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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

SPARKS PROPERTY INVESTMENTS,  
LLC,

Plaintiff, Cross-defendant and  
Respondent,

v.

MISSION CAREER COLLEGE, LLC et  
al.,

Defendants, Cross-complainants and  
Appellants;

THOMAS SPARKS et al.,

Cross-defendants and Respondents.

E051124

(Super.Ct.No. RIC499571)

OPINION

APPEAL from the Superior Court of Riverside County. Dallas Holmes, Judge.  
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to  
art. VI, § 6 of the Cal. Const.) Affirmed.

Law Office of Thomas Avdeef and Thomas Avdeef for Defendants, Cross-  
Complainants, and Appellant.

Law Offices of Cummings Myer, Audrey L. Myer and Thomas B. Cummings for  
Cross-Defendants and Respondents.

## I. INTRODUCTION

Defendants and cross-complainants Mission Career College, LLC (Mission), Frances Abila,<sup>1</sup> and Angelina Salgado (sometimes referred to collectively herein as defendants) appeal from (1) judgment in favor of plaintiff and cross-defendant Sparks Property Investments, LLC (SPI) in SPI's action for breach of lease against Mission and enforcement of personal guaranties against Abila and Salgado and (2) in favor of cross-defendants Thomas Sparks (Sparks), SPI, Kenski Properties, Inc. (KPI), Linda Kenski (Kenski), Andrew Gordon (Gordon), and RBI Southern Cal., Inc. (RBI) in defendants' cross-complaint for breach of contract, negligent misrepresentation, and intentional misrepresentation. Defendants contend the trial court erred in (1) finding that the lease was legal despite the lack of a certificate of occupancy as required by the County of Riverside (County); (2) failing to find that SPI breached the lease; and (3) failing to find cross-defendants committed fraud. Defendants also request this court to reverse the attorney fees award. We find no error, and we affirm.

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<sup>1</sup> Although Ms. Abila was named in the complaint as "Francis," she confirmed at trial that her name is "Frances."

## II. FACTS AND PROCEDURAL BACKGROUND

In early 2006 Tino Avila,<sup>2</sup> Mission's executive director, was looking for a facility to lease for the purpose of conducting vocational training. Avila called Gordon, a real estate agent with RBI, after seeing Gordon's name and telephone number on a sign at a shopping center in Riverside. Avila had spoken to the previous owner of the shopping center, who had run a massage school in the building in 2005, and Avila intended to locate Mission's training facility in the premises previously occupied by the massage school.

Sparks is the managing member of SPI, which owns the shopping center. On April 7, 2006, Avila, on behalf of Mission, and Sparks, on behalf of SPI, executed a lease for Mission to rent 3,000 square feet at the shopping center. The term of the lease was 60 months, to begin on May 8, 2006, with initial rent of \$4,500 per month. Avila's wife, Frances Abila (see footnote No. 2 below) and his daughter, Angelina Salgado, both members of Mission, signed the lease as guarantors. Avila had never negotiated a lease before.

Gordon testified that in negotiating the lease, he did not make any representations to Avila about the suitability of the space, did not give Avila any advice, and did not make any misrepresentations.

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<sup>2</sup> Tino Avila's name is spelled throughout the record as "Abila." However, he confirmed at trial that it is spelled "Avila." His wife, Frances Abila, spells her last name "Abila."

Avila testified that in May 2006, he went to the County's planning department and requested a business license. He was informed that his leased space was not shown on the plot map and he first needed a certificate of occupancy before he could obtain a business license. The planning department provided Avila with an application for construction, which he forwarded to SPI. The application requested information about all the tenant building improvements that were not shown on the County's plot map, and requested a fully-dimensioned floor plan.

SPI retained KPI as property manager for the shopping center commencing on June 1, 2006. On June 1, Avila requested Gordon and Kenski to fill out the application and submit it to the County.

In response, Kenski sent Avila a fax dated June 7, 2006, asking, "Is it a Certificate of Occupancy that you are applying for? If not, what 'Cert' are you attempting to acquire. The pages attached to your fax are for a construction application with the County of Riverside."

Avila replied in a fax to Kenski dated June 8, "Linda, there are two sections that need to be filled out. The Plans shall consist of, [sic] and Floor Plan which I am faxing. Some I have filled out and the ones with a check mark maybe you can help me out. If you have the floor plans it would help."

Avila sent Sparks a fax dated July 19, 2006, stating: "Riverside County has requested that you fill out this application and submit it to them. I have been trying since the beginning of the lease agreement (4/06) to obtain a Certificate of Occupancy. I have communicated this to Andrew Gordon, your previous property manager, Kenski

Properties and even sent the information to your company. I can not operate without this certificate and non [sic] will be issued to other now tenets [sic] if this is not resolved. I'm caught in the middle of this and it's not my responsibility to come up with facility blue prints, or parking lot plans, that county is requesting. [¶] I have been to the planning department four times and my certificate approval is contingent upon Sparks Properties submitting building updates to the county.”

Kenski testified that on August 9, 2006, she had hand delivered the requested documents to Avila's office. The documents included the “application, the legal description of the property in the form of the grant deed, [and] 15 copies of the site plan . . . .” She did not have a floor plan for the premises, and she told Avila he would have to provide his own. Avila denied ever having received the documents.

After Kenski delivered the documents to Avila, she had no further communication with Avila about a certificate of occupancy until July 6, 2007. Avila testified he did not remember doing anything between July and December 2006 to determine the status of any documents he needed from SPI to obtain a certificate of occupancy. He did not send any written communication to Kenski or SPI on the subject between July 2006 and July 2007.

On July 6, 2007, Avila informed KPI that he had been to the County seven times concerning the occupancy permit problem, and the County would not issue the certificate “until all building permits and blue prints are finalized.”

On July 9, 2007, Kenski asked Andrew Perez, a licensed architect, to go to the County to investigate, and he reported that “there was nothing outstanding and no reason that Mission . . . could not get their business license and Certificate of Occupancy.”

On July 23, 2007, Kenski sent Avila an e-mail stating: “Thanks for taking my phone call today, Tino. For the record, you gave me ‘case # PP3515’ and you said you will email me with the reference number for the ‘open permit’ that you say the County is using as a reason to not allow your Certificate of Occupancy. You also said you will give me the name & number with extension of the person you talk to at the County. Could I also have a copy of the ‘30-day notice’ that you received from the County or State? This may have information on it that I could use to help resolve your C of O issue. . . . We are (and have been) very willing to help you, but we need the above information f[ro]m you. So please give us a copy of whatever you have in writing from the County so we can follow up to help resolve the issue.”

Avila testified that he gave Kenski a case number and “probably” gave her the name and telephone number of a person to talk to at the County. He did not remember having any followup with her after her July 23, 2007, email.

On November 28, 2007, Mission sent a letter to SPI and KPI giving 30-day notice to vacate the premises due to SPI’s alleged failure to remedy the occupancy permit issue. The letter stated: “Mission Career College since April 7, 2006 has numerous times (5) applied for a Conditional Use Permit at the County of Riverside Department of Building and Safety. Mission Career College has discussed this with you and notified your property managers of the denials due to Sparks Property Investments not satisfying

the building code requirements, Referenced Ordinance 457 County of Riverside Code.

[¶] Mission Career College attempted once again to acquire the Conditional Use Permit after you stated that all conditions were satisfied by your architect. When I requested a CUP Ms. Pradip Singh and Ms. Diana O'Keith of the Planning Department reviewed units 12, 13, 20 & 21. During their research they found that these and other units did not have Building Tenet [*sic*] Improvements (BTI) permits. They also stated that these units should not be leased until BTI were approved by the Planning and Safety Department. . . .”

On December 31, 2007, Mission vacated the premises. The space remained vacant after January 1, 2008, although SPI attempted to find a new tenant.

Neither KPI nor Kenski had any involvement in negotiating the lease between SPI and Mission. Kenski did not make any representations to Mission about the suitability or use of the premises. Avila never told Kenski that he believed it was the owner's obligation to undertake all activity to obtain a certificate of occupancy for Mission. Other tenants were able to secure their own certificates of occupancy. Kenski testified that she had helped two other tenants obtain occupancy permits. She testified that every time Avila asked for information, she provided it for him. In her experience as property manager, generally a commercial tenant applies for the certificate of occupancy.

Sparks testified he had not made any misrepresentations of fact to Mission, and he had not received any information that other tenants had difficulty in obtaining certificates of occupancy.

On May 16, 2008, SPI filed a complaint against Mission for breach of contract and against Abila and Salgado for enforcement of personal guaranties. On June 20, 2008, defendants filed a cross-complaint against cross-defendants, alleging breach of contract, intentional misrepresentation, and negligent misrepresentation.

Following the bench trial, the trial court issued a minute order on March 1, 2010, stating the court's decision in favor of SPI on its complaint and in favor of cross-defendants on the cross-complaint. The document stated it would become the statement of decision unless either party specified controverted issues or timely made additional proposals. Defendants filed an objection on March 12, 2010, requesting a decision on controverted issues and listing 17 controverted issues to be addressed. On June 3, 2010, the trial court entered judgment without addressing the controverted issues.

### III. DISCUSSION

#### **A. Breach of Lease**

Defendants contend the trial court erred in failing to find that SPI breached the lease by failing to provide a certificate of occupancy and in finding that Mission itself had breached the lease.

##### *1. Failure to Provide Citations to Record*

An appellant must, in its opening brief, set forth a “summary of the significant facts limited to matters in the record” (Cal. Rules of Court, rule 8.204(a)(2)(C)) and must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” (Cal. Rules of Court, rule 8.204(a)(1)(C).) In their opening brief, defendants’ only citations to the trial court record

are to pages 165 through 205; 380 through 438, and 460-461 of the reporter's transcript. Those portions of the record encompass part of Avila's testimony, part of Sparks's testimony, and part of the testimony of Lyn Tontz, the custodian of records for the County building and safety department. Moreover, although defendants quoted various portions of the lease in their opening brief, they did not provide any citations to the record where those portions of the lease appear. In their reply brief, however, they did provide a few additional citations to the record, although, again, many assertions of fact are unsupported by such citations.

We are not required to search the record on our own seeking error. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 [Fourth Dist., Div. 2].) "If a party fails to . . . support an argument with necessary citations to the record, we may deem the argument waived. [Citations.]" (*Utility Consumers' Action Network v. Public Utilities Com.* (2010) 187 Cal.App.4th 688, 697.) Here, however, because the breach of lease claims raised in the complaint and cross-complaint are opposite sides of the same coin, and plaintiff and cross-defendants have supported their arguments with appropriate citations to the records, we will address the breach of lease issues on the merits.

## 2. *Analysis*

Section 5.01 of the lease provides: "Occupancy and Delivery of Possession. Where Landlord is required to do work in the Premises pursuant to Exhibit 'B,' attached hereto, Landlord agrees to deliver possession of the Premises to Tenant, and Tenant agrees to accept delivery of possession of the Premises from Landlord, upon the Substantial Completion of the Premises, as defined in Section 2.14 above. In any case

where Landlord is not required to do work in the Premises, Tenant agrees to accept delivery of possession of the Premises upon notice from Landlord to Tenant that the Premises are available for occupancy by Tenant. . . .” (Underlining in original.)

Mission contends that in the lease, it “bargained for premises that it could occupy initially, at the commencement of the lease,” and under the second sentence of section 5.01, SPI “falsely guaranteed to [it] that upon commencement of the lease it could occupy the premises.”

However, that second sentence applies only if the landlord “*is not required to do work in the Premises.*” Exhibit “B” to the lease sets forth the work the landlord was required to do as follows: “Landlord shall deliver the Premises with the HVAC, plumbing and electrical systems in good working condition.” Thus, because Exhibit B required the landlord to do work in the premises, the second sentence on which defendants rely is, by its terms, inapplicable.

Plaintiff and cross-defendants point out that under section 5.02 of the lease, Mission took the leased premises “as is,” with the exception noted in Exhibit “B” Under section 5.02, Mission acknowledged that neither Sparks nor its agents “have made any representation or warranty as to the present or future suitability of the Premises for the conduct of Tenant’s business . . . .” Avila testified that he understood the landlord was making no representation about the suitability of the premises for Mission’s business.

Other provisions of the lease make clear the obligation to obtain a certificate of occupancy was placed on Mission. Section 12 of the lease provided that the tenant would obtain all “permits, licenses or other governmental, quasi-governmental or other licensing

authority authorizations” that were required as a prerequisite for the tenant to conduct business operations.

Section 17.02 of the lease provided: “Tenant shall, at Tenant’s sole cost and expense, strictly comply with all of the requirements of all city, county, municipal, state, federal and all other applicable governmental authorities, now in force, or which may hereafter be in force, pertaining to the Premises, including the installation of additional facilities as required for the conduct and continuance of Tenant’s business, and shall maintain the Premises at all times in strict compliance with all city, county, municipal, state, federal and other statutes, laws, ordinances, rules, decrees, orders and regulations now in force or which may hereafter be in force.”

Section 33.24, entitled “Permit Requirement,” provides: “Upon mutual execution of this Lease, Tenant shall file in its own name appropriate applications to obtain necessary licenses and permits as are required to enable Tenant to operate its business and shall diligently pursue the procurement and/or approval of such licenses and permits.” (Underlining in original.)

Exhibit “C” to the lease provided that Mission was responsible for obtaining any building permit or other permit before commencing any work on tenant improvements, was responsible for complying with all applicable codes and regulations, and was responsible for obtaining and recording any notice of completion concerning tenant improvements.

We conclude the lease did not require Sparks to provide a certificate of occupancy for Mission; rather, under the above-quoted sections of the lease, Mission was required to

obtain any permit necessary for the operation of its business, including the certificate of occupancy.

### **B. Good Faith and Fair Dealing**

Although we conclude the lease did not require Sparks to provide a certificate of occupancy, we will assume the covenant of good faith and fair dealing that inheres in every contract required Sparks to cooperate with defendant's efforts to obtain the certificate, including the duty to provide defendants with information within Sparks's sole control necessary for defendants to obtain the required permits. Defendants argue that Sparks failed to do so.

With respect to that issue, the trial court found as follows: "It appears from the evidence here that plaintiff had a tenant in trouble who says he wanted to stay if he could get his permits worked out. But he couldn't. He did not know what to do to get his occupancy validated, or really even which permit he needed to do so. He never actually applied for a Certificate of Occupancy, and at various times as he flailed about he called what he was seeking a 'Cert of Operate' . . . a 'Certification of Authorization' . . . a 'Conditional Use Permit' . . . and a 'Certificate of Occupation.' . . . It is no wonder that he was unsuccessful in his efforts at the County counter, and periodically asked plaintiff and his representatives for help. The fact that plaintiff's people responded and tried to help creates no legal duty on their part to obtain the Certificate of Occupancy. [¶] Plaintiff's agent Kenski testified that she wondered if he really wanted her help after all because it took him so long to respond to her requests for follow-up information as to whom she could talk to so she could help. Indeed, sometimes he never responded. Set

off against this is Mr. A[v]ila's offhand diffidence on the stand, which did nothing to correct Ms. Kenski's impressions. Whether defendant was really trying to get a Certificate of Occupancy it never applied for, or was just using that as a possible later excuse for lease nonperformance is just speculation, but the evidence showed no competent or consistent effort on defendant's part to obtain same."

We agree with the trial court's assessment of the evidence: Defendants' failure to obtain a certificate of occupancy was not attributable to a failure of cooperation on their part, but on Mission's own failure to diligently follow through.

### **C. Legality of Lease**

Defendants argue the lease was illegal, and therefore unenforceable, if it did not require Sparks to provide a certificate of occupancy.

Defendants rely on several cases for their argument: *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393 (*Espinoza*); *Gruzen v. Henry* (1978) 84 Cal.App.3d 515 (*Gruzen*); and *Lyke v. Pursley* (1959) 171 Cal.App.2d 417 (*Lyke*). Those cases are distinguishable. In both *Espinoza* and *Gruzen*, the courts were interpreting specific provisions of the applicable municipal codes, and residential leases rather than a commercial lease were at issue. (*Espinoza, supra*, at p. 1400 [when the landlord did not have a certificate of occupancy for a residence, in violation of the local municipal code, the residential lease was illegal, and the landlord could not collect back rent from the tenant]; *Gruzen, supra*, at p. 519 [the landlord's failure to secure a certificate of occupancy required by a city ordinance provided a defense to the tenants in an unlawful detainer action, and the landlord was not entitled to an award of rent]; see also *Currier v. City of Pasadena*

(1975) 48 Cal.App.3d 810, 812-813 [describing the ordinance at issue in *Gruzen*].) *Lyke* dealt with a state regulation enacted for public protection; specifically, a regulation requiring a permit for the operation of a motel. (*Lyke, supra*, at p. 421.)

Defendants assert that the “County of Riverside requires a certificate of occupancy for commercial, industrial and office buildings, including individual tenant spaces,” and the cases discussed above are therefore controlling. However, the trial court held that Mission had failed to establish that the County required a certificate of occupancy.

Lyn Tontz, the custodian of records for the County building and safety department, testified that the requirement for a certificate of occupancy is not in the text of County ordinance No. 457.101, but he believed the requirement was in one of the Uniform Codes that are referenced in ordinance No. 457.101. Mission’s attorney nonetheless argued that Tontz had testified that such a requirement was in ordinance No. 457.101. The trial court disagreed: “No. He said it’s not in there. He said it’s in one of the incorporated codes. That’s what I’ve been trying to say all along. The entire text of the ordinance is not before us . . . .” Mission’s counsel again argued that Ordinance 457.101<sup>3</sup> required a certificate of occupancy, and the trial court responded, “Let me try this another way, [counsel]. I want to know if I need a Certificate of Occupancy in Riverside County for what I’m about to do. What is here before me does not tell me whether I need one or not. I do not have that before me in this case. [¶] I have tried to make it clear for days that I didn’t have it yet. I thought it might appear, but it’s not

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<sup>3</sup> Defendants’ counsel in fact referred to “Ordinance 475,” but the context makes clear the intended reference was to ordinance No. 457.101.

here.” After even more argument, the trial court ruled that a County ordinance that imposed a requirement of a certificate of occupancy was not before the court. The trial court clarified that it had taken judicial notice of ordinance No. 457.101, “but you won’t find in that ordinance any language about a Certificate of Occupancy. What your witness told us was, you’ll find reference somewhere in there, and he didn’t know where, incorporating a Uniform Building Code Section that must have that in it, but that is not he[re] before us.”

Defendants have provided nothing more on appeal; they continue to argue that ordinance No. 457.101 requires a certificate of occupancy. We have examined the text of that ordinance and, like the trial court, find no reference to such a requirement. We therefore agree with the trial court that defendants failed to establish the legal basis for their claim.

In their reply brief, defendants argue that the trial court took judicial notice of trial exhibit No. 258, entitled “County of Riverside Building and Safety Department Certificates of Occupancy Permit Policy,” which was legal authority for the County’s occupancy permit requirements. Defendants also cite the following colloquy from the trial:

“[Counsel for defendants:] Before we start, Sir, can you explain what an occupancy permit is with the County of Riverside[?]”

“[Tontz:] I’m going to read from the policy of the Building and Safety Department of the Riverside County that’s posted on our website entitled, ‘Certificates of Occupancy Permit Policy.’”

“Overview: A certificate of occupancy is required for commercial, industrial and office building, including individual tenant spaces. This includes new buildings and existing buildings that are being remodeled, expanded or that change the occupancy classification of the building or tenant space.” (Boldface omitted.)

“Judicial notice may not be taken of any matter unless authorized or required by law.” (Evid. Code, § 450.) A court may take “judicial notice of a public entity’s legislative enactments (Evid. Code, § 452, subd. (b)) and official acts (*id.*, subd. (c).) “Thus, we may take notice of local ordinances [citation] and the official resolutions, reports, and other official acts of a city [citation].” (*Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027.) However, defendants have provided no citation to authority that would permit us (or the trial court) to take judicial notice of a *policy* of a department of a county. Moreover, nothing in the text of the cited policy establishes a requirement that the landlord obtain the certificate for the tenant; the policy merely states that the certificate is required.

#### **E. Fraud Claims**

Defendants contend the trial court erred in entering judgment for cross-defendants on defendant’s causes of action in their cross-complaint for intentional and negligent misrepresentation. However, in setting forth the facts on which they rely to support their cause of action for fraud, defendants have failed to provide a single citation to the record. We therefore deem their argument waived. (*Utility Consumers’ Action Network v. Public Utilities Com.*, *supra*, 187 Cal.App.4th at p. 697.)

## **F. Constructive Eviction**

On appeal, defendants argue the theory of constructive eviction. However, they did not allege such a claim in their cross-complaint and did not raise the issue at trial. Theories not raised at the trial level generally may not be raised for the first time on appeal. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.) We therefore decline to address defendants' arguments as to constructive eviction.

## **G. Decision on Cross-Complaint**

In their reply brief, defendants argue for the first time that the trial court erred in failing to address the controverted issues identified in their request for a decision, and plaintiff is therefore precluded from referring to the trial court's statement of decision in their brief. We decline to consider this argument because it was raised for the first time in the reply brief, and plaintiff had no opportunity to respond. (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 855.)

## **H. Attorney Fees**

Following trial, the court awarded defendants contractual attorney fees in the amount of \$79,723. In the conclusion section of their opening brief, defendants request reversal of the award of attorney fees, but do not provide any authority or argument for their request. We therefore deem forfeited any challenge to the attorney fee award. (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [“[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's . . . issue as waived. [Citation.]”].)

IV. DISPOSITION

The judgment is affirmed. Parties shall bear their own costs on appeal.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MCKINSTER

J.