Filed 1/25/17 Gimbel v. The Kriozere Corp. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GIMBEL, LLC, Plaintiff, Cross-defendant and Appellant, v. THE KRIOZERE CORPORATION et al., Defendants, Cross-complainants and Respondents.	D068107 (Super. Ct. No. 37-2013-00044004-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Ernest Slome and Brittany H. Bartold for Plaintiff, Cross-defendant and Appellant.

Dentons US, Charles A. Bird and Mark Hagarty for Defendants, Cross-complainants and Respondents.

Plaintiff Gimbel, LLC (Gimbel) appeals from a judgment in favor of The Kriozere Corporation (Kriozere), Michael Kriozere and Urban Pacific Investors, LLC (Urban

Pacific) (collectively Defendants) following a bench trial on Gimbel's complaint for breach of contract, breach of fiduciary duty and common counts. Gimbel, Kriozere and Michael Kriozere entered into a partnership agreement to invest in properties and Gimbel alleged Kriozere and Michael Kriozere breached the agreement by subsequently providing development management services to a third party. The court found in favor of Defendants on all claims, finding the development management agreement was not within the scope of the partnership agreement and, therefore, Kriozere and Michael Kriozere did not breach the agreement or their fiduciary duty and Urban Pacific did not aid or abet any breach or interfere with the agreement. On appeal, Gimbel contends: (1) the development management agreement was a project within the scope of the partnership agreement; (2) the partnership agreement was not limited to projects requiring preconstruction financing, and (3) Gimbel was not required to contribute any money to the development management agreement in order to participate in Defendants' profits under the agreement because the funds sought by Defendants were not "preconstruction financing" as that term was used in the partnership agreement.

We conclude that the development management agreement was not a project within the scope of the partnership agreement and Defendants therefore did not breach the partnership agreement by entering into the development management agreement without Gimbel. Because our conclusion resolves the dispositive issue of breach, we need not reach the issues Gimbel raised relating to the definition and scope of "preconstruction financing." We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *History*

Michael Kriozere and Stuart Gimbel (Stuart)[1] were childhood friends. In 1989 Michael, who had worked as a real estate developer in Chicago for 21 years, moved to San Diego and needed seed money to pursue a potential development opportunity. Michael contacted Stuart and asked him if he would be interested in forming a partnership to invest money to pursue the opportunity. Stuart agreed and formed Gimbel Corporation with another friend, Dr. Arnold Rubenstein. Michael formed Kriozere, in which he was the sole shareholder, and Kriozere and Gimbel Corporation entered into an agreement (1989 Agreement) forming Urban West Associates of San Diego (Urban West), a general partnership. Gimbel Corporation invested $250,000 in the first project, a development in downtown San Diego, which was profitable for both Gimbel Corporation and Kriozere.

In 1993 the 1989 Agreement was modified to change the allocation of profits among the partners (1993 Agreement). At some point in 2000, Gimbel Corporation was converted to Gimbel, LLC. Gimbel invested in several properties with Kriozere under the 1993 Agreement, including One Embarcadero in San Francisco, a property in San Jose, and in properties referred to as Rincon Phase I and Phase II. In 2006 the partnership was restructured (Partnership Agreement) to make Gimbel a limited partner

---

[1] Hereafter, we refer to Michael Kriozere and Stuart Gimbel by their first names for the sake of clarity and ease of reference.

and Kriozere the general partner. In early 2009, Rubenstein and two other Gimbel investors replaced Stuart as directors of Gimbel.

Subsequently, Gimbel lost over $1.5 million on Rincon Phase I and construction was never commenced on Rincon Phase II. A CB Richard Ellis entity (CBRE) had loaned Urban West money for Rincon Phase II and in September 2010, CBRE notified Urban West of its plans to sell the property and the Urban West loans. In December 2010 Michael sent a letter to Rubenstein advising him of possible foreclosure by CBRE and seeking an additional investment from Gimbel. Later that month, Michael's attorney notified Gimbel of CBRE's notices of default for the Rincon Phase II loans. In early March 2011 Michael advised Rubenstein that CBRE was preparing to foreclose. Michael thereafter offered Gimbel the opportunity to contribute in any amount up to $30 million in an attempt to avoid foreclosure. Subsequently, Michael's colleague, Chris Collins, sent a letter to Gimbel seeking an investment of $31 million to save Rincon Phase II from foreclosure.

After Gimbel repeatedly declined to invest any additional money in Rincon Phase II, Michael reached agreement with Gilbert Platt who indicated he would contribute up to $21 million to buy out CBRE's interest in the property. Michael's attorney provided Gimbel with the right of first refusal and it declined, so Michael signed a term sheet with Platt and Platt brought in Principal Real Estate (Principal), a mortgage bank, which was willing to buy out CBRE's interest. Michael formed a new partnership, Urban Pacific, in preparation for finalizing an agreement with Platt and Principal. However, Platt did not provide the required $20 million. Principal thereafter agreed to proceed if Platt and

Kriozere would each invest $5 million in the deal, but Platt did not invest. Urban Pacific, Platt and Principal were therefore unable to consummate any agreement to purchase the property from CBRE and in October 2011 CBRE foreclosed on Rincon Phase II, eliminating all of Urban West's interest in the property.

Following foreclosure, Principal continued its efforts to purchase the property and offered Michael the opportunity to be involved in the undertaking as the development manager if he would pay to settle a lien on the property. The lien resulted from a legal judgment against Michael, Urban West, Kriozere and its affiliates based on the breach of a broker agreement with American Property Consultants Ltd. (APC) relating to Rincon Phase I and Phase II. Michael paid approximately $6 million to settle the APC judgment, removing the lien, and Principal simultaneously purchased the property. In February 2012 Principal created 401 Harrison Investor LLC to develop the property and it entered into a development management agreement (DMA) with Urban Pacific. Neither Michael, nor Kriozere received any interest in the property or in 401 Harrison Investor LLC.

Gimbel learned of the DMA and took the position that it was entitled to 40 percent of the developer fee and any profits generated from the DMA. Michael's attorney thereafter offered Gimbel, through two separate written offers, the opportunity to participate in the DMA if it would contribute all or a portion of the money Michael paid to settle the APC judgment and remove the lien. Gimbel declined the offers to invest in the DMA.

B. The Partnership Agreement

The purpose of the Partnership Agreement between Kriozere and Gimbel was set forth as follows in article 1, section 1.3:[2] "Notwithstanding anything to the contrary in the Certificate, the Partnership is organized to (i) acquire, own, operate, market, sell or otherwise disposed [sic] of real estate investments (the 'Business'), and (ii) engage in and carry on any lawful business purpose or activity which is required to conduct the Business that is not prohibited by the Act[3] or other applicable law." The Partnership Agreement provided Gimbel with an exclusive right of first refusal to provide all or any part of the preconstruction financing for any "Project of the Partnership" (Project) during the partnership term (art. 2, § 2.2). "Preconstruction Financing" was defined to "include all monies required to complete the Project, except for the construction loan and equity financing from third party investors who are not Partners in this Partnership" (art. 2, § 2.2). "Projects" was defined as "the real estate activities including but not limited to, the development, brokerage, buying and selling of real property conducted by the Partnership" and "[e]ach such real estate activity" was defined as "a separate 'Project' of the Partnership" (art. 13, § (m)).

The Partnership Agreement required Kriozere, as general partner, to "devote such time to the Partnership's business and affairs as is reasonably necessary to carry out that

---

2 All further article/section references will be to the Partnership Agreement unless otherwise designated.

3 References to "the Act" are to the former California Revised Limited Partnership Act (Corp. Code, § 15611 et seq., repealed by Stats. 2006, ch. 495, § 18, operative Jan. 1, 2010) as provided in the Partnership Agreement.

General Partner's obligations under this Agreement" and required Kriozere to "take all actions that may be necessary or appropriate (i) for the continuation of the Partnership's valid existence as a limited partnership under the Act, and (ii) for the acquisition, development, maintenance, preservation, and operation of Partnership property in accordance with the provisions of this Agreement and applicable laws and regulations" (art 4, § 4.4(a),(b)). In addition, both Kriozere and Michael, as an individual, agreed to section 4.4(d), as follows: "During the term of the Partnership, the General Partner and Michael Kriozere shall only conduct Projects in the Partnership, unless the Limited Partner declines or fails to provide any Preconstruction Financing for a Project that requires Preconstruction Financing." Article 6, section 6.1, entitled "Tax Allocations," stated that the net profits or net losses of a Project were to be determined as follows:

"Preconstruction Financing for a Project

"Partner	Percentage Interest
"Limited Partner	40 [percent]
"General Partner	60 [percent]

"If a Project Does Not Require Preconstruction Financing

"Partner	Percentage Interest
"Limited Partner	40 [percent]
"General Partner	60 [percent]"

In addition, article 6, section 6.1 provided the same 40 and 60 percent allocation for developer fees. The Partnership Agreement also contained an integration clause and an attorney fees provision. The partnership term extended to December 31, 2017, absent a "Dissolution Event."

C. *The DMA*

The DMA between Urban Pacific and 401 Harrison Investor, LLC (Owner) was a contract for Urban Pacific to perform development management services for Owner in connection with the project at 401 Harrison Street (formerly Rincon Phase II). Under the DMA, Urban Pacific would receive a project management fee of $3.7 million, a development fee of $1.3 million and an incentive fee of up to $15 million, upon completion of the project, contingent upon Owner's sale of the asset at a certain return rate, among other things. Owner also agreed to reimburse Urban Pacific up to $500,000 in legal fees incurred in connection with the acquisition of the property and pay additional legal fees upon closing of construction loan financing. Urban Pacific was required to pay for costs and expenses relating to its development management activities, including employee salaries, benefits and overhead and also agreed to a soft cost overrun guaranty and to a "holdback" of up to $2 million of any fees to be received in the event Owner was required to make any further payments to CBRE. The DMA also allowed Owner to terminate the services of Urban Pacific for cause or if Owner decided to sell the property prior to completing the development.

D. *Gimbel's Complaint, Defendants' Cross-Complaint, Pretrial Stipulation*

In April 2013 Gimbel filed a complaint against Defendants, alleging breach of the Partnership Agreement, breach of fiduciary duty and fraud, among other causes of action, and seeking appointment of a receiver and an accounting. Defendants filed a cross-complaint and amended cross-complaint, seeking dissolution of the partnership and declaratory relief. Prior to trial, parties agreed by stipulation to limit Gimbel's claims for

relief on its first and second causes of action for breach of the Partnership Agreement and third cause of action for breach of fiduciary duty (against Kriozere and Michael) to breaches attributable to: (1) Kriozere and Michael's entering into the DMA, (2) the manner in which David Kriozere[4] was compensated, and (3) reimbursement of expenses to Kriozere and Michael. The fourth cause of action for breach of fiduciary duty (based on costs of a tax investigation) and the fifth cause of action for fraud were dismissed.

E. *Trial*

The court held a bench trial. In its trial brief, Gimbel characterized the DMA as a Project under the Partnership Agreement because it involved "real estate activities" and contended because Michael and Kriozere participated in the DMA without including Gimbel, they breached article 4, section 4.4(d), requiring them to only conduct Projects in the partnership. Gimbel argued it was undisputed that the DMA did not require preconstruction financing and because the Partnership Agreement provided Michael and Kriozere could only conduct Projects outside of the partnership if Gimbel declined to provide required preconstruction financing, they were required to conduct the Project within the partnership and pay Gimbel 40 percent of the proceeds.

Defendants argued the DMA was not a "Project" under the Partnership Agreement because the services rendered under the DMA were not within the object or purpose of the Partnership Agreement, which defined the partnership as organized to "acquire, own operate, market, sell or otherwise disposed [*sic*] of real estate investments (the

---

4 Michael's son, David, was employed by Kriozere. He is not a party to this appeal.

'Business')," and the parties' roles in the partnership and past projects also supported the limited interpretation of the word "Project" because Gimbel consistently acted as the "Investor" during the parties' history and each investment was to acquire, own and sell condominium developments. Defendants further contended Gimbel's refusal to pay for any portion of the lien settlement associated with the DMA was a refusal to provide preconstruction financing, freeing Michael and Kriozere to participate in the DMA outside the partnership.

The trial, which took six days, consisted of testimony from Michael, David Kriozere, Rubenstein, a second Gimbel director and two attorneys. Rubenstein characterized the Partnership Agreement as a personal services contract on the part of Michael and Kriozere, pursuant to which they agreed to provide Gimbel with 40 percent of any real estate activity in which they participated, regardless of whether or not Gimbel made any investment. Rubenstein confirmed that, throughout the history of the partnership, Urban West had obtained an equity interest in each project the partners had undertaken, in exchange for seed money. Michael testified that Stuart approached him in early 2006 and explained that he was bringing new partners into Gimbel and wanted to restructure the agreement with Kriozere to make Gimbel a limited partner in order to reduce the partners' risks. Michael further testified that the parties restated the purpose and "cleaned up" the right of first refusal. Michael characterized his participation in the DMA as development manager as distinguishable from that of a developer because a developer is an equity owner in the project and participates fully in the projects profits and losses whereas the development manager is an employee of the owner and has no

ownership interest. Michael also testified that neither he, Urban Pacific or Kriozere had any interest in 401 Harrison Investor, LLC or the property it owned.

F. *Trial Court's Statement of Decision and Judgment*

Following trial, the court determined that Michael and Kriozere did not breach the Partnership Agreement or their fiduciary duties by entering into the DMA, by compensating David Kriozere with project funds or by reimbursing expenses without the required documentation, and ordered the dissolution of Urban West. In its statement of decision, the trial court found that the role of Gimbel in the 1989 Agreement and 1993 Agreement was to provide seed money for real estate developments while Michael and Kriozere's role was to do everything necessary to complete the developments. The court likewise found that Gimbel's role in the Partnership Agreement was to provide seed money for real estate developments and the express purpose and business of the Urban West partnership was to "'acquire, own operate, market, sell or otherwise dispose of real estate investments.'" The court determined Rincon Phase I and Phase II were Projects under the terms of the Partnership Agreement, but that upon the foreclosure sale, Rincon Phase II ceased being a Project of Urban West. The court concluded the DMA was a transaction which did not constitute the object or purpose for which Urban West was formed, therefore it was not a Project under the terms of the Partnership Agreement.

The court noted the provision precluding Michael and Kriozere from engaging in Projects outside the partnership was limited to real estate activities conducted by the partnership and the "'Business'" of the partnership was expressly defined as the acquisition, ownership, operation, marketing and selling of real estate investments. The

court further concluded that "a 'Project' of the Partnership by necessity can only entail real estate activities where Seed Money/Preconstruction Financing is required because otherwise there is no role for Gimbel." Because the DMA did not entail the acquisition, ownership, operation, marketing and selling of a real estate investment by Defendants, Michael and Kriozere did not breach article 4, section 4.4 of the agreement or their fiduciary duties by entering into the DMA to serve as the development manager.

In addition, the trial court found the money Michael and Kriozere paid to settle the APC judgment and remove the lien from the Rincon Phase II property was required to secure the DMA and therefore "was money required to complete the Project" (or preconstruction financing); Michael and Kriozere provided Gimbel with the opportunity to participate in the DMA by reimbursing him for the payment, but Gimbel rejected the offer; and it would have been inequitable to allow Gimbel to obtain 40 percent of the profits from the DMA when it had paid nothing. The court also found that Gimbel had been given numerous opportunities to provide funds to save the Rincon Phase II project, but had declined to invest any further funds, and therefore Kriozere and Michael were free to deal with third parties and exclude Gimbel. The court further concluded because there had been no breach of the Partnership Agreement or breach of fiduciary duty, Urban Pacific was not liable for aiding and abetting or interference with contract.

The court entered judgment in Defendants' favor and awarded attorney fees and costs to Defendants. Gimbel timely appealed the judgment and the postjudgment award of attorney fees and costs.

STANDARDS OF REVIEW AND PRICIPLES OF CONTRACT INTERPRETATION

When the trial court's judgment and statement of decision contain both findings of fact and legal conclusions, we "'review the trial court's findings of fact to determine whether they are supported by substantial evidence'" and any conclusions of law de novo. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266 (*ASP Properties Group*).) In reviewing the trial court's interpretation of a contract, if there was ambiguity in the contract language and the court admitted conflicting extrinsic evidence on the meaning of the language, we will uphold any reasonable construction of the language supported by substantial evidence. (*Horath v. Hess* (2014) 225 Cal.App.4th 456, 464 (*Horath*).) However, we apply an independent, or de novo, standard of review to conclusions of law regarding a contract's interpretation and if no evidence is introduced, the evidence is not in conflict or the conflicting evidence does not require a credibility determination, we independently construe the contract. (*ASP Properties Group, supra,* at pp. 1266-1267.) We also independently review the trial court's determination of whether the contested contract language is ambiguous, as such determination is a question of law. (*Horath, supra,* at p. 464.) We may affirm the trial court's judgment on any sound basis presented by the record, regardless of the reasons for the trial court's decision. (*ASP Properties Group, supra,* at p. 1268.)

We must interpret a contract to give effect to the mutual intention of the parties, and the language of the contract governs if it is clear and explicit and does not involve an absurdity. (*Horath, supra,* 225 Cal.App.4th at p. 463; Civ. Code, §§ 1636, 1638.) "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." (Civ. Code, § 1641; *Ghirardelli v. Peninsula Properties Co.* (1940) 16 Cal.2d 494, 496 ["In the interpretation of a contract, it is a fundamental rule that all of the writing must be read together and every part interpreted with reference to the whole, so that each provision therein will be effective for its general purpose."].) "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." (Civ. Code, § 1648.) In addition, "[p]articular clauses of a contract are subordinate to its general intent." (Civ. Code, § 1650.)

If there is a dispute over the meaning of the contract language, the trial court provisionally receives all credible evidence of the parties' intentions to determine "whether the language is 'reasonably susceptible' to the interpretation urged by the party" and, if it is, the court will then admit the extrinsic evidence to assist in the interpretation of the contract. (*Horath, supra*, 225 Cal.App.4th at p. 464.) In ascertaining the contract's meaning, the court examines the parties' expressed intent, using an objective standard. (*ASP Properties Group, supra*, 133 Cal.App.4th at p. 1266.) A court may consider all competent evidence, such as the language used in the contract and its object, nature and subject matter, as well as the circumstances of the parties' negotiations and their subsequent conduct. (*Ibid.*) However, evidence of the undisclosed subjective intent of the parties is not competent extrinsic evidence, as "it is irrelevant to determining the meaning of contractual language." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166, fn. 3 (*Winet*).)

Gimbel contends an independent review is required in this case, as "the evidence is undisputed and the parties draw conflicting inferences." Defendants maintain a substantial evidence standard of review is required because the "record contains conflicting extrinsic evidence." Defendants identify three instances of conflicting evidence.

Defendants refer to Rubenstein's testimony, in which he describes Gimbel's understanding that the Partnership Agreement was drafted to require Michael to work exclusively for Gimbel, an interpretation not reflected in Michael's description of his negotiations with Stuart. Defendants also identify evidence of a proposed term sheet Michael had submitted to Gimbel regarding Rincon Phase II in which he had crossed out the "pre-" from the term "pre-construction financing," which Gimbel presented as evidence that the Partnership Agreement encompassed real estate activities that did not require preconstruction financing and Michael disputed Gimbel's characterization of the term sheet. Defendants further reference conflicting testimony of the parties regarding whether Gimbel informed Michael, during the time in which he was attempting to salvage an interest in Rincon Phase II, that it did not have funds to continue to invest in Phase II and did not wish to make any further investment in Urban West.

Regarding Rubenstein's testimony regarding Gimbel's intent in entering into the Partnership Agreement, under California law the subjective intent of a party is not competent extrinsic evidence of the parties' objective intentions, and Gimbel presented no evidence that it ever discussed its view with Michael during the negotiations. (*Winet, supra,* 4 Cal.App.4th at p. 1166, fn. 3.) Therefore Rubenstein's testimony on this issue

cannot be considered in interpreting the Partnership Agreement. As to the two other instances of conflicting evidence, neither sheds light on the meaning of the term "Project" as used in the Partnership Agreement, which we find dispositive of Gimbel's case, and we therefore find the proper interpretation of the term presents a question of law which we must interpret independently. (*ASP Properties Group, supra,* 133 Cal.App.4th at pp. 1266-1267.)

DISCUSSION

Gimbel maintains the judgment should be reversed because Kriozere breached its fiduciary and contractual obligations to Gimbel by entering into the DMA through Urban Pacific, an entity owned solely by Kriozere, rather than through the partnership, Urban West. Gimbel raises three issues on appeal: whether the court erred in concluding the DMA was not a Project under the Partnership Agreement, whether the court erred in determining that only Projects requiring preconstruction financing are governed by the Partnership Agreement, and whether the court erred in concluding the $6 million Kriozere paid to settle the APC judgment and remove the lien constituted preconstruction financing Gimbel was required to pay to participate in the DMA. Gimbel further contends the attorney fee and cost award against Gimbel must be reversed because the judgment was in error, but does not raise any issue as to the amount of the fee and cost award.

I. *THE TRIAL COURT CORRECTLY CONCLUDED THE PARTNERSHIP AGREEMENT IS AMBIGUOUS AND ADMITTED EXTRINSIC EVIDENCE TO AID ITS INTERPRETATION*

As a threshold matter, we agree with the trial court's determination that the Partnership Agreement was ambiguous with respect to the scope of Projects encompassed by the agreement.[5] Article 4, section 4.4(d), the provision restricting Kriozere and Michael's activities, provides: "During the term of the Partnership, the General Partner and Michael Kriozere shall only conduct Projects in the Partnership, unless the Limited Partner declines or fails to provide any Preconstruction Financing for a Project that requires Preconstruction Financing." The Partnership Agreement defines the word "Projects" as follows: " 'Projects' means the real estate activities including but not limited to, the development, brokerage, buying and selling of real estate conducted by the Partnership. Each such real estate activity is a separate 'Project' of the Partnership." (Art. 13, § (m).)

The definition of "Projects" therefore contains a broad inclusion clause requiring an expansive interpretation of the types of activities included in the term. (*Wainwright v. Superior Court* (2000) 84 Cal.App.4th 262, 267 [the "phrase "'including but not limited to" is a phrase of enlargement"'].)) However, because the inclusion clause is placed in the context of "the real estate activities . . . conducted by the Partnership," the definition of Projects is reasonably limited to those types of activities contemplated to be

---

[5] Although the trial court did not expressly conclude that the Partnership Agreement was ambiguous, its reference to extrinsic evidence presented at trial in its statement of decision demonstrates that the court made such a determination.

"conducted by the Partnership." (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391, fn. 14 [The doctrine of noscitur a sociis establishes that """the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used."""]; see also *Seid Pak Sing v. Barker* (1925) 197 Cal. 321, 341 [the "ancient maxim of *noscitur a sociis* has still some degree of application to the use of the context in determining the scope and meaning of the words, sentences, and clauses of contracts"].)

The Partnership Agreement (art. 1, § 1.3) characterizes its purpose as being "organized to (i) acquire, own, operate, market, sell or otherwise disposed [*sic*] of real estate investments (the 'Business'), and (ii) engage in and carry on any lawful business purpose or activity which is required to conduct the Business that is not prohibited by the Act or other applicable law." Pursuant to this purpose, Kriozere was required to "devote such time to the Partnership's business and affairs as is reasonably necessary to carry out that General Partner's obligations under this Agreement" (art. 4, § 4.4(a)) and to "take all actions that may be necessary or appropriate (i) for the continuation of the Partnership's valid existence as a limited partnership under the Act, and (ii) for the acquisition, development, maintenance, preservation, and operation of Partnership property in accordance with the provisions of this Agreement and applicable laws and regulations" (art. 4, § 4.4(b)). Notably, these provisions: (1) did not require Kriozere to limit its activities exclusively to the business of the partnership, and (2) characterized Kriozere's activities under the Partnership Agreement as relating to "the acquisition, development, maintenance, preservation, and operation of Partnership property."

In addition, there is no provision in the Partnership Agreement for Kriozere to bring any potential project to Gimbel, other than through the right of first refusal process in which Gimbel is provided with ninety (90) days to decide whether it wants to contribute preconstruction financing for any "Project of the Partnership" (art 2, § 2.2). However, the tax allocation portion of the Partnership Agreement (art. 6, § 6.1) references a 40 percent profit and loss allocation to Gimbel for a Project that "does not require Preconstruction Financing," and the restriction clause of article 4, section 4.4(d) describes provision of "Preconstruction Financing for a Project that requires Preconstruction Financing" and thereby implies the existence of Projects not requiring preconstruction financing. Accordingly, to the extent that the Partnership Agreement contemplates the parties engaging in Projects that do not require preconstruction financing, the vetting process for evaluating such opportunities and converting them into "Projects of the Partnership" is uncertain. We therefore conclude the Partnership Agreement is ambiguous regarding the scope of the Projects, as the word is reasonably susceptible to more than one meaning.

II. *THE DMA WAS NOT A PROJECT UNDER THE PARTNERSHIP AGREEMENT*

Gimbel contends the DMA was a Project under the Partnership Agreement because the purpose of the partnership was to engage in real estate activities and develop real estate, the definition of Project in the Partnership Agreement is "open-ended and non-exhaustive" and "includes all real estate activities of any kind," and therefore because the DMA involved a "real estate activity" it was a Project in which Urban West was entitled to participate. Gimbel further contends the DMA is a Project because

Kriozere was compensated as a developer under the DMA and the Partnership Agreement contemplates that the partners share in developer fees. We disagree.

In construing the Partnership Agreement, our primary directive is to give effect to the mutual intention of the parties (Civ. Code, § 1636), applying California's rules of interpretation (Civ. Code, § 1637). Pursuant to the rules, each contractual provision must be construed in the context of the agreement as a whole and concern subject matter for "which it appears that the parties intended to contract." (Civ. Code, §§ 1648, 1641.) In addition, "[p]articular clauses of a contract are subordinate to its general intent." (Civ. Code, § 1650.) We conclude the term "Projects of the Partnership," when examined in the context of the Partnership Agreement in its entirety, cannot be interpreted so broadly as to preclude Michael and Kriozere from engaging in "all real estate activities of any kind" as Gimbel maintains. As described *ante*, the broad inclusionary language contained in the definition of Projects is limited by surrounding language referring to "the real estate activities . . . conducted by the Partnership" and must be examined in context. In addition, the clause defining the Projects of the Partnership is subject to the general intent of the contract. (Civ. Code, § 1650.) As evidenced by its plain language, the Partnership Agreement was formed to engage in "real estate investments" and activities involving "Partnership property," and does not appear to contemplate real estate activities that do not involve some form of financial investment in real property.

Likewise, we are unpersuaded by Gimbel's argument that the DMA is a Project under the Partnership Agreement because Kriozere (through Urban Pacific) agreed to provide development of real estate pursuant to the DMA, was compensated as a

developer, and development is a specifically enumerated real estate activity within the definition of Project. The Partnership Agreement describes Kriozere's development activities in the context of "the . . . development . . . of Partnership property" (art. 4, § 4.4(b)) and the specific provision of the agreement defining Project is constrained by the overall purpose of the Partnership Agreement, which was to "acquire, own, operate, market, sell or otherwise disposed [*sic*] of real estate investments." (Art. 1, § 1.3.) The Partnership Agreement therefore does not encompass Kriozere's provision of development management services relating to real estate in which the partnership has no financial investment, such as the property owned by 401 Harrison Investor LLC. It was undisputed at trial that any ownership interest the partnership had in the property at 401 Harrison Street (through Rincon Phase II) was eliminated through foreclosure.

Our interpretation is further supported by extrinsic evidence of the circumstances under which the Partnership Agreement was made. (Civ. Code, § 1647.) At the time they entered into the Partnership Agreement, the parties had participated in real estate transactions as partners for over 16 years. The original partnership relationship originated with Michael's request for seed money to invest in a real estate development opportunity and each of the five projects the parties participated in involved Gimbel's investment of seed money. The 1989 Agreement and 1993 Agreement both referred to Gimbel as the "Investor" and Kriozere as the "Manager" and the primary purpose of the partnership in each case was to "invest, directly or indirectly, . . . in real property." Under the prior agreements, Gimbel was entitled to be offered the opportunity to invest whenever Kriozere or Urban West invested in real property and additional funding was

required. Gimbel presented no competent evidence that the Partnership Agreement (which restructured the partnership to make Gimbel a limited, rather than general, partner) was intended to effect a fundamental change in the purpose of the parties' relationship and the restated language of the Partnership Agreement reflects a similar purpose (to "acquire, own, operate, market, sell or otherwise disposed [*sic*] of real estate investments"). Consequently, the circumstances under which the Partnership Agreement was made supports the interpretation that the parties' objective intent in entering into the Partnership Agreement was to facilitate the partnership's financial investment in real estate. As the DMA did not provide such opportunity, it was not a Project as contemplated under the purpose of the Partnership Agreement.[6]

Gimbel also contends that the DMA was a Project under the Partnership Agreement because the agreement expressly contemplates that Gimbel and Kriozere share developer fees, identifying two provisions (art. 5, § 5.3 & art. 6, § 6.1) in which the distribution of developer fees from a Project is allocated 40 percent to Gimbel and 60 percent to Kriozere. However, both provisions apply, by their plain language, only to a

---

6 To the extent Michael's pre-DMA payment of approximately $6 million to settle the APC judgment and remove the lien may be construed as an opportunity for the partnership to invest in the DMA, Michael provided Gimbel with the option to participate by reimbursing him for all or a portion of his expenditure and Gimbal declined. Although the investment opportunity was provided to Gimbel after-the-fact, Gimbel does not contend it would have made the investment if it had been presented with the opportunity in advance. In any case, Gimbel maintains Michael's funding request did not constitute "Preconstruction Financing" under the Partnership Agreement, and the agreement did not provide any specific mechanism governing how Kriozere was to present other types of investment opportunities to Gimbel.

Project. The provisions do not purport to expand the definition of Project to encompass any transaction which includes a developer fee.

Under the Partnership Agreement, Michael and Kriozere are required to "only conduct Projects in the Partnership . . . ." (art. 4. § 4.4(d)). Accordingly, if an activity is not a Project under the terms of the Partnership Agreement, they are not required to conduct the activity "in the partnership." Because we have concluded that the DMA is not a Project, we further conclude that Michael and Kriozere's participation in the DMA outside the partnership (without Urban West or Gimbel) did not constitute a breach of the Partnership Agreement.[7]

III. *PRECONSTRUCTION FINANCING*

Gimbel further contends the trial court erred in determining that only Projects requiring preconstruction financing are Projects included in the Partnership Agreement. We have interpreted Projects of the partnership as limited to real estate activities in which the partnership makes some type of financial investment in real property. We therefore need not determine whether the term "Projects" is further limited to encompass only those Projects in which Gimbel's financial contribution falls within the definition of preconstruction financing. Likewise, we do not reach Gimbel's argument that the $6

---

[7] On appeal, Gimbel does not provide any argument or legal authority distinguishing its breach of fiduciary duty cause of action or advancing any error specific to that cause of action, thereby we conclude Gimbel forfeited the issue. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."].)

million Michael paid APC to remove the lien on the property was not Preconstruction Financing because in light of our conclusion that the DMA was not a Project under the terms of the Partnership Agreement, Michael and Kriozere's participation in the DMA was not prohibited regardless of whether or not Gimbel declined to provide preconstruction financing.

IV. *ATTORNEY FEE AWARD*

Gimbel does not dispute the applicability of the attorney fee provision of the Partnership Agreement or the amount of the fees and costs the trial court ordered it to pay. Instead, Gimbel's only argument on appeal was that the award should be reversed upon the reversal of judgment. Where a party fails to cite authority or present argument, the party forfeits the issue on appeal. (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 949.) Because we have affirmed the judgment, there are no grounds for reversal of the attorney fee and costs award.

DISPOSITION

The judgment is affirmed. Defendants shall recover their reasonable costs on appeal.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.