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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALICIA T. VASQUEZ et al.,

Plaintiffs and Appellants,

v.

JERRY LEAF et al.,

Defendants and Respondents.

D059210

(Super. Ct. No.  
37-2009-00074282-CU-BC-CTL)

APPEAL from a judgment and an order of the Superior Court of San Diego County, Jeffrey B. Barton, Judge. Affirmed in part; reversed in part; and remanded for further proceedings.

I.

INTRODUCTION

In 2003, Alicia T. Vasquez (Alicia) and Francisco A. Vasquez (Francisco) (collectively "the Vasquezes") purchased a parcel of real property (the property) in Chula Vista from Jerry Leaf (Jerry) and Joyce Leaf (Joyce) (collectively "the Leafs"). In 2010, the Vasquezes filed a third amended complaint against the Leafs alleging claims for

breach of contract and fraud.<sup>1</sup> The Vasquezes' claims were based on their allegation that the sales contract for the property falsely stated that the property was free of encroachments.<sup>2</sup> The Leafs filed a motion for summary judgment/adjudication in which they maintained that they were entitled to judgment as a matter of law on the breach of contract claim because the Vasquezes had no evidence that they had incurred damages as a consequence of the allegedly false statement in the sales contract, among other grounds.<sup>3</sup> The Leafs contended that the Vasquezes' fraud claim failed for several reasons, including that there was no evidence that the Leafs knew of any encroachment. The trial court granted the Leafs' motion for summary judgment.

On appeal, the Vasquezes claim that the trial court erred in granting judgment as a matter of law in favor of the Leafs, as to both of their claims. We conclude that the trial court erred in granting judgment as a matter of a law on the Vasquezes' claim for breach of contract. Although the Leafs *asserted* in their brief in support of their motion for summary judgment/adjudication that the Vasquezes would be unable to establish damages, the Leafs failed to support that assertion with any *evidence* to that effect, as is required. The Leafs thus failed to carry their initial burden of production to make a prima

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1 The third amended complaint also included a negligence cause of action against their real estate broker. The negligence cause of action is not before us, and the real estate broker is not a party to this appeal.

2 Although the size of the alleged encroachment was not stated in the Vasquezes' complaint, it is undisputed that it is approximately 450 square feet.

3 The Leafs' primary argument was that the Vasquezes could not produce any evidence that the parties had entered into a sales contract that stated that the property was free of encroachments. In making this argument, the Leafs noted that no "actual purchase contract between the parties ha[d] . . . been discovered."

facie showing that the Vasquezes could not prove that they had suffered any damages from the alleged breach.<sup>4</sup> For reasons that we explain in the body of this opinion, we cannot affirm the trial court's order granting summary judgment on the breach of contract claim on any of the other grounds on which the Leaf's relied in their motion.

As to the fraud cause of action, we conclude that the Leaf's carried their burden of production to make a prima facie showing that the Vasquezes would be unable to establish that the Leaf's knew that the alleged statement in the sales contract that the property was free of encroachments was false. The Vasquezes failed to present any contrary evidence. We therefore conclude that the trial court properly granted judgment as a matter of law in favor of the Leaf's on the Vasquezes' fraud claim. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

## II.

### FACTUAL AND PROCEDURAL HISTORY

#### A. *The operative third amended complaint*

In 2010, the Vasquezes filed a third amended complaint against the Leaf's alleging breach of contract and fraud. In their breach of contract claim, the Vasquezes alleged that they entered into a written contract with the Leaf's for the purchase of the property, and that the contract stated there were no encroachments on the property. The

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<sup>4</sup> We emphasize that we reverse solely on the ground that the Leaf's failed to carry their burden of production in moving for summary adjudication of the Vasquezes' breach of contract claim. We express no opinion as to the merits of that claim. Further, nothing that we state in this opinion should be construed as precluding the trial court on remand from granting the Leaf's judgment as a matter of law on the Vasquezes' breach of contract claim, pursuant to a procedurally proper motion, supported by evidence.

Vasquezes further alleged that, several years after their purchase of the property, a survey determined that a building on an adjacent property encroached on the property. In their fraud cause of action, the Vasquezes alleged that the Leaf's knowingly misrepresented to the Vasquezes that there were no encroachments on the property.

B. *The Leaf's motion for summary judgment/adjudication*

The Leaf's filed a motion for summary judgment/adjudication. In their brief in support of their motion, the Leaf's contended that the Vasquezes could not establish their breach of contract cause of action because the Vasquezes had no evidence that the Leaf's had promised to sell the property free of any encroachments. Specifically, the Leaf's contended that "[t]he contract between [the Vasquezes] and [the Leaf's] has been lost, or never existed," and thus, the Vasquezes have no evidence that "the purchase contract contained any term that the subject property had to be delivered to the [Vasquezes] free of encroachments."

The Leaf's noted in their motion that after they had accepted the Vasquezes' offer to purchase the property for \$848,000, the Vasquezes learned that they would "lose over 14,000 square feet to road improvements, set backs, a privacy screens [*sic*], and other City redevelopment requirements." The Leaf's further noted that the Vasquezes sought a reduction in the sale price based on this information, but that the Vasquezes ultimately purchased the property at the originally agreed upon price. The Leaf's argued, "Since Mr. and Mrs. Vasquez wanted to buy the property when they believed they were losing

14,000 square feet due to the City's demands, it seems impossible that they would have refused to buy the property over a supposed 450 square feet encroachment."<sup>5</sup>

Finally, the Leafs argued that the Vasquezes had no evidence that they had been damaged by any alleged breach. The entirety of the Leafs' argument in this regard was as follows:

"[T]here is no evidence regarding any damages the [Vasquezes] may have suffered due to any alleged breach of contract. [The Leafs] have been provided with an appraisal stating that the subject property is now worth, in its present condition, \$1,200,000 [citation]. Surely when the [Vasquezes] spent \$848,000 on a property now worth \$1,200,000, they received their benefit of the bargain."

The Leafs also contended that the Vasquezes' fraud claim failed for several reasons, including that there was "no evidence that [the Leafs] knew of any encroachment." In their separate statement of facts, the Leafs stated, "Neither Mr. [or] Mrs. Leaf had any knowledge that there was an encroachment on the property." The Leafs' separate statement in turn cited to declarations in which Jerry Leaf and Joyce Leaf stated that they had no knowledge of any encroachment on the property.

C. *The opposition*

In their opposition, the Vasquezes contended that the Leafs had failed to carry their burden of production in establishing that no triable issue of fact existed as to the Vasquezes' claims. With respect to their breach of contract claim, the Vasquezes argued that a triable issue of fact existed as to whether the contract stated that the property was free of encroachments. The Vasquezes supported this contention with a declaration from

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<sup>5</sup> The Leafs did not raise this as a separate argument in their brief, but rather, referred to these facts in the factual background portion of the brief.

Francisco. In his declaration, Francisco stated that he had read the contract for the sale of the property and that it stated that the property was free of encroachments. The Vasquezes did not address the Leafs' contentions regarding damages or the Vasquezes' willingness to purchase the property at the originally agreed upon price. The Vasquezes also did not address the remainder of the Leafs' contentions as to the breach of contract claim, nor any of the Leafs' arguments as to the fraud claim.

D. *The reply*

In their reply, the Leafs contended that Francisco's declaration was "highly dubious," but acknowledged that for purposes of ruling on a motion for summary judgment, a trial court is required "to consider all evidence to support plaintiff's position, no matter how unlikely." The Leafs reiterated their argument that the Vasquezes had "failed to produce" any evidence that they had been damaged by the alleged breach of contract.

The Leafs reiterated their argument that they were entitled to judgment as a matter of law on their fraud claim for several reasons, including that the Vasquezes lacked any evidence demonstrating that the Leafs knew of the encroachments prior to the sale of the property.

E. *The trial court's order granting summary judgment*

After a hearing, the trial court granted the motion for summary judgment. In its order, the trial court determined that Francisco's declaration created an issue of material fact with respect to whether the contract stated that the property was free of encroachments. However, the trial court concluded that "[the Vasquezes] failed to meet

their burden to show by admissible evidence that they were materially damaged by the encroachment." The trial court also stated, "There is no evidence to rebut [the Leafs'] evidence that the three[- foot] encroachment was immaterial based upon the prior waiver regarding the loss through the City's action of the 14,000 square feet." With respect to the fraud claim, the trial court noted that the Leafs had presented evidence that they were unaware of the encroachment, and concluded that the Vasquezes had failed to rebut the Leafs' evidence with any contrary evidence.

F. *The final judgment and the appeal*

The trial court subsequently entered a final judgment in favor of the Leafs. The Vasquezes timely appeal from the judgment.

III.

DISCUSSION

*The trial court erred in granting judgment as a matter of law on the Vasquezes' breach of contract claim, but properly granted judgment as a matter of law on the Vasquezes' fraud claim*

The Vasquezes claim that the trial court erred in granting the Leafs' motion for summary judgment.

A. *Governing law and standard of review*

1. *The relevant statutory framework*

A "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)<sup>6</sup> "A cause of action has no merit if . . . [¶] [o]ne or more of the elements of the cause of action cannot be separately established . . . ." (§ 437c, subd. (o)(1).) "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established. . . . Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action . . . . The plaintiff . . . may not rely upon the mere allegations . . . of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." (§ 437c, subd. (p)(2).)

2. *The trial court's determination of a defendant's summary judgment motion*

A trial court must employ a "three-step process . . . in analyzing a summary judgment motion." (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 366.) The trial court must first " ' ' 'identify the issues framed by the pleadings since it is these allegations to which the motion must respond.' " ' ' ' (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503, citations omitted.)

Next, the trial court must consider whether the defendant has carried its "initial burden of production to make a prima facie showing of the nonexistence of any triable

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<sup>6</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*)).) The defendant may carry this burden by demonstrating that "the plaintiff cannot establish at least one element of the cause of action." (*Id.* at p. 853.) The defendant may make such a showing by demonstrating "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Ibid.*) However, the *Aguilar* court made clear that a moving defendant does not carry its initial burden of production by simply asserting in a brief that the plaintiff does not possess, and cannot reasonably obtain, such evidence.

"Summary judgment law in this state . . . continues to require a defendant moving for summary judgment to present evidence, and not simply point out [fn. omitted] that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. . . . For the defendant *must* 'support[]' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' (Code Civ. Proc., § 437c, subd. (b).) The defendant may . . . present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing. [Fn. omitted.] But, . . . the defendant *must* indeed present evidence: Whereas, under federal law, 'pointing out through argument' [citation] may be sufficient [citation], under state law, it is not." (*Aguilar, supra*, at pp. 854-855.)

In the first footnote omitted from the quotation above, the *Aguilar* court again emphasized the need for a moving defendant to make an *evidentiary* showing that the plaintiff lacks needed evidence by stating in part, "Language in certain decisions purportedly allowing a defendant moving for summary judgment simply to 'point[]' out 'an *absence of evidence* to support' an element of the plaintiff's cause of action [citation]

does not reflect summary judgment law as it has ever stood, and is accordingly disapproved." (*Aguilar, supra*, 25 Cal.4th at p. 854, fn. 23.)

Another method that a moving defendant may employ in order to carry its burden of production is to present evidence "which, unless materially contradicted or rebutted, would establish that each of [the plaintiff's] causes of action lacked merit." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335, fn. 7.) Where, as in this case, the plaintiff bears the burden of proving the underlying claims by a preponderance of evidence, "a moving defendant must present evidence which, if uncontradicted, would constitute a preponderance of evidence that an essential element of the plaintiff's case cannot be established." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878-879.)

"If the defendant fails to meet this initial burden [of production], it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied." (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 805.) In contrast, if the defendant has carried its burden of production, the trial court considers whether the plaintiff's opposition demonstrates a triable issue of fact. (*Aguilar, supra*, 25 Cal.4th at p. 849.) "The plaintiff . . . may not rely upon the mere allegations . . . ' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action.' [Citation.]" (*Ibid.*) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850, fn. omitted.)

Even assuming that the defendant successfully shifts the burden of production, he still "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) "In ruling on [a] motion [for summary judgment], the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citations], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Id.* at p. 843.)

3. *The standard of review*

On appeal, this court "independently review[s] a motion for summary judgment using the same legal standards that governed the trial court's determination of the motion." (*Catholic Healthcare West v. California Ins. Guarantee Assn* (2009) 178 Cal.App.4th 15, 23.) More specifically, "We examine the pleadings to ascertain the elements of the plaintiff's claim; the moving papers to determine whether the defendant has established facts justifying judgment in its favor; and, if the defendant did meet this burden, plaintiff's opposition to decide whether he or she has demonstrated the existence of a triable issue of material fact." (*Zoran Corp. v. Chen, supra*, 185 Cal.App.4th at pp. 805-806.)

B. *The Leafs failed to carry their burden of production in establishing that the Vasquezes cannot establish a breach of contract action*

The Vasquezes contend that the trial court erred in granting judgment as a matter of law in favor of the Leafs on the breach of contract claim.

1. *The elements of a breach of contract claim*

"The essential elements of a breach of contract claim are: '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.' [Citation.]" (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.)

2. *Application*

As noted above (see pt. II.E., *ante*), the trial court granted the Leaf's motion for summary adjudication of the Vasquez's breach of contract claim on two grounds: 1) that the Vasquez's had failed to carry their burden of producing evidence that they had suffered damages from the alleged breach, and 2) that the Vasquez's had failed to rebut evidence demonstrating that the encroachment was immaterial.<sup>7</sup> For the reasons stated below, we cannot affirm the order on either ground.

As to damages, the Leaf's asserted in their brief in the trial court that the Vasquez's would be unable to establish damages. However, the Leaf's failed to support that assertion with any *evidence* to that effect. Under *Aguilar*, the Leaf's bare assertion was insufficient to shift the burden to the Vasquez's to produce evidence as to damages. (See *Aguilar, supra*, 25 Cal.4th at p. 853 ["Summary judgment law in this state . . . continues to require a defendant moving for summary judgment to present evidence, and not simply

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<sup>7</sup> As noted above (see pt. II.E., *ante*), the trial court concluded that there was an issue of material fact with respect to whether the contract stated that the property was free of encroachments. The Leaf's do not dispute this ruling on appeal. We thus conclude that we cannot affirm the trial court's order on the ground that "[t]here is absolutely no evidence that the purchase contract contained any term that the subject property had to be delivered to the [Vasquez's] free of encroachments," as the Leaf's argued in the trial court.

point out [fn. omitted] that the plaintiff does not possess, and cannot reasonably obtain, needed evidence").) The Leafs' citation to an appraisal setting forth the value of the property several years *after* the sale of the property does not constitute evidence which, if uncontradicted, would constitute a preponderance of evidence that the Vasquezes could not establish that they were damaged by the breach. (See *ibid.*)

Because the Leafs failed to carry their burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact as to the breach of contract claim (*Aguilar, supra*, 25 Cal.4th at p. 850), the burden never shifted to the Vasquezes to present evidence that they had suffered damages from the Leafs' purported breach. (See *ibid.*) Accordingly, we conclude that the trial court erred in granting judgment as a matter of law on the breach of contract claim on the ground that the Vasquezes had "failed to meet their burden to show by admissible evidence that they were materially damaged by the encroachment."

The trial court also granted summary judgment on the breach of contract claim on the ground that the Vasquezes failed to rebut evidence that the Leafs presented demonstrating that "the three[-foot] encroachment was immaterial." Assuming, for purposes of this opinion only, that materiality is an element of the Vasquezes' breach of contract claim (but see 23 Williston on Contracts (4th ed. 2002) § 63:3 [stating that a nonbreaching party to a contract "is entitled to damages caused even by the immaterial breach"]), the only evidence that the Leafs presented as to the immateriality of the encroachment was evidence demonstrating that the Vasquezes were unsuccessful in obtaining a price reduction from the Leafs on the ground that they would "lose

approximately 14,000 square feet of property for right of way purposes." Evidence that the Vasquezes were willing to purchase the property at a particular price based on their knowledge of various City requirements pertaining to the property does not demonstrate that an entirely separate encroachment was an immaterial breach. Accordingly, we conclude that the trial court erred in granting the Leaf's judgment as a matter of law on the Vasquezes' breach of contract claim on this ground as well.

C. *The trial court properly granted judgment as a matter of law on the Vasquezes' fraud claim*

The Vasquezes contend that the trial court erred in granting judgment as a matter of law in favor of the Leaf's on the fraud claim.

1. *The elements of fraud*

"The elements of common law fraud in California are: (1) a misrepresentation of a material fact (false representation, concealment, or nondisclosure); (2) *knowledge of falsity*; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. [Citation.]" (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 259, italics added.)

2. *Application*

The Leaf's lodged declarations in the trial court in which they stated that they had no knowledge of any encroachment on the property. These declarations constituted evidence which, if uncontradicted, would constitute a preponderance of evidence that an essential element of the Vasquezes' fraud claim could not be established. (See *Kids' Universe v. In2Labs, supra*, 95 Cal.App.4th at pp. 878-879.) The Leaf's thus carried their

burden of production to make a prima facie showing of the nonexistence of a triable issue of material fact with respect to the knowledge element of the Vasquezes' fraud claim. (See *Aguilar, supra*, 25 Cal.4th at p. 850.) The burden then shifted to the Vasquezes to present evidence showing that a triable issue of material fact existed as to the knowledge element of their fraud claim. (See *id.* at p. 849 .)

The Vasquezes failed to present any evidence from which a reasonable trier of fact could find that the Leafs knew that the alleged statement in the contract that the property was free from encroachments was false. As noted above, the Leafs' knowledge of the falsity of the alleged misrepresentation is an essential element of the Vasquezes' fraud claim. (See *Collins v. eMachines, Inc., supra*, 202 Cal.App.4th at p. 259.) Accordingly, the trial court properly concluded that the Leafs were entitled to judgment as a matter of law on the Vasquezes' fraud claim.

#### IV.

#### DISPOSITION

The judgment and the trial court's order granting summary judgment are reversed. The matter is remanded to the trial court with directions to grant the Leafs' motion for summary adjudication of the Vasquezes' fraud cause of action. The trial court is further directed to deny the Leafs' motion for summary adjudication of the Vasquezes' breach of

contract cause of action and to conduct further proceedings. The parties are to bear their own costs on appeal.

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AARON, J.

WE CONCUR:

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McDONALD, Acting P. J.

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O'ROURKE, J.