

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRYAN KEITH et al.,

Plaintiffs, Cross-defendants and
Respondents,

v.

KENNETH C. SHUTTLEWORTH et al.,

Defendants, Cross-complainants and
Appellants.

D058881

(Super. Ct. No. 37-2009-00091108-
CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

Kenneth Shuttleworth and Equitarian, Inc. (Equitarian) appeal a judgment against them on their cross-complaint against Bryan Keith and Rancho Pacific Group, LLC (Rancho Pacific) for breach of a real estate listing agreement.¹ Equitarian contends the

¹ The only parties to the listing agreement were Equitarian and Rancho Pacific, but the cross-complaint includes Shuttleworth and Keith as parties and they are included in the judgment on the cross-complaint. When appropriate we refer to Shuttleworth and Equitarian together as Equitarian and Keith and Rancho Pacific together as Rancho Pacific.

court erred by finding the listing agreement unenforceable because of ambiguity in the description of property; the court's finding that Rancho Pacific did not cause property to be withdrawn from the market is unsupported by substantial evidence; the court erred by not awarding a commission under the implied covenant of good faith and fair dealing; and the court erred by awarding Rancho Pacific attorney fees when it did not make a reasonable effort to mediate before filing suit. We conclude the contentions lack merit, and thus we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2002 Keith purchased a 45-acre parcel of land in an unincorporated area of San Diego County referred to as the Country Club property. Shuttleworth, a real estate broker, represented Keith in the transaction. Keith, a show horse enthusiast, operated an equestrian center on the property.

In 2003 a developer, New Urban West, asked Keith if he was interested in selling the Country Club property. Keith said he was interested, but he was concerned about finding a suitable property to which he could move his equestrian center.

On August 12, 2003, Keith entered into an option agreement (Option Agreement) with an affiliate of New Urban West, Cold Springs Land Investment, LLC (Cold Springs). Cold Springs acquired an option to purchase the Country Club property, valued at \$3,550,000, in exchange for a smaller parcel nearby on which Cold Springs had an option, referred to as the Kesting property, valued at \$1.4 million, plus cash for the difference in values. Keith intended to "build and operate a first class private commercial equestrian boarding and training facility" on the Kesting property, and Cold Springs was

to "diligently prepare, process, and obtain a master use or comparable permit to allow the operation" of an equestrian center. Cold Springs intended to include the Country Club property in a "residential village community" development. The term of the Option Agreement was three years, with two potential six-month extensions.

In late 2004 Keith contacted Shuttleworth and said "he wanted to do something with the equestrian center. He didn't want to be managing horses and riders anymore." Keith was interested in "something on a much lower scale." Shuttleworth said to Keith, "Let's sell it," referring to the Country Club property. Keith responded, "I can't quite sell it." Keith told Shuttleworth about the Option Agreement and that he may obtain the Kesting property in an exchange.

On May 3, 2005, Keith's company, Rancho Pacific, entered into a standard form Non-Residential, Residential Income and Vacant Land Listing Agreement (Listing Agreement) with Shuttleworth's company, Equitarian, for the sale of property. Paragraph 1 of the Listing Agreement defines the "Property" subject to the listing as "45+/- acres of land, currently used for an equestrian Center. (APN 235-031-02)" It is undisputed that this is the Country Club property.

The Listing Agreement also refers to the Kesting property. Paragraph 16 of the Listing Agreement, under the heading "Additional Terms," provides: "The subject property is under contract with owner to exchange the subject property for approximately 36 Acres in the new Harmony Grove Village, with New Urban West Said 36 acres includes a 22 acre equestrian Center and a contiguous 14 acre parcel with a home on it, as more fully identified as Planning Area 4 'Equestrian Ranch,' in the draft Harmony Grove

Village Specific Plan and General Plan Amendment, dated January 31, 2005."

Shuttleworth interlineated the following in paragraph 16: "Seller's contract with New Urban West provides cash to be used as follows: \$1,000,000 for improvements on new 22 acre equestrian center. Seller to retain \$1,000,000." Keith interlineated the words, "Less 1 million on contract."

Paragraph 3 of the Listing Agreement sets forth one sale price of \$6.1 million.

Paragraph 3 states: "Allocation of costs of New Urban West Equestrian Center \$4,400,000; Home contiguous to Equestrian Center on 14+/- Acres \$1,700,000."

According to Shuttleworth, the purpose of the Listing Agreement was to sell either the Country Club property or the Kesting property, depending on whether Cold Springs exercised its option. According to Keith, the purpose of the Listing Agreement was to sell his interest in the Option Agreement. The Option Agreement, however, included a nonassignment clause.

In January 2006 Shuttleworth ceased performing under the Listing Agreement. He advised Keith he was "running into a brick wall, and . . . spinning my wheels." Shuttleworth wanted to "pull the listing" because it was becoming stale and "it was to no one's benefit." He did not want to proceed until "we got closer to this thing being approved," which apparently refers to an equestrian center on the Kesting property. Keith told Shuttleworth that in the meantime he needed to lease the Country Club property because "I can't deal with it anymore."

After January 2006 Keith contacted another developer, SunCal, about the possibility of SunCal purchasing the Kesting property should Cold Springs exercise its

option. SunCal owned land near the Kesting property it intended to develop, and it expressed interest. SunCal requested documentation, and Keith referred it to New Urban West. Within a day or two, a New Urban West representative contacted Keith and "said that it would be catastrophic" if SunCal acquired the Kesting property, and "we just can't have that happen, not at this point. We've got too much invested . . . to risk it." The SunCal representative contacted Keith again a couple of days later, and said, "We went through everything, and we basically took out the . . . Kesting component." Cold Springs was concerned about competition from SunCal, and further, to quell community opposition to Cold Springs's development, it had promised that the Kesting property would include a large scale equestrian center.

In February or March 2006 Keith orally advised Shuttleworth that the Kesting property would be taken out of the Option Agreement, and in a March 15, 2006 e-mail, Keith confirmed that plan. In late March 2006 Equitarian procured a one-year lease of the Country Club property and collected a commission.

On May 2, 2006, an Amended and Restated Option Agreement was recorded, which gave Cold Springs the option to acquire the Country Club property in exchange for cash, as opposed to mixed consideration of the Kesting property and cash. The new option purchase price for the Country Club property was \$4,975,000.

The Listing Agreement expired on May 3, 2006, and it was not renewed. In February 2007 Equitarian nonetheless sent Keith an invoice for \$219,600 for a sales commission under the Listing Agreement. The invoice gave a professional courtesy

discount of 40 percent on a claimed commission of \$366,000, which is 6 percent of the \$6.1 million sales price in the Listing Agreement.

Rancho Pacific denied owing any commission. Shuttleworth was having financial difficulties, and Equitarian lowered its demand to \$125,000 on the condition it receive \$50,000 immediately. Rancho Pacific instead agreed to loan Equitarian \$58,750, and that if the Country Club property sold under the Amended and Restated Option Agreement by June 1, 2009, Equitarian could collect a \$58,750 sales commission to repay the loan. The loan is memorialized in a June 2007 promissory note, with Shuttleworth as Equitarian's personal guarantor.

In September 2008 Cold Springs opted not to purchase the Country Club property. Equitarian did not repay the loan, and in June 2009 Rancho Pacific sued Equitarian for breach of the promissory note.

Equitarian cross-complained against Rancho Pacific for breach of the Listing Agreement. The cross-complaint alleged that during the term of the Listing Agreement, the Option Agreement "was amended to remove the Kesting Property from the consideration for the purchase of the Country Club Property," and thus Equitarian's "performance of the Listing Agreement became impossible. The amendment[] prevented [Equitarian] from being able to sell the equestrian center on either the Country Club Property or the Kesting Property." The cross-complaint cited paragraph 4.A.(3) of the Listing Agreement, which provided that Equitarian was entitled to its 6 percent commission "[i]f, without Broker's prior written consent, the Property is withdrawn from sale, lease, exchange, option or other, as specified in paragraph 1, or is sold, conveyed,

leased, rented, exchanged, optioned or otherwise transferred, or made unmarketable by a voluntary act of Owner during the Listing Period."

After a bench trial, the court found in favor of Rancho Pacific on the complaint and awarded it \$71,721.49, which includes interest and a late fee. The court found against Equitarian on the cross-complaint. The court interpreted ambiguities in the Listing Agreement against Equitarian, as the drafter. The court determined the Listing Agreement was too uncertain to enforce insofar as the Kesting property is concerned, and thus its withdrawal from the Option Agreement is immaterial. Thus, the only property that was subject to the Listing Agreement was the Country Club property, and that property was never withdrawn from the Option Agreement.

Judgment was entered on December 13, 2010.² It states that costs, including attorney fees, shall be awarded to plaintiffs as the prevailing parties and added to the judgment after a motion for fees. Plaintiffs moved for attorney fees and other costs under the promissory note and the Listing Agreement, and after a hearing in March 2011 the court awarded fees of \$219,171.18 and other costs of \$19,205.34. A final judgment adding the fees and costs was entered on May 16, 2011, nunc pro tunc to the December 13, 2010, judgment.

² Equitarian does not challenge the judgment insofar as it concerns the complaint.

I

Appellate Jurisdiction Issues

A

Timeliness of Notice of Appeal

Preliminarily, we dispose of Keith's contention this court lacks jurisdiction over Equitarian because it did not timely appeal the judgment. The timely filing of a notice of appeal is a prerequisite to appellate jurisdiction. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Once the deadline expires, the appellate court has no power to entertain the appeal. (*Ibid.*)

The judgment was entered on December 13, 2000, and Keith served a notice of entry of judgment by mail to Shuttleworth and Equitarian on December 15, 2010. Thus, their notice of appeal had to be filed within 60 days of December 15, 2010. (Cal. Rules of Court,³ rule 8.104(a)(2); *Glasser v. Glasser* (1998) 64 Cal.App.4th 1004, 1010 [date of mailing commences 60-day period].)

A notice of appeal on Judicial Council of California form APP-002 was filed on January 3, 2011. The first line of the form has a space to fill in the name of the appellant, and only Shuttleworth's name was added. On June 14, 2011, an amended notice of appeal was filed to add Equitarian as an appellant. Keith argues the amended notice is untimely.

³ Further rule references are also to the California Rules of Court.

"The notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed." (Rule 8.100(a)(2).) We find *Toal v. Tardif* (2009) 178 Cal.App.4th 1208 (*Toal*), instructive. In *Toal*, the defendants, a husband and wife, were subject to a judgment. The husband signed a form notice of appeal (see rule 8.100(a)(1) [appellant or appellant's attorney must sign notice]), but he did not include either his or his wife's name as an appellant. The plaintiffs argued the wife had not appealed and the judgment against her must stand regardless of the outcome of the husband's appeal. (*Toal, supra*, at p. 1216.)

The appellate court disagreed, relying on the rule of liberal construction. The court also explained that rule 8.100(a)(1) had been construed to allow *any* person, attorney or not, who is empowered to act on an appellant's behalf to sign a notice of appeal. (*Toal, supra*, 178 Cal.App.4th at p. 1216, citing *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 853.) *Toal* states, "[W]e must conclude [the husband] was authorized to . . . act [on behalf of the wife] in the absence of a clear and satisfactory showing that such authority was lacking.'" (*Toal, supra*, at p. 1216.) The court also noted the notice clearly identified the judgment challenged on appeal, which on its face subjected both husband and wife to the same award. (*Ibid.*) Further, the court found no prejudice resulted from liberal construction because the parties argued the merits as to both appellants. (*Id.* at p. 1217.)

Toal is analogous to the instant appeal. The original notice states the appeal is from a judgment after a court trial, and on its face the judgment affects both Shuttleworth and his company, Equitarian. The attorney for both Shuttleworth and Equitarian signed

the original notice, and he had authority to act for both parties. Construing the original notice liberally, we conclude that both Shuttleworth and Equitarian have appealed. Further, Keith makes no claim of prejudice to overcome the rule of liberal construction. (See *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 967.)

B

Challenge to Award of Attorney Fees

We also disagree with Rancho Pacific's contention we lack jurisdiction to consider Equitarian's challenge to the award of attorney fees to Rancho Pacific because the fee award was a separately appealable order from which Equitarian did not appeal. "[W]here the final judgment is *silent* as to attorney fees and costs (determines *neither* entitlement nor amount), the failure to separately appeal a postjudgment order awarding costs and fees is a *jurisdictional bar* to appellate review of the fees and costs award." (*Eisenberg, et al.*, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 2:156.3, pp. 2-74 to 2-75 (*Eisenberg*), citing *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46 (*Krug*)). Rancho Pacific relies on the *Krug* opinion.

The December 13, 2010 judgment on appeal, however, provides: "Costs, including attorneys' fees *shall be awarded to . . . Keith and Rancho Pacific . . . as the prevailing parties*, and added to this judgment upon the orderly filing of a memorandum of costs and motion for attorneys fees." (Italics added.) "Where a judgment awards *unspecified* costs and attorney fees and provides for *later determination of the amount*, the failure to file a separate appeal from the subsequent order fixing the amount of costs

and fees does not preclude review of the order on appeal from the underlying judgment: '[W]hen a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal *subsumes* any later order setting the amounts of the award.' " (*Eisenberg, supra*, ¶ 2:156.2, p. 2-73, citing *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998; see also *R. P. Richards, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 158.) "In effect, this means the notice of appeal from the final judgment encompasses the subsequent order fixing the amount of fees and costs. A separate appeal is *permitted*, but *not required*, for appellate review of the postjudgment order." (*Eisenberg, supra*, ¶ 2:156.2, p. 2-73.) We address the merits of the attorney fees issue below.

II

Interpretation of Listing Agreement

A

Overview of Applicable Law

A real estate broker's commission agreement is invalid under the statute of frauds unless the agreement "or some note or memorandum thereof" is in writing. (Civ. Code, § 1624, subd. (a).) "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. [Citation.]" " (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635,

647.) "It is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.)

When a contract is ambiguous on its face, however, parol evidence is admissible to interpret it. (*Bill Signs Trucking, LLC v. Signs Family Limited Partnership* (2007) 157 Cal.App.4th 1515, 1521.) Here, the trial was based largely on parol evidence.

"It is elementary that in order to earn a commission, a broker must render the service which is the sole consideration for the promise of compensation." (*Frederick v. Curtright* (1955) 137 Cal.App.2d 610, 615.) "An agreement cannot be specifically enforced unless the terms are 'sufficiently certain to make the precise act which is to be done clearly ascertainable.' [Citation.] It must not only contain all the material terms but also express each in a reasonably definite manner. [Citations.] Similarly, to enforce a contract at law, the offer must be sufficiently definite or must call for such definite terms in the acceptance, that the performance required is reasonably certain." (*Spellman v. Dixon* (1967) 256 Cal.App.2d 1, 3.) In the event of ambiguity, a "contract prepared by a broker that is claimed to give an exclusive right to sell has been construed narrowly as against the broker." (*Coleman v. Mora* (1968) 263 Cal.App.2d 137, 144.) "[W]here a listing agreement is prepared by a broker, as in this case, any uncertainty in the provisions therein relating to the commission should be construed in favor of the seller." (*Matthews v. Starritt* (1967) 252 Cal.App.2d 884, 887.)

"When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld if it is supported by

substantial evidence." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club Inc.* (2003) 109 Cal.App.4th 944, 956; *Burch v. Premier Homes, LLC* (2011) 199 Cal.App.4th 730, 741 (*Burch*)). "As long as the trial court's order was supported by substantial evidence in the record, any evidentiary conflict must be resolved in favor of the prevailing party . . . and any reasonable interpretation of the writing by the trial court will be upheld." (*Id.* at p. 742.) " [T]he appellate court must defer to a trial court's assessment of the extrinsic evidence, as it defers to other factual determinations.' " (*Id.* at p. 744.)

B

Analysis

1

Equitarian contends the trial court erred as a matter of law by finding the Listing Agreement unenforceable as to the Kesting property because of an ambiguity in the property description. Equitarian cites *Goodrich v. Turney* (1919) 44 Cal.App. 516, which explains: " 'Much greater liberality is allowed in construing and curing defective descriptions in brokers' contracts than in a deed of grant of land, for, so far as the statute of frauds is concerned, the terms of the employment are the essential part, and such contracts will not be declared void merely because of a defect, uncertainty or ambiguity in the description of the property to be sold or exchanged when such defect can be cured by the allegation or proof of extrinsic facts and circumstances.' " (*Id.* at pp. 521-522; *Maze v. Gordon* (1892) 96 Cal. 61, 65 ["contract to employ a broker need not describe the lands specifically, if the terms of the employment can be made definite without it"]);

Proulx v. Sacramento Valley Land Co. (1912) 19 Cal.App. 529, 534 ["description of land sought to be sold under a broker's contract can be cured, but not created by parol evidence"]; *Babcock v. Houston* (1973) 33 Cal.App.3d 858, 864.)

We find no error of law. In our view, the ambiguity in the Listing Agreement is not in the identity of property. It is undisputed that the Listing Agreement refers to both the Country Club property and the Kesting property. In fact, the description of the Kesting property is thorough, describing a specific plan and general plan amendment pertaining to it.

Rather, the Listing Agreement is ambiguous as to the actual terms of Equitarian's *employment*, since it designates the Country Club property as the "Property" that is the subject of the listing, but also contains references to the Kesting property without a cogent explanation. After considering the parties' parol evidence the court determined "the Listing Agreement as to 'the additional terms' [meaning the Kesting property] is too vague, ambiguous and uncertain to be enforced in any regard." Contrary to Equitarian's assertion, this does not mean the ambiguity was in the description of property and not in the terms of employment. As discussed below, Equitarian did not ask the court for any clarification of its statement of decision, and thus we make all presumptions in favor of the court's ruling.

2

The issue is whether the parol evidence sufficiently supports the court's ruling, and we conclude it does. Shuttleworth had difficulty explaining the nature of the interest to be transferred under the Listing Agreement. He testified that Keith wanted him to find a

buyer for either the Country Club property or the Kesting property. Shuttleworth denied that he was "selling an option on an option" or a "position." The following exchange, however, took place between Rancho Pacific's attorney and Shuttleworth:

"Q. Well, isn't that—all you could do is try to sell [Rancho Pacific's] beneficial interest in the [O]ption [A]greement?

"A. Not—no. The—the idea of having the 45 acres [the Country Club property] there was if New Urban West defaulted on the contract.

"Q. Pardon?

"A. Would you like me to repeat that?

"Q. Yes, please.

"A. Okay. The reason the 45 acres was there is that if New Urban West defaulted on the contract and now Kesting was gone, New Urban West was gone, then—the listing would then be for the marketing of the 45 acres. But there was never that occasion.

"Q. So is it your testimony that you were not trying to sell the beneficial interest that . . . Keith had in the option agreements?

"A. The option agreement on what?

"Q. There was only one [O]ption [A]greement at the time?

"A. Well, I—yeah. The Kesting property. . . .

"Q. As—when you entered into the [L]isting [A]greement, wasn't it your intent that all you could do was sell . . . Keith's beneficial interest in the [O]ption [A]greement—

"A. Yeah. I—I think—

"Q. —or equitable interest in the [O]ption [A]greement?

"A. And don't you believe—it was actually a purchase agreement, but his—whatever his—yes. Whatever his beneficial equity was in

the contract—we'll call it that—that was what was being marketed for—on—

"Q. And you—

"A. —on the Kesting property for the creation of an equestrian center. [¶] Do you want me to repeat that?

"Q. I just want to know if you agree that when you entered into the [L]isting [A]greement—

"A. Yes.

"Q: —you understood that and what you were trying to do was sell . . . Keith's equitable interests, beneficial interests in the [O]ption [A]greement. That's all he had at the time; is that correct?

"A. Yeah. But I think it was a purchase agreement. But, yes, that's correct."

The court asked Shuttleworth whether a "beneficial equity" in the Kesting property was "an option" or a "nonoption." He replied, "[W]ell, in my mind, it is—a nontitled ownership interest in property." He added that it "could be a leasehold estate—would be a beneficial equity, I think." He also testified he could sell the Kesting property with the contingency that Keith obtain title to it. Shuttleworth testified that if a potential purchaser asked when escrow could close, he would say, "We're not sure."

Shuttleworth also testified that while the Listing Agreement states the only transaction authorized was "SELL," that is inaccurate. He said he should also have checked the boxes on the form for other types of transactions, including "OPTION," "EXCHANGE," and "LEASE," because that would have been "more accurate." He claimed that the lease of the Country Club property was a covered transaction, even though the Listing Agreement specifies only "SELL."

In paragraph 16 of the Listing Agreement, which refers to additional terms as to the Kesting property, Shuttleworth wrote: "Seller's contract with New Urban West [presumably the Option Agreement] provides cash to be used as follows: \$1,000,000 for improvements on new 22 acre equestrian center. Seller to retain \$1,000,000." Keith wrote in, "Less 1 million on contract."

Shuttleworth could not satisfactorily explain any of the language. To the contrary, he testified the interlineations were inaccurate. He stated, "[T]he correct number is not two million. It's two million one fifty." He added, "It should be a million one fifty for improvements and seller to retain a million dollars, which was an arbitrary number that Mr. Keith wanted to retain." He was asked, "it's your testimony now that the seller's contract doesn't provide for that provision?" He responded, "[O]f course it doesn't. It was—it's not in that contract. It's an agreement that is part of the listing on how funds were to be used that were in the contract."

Keith testified that Shuttleworth made his interlineations in paragraph 16 of the Listing Agreement without even having a copy of the Option Agreement. Equitarian's own expert, Charles Simmons, testified the interlineations in paragraph 16 are indecipherable. Simmons testified in deposition that the Listing Agreement would be "null and void" if the Option Agreement was not assignable. At the time of his deposition, however, Simmons had not seen the portion of the Option Agreement containing the nonassignment clause. When shown the clause at trial, he attempted to change his testimony.

Keith testified the Listing Agreement was "a hybrid of sorts" because of the Option Agreement. His intent was to sell his interest in the Option Agreement for \$6.1 million, with the buyer stepping into his shoes. A buyer would supposedly take over the existing equestrian center on the Country Club property, and later move to the Kesting property if Cold Springs exercised its option, an exchange of properties took place, and Keith built out a new equestrian center. If the contingencies did not occur, the buyer would remain on the Country Club property. Again, however, the Option Agreement contained a nonassignment clause.

Keith testified he and Shuttleworth discussed the difficulty of trying to "sell an option on an option." Keith told Shuttleworth that "if he didn't mind spinning his wheels, [the listing] was fine with me." According to Keith, Shuttleworth "was the one that wanted to kind of take this thing out to market even though we both knew that it was going to be very difficult." Equitarian concedes the "practical aspects of such a transfer were complicated and somewhat ambiguous."

Rancho Pacific's expert, Richard Snyder, testified Shuttleworth's deposition testimony showed he did not understand the Option Agreement or the actual subject of the Listing Agreement. Snyder added, "In my opinion, the ability for Mr. Shuttleworth to be both effective and have the ability to market the property was limited and . . . made ineffective by his inability to understand the effect of the option on the subject of his listing."

In its appellate briefing, Equitarian takes conflicting positions. Equitarian asserts a "buyer would step into the shoes of Rancho Pacific under the original Option

Agreement," and, "It was understood by . . . Shuttleworth that Equitarian was *hired to sell Rancho Pacific's interest in the Option Agreement.*" (Italics added.) Equitarian also asserts, however, that the Option Agreement was irrelevant to the terms of its employment under the Listing Agreement. Equitarian submits, "It is irrelevant whether [Keith], owner of the subject property [Country Club property], could not assign his rights under the Option Agreement, because it is the principal/owner's responsibility to deliver marketable title." Equitarian also asserts the "true issue is whether a buyer could enter into a purchase agreement for the Country Club Property, subject to the outcome of the Option Agreement."

We conclude substantial evidence supports the court's ruling. The court reasonably found the parol evidence did not rectify ambiguities in the terms of Equitarian's employment insofar as the Kesting property is concerned. Indeed, Shuttleworth's testimony only confounded the matter, and Equitarian's own expert called paragraph 16 of the Listing Agreement, pertaining to the Kesting property, indecipherable. Further, he characterized the listing as null and void because the Kesting property was encumbered with the Option Agreement. The court properly construed the ambiguity against Equitarian as the drafting party.

Equitarian asserts the Listing Agreement cannot be ambiguous on the terms of employment for the following reason: "The California Association of Realtors listing agreement that was used in the subject transaction is a litigation-tested document. It has been drafted and re-drafted over many years in order to remove any ambiguities that may have existed, and provides only enough space for a broker to give a brief description of

the subject property." This is not, however, a routine situation in which a form listing agreement pertains to a single property. Shuttleworth inserted the ambiguities into the Listing Agreement; the deal he wrote up was essentially nonsensical.

Equitarian also claims Rancho Pacific's appellate brief does not raise any issue as to ambiguity in the terms of employment. The brief, however, states "Appellants conceded that they were not sure exactly what they were attempting to sell under the Listing Agreement." We construe this to pertain to the nature of Equitarian's task rather than a deficiency in identifying the Kesting property. Also, Rancho Pacific cites *Matthews v. Starritt* (1967) 252 Cal.App.2d 884, 887, for the proposition that "where a listing agreement is prepared by a broker, as in this case, any uncertainty in the provisions therein *relating to the commission* should be construed in favor of the seller." (Italics added.) The terms of employment relate to the commission. Moreover, regardless of positions taken in the respondent's brief, the appellant has the burden of showing reversible error.⁴

⁴ It also appears that Equitarian did not establish the element of causation. We asked the parties for supplemental briefing on whether Shuttleworth learned the Kesting property would be withdrawn from the Option Agreement before or after he stopped marketing the Listing Agreement in January 2006. Shuttleworth claims he learned of the new deal between Rancho Pacific and Cold Springs in "late January or February 2006, during several conversations with Bryan Keith." His citations to the record, however, do not mention January. Shuttleworth testified, "So I think I found out in, like, February, March 2006." Additionally, the evidence indicates New Urban West, and not Rancho Pacific, pulled the Kesting property from the Option Agreement to avoid a competitor's purchase of it.

Additionally, Equitarian challenges the sufficiency of the evidence to support the court's finding that Rancho Pacific never withdrew the Country Club property from sale or made it unmarketable. Equitarian asserts the court "ignored overwhelming evidence that the exchange of the [properties] was a significant part of the Listing Agreement."

The evidence amply supports the court's finding. It is true that with only the Country Club property being listed, Cold Springs' exercise of its option to purchase that property would have left Equitarian with nothing to sell. The exchange element is irrelevant, however, because substantial evidence supports the court's finding that the terms of the Listing Agreement were fatally ambiguous as to the Kesting property. Thus, we view the Listing Agreement as only pertaining to the Country Club property, and during the listing period that property, with its equestrian center, remained just as marketable as it ever was—given the encumbrance of the Option Agreement.

The withdrawal of the Kesting property during the listing period did not make the Country Club property unmarketable. Equitarian did collect a commission for leasing the Country Club property. Further, Equitarian could have continued to market the Country Club property for sale, contingent on Cold Springs opting not to purchase the property, which is what occurred. Equitarian itself argues that a potential buyer of the Country Club property "may have to wait for the original option period to expire in August 2006, and continue to wait for Cold Springs to exercise all of its extensions under the Option Agreement before the transaction could close escrow," but "this transaction could be completed if the correct buyer were found." Equitarian, however, quit marketing the

property in January 2006 even though the Listing Agreement did not expire until May 2006.

4

Equitarian characterizes the court's statement of decision as deficient. Equitarian faults the statement for not including "any opinion regarding the clarity of the terms of employment and compensation set forth in the Listing Agreement," and for not discussing "parol evidence with regard to the property description set forth in the Listing Agreement."

After a bench trial, the "court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." "The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision." (Code Civ. Proc., § 632.)

A " 'judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.' [Citation.] Parties wishing to avoid inferences in favor of the judgment must obtain a statement of decision under Code of Civil Procedure sections 632 and 634." (*Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 551.)⁵

⁵ Code of Civil Procedure section 634 provides: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court . . . prior to entry of judgment . . . it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue."

In *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, the California Supreme Court held the failure to bring deficiencies in a statement of decision to the trial court's attention constitutes waiver. (*Id.* at p. 1132.) The court explained the "clear implication of [Code of Civil Procedure section 634], of course, is that if a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment. Furthermore, [Code of Civil Procedure] section 634 clearly refers to a party's need to point out deficiencies in the trial court's statement of decision as a condition of avoiding such implied findings, rather than merely to request such a statement initially as provided in [Code of Civil Procedure] section 632." (*Arceneaux, supra*, at pp. 1133-1134.)

Equitarian concedes it did not bring the claimed deficiencies in the statement of decision to the trial court's attention. Thus, it has waived appellate review of the matter, and we imply findings in support of the judgment. We reject Equitarian's cursory assertion, unsupported by any citation of authority, that it was excused from challenging the statement of decision in the trial court on the ground of futility.

III

Implied Covenant of Good Faith and Fair Dealing

Additionally, Equitarian contends the court erred by not awarding it a commission based on Rancho Pacific's breach of the implied covenant of good faith and fair dealing. "The law implies in every contract . . . a covenant of good faith and fair dealing. "The implied promise requires each contracting party to refrain from doing anything to injure

the right of the other to receive the agreement's benefits.' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720.)

Equitarian cites paragraph 8 of the Listing Agreement, which provides in part: "[O]wner agrees to consider offers presented by Broker, and to act in good faith toward accomplishing the transfer of the Property by, among other things, making the Property available for showing at reasonable times and referring to Broker all inquiries of any party interested in the Property." Equitarian complains that Keith directly dealt with two parties, including SunCal, in an effort to sell his potential interest in the Kesting property, without referring the parties to Equitarian.

As discussed, however, substantial evidence supports the court's ruling that the Kesting property was not the subject of the Listing Agreement. Thus, any dealings by Keith on that property are irrelevant. Further, Equitarian did not establish any breach, because Keith testified he did mention the parties to Shuttleworth, and if either had made an offer he would have gotten Equitarian involved.

IV

Attorney Fees

A

Trial

Equitarian challenges the legal basis for the award of attorney fees to Rancho Pacific. This is a question of law we review independently. (*Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal.App.4th 373, 378.) We find no error.

"California follows the 'American rule,' under which each party to a lawsuit ordinarily must pay his or her own attorney fees." (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 516.) Code of Civil Procedure section 1021, which codifies the rule, provides that the measure and mode of attorney compensation are left to the agreement of the parties except as fees are allowed by statute. "Although Code of Civil Procedure section 1021 gives individuals a rather broad right to 'contract out' of the American rule by executing such an agreement, these arrangements are subject to the restrictions and conditions of [Civil Code] section 1717 in cases to which that provision applies." (*Trope v. Katz* (1995) 11 Cal.4th 274, 279.)

Civil Code section 1717, subdivision (a) provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Equitarian asserts the fee award violates paragraph 19.A. of the Listing Agreement, which provides: "MEDIATION: Owner and Broker agree to mediate any dispute or claim arising between them out of this agreement, or any resulting transaction, before resorting to arbitration or court action. . . . If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then

that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action."

Equitarian complains that Rancho Pacific did not attempt mediation before filing its complaint. The complaint, however, was on the promissory note, which like the Listing Agreement, contains an attorney fees clause. The promissory note does not require mediation before the commencement of litigation. It was up to Equitarian to satisfy paragraph 19.A. of the Listing Agreement before filing the cross-complaint if it intended to seek attorney fees. A mediation was held in October 2009, before Equitarian filed its cross-complaint in April 2010.

Equitarian argues paragraph 19.A. of the Listing Agreement applies to the complaint on the promissory note because it arose from the Listing Agreement. Equitarian, however, does not cite the appellate record to show it raised the issue at the trial court. It makes a reference to the hearing, but gives no citation, and in any event, the record does not include the reporter's transcript from the hearing. Further, the record does not include any memorandum of points and authorities by Equitarian in opposition to the fee motion. The appendix includes declarations by Shuttleworth and his attorney that claim paragraph 19.A. of the Listing Agreement is applicable, but they do not argue the provision is applicable because the complaint on the promissory note arises from the Listing Agreement.

We deem the issue forfeited. Generally, a party forfeits review of a theory presented for the first time on appeal. "[F]orfeiture is the 'failure to make the timely assertion of a right.'" (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 521, fn. 3.) " In

order to preserve an issue for appeal, a party ordinarily must raise the objection in the trial court. [Citation.] "The rule that contentions not raised in the trial court will not be considered on appeal is founded on considerations of fairness to the court and opposing party, and on the practical need for orderly and efficient administration of the law." ' ' "*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799-800.)

Even on the merits, however, we would find against Equitarian. We are satisfied that Rancho Pacific's complaint for breach of the promissory note is not an action under the Listing Agreement. Moreover, Equitarian does not appeal the judgment on the complaint, and thus it cannot appeal the award of attorney fees on the complaint. The award does not apportion fees between those incurred on the complaint and the cross-complaint, and thus Equitarian could obtain no relief on appeal.

B

Appeal

Keith and Rancho Pacific seek attorney fees on appeal. It is established that when a party is entitled to attorney fees, they are available for services at trial and on appeal. (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) Keith and Rancho Pacific are the prevailing parties on appeal, and thus they are entitled to contractual attorney fees. "Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees." (*Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 498.)

DISPOSITION

The judgment is affirmed. Keith and Rancho Pacific are also entitled to costs on appeal.

McCONNELL, P. J.

I CONCUR:

HALLER, J.

I CONCUR IN THE JUDGMENT:

McINTYRE, J.