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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WEIKEL RANCHO BERNARDO, L.P.,

Plaintiff and Appellant,

v.

TIMOTHY R. GAROFOLO, DDS, INC.,

Defendants and Respondents.

D059199

(Super. Ct. No. 37-2009-88704)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

At all times relevant in this appeal, Weikel Rancho Bernardo, L.P. (landlord) owned a shopping center managed by Boardwalk Property Management (Boardwalk). James Dunny (Dr. Dunny) and Irene Dunny (together, the Dunnys) signed a 10-year lease in April 1998 to operate a dental office in one of the spaces at the shopping center (the premises). Because a restaurant had been operating in the premises, the Dunnys made substantial alterations to them with the permission of landlord.

In April 2007, Timothy R. Garofolo (Dr. Garofolo) and Timothy R. Garofolo, DDS, Inc. (tenant), joined and later, on Dr. Dunny's retirement, purchased Dr. Dunny's dental practice and executed an assignment of lease.¹ Dr. Garofolo initially intended to stay in the premises and execute a new lease. However, when Dr. Garofolo learned the rent under a new lease was going to be substantially higher, Dr. Garofolo decided to move his dental practice when the lease term on the premises expired.

Thirty to 60 days prior to the expiration of the lease, Dr. Garofolo notified landlord he would be vacating the premises, which he in fact did in late May 2008 when he surrendered possession of the premises to landlord.

At issue in this appeal is whether landlord made a timely election under section 9.4 of the lease. This provision gave landlord the option to take ownership of any alterations made by tenant or to require tenant to remove them. After a short bench trial, the trial court found landlord failed to timely exercise this option under section 9.4. The trial court ordered landlord to return tenant's security deposit, less \$2,500 to repair damages caused by tenant when dental equipment was removed from the premises.

Landlord argues the trial court committed two errors of law compelling reversal. First, it contends the trial court improperly construed section 9.4 when it found the meaning of the word "expiration" in section 9.4 did not include "termination" as also used in that provision. Second, it contends the trial court erred when it failed to find the

¹ Because Dr. Garofolo and the Dunnys were dismissed from the complaint, neither is a party in this appeal.

conduct of the parties satisfied "several bases to extend the deadline to give notice" under section 9.4.

As we explain, we independently conclude the terms "expiration" and "termination" in section 9.4 have distinct legal meanings and apply to independent events and deadlines. We further conclude the trial court properly found that landlord failed to make a timely election under section 9.4 and that tenant had no duty to restore the premises to their "original" condition prior to the execution of the lease in 1998.

Judgment affirmed.

FACTUAL AND PROCEDURAL OVERVIEW²

"Plaintiff [e.g., landlord] owns real property, specifically a storefront located within the shopping center [known as the premises]. Boardwalk . . . is the property manager for the premises, and in that capacity maintains, manages, and leases the premises on behalf of the Landlord. On April 15, 1998, Boardwalk leased the premises, which had been operating as a restaurant, to the Dunnys, who removed the restaurant fixtures of the previous tenant and thereafter modified the space to accommodate their dental practice.

"Defendant Dr. Garofolo, a new dentist, joined Dr. Dunny's practice and later, upon Dr. Dunny's retirement, agreed to assume the lease from the Dunnys pursuant to a lease assignment dated April, 2007. The Dunny/Garofolo ten year lease expired on

² This summary is derived from the statement of decision (SOD).

June 30, 1998. Thirty to sixty days prior to the expiration of the lease, Dr. Garofolo notified the Landlord that he would be vacating the premises. In late May, 2008, Dr. Garofolo vacated the premises and surrendered possession of the premises to the Landlord.

"The relevant portions of the lease provide[] as follows: [¶] 9.4 Any alterations made shall, unless LANDLORD elects otherwise, remain on, become a part of, and be surrendered with the PREMISES on the expiration or termination of the term, except that LANDLORD can elect within thirty (30) days before the expiration of the term, or within thirty (30) days after termination of the term, to require TENANT to remove any alterations that TENANT has made to the PREMISES. If LANDLORD so elects, TENANT, at its cost, shall restore the PREMISES to the condition designated by the LANDLORD in its election before the last day of the term, or within thirty (30) days after notice of election is given, whichever is later. The foregoing provision shall not apply to any trade fixtures installed by TENANT or any subtenant which are capable of being removed by TENANT, or any subtenant without substantial and irreparable damage to the PREMISES, and which TENANT, or any subtenant, promptly repairs, at its sole cost and expense, all damage to the remaining improvements on the PREMISES caused by such removal, and provided further, that the value of the improvements remaining on the PREMISES following such removal, are substantially equal to what the value of the improvements existing on the PREMISES at the time of the execution of this Lease would have been, if the same had remained on the PREMISES at the time of

termination of this Lease, assuming no alterations and additions thereto, and only normal wear and tear since the date of the execution of this Lease, and, provided further that TENANT'S right to remove such alterations shall be suspended at any time TENANT is in default under this Lease.

"The controversy herein involves whether timely election was made by the Landlord according to section 9.4 of the lease in making a demand on defendant on August 14, 2008, to remove tenant improvements and restore the leasehold to its prior use either as a restaurant or to a 'warm shell' condition.

"Plaintiff sues for breach of contract on the failure to restore the premises, and trespass for entry made by defendant in an attempt to remove his fixtures after the lease had expired.

"Defendant cross complains for breach of contract in plaintiff's wrongful retention of his security deposit and for conversion of his dental fixtures and equipment. Defendant concedes that if the Court finds no election was made pursuant to section 9.4 of the lease that the Landlord would then own the alterations to the space and defendant's second cause of action would be rendered moot.

"Section 9.4 of the Lease

"Ambiguity in the lease should be resolved against the party who drafted it, in this case, the Landlord/Boardwalk.

"The contract should be interpreted to give every part of the written contract meaning. The Court finds there would be no reason to include a separate discussion of

the terms 'expiration' and 'termination' in section 9.4 of the lease unless the parties intended them to have different meanings.

" 'Expiration' within the context of this lease means the end of the duration of the lease term while 'termination' requires the action of one of the parties to cause the end of the lease prior to its expiration.

"Plaintiff had only the time from thirty days prior to the expiration of the lease to the date of expiration, that is, until June 30, 2008, to make its formal election in regard to restoring the premises. It failed to make a timely election.

"The fact that prior to expiration of the lease, plaintiff negotiated with defendant to extend the period for election to one year, so that the Landlord could attempt to re-let the premises as a dental office does not change the result. (Proposals in this regard, Exhibits 2 and 3, drafted by plaintiffs, reflect the fact that plaintiff understood the lease expired on June 30, 2008.)

"The June 30 expiration date passed without written modification or extension. The time for election was never extended by defendant or his attorney in writing prior to its expiration.

"The Court finds that the extension contained in Exhibit[] 15 was solely to provide plaintiff with time to execute the Termination and Surrender Agreement. The agreement was never signed.

"Plaintiff sent an email to defendant, Exhibit 16, proposing that the time for election contained in section 9.4 be 'tolled.' Plaintiff's unilateral proposal to toll the time

for election made on July 30 is ineffective in this regard. No agreement was reached between the Landlord and tenant to extend the deadline except by mutual mistake. By the time this discussion occurred, the deadline had already passed. After June 30, there was nothing to extend. The parties' mutual mistake does not change the deadline from June 30 to July 30 or August 14.

"Even assuming the election date to have been July 30, since the lease contained a written modifications clause requiring all modifications to the lease be committed to writing, there could be no verbal modification or extension of the election deadline nor was there or could there be an effective modification by conduct. No agreement was reached between the landlord and tenant to extend the deadline to August 14. The Landlord's attempt to exercise its election was untimely and ineffective.

"The Court finds Mr. Josselson's testimony to be credible. Mr. [Ronald] Bamberger [e.g., the primary representative of Boardwalk] represented the date of election to be July 30. Mr. Josselson [e.g., then counsel for Dr. Garofolo] testified that although he did not contest Mr. Bamberger's representation that he (Bamberger) had until July 30 to exercise his election on behalf of the Landlord, he never intended to concede that point. Mr. Josselson believed Mr. Bamberger. Mr. Bamberger was wrong. The election date passed and election therefore was not an option for the Landlord. It is clear to the Court that the property manager wanted to have more time to decide whether to keep the tenant improvements or to have them removed. However, there was no written agreement to this extension. Plaintiff argues that although he misled the defendant as to

the term of his election and defendant accepted his mistaken assessment, that this constituted acceptance of an extension. This is not the case.

"Thereafter, on August 11, the Landlord contacted Dr. Garofolo directly by email and in that email attempted to exercise his election, stating, 'The bottom line, is given the difficulty of the process, we are inclined to have you restore the premises to its prior use' (as a **new** restaurant) because 'your lawyer is making this process too much work for the landlord.' (Exhibits 19-21[.])

"Then, on August 13, after specifically directing defendant to remove his fixtures, Boardwalk/Bamberger stepped in to aggressively prevent defendant from completing this removal by ejecting defendant's licensed contractor and changing the locks on the suite. The Court finds that Dr. Garofolo's agent, Mr. King, had the permission, if not the mandate of the Landlord to enter the premises to remove defendant's fixtures. His entry did not constitute a trespass. The Court rejects Mr. Bamberger's testimony that he ejected the contractor because the contractor did not have insurance. The Court finds as a matter of fact that Mr. Bamberger could not or would not decide whether he wanted the tenant improvements to go or to stay and so he prevented their removal to give himself additional time to decide. Mr. Bamberger knew the contractor could not restore the premises because he had refused to produce the plans that would enable the contractor to do so. No offer to produce the plans was made until March 2009. Even if the parties effectively agreed to extend the deadline under section 9.4, and that plaintiff exercised its option to have the space restored to its previous use, the Court finds the lease is

ambiguous at best as to what was required of defendant in terms of the extent of restoration efforts he was required to perform. The Court rejects plaintiff's contention that defendant was required to build a new restaurant at plaintiff's election when the lease expired. There was no agreement between the parties that Dr. Garofolo would return the leasehold to a 'warm shell[.]'

"In an email dated August 14, 2008, (Exhibit 20) from Ron Bamberger to Dr. Garofolo, the landlord, through its agent, stated, 'Please be advised that the Landlord is requiring you to restore the Premises to the condition it was prior to the lease.' Prior to the lease, the premises [were] occupied by a restaurant. Earlier, Mr. Bamberger advised Dr. Garofolo's attorney to advise Dr. Garofolo to remove his equipment. However, when Dr. Garofolo's licensed contractor entered the premises to remove the dentist's equipment, he was ejected by the landlord, not for trespass but over an alleged concern over 'insurance[.]' The Court finds that the landlord was not concerned about insurance but over the likelihood that valuable dental equipment was being removed. As late as September 10, the landlord was equivocal on what, if any, actions Dr. Garofolo would be required to make other than to claim restoration would cost \$30,000. Dr. Garofolo reasonably responded that he was confused by the contradictory instructions he had been given by the landlord. Plaintiff could have written the lease to be specific as to what, if any, restoration was required. In the absence of any specificity, to require defendant to build a new restaurant would result in a windfall to plaintiff. Defendant had no way of knowing whether he was required to 'restore' anything, especially in the absence of plans

to give him direction. Once he had excluded the contractor, Mr. Bamberger wrote to Dr. Garofolo demanding \$11,000.00 in holdover rent for defendant's act of permitting the contractor to enter the leasehold.

"Defendant was not a holdover tenant or a tenant at sufferance. The plaintiff ordered defendant to remove his property from the premises and then prevented him from doing so.

"As a result of his efforts to remove defendant's equipment, defendant's contractor, Mr. King, damaged the premises by removing cabinets, leaving holes in the walls, and leaving electrical wiring exposed, in a condition in which it could not be rented to new tenants. Plaintiff will be required to spend significant sums to repair damage to the premises in the amount of \$2,500.00. Defendant is required to pay for these repairs.

"In the absence of agreement to the contrary[] or timely assertion of its rights under the lease, plaintiff, in effect, chose to leave the improvements in place. Defendant is required to pay the \$2,500.00 to restore the premises to good, rentable condition by remediating the damage his contractor caused.

"No timely election was made under provision 9.4 of the lease. Because there was no timely election, defendant was under no obligation to restore the premises to its previous use as a restaurant or to build out a 'warm shell.'

"The Court finds in favor of the defense on the complaint. On the cross complaint, defendant is entitled to recover his security deposit less the \$2,500.00 in damage to the leasehold. Defendant's second cause of action for conversion is moot."

DISCUSSION

I

Notice of Election

A. Meaning of the Words "Expiration" and "Termination"

1. Governing Law

"We are guided by the well-settled rules of interpretation of a contract, endeavoring to effectuate the mutual intent of the parties as it existed at the time of contracting insofar as it is ascertainable and lawful. [Citations.]

" "As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit. [Citations.] A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach' [citation]." If possible, the court should give effect to every provision. [Citations.] An interpretation which renders part of the instrument to be surplusage should be avoided. [Citations.]

" "When an instrument is susceptible to two interpretations, the court should give the construction that will make the instrument lawful, operative, definite, reasonable and capable of being carried into effect and avoid an interpretation which will make the instrument extraordinary, harsh, unjust, inequitable or which would result in absurdity. [Citations.]" [Citation.]' [Citation.]" (*National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279; see also Civ. Code, § 1636 ["A contract

must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."].)

An interpretation of a contract or other written instrument is a question of law subject to our independent review if there is no extrinsic evidence thereon or if the evidence is without conflict and is not susceptible of conflicting inferences.

(*Avioninteriors Spa v. World Airways, Inc.* (1986) 181 Cal.App.3d 908, 915.) "Thus, where extrinsic evidence has been properly admitted, and the evidence is in conflict, any reasonable construction by the lower court will be upheld. [Citation.]" (*Ibid.*; see also *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, fn. 2 [where the evidence is conflicting, a trial court's construction of a contract is binding].)

With these principles in mind, we turn to section 9.4 of the lease.

2. *Section 9.4*

As noted *ante*, section 9.4 provides that any alterations made by tenant "shall, unless LANDLORD elects otherwise, remain on, become part of, and be surrendered with the PREMISES on the expiration *or* termination of the term" (Italics added.) Section 9.4 provides further guidance regarding when the landlord must give notice of election: "LANDLORD can elect within thirty (30) days *before* the *expiration* of the term, *or* within thirty (30) days *after termination* of the term, to require TENANT to remove any alterations that TENANT has made to the PREMISES." (Italics added.) The lease does not define the terms "expiration" or "termination."

3. *Analysis*

The key issue in this appeal is whether landlord, through Boardwalk, timely exercised its notice of election under section 9.4 of the lease, thus requiring tenant to restore the premises as provided in the lease. As landlord notes, this issue, in turn, depends on landlord's deadline to make such an election under section 9.4.

Landlord argues it was entitled under section 9.4 to give notice of election "up to [30] days after the Lease term ended (i.e., July 30 or 31, 2008)." Specifically, it argues that it could give notice of election *either* 30 days before expiration or 30 days after termination because "as a matter of law, 'termination' includes 'expiration' " and when it gave notice the lease had "expired."

Initially, we note that landlord has not challenged the trial court's definition of the word "expiration." The trial court ruled the word "expiration" in section 9.4 means the end of the duration of the lease term. The issue instead is whether the word "termination" in section 9.4 includes "expiration," as landlord contends.

If, as landlord argues, the term "termination" includes "expiration" for purposes of section 9.4, then the words "expiration" and "or" in the phrase "expiration or termination" in the first sentence of this provision would become mere surplusage, a result we seek to avoid if possible when construing the language of a contract. (See *National City Police Officers' Assn. v. City of National City, supra*, 87 Cal.App.4th at p. 1279.) The same is true with respect to the phrase "thirty (30) days before expiration" appearing later in that

same sentence: if "expiration" included "termination" as landlord argues, then there would be no reason to include that phrase in section 9.4 because landlord, under its reasoning, would always have "thirty (30) days *after* termination[/expiration]" to exercise its election.

In addition, construing the word "expiration" to be identical to the word "termination" violates the principle that "[w]hen two words are used in a contract, the rule of construction is that the words have different meanings." (*Queen Villas Homeowners Assn. v. TCB Property Management* (2007) 149 Cal.App.4th 1, 9.)

We thus independently conclude from the words themselves that "expiration" cannot include "termination" for purposes of section 9.4. Because the lease in the instant case "expired" by its own terms, and because landlord does not dispute the definition of "expiration" adopted by the trial court, we conclude landlord was required to exercise its election under section 9.4 of the lease 30 days *before* the end of the duration of the lease term.

Our conclusion is further supported by other provisions in the lease. (See Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."].) On the one hand, section 2 of the lease provides the agreement will "expire" after 10 years. On the other hand, the word "termination" is used in sections 16.2 (e.g., "Election to Terminate") and 16.5 (e.g., "Termination Date"), both of which involve damage to the premises, 17.5 (improper assignment or subletting), 22.2 (death) and 26.2

(condemnation). Significantly, all of these sections (other than section 2) involve conduct by the tenant in which the tenant would lose its right to remain on the premises *before* the lease term "expired."

Similarly, section 25 of the lease governing "Safety and Health" provides that the tenant's indemnification of the landlord for certain damages survives the "expiration *or* termination" of the lease. (Italics added.) Again, if these words were interchangeable, as landlord argues, the words "expiration or" would be rendered surplusage. (See *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730 ["An interpretation which renders part of the instrument to be surplusage should be avoided."].)

To support its argument that "termination" includes "expiration" in section 9.4, landlord relies on section 12.3 of the lease. This section authorized landlord to dispose of tenant's property after "termination" (but not "expiration") of the lease if tenant failed to remove all personal property from the premises prior to the date of such termination. According to landlord, if the word "termination" in section 12.3 did not include "expiration," "nothing would protect the Tenant's personal property if the Lease 'expired.' "

This argument is unavailing. In reviewing section 12.3, we discern no reason why it cannot apply only to a lease that is terminated, as opposed to one that expires on its own terms, given the language of the provision including the right of landlord to remove tenant's property on termination and either store such property at tenant's expense or

"without notice, sell said personal property, or any portion thereof, at a private sale and without legal process, for such price as LANDLORD may obtain, and apply the proceeds of such sales to any amounts due under this Lease from TENANT to LANDLORD and to the expenses incident to the removal and sale of said property."

In addition, various provisions in the Civil Code govern the disposition of tenant property after a tenant vacates the leasehold estate. (See e.g., Civ. Code, § 1993 et seq. [applicable to commercial tenancies].)

Finally, the case at bar does *not* involve a construction of section 12.3, or sections 13.1 and 13.2 ("Indemnity and Damages") on which landlord also relies; and, to the extent there is ambiguity in those sections regarding the meaning of the word "termination," we conclude that ambiguity does not exist in section 9.4, which clearly and explicitly uses "expiration" and "termination" in a manner that prevents the "expiration" of the lease to include "termination."

We also reject landlord's argument that because legal authorities in certain instances treat the "expiration" of something, including a lease, as one form of "termination" of that thing, that we too must follow that rule in the construction of section 9.4. (See e.g., Civ. Code, § 1933 ["The hiring of a thing terminates: [¶] 1. At the end of the term agreed upon"]; *Riverside Fence Co. v Novak* (1969) 273 Cal.App.2d 656, 663 ["A reasonable construction of the words 'within thirty days of termination of this Lease' is that the phrase was intended to mean the 30-day period immediately preceding expiration of the term."]; *Ryland v. Appelbaum* (1924) 70 Cal.App. 268, 270 ["It is well

established that it is the duty of the tenant as soon as his tenancy expires by his own limitations, to surrender the possession of the premises and that no notice of termination is necessary, the lease itself terminating the tenancy"]; *Earl Orchard Co. v. Fava* (1902) 138 Cal.76, 78-79 ["[t]he case here is one of a lease for a fixed period, which terminated by lapse of time"]; *McKissick v. Ashby* (1893) 98 Cal. 422, 425 ["The hiring of a thing terminates at the end of the term agreed upon."].)

While we have no quarrel with these authorities, none stand for the proposition that in construing a freely negotiated provision between sophisticated parties, a court must ignore the language chosen by the parties and refrain from employing generally accepted canons of contract interpretation. Moreover, none of these authorities required the construction of a provision similar to section 9.4 at issue here, where the parties themselves specifically used the words "expiration" and "termination" in such a manner so as to give the words, and the phrases of which they were a part, distinct legal meanings that involve *independent* events and deadlines.³

B. *Deadline to Exercise Notice of Election*

Landlord argues the lease expired by its own terms on July 1, 2008. However, the trial court found the lease term expired on June 30, 2008, a finding we conclude is

³ Given our conclusion, we reject landlord's argument that its failure to give a timely notice of election was immaterial because under the terms of the lease it could give such notice "at any time before the Tenant would be injured." If that was the case, there would be no reason to include any of the express notice provisions in section 9.4. (See *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.*, *supra*, 177 Cal.App.3d at p. 730.)

supported by substantial evidence in the record. (See *People v. Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, 1071 [noting that when a "court issues a statement of decision, it need only recite ultimate facts supporting the judgment being entered" and noting "[i]f the judgment is supported by factual findings based on substantial evidence, the reviewing court affirms."].)

Here, the record shows that landlord's representative, Bamberger, testified at trial that the term of the 10-year lease expired on June 30, 2008. The record also shows the expiration date of the lease on the assignment of lease prepared *by landlord* and executed by tenant is June 30, 2008. This evidence is credible, sufficient and supports the finding of the trial court that the lease term expired on June 30, 2008.

C. Extension of the June 30, 2008 Deadline

The next issue is whether the deadline in section 9.4 was extended by agreement or operation of law. Landlord argues the trial court erred when it failed to find, pursuant to Civil Code section 1698, that the parties executed a modification of the lease and extended landlord's deadline to make its election under section 9.4.

We conclude landlord failed to satisfy any of the grounds for modification of the lease pursuant to Civil Code section 1698⁴ because there is substantial evidence in the record supporting the trial court's finding that the e-mail by tenant's counsel on July 30, 2008—*after* the June 30, 2008 deadline—was "solely" to provide landlord with time to execute the surrender agreement, which in fact was never signed by either party.⁵

The record shows that at 11:48 a.m. on July 30, 2008, tenant's counsel e-mailed landlord (through Bamberger) a "clean" and "redlined" version of the proposed surrender agreement. Tenant's counsel believed the surrender agreement was final and ready to be signed by the parties, as the changes requested by Bamberger on behalf of landlord had been incorporated into the agreement.

A few minutes later, Bamberger called tenant's counsel regarding the agreement. The parties disagree over what was (and was not) agreed to during this call: landlord argued that tenant agreed to extend the deadline under section 9.4, while tenant

⁴ Civil Code section 1698 provides: "(a) A contract in writing may be modified by a contract in writing. [¶] (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties. [¶] (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions. [¶] (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts."

⁵ Of course, if the parties had executed the surrender agreement, the issue of the timeliness of landlord's election under section 9.4 would have been moot. See discussion *post*.

contended that Bamberger merely sought 15 additional days for landlord to sign the surrender agreement. Ultimately, the court decided that issue in favor of tenant. (See *ante.*) The record supports that finding.

Indeed, on 12:02 p.m. that same day, tenant's counsel sent landlord (again through Bamberger) an e-mail that provided in part: "*Pursuant to your request, on behalf of my client [tenant], I respectfully request an extension until August 15, 2008 for my client and your client to execute that certain [surrender agreement e-mailed at 11:48 a.m.]. [¶] Please return a copy of such executed agreement after your client has signed the same.*" (Italics added.)

In response, Bamberger e-mailed tenant's counsel as follows: "We agree to extend the time as you request, *and shall toll the decision in the Lease regarding Tenant's obligation to remove (or not) Alterations pending the outcome of the agreement. Thanks.*" (Italics added.)

Tenant's counsel testified he never agreed (on behalf of his client) to continue the deadline contained in section 9.4 of the lease. Tenant's counsel also testified that he wrote the July 30 e-mail to Bamberger at Bamberger's request (which is in fact supported by the italicized language above), with the understanding the surrender agreement was final and acceptable to landlord; that the only thing left to be done was for the parties to sign said agreement; and that in agreeing to the August 15, 2008 extension it was solely for the parties to execute the surrender agreement.

The record shows the parties continued to negotiate the terms of the surrender agreement but ultimately were unable to reach an agreement. On August 14, 2008, landlord notified tenant of its election under section 9.4 to restore the premises to the condition they were in "prior to" to the lease with the Dunnys.

Although the record shows landlord (through Bamberger) believed tenant agreed to toll landlord's time to elect under section 9.4, we conclude the record contains sufficient, credible evidence from which the trier of fact could find the parties' July 30, 2008 extension agreement was *solely* to allow them 15 additional days to execute the surrender agreement and was *not* an extension of landlord's right to elect under section 9.4.⁶ (See *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 ["When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court."].)

⁶ According to landlord, because the surrender agreement included landlord's election set forth in section 9.4, we must *assume* the parties *also* agreed to extend the deadline in that provision. Not only does this argument ignore the trial court's finding otherwise, we disagree with landlord's reasoning, inasmuch as it is just as likely that tenant would *not* have *separately* agreed (in that e-mail) to extend landlord's deadline in section 9.4 when that subject matter was *fully* covered in the surrender agreement that at least on July 30, 2008, tenant deemed was final and ready for the parties' signatures.

That one or both parties operated under a mistake of fact in connection with the proper deadline of the notice of election in section 9.4 does not change the result. We note that landlord does not challenge on appeal the finding of mistake. (See *First American Title Ins. & Trust Co. v. Cook* (1970) 12 Cal.App.3d 592, 598-599 [applying substantial evidence standard of review to mutual mistake of fact of the parties regarding the lawfulness of compound interest provision in a note].)

In any event, tenant's counsel testified he relied on Bamberger's interpretation of section 9.4 when Bamberger (incorrectly) determined landlord had until July 30, 2008, to exercise its notice of election under that provision. However, as shown *ante* the lease required landlord to execute that right by June 30, 2008 (e.g., 30 days before the lease term expired). And substantial evidence in the record supports the finding that the parties' extension agreement was solely for the purpose of executing the surrender agreement and not for the purpose of extending landlord's election rights in section 9.4.⁷

II

Trespass

Finally, landlord argues the trial court erred when it found the entry of tenant's contractor onto the premises on or about August 13 or 14, 2008 was not a trespass.

⁷ In light of our decision, it is unnecessary to address the trial court's alternate finding that the "modifications clause" contained in section 27.14 of the lease precluded any "verbal modification or extension of the election deadline" even assuming the election date under section 9.4 was July 30 and not June 30.

A. Brief Additional Background

Tenant's counsel testified that he was "shocked," "dumbfounded" and "very disturbed" when he became aware on or about August 11, 2008, of an e-mail sent by landlord's attorney on August 4 that included a new draft of the surrender agreement. Tenant's counsel testified that Bamberger had led him to believe on July 30 that the surrender agreement was final after tenant's counsel made the changes to the document requested by Bamberger.

Tenant's counsel testified he immediately called Bamberger and the conversation became "heated," at which point tenant's counsel's notes show that Bamberger ordered tenant to "remove improvements." Bamberger followed up that conversation with an e-mail to Dr. Garofolo, which stated in part: "The bottom line is, given the difficulty of the process, we are inclined to have you restore the premises." Dr. Garofolo testified he interpreted the e-mail to mean he "needed to get [his] things out of the premises." Bamberger denied any such demand was made.

The following day, at tenant's direction a licensed contractor (who specializes in dental office construction) began removing dental equipment and cabinetry from the premises. The contractor testified that when he commenced working on the premises he had liability and workman's compensation insurance. When Bamberger learned the contractor was working at the premises, Bamberger ordered the contractor to stop work

and changed the locks, preventing the contractor from retrieving his tools or finishing the work.

As noted *ante*, Bamberger on August 14, 2008, notified tenant and tenant's legal counsel that landlord elected under section 9.4 to have tenant restore the premises to its condition before the lease. Bamberger also notified tenant that tenant was responsible for holdover rent of about \$11,000; that tenant's contractor had not provided any "indication of insurance" to be on the premises; and that in the course of performing work, the contractor had caused "much damage" to the premises. At trial, landlord's expert witness testified that tenant's contractor caused \$2,500 in damage to the premises, which amount the court offset from the tenant's security deposit ordered returned by landlord.

After several unsuccessful attempts to reach Bamberger, he finally called and told the tenant's contractor he was not interested in discussing the lockout and advised the contractor he could reenter the premises only after tenant signed the surrender agreement.

2. *Governing Law and Analysis*

A trespass requires, among other elements, that the entry be without permission.

(*Cobb v. City of Stockton* (2011) 192 Cal.App.4th 65, 73; see also CACI No. 2000.⁸) As

⁸ CACI No. 2000 provides: "[*Name of plaintiff*] claims that [*name of defendant*] trespassed on [*his/her/its*] property. To establish this claim, [*name of plaintiff*] must prove all of the following: [¶] 1. That [*name of plaintiff*] [*owned/leased/occupied/controlled*] the property; [¶] 2. That [*name of defendant*] [*intentionally, recklessly, or negligently*] entered [*name of plaintiff*]'s property [or] [¶] [*intentionally, recklessly, or negligently*] caused [*another person/[insert name of thing]*] to enter [*name of plaintiff*]'s property];

noted *ante*, the trial court found tenant "had the permission, if not the mandate," of landlord to enter the premises to remove the tenant improvements. Landlord argues this finding is contrary to the evidence, as Bamberger testified he did not give tenant permission to enter the premises for *any* reason. Landlord also argues that even if tenant had authorization to enter the premises, tenant exceeded that authorization and thus trespassed on the property.

Bamberger's testimony aside, we reject landlord's first argument because the evidence in the record fully supports the finding of the trial court that tenant had landlord's permission to enter the premises to "remove improvements." (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 207 ["It is an elementary . . . principal of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the [trier of fact].' [Citation.]".])

We also reject landlord's argument that tenant exceeded landlord's authority when tenant hired a licensed contractor to remove the dental equipment, as opposed to the leasehold improvements made to the premises. We conclude the record fully supports the

3. That [*name of plaintiff*] did not give permission for the entry [or that [*name of defendant*] exceeded [*name of plaintiff*]'s permission]; [and] [¶] 4. That [*name of plaintiff*] was [actually] harmed; and [¶] 5. That [*name of defendant*]'s [entry/conduct] was a substantial factor in causing [*name of plaintiff*]'s harm. [¶] [Entry can be on, above, or below the surface of the land.] [¶] [Entry may occur indirectly, such as by causing vibrations that damage the land or structures or other improvements on the land.]"

findings of the trial court that tenant reasonably responded to what were confusing and contradictory instructions given by Bamberger on behalf of landlord regarding restoration of the premises, findings we conclude are amply supported by substantial, credible evidence in the record.⁹ (See *Caldwell v. Paramount Unified School Dist.*, *supra*, 41 Cal.App.4th at p. 207.)

DISPOSITION

Judgment affirmed. Tenant to recover the costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.

⁹ Because we conclude substantial evidence in the record supports the trial court's finding that tenant had landlord's "permission" to enter the premises and remove the dental equipment, we further conclude the case cited by landlord, *Cassinovs v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1775-1776, is inapposite because there a party to a lease injected *without* the other party's permission wastewater into an oil and gas well drilled by the party on the other's property.