. It does not.

Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence that is relevant to show whether the contract is reasonably susceptible of a particular meaning. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40.) Here, the parties disagreed regarding the nature of Shore's \$62,500 payment. Shore argues the payment was refundable. The Russos contend it was not. This disagreement does not render the Letter so uncertain as to make it unenforceable. Instead, a provision of the Letter was ambiguous, and the court needed to consider extrinsic evidence to interpret the contract. As trier of fact in this matter, it was the trial court's responsibility to resolve any conflict in the extrinsic evidence properly admitted to interpret the language in the Letter. (*Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 891-892 & fn. 4 [where conflicting extrinsic evidence is admitted to interpret language of agreement, the proper procedure is "for the trial court to require the jury to make special findings on the disputed issues and then base its interpretation of the contract on those findings"].) This is precisely what the trial court did in finding that the \$62,500 payment was nonrefundable.

Where the interpretation of a contract turns upon the credibility of conflicting extrinsic evidence, which was properly admitted at trial, we will uphold any reasonable construction of the contract by the trial court if it is supported by substantial evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 913.) Here, substantial evidence supports the court's interpretation.

The Letter originally called for a \$125,000 nonrefundable payment, which required a 30-day due diligence period before the money became nonrefundable. The evidence indicates that the Russos were upset by this provision because they believed it was not consistent with what the parties had discussed at a previous meeting. After discussions with Shore and Katz, John Russo made the handwritten changes to the Letter whereby Shore would immediately pay \$62,500 with the signing of the Letter. The handwritten changes refer to this payment as nonrefundable. In addition, there was evidence that the Russos informed Shore that they did not wish to tie up the Property without receiving compensation. Indeed, Gino Russo testified that the Russos told Shore that they wanted to "go hard" meaning a nonrefundable deposit was required for an option agreement. The court found this testimony credible. We are satisfied that substantial evidence supports the trial court's interpretation of the Letter.

In summary, the Letter contains all the essential terms required in a contract to purchase real property. (*Patel, supra*, 45 Cal.4th at p. 349.) Shore raises issues that do not bear on the certainty of the Letter, but instead, challenge the existence of a contract (i.e., whether the parties intended to enter into a binding agreement) and the court's

interpretation of the Letter in light of conflicting extrinsic evidence. Shore received exactly what he bargained for: an option to purchase the Property. In conducting his due diligence, he discovered restrictions contained in the Property's deed prevented him from bundling the Property with other adjacent properties and selling them to a third party to develop. Shore's discovery neither makes the Letter uncertain nor indicates the parties left material terms of the purchase of the Property to be negotiated in the future. Because we determine Shore's arguments lack merit, we affirm the judgment.

DISPOSITION

The judgment is affirmed. The Russos are awarded their costs on appeal.

HUFFMAN, J.

I CONCUR:

McCONNELL, P. J.

I CONCUR IN THE RESULT:

McDONALD, J.