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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

RICARDO R. RIVERA,

Plaintiff and Appellant,

v.

ANDREW JOHNSON et al.,

Defendants and Respondents.

E051949

(Super.Ct.No. RIC471736)

O P I N I O N

JOSEFINA RIVERA ORTIZ,

Plaintiff and Appellant,

v.

ANDREW JOHNSON et al.,

Defendants and Respondents.

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge.

Affirmed in part and reversed in part.

Brian G. Saylin and Marvin D. Mayer for Plaintiffs and Appellants.

Ericksen Arbuthnot, Mark L. Kiefer, Kathleen E. Wilcox, and Gregory Mase for Defendants and Respondents Gregory E. Ward, Michael Johnson, and Amabelle Johnson.

Kneafsey & Friend, Sean M. Kneafsey and Shaun Swiger for Defendant and Respondent Andrew Johnson.

Carter & Carter and Christopher C. Carter for Defendants and Respondents Jeffrey Creamer, Paul Creamer, and Aaron Creamer.

## I. INTRODUCTION

Plaintiffs Ricardo R. Rivera and Josefina Rivera Ortiz alleged defendants defrauded them in connection with their purchase of certain residential property (the Property) in Corona. They contend that prior to the purchase a septic tank on the Property was replaced when Corona's building code required the property be connected to a sewer line. The illegal septic tank was not disclosed to them until after the purchase—when the City of Corona notified them of the code violation and demanded compliance. They also alleged other facts were fraudulently concealed or misrepresented.

The defendants responded in three groups: (1) Andrew and Julie Johnson (who sold the Property to defendants Michael and Amabelle Johnson); (2) Michael and Amabelle Johnson (who bought the property from Andrew and Julie Johnson, replaced the septic tank, then sold the Property to Rivera) and Gregory Ward (Michael and Julie Johnson's real estate broker in the sale to Rivera); and (3) Jeffrey, Aaron, and Paul

Creamer (septic tank inspectors who allegedly made representations relating to the quality and legality of the septic tank).<sup>1</sup>

Each group of defendants filed separate motions for summary judgment against each plaintiff—six in all.<sup>2</sup> In Rivera’s opposition to the Creamers’ motion, Rivera stated that Jeffrey Creamer lacked standing to move for summary judgment because his default had been entered. Jeffrey Creamer then moved to set aside the default, which the court granted. The court also granted each of the motions for summary judgment and judgments were entered thereon. Plaintiffs appealed.

Reviewing the motions de novo, we affirm the judgment in favor of Andrew as to both plaintiffs and affirm the judgments in favor of the other defendants as to Ortiz’s complaint. For the reasons discussed below, we hold that Michael, Amabelle, Ward, and the Creamers failed to establish that they are entitled to judgment as a matter of law against Rivera. We therefore reverse the judgments in favor of such defendants against Rivera.

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<sup>1</sup> To avoid confusion, we will refer to the four defendants with the last name Johnson by their first names.

In the Creamers’ summary judgment motion and in their brief on appeal, they refer to themselves collectively as “Creamer” or “Creamers” without distinguishing between the individuals. We will do likewise except where the context requires individual identification.

<sup>2</sup> Prior to the hearing on the motions, the plaintiffs dismissed Julie from the action.

## II. FACTUAL SUMMARY AND PROCEDURAL BACKGROUND

### A. *The Pleadings*

Rivera's first amended complaint (FAC) alleges the following facts.

Andrew and Julie owned the Property from January 2002 until March 2006.

Andrew and Julie were aware that: (1) the septic tank at the Property was defective and made the Property uninhabitable and unsafe for occupancy; (2) a Corona Municipal Code provision made it unlawful to replace a septic tank if it is located on property within 200 feet of a city sewer line; and (3) the Property was within 200 feet of a city sewer line.

They therefore knew that the plumbing system needed to be connected to the sewer line in order to be habitable.

In March 2006, Andrew and Julie transferred title to the Property to Michael and Amabelle. Michael and Amabelle were licensed real estate agents. Andrew and Julie knew that Michael and Amabelle intended to make cosmetic repairs to the Property and resell it to third parties without connecting the plumbing system to the city sewer line.

In July 2006,<sup>3</sup> Michael and Amabelle replaced the septic tank without obtaining a permit to do so and without connecting the plumbing system to the city sewer line. The replacement septic tank was defectively installed, resulting in a dangerous and unhealthy condition at the Property.

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<sup>3</sup> The FAC states this occurred in July 2007. However, the year appears to be a typographical error.

In September 2006, Michael and Amabelle entered into a written agreement to sell the Property to Rivera. They were aware that Rivera was purchasing the Property for his cousin, Josefina Rivera Ortiz, and her family.

Prior to the purchase of the Property, each of the defendants falsely represented to Rivera that the septic tank had been repaired (rather than replaced), was in good working order, and that there was no sewer line within 200 feet of the Property. Defendants did not disclose that the septic tank was replaced in violation of the Corona Municipal Code or that it was defectively installed. When defendants made these representations, they knew their conduct was unlawful and their representations were false. They made the representations and nondisclosures with the intent to induce Rivera to purchase the Property. Rivera believed the representations and relied on them in agreeing to the purchase.

In January 2007, Rivera received notice from the City of Corona that the replacement of the septic tank violated the city's municipal code. The city demanded that Rivera bring the Property into compliance within 30 days or face criminal penalties.

Rivera did not have sufficient funds to bring the Property into compliance. The city then determined the Property was unfit for habitation.

Rivera also discovered that the roof was defective and that defendants made cosmetic repairs to the interior ceiling to prevent prospective purchasers from discovering the defects. Defendants also failed to disclose that the basement was unlawfully constructed without a permit.

Gregory Ward, the listing broker for the purchase, ratified and approved of the misrepresentations and nondisclosures.

Rivera suffered damages, including loss of use and enjoyment of the Property, costs of relocation, diminution in value of the Property, and emotional distress.

Rivera asserts three causes of action: (1) rescission for fraud (against Michael and Amabelle); (2) damages for fraud (against all defendants); and (3) breach of duty of care (against Ward and Amabelle). He sought rescission of the purchase of the Property and damages, among other relief.

Ortiz filed her complaint approximately two weeks after Rivera filed his FAC. Ortiz asserted claims for damages based upon fraud and “breach of duty of care.” The allegations of Ortiz’s complaint generally mirror the allegations in Rivera’s FAC. However, she adds that she acquired “equitable title” from Rivera and moved onto the Property in September 2006. She relied on defendants’ false representations in agreeing to acquire equitable title, take possession of the Property, and assume the mortgage loan for the Property.

Ortiz’s complaint includes allegations pertaining to Jeffrey Creamer. She alleged that Jeffrey Creamer conspired with the other defendants to make unlawful repairs to the Property and to conceal the repairs “to unsuspecting members of the public.” He also made other misrepresentations and nondisclosures. In particular, he “executed a Certification of Existing Subsurface Sewage Disposal System” (the septic tank certification), in which he stated he had examined the septic tank at the Property, it

appeared to be in good working order, and “there was no sewer within 200 feet of the system which abutted the property line.” These statements were false and Jeffrey Creamer knew they were false when he made them.

Rivera subsequently filed and served Doe amendments adding Jeffrey Creamer, Paul Creamer, and Aaron Creamer as defendants.<sup>4</sup>

In February 2009, the two lawsuits were consolidated.

*B. Overview of Evidence in Support of, and in Opposition to, the Motions for Summary Judgment*

As noted at the outset, this appeal is concerned with six summary judgment motions. The motions present different issues and, as the trial court noted, evidence pertaining to one motion is not necessarily relevant or admissible with respect to another motion. However, before analyzing the separate motions based upon the claims and evidence peculiar to each motion, we set forth the following general overview of the evidence.

Andrew Johnson and Julie Johnson owned the Property from January 2002 until March 2006. In 2004 and 2005, the Property was occupied by Andrew’s sister, Amy. During that time, neighbors noticed problems concerning the Property’s septic tank, including human waste seeping out of the cleanup valve into the yard and onto the neighbor’s yard; the house smelled like an outhouse.

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<sup>4</sup> It does not appear from our record that Ortiz added Paul or Aaron Creamer as defendants to her complaint.

Amy Johnson and her family moved out of the house near the end of 2005. For several months thereafter the house remained vacant. In March 2006, Andrew and Julie sold the Property to Michael and Amabelle.

The septic tank on the Property was replaced in July 2006. Michael was at the Property talking with workmen while it was being replaced.

On September 2, 2006, Michael and Amabelle entered into an agreement to sell the Property to Rivera. At the time of the transaction, Michael and Amabelle were real estate agents employed by Ward.

Rivera purchased the Property as his sole and separate property and agreed that the Property would be his primary residence.

Ortiz was not a party to the purchase agreement and is not a legal title holder to the Property.

In response to a request from an escrow company, Jeffrey Creamer inspected and performed a certification test on the septic tank on the Property. Jeffrey Creamer (or someone authorized by him to sign his name) signed a "Certification of Existing Subsurface Sewage Disposal System" form.<sup>5</sup> The document states that Jeffrey Creamer

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<sup>5</sup> Ortiz submitted a declaration stating that when she showed the septic tank certification to Jeffrey Creamer, Creamer told her that the signature was a forgery and he did not know who prepared it. At his deposition, Jeffrey Creamer testified that the document was signed by "Trang," who had Creamer's authorization to sign the document. Creamer said that he did not sign the form "[b]ecause I probably wasn't in the office and they needed the certification for escrow." He said that Trang filled out the certification form based on information Creamer gave to Trang.

examined the sewage disposal system at the Property.<sup>6</sup> In response to the question, “Is sewer within 200 ft. of system and abut property line?,” the check box for “No” is checked.<sup>7</sup> Above the signature certifying that the responses are true and correct under penalty of perjury are the words, “the system appears to be in good working order at the time of inspection and can be expected to function properly with proper maintenance.”

Rivera financed the purchase with two mortgages: a first deed of trust securing a \$317,200 debt, and a second deed of trust securing a \$79,300 debt. The sum of the two obligations represented the entire purchase price of the Property.

Rivera and Ortiz made an oral agreement whereby Rivera would purchase the property using his credit and Ortiz would live on the Property and pay all monthly mortgage payments in exchange for Ortiz becoming the owner after one year.<sup>8</sup> They agreed that if Ortiz did not make the mortgage payments, Rivera would have to pay them.

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<sup>6</sup> A hearsay objection by Michael, Amabelle, and Ward to the septic tank certification was sustained by the court.

<sup>7</sup> Jeffrey Creamer testified at his deposition that when he “did the inspection, . . . there was no sewer available or around within 200 feet,” and that the sewer line was between 240 feet and 260 feet from the Property.

<sup>8</sup> Rivera described the circumstances regarding the oral agreement with Ortiz as follows. Rivera lived in Goleta, California, and desired to move closer to Riverside County. His employer planned to open a restaurant near Corona where he could work. Rivera contacted Ortiz, who lived in Corona, to help him find a house. With the help of a real estate agent, Ortiz found the Property. Rivera made an offer to buy the Property, which was accepted. Prior to the close of escrow, Rivera’s employer told him he would not be opening a new restaurant and offered Rivera a pay raise to stay. Rather than cancel the escrow for the Property, which Rivera believed would cause legal problems, he suggested that Ortiz and her family move into the Property and make the mortgage

*[footnote continued on next page]*

Ortiz moved onto the Property in October or November 2006. By early December 2006, Ortiz began to notice problems with the septic tank. She states: “We saw solid waste material coming out of the clean-up valve in the yard. The shower and the sinks were taking a long time to drain. Sometimes we could smell the odor of human waste throughout the house.”

In January 2007, Ortiz received a notice of violation from the City of Corona Building Department. The notice, addressed to Rivera, states: “It has come to the attention of the City of Corona Building Department that *the existing Septic system on your property has been replaced* in violation of the Corona Municipal Code.” The notice referred to section 13.12.060 of the Corona Municipal Code as providing “that all properties located within 200 [feet] of a City Sewer line must legally [be] connected to such line.” The notice directed Rivera to “correct all violations” or be “subject to further enforcement action . . . up to and including CRIMINAL PROSECUTION and/or fines of up to \$500 per day.” Another notice of violation, sent on February 12, 2008, required Rivera to remove the septic tank and connect the residence to the public sewer system. According to Ortiz, a city building code enforcement officer “kept coming to the house every few weeks, and kept serving [them] with criminal citations.”

Ortiz contacted Jeffrey Creamer, who told Ortiz that Michael had asked him to prepare the septic tank certification, and that he told Michael he could not do so and he

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*[footnote continued from previous page]*

loan payments and other payments on his behalf. If Ortiz did this for approximately one year, Rivera would transfer the Property’s title to her. Ortiz agreed.

would have to connect the Property to the sewer line. Jeffrey Creamer met with Ortiz and showed her where a connection to the sewer line, running under an alley next to the Property, would be constructed. According to Ortiz, the sewer line is approximately 105 feet from the Property.<sup>9</sup>

Plaintiffs submitted evidence that the cost of obtaining a building permit and connecting the Property to the sewer line was \$64,845.

Ortiz continued to make the monthly mortgage payments until December 2007. She thereafter lived on the Property without making mortgage payments until March 2008, when the Property was “red tag[ged]” as uninhabitable. Rivera never transferred legal title to the Property to Ortiz.

Rivera conceded that he “put no cash into the property at any time.” He did not make any mortgage payments or pay any county taxes on the Property. Nor did he pay for any repairs to the Property.

Rivera says he has “headaches, and feelings of sadness and depression” as a result of the circumstances and events giving rise to his claims.

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<sup>9</sup> The evidence described in this paragraph is taken from Ortiz’s declaration. The Creamers, Michael, Amabelle, and Ward objected to this evidence. The court sustained the objection as to Michael, Amabelle, and Ward, but overruled the objection as to the Creamers. Andrew did not object to the evidence.

### *C. The Motions for Summary Judgment and the Trial Court's Rulings*

#### 1. Andrew

Andrew moved for summary judgment against Rivera on the following grounds:

(1) Rivera cannot establish any misrepresentation attributable to Andrew or Julie; (2) Rivera cannot establish that Andrew or Julie were part of a civil conspiracy to defraud him; and (3) Rivera has sustained no actual damages. Against Ortiz, they assert that Ortiz has no legal standing to assert a cause of action; (2) Andrew and Julie made no misrepresentation of a material fact to Ortiz and owed her no duty of care; and (3) they were not part of any fraudulent conspiracy.

After the hearing, the trial court granted Andrew's motions. The court stated it could find "no actionable misrepresentations that Andrew made as to either plaintiff. . . . So his liability has to hinge on whether he was involved in a conspiracy . . . ." The court went on to conclude that it did not "see evidence of a conspiracy here."

#### 2. Michael, Amabelle, and Ward

Michael, Amabelle, and Ward based their motion for summary judgment against Rivera on the ground that Rivera has sustained no actual damages. Their motion against Ortiz states two grounds: (1) Ortiz is not the real party in interest and has no standing to sue; and (2) she "cannot prove essential elements of the causes of action pleaded against" them.

In granting the motion as to Rivera's FAC, the court explained that "some of the elements of a fraud cause of action have been met, but I can't find a shred of evidence

here as to damages that [Rivera] suffered that are contemplated by [Civil Code section] 3343.” Regarding Ortiz, the court found that she had no interest in the Property and, therefore, was not a real party in interest.

### 3. The Creamers

The Creamers based their summary judgment motion against Rivera on the grounds that: (1) Rivera cannot establish any misrepresentation attributable to the Creamers; (2) Rivera cannot establish that the Creamers were part of a civil conspiracy to defraud him; and (3) Rivera has sustained no actual damages.

Their motion against Ortiz was based on: (1) Ortiz has no legal standing to assert a cause of action; (2) the Creamers made no misrepresentation of a material fact to Ortiz and owed her no duty of care; and (3) they were not part of any fraudulent conspiracy to defraud her.

The court granted summary judgment for the Creamers because there was no evidence that they were part of a conspiracy to defraud the plaintiffs. Regarding Ortiz’s claims, the court further found that she was “at best a tenant,” and neither a subsequent purchaser nor an equitable owner of the Property. She therefore “lacked standing” to pursue her claims.

## III. STANDARD OF REVIEW

A trial court properly grants summary judgment when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ.

Proc., § 437c, subd. (c).)<sup>10</sup> “The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).

A moving party defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff’s causes of action, or shows that one or more elements of each cause of action cannot be established. (§ 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 849.) A moving party defendant bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. Once the initial burden of production is met, the burden shifts to the responding party plaintiff to demonstrate the existence of a triable issue of material fact. (§ 437c, subd. (p)(2); *Aguilar, supra*, at pp. 850-851.) The plaintiff may not rely upon the mere allegations in its complaint, but must set forth “specific facts” showing that a triable issue exists. (§ 437c, subd. (p)(2).) From commencement to conclusion, the moving party defendant bears the burden of persuasion that there is no triable issue of material fact and that the defendant is entitled to judgment as a matter of law. (*Aguilar, supra*, at p. 850.) Summary judgment shall be granted if all the papers submitted show there is no triable issue of material fact in the action, thereby entitling the moving party to judgment as a matter of law. (§ 437c, subd. (c).)

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<sup>10</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

“On appeal, we exercise ‘an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.’ [Citation.] ‘. . . Moreover, we construe the moving party’s affidavits strictly, construe the opponent’s affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.’ [Citations.]” (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201-1202.)

#### IV. ANALYSIS

##### A. *Andrew’s Motions for Summary Judgment*

Rivera and Ortiz each asserted a single cause of action—for fraud—against Andrew. “The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.” (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.) As to each plaintiff, Andrew challenged the elements of misrepresentation and damages.

In support of the assertion that he made no misrepresentation to Rivera or Ortiz, Andrew proffered the following facts: Andrew and Julie owned the Property until they sold it to Michael and Amabelle in March 2006; they did not have any communications with Michael or Amabelle regarding what Michael or Amabelle intended to do with the septic system; they never entered into any agreement with Michael or Amabelle to replace the septic system in order to resell it to a third party without disclosing that the

system was replaced; they had no knowledge of Michael's or Amabelle's intentions regarding the septic system and were not involved in any repair or replacement of the septic system; they were not involved in the sale of the Property to Rivera; and they never made any representations to Rivera or Ortiz regarding the Property. These facts are supported by citations to Andrew's and Julie's declarations and deposition testimony of Rivera and Ortiz.

These facts, supported by admissible evidence, satisfy Andrew's burden of establishing a prima facie case that he made no misrepresentations to Rivera or Ortiz—an essential element of the plaintiff's fraud claim. The burden thus shifts to the plaintiffs to show a triable issue of fact. (§ 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 850-851.)

In their opposing separate statements, Rivera and Ortiz disputed Andrew's assertions that Andrew had no communication or agreement with Michael or Amabelle regarding the septic system, no knowledge of Michael's or Amabelle's intentions regarding the septic system, and that he never made any representations to Rivera or Ortiz regarding the Property. Rivera and Ortiz support these disputes by reference to the declaration of their attorney, Marvin D. Mayer, and a direction to "see" their undisputed material facts that followed their responses to Andrew's separate statement.

The plaintiffs' opposing separate statements are insufficient. The summary judgment statute requires any dispute of a fact "be followed by a reference to the supporting evidence." (§ 437c, subd. (b)(3).) Rule 3.1350(f) of the California Rules of

Court<sup>11</sup> requires such reference be made “by citation to exhibit, title, page, and line numbers in the evidence submitted.” The plaintiffs’ reference to Mayer’s declaration, without any citation to page or line numbers in the declaration, does not satisfy this requirement. Nor does the vague reference to unspecified “undisputed material facts.”

Moreover, the declaration of Mayer included in our record consists only of (1) the attorney’s statements that he took certain depositions and (2) his foundational statements concerning approximately 80 pages of deposition transcripts and responses to form interrogatories attached to his declaration. Even if we disregard the failure to comply with rule 3.1350(f), nothing in Mayer’s declaration provides any support for the asserted disputes. If, by referring to Mayer’s declaration, plaintiffs intended to refer to somewhere within the pages attached to Mayer’s declaration, we decline to undergo a search for the evidence. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315-316 [court has discretion whether to consider evidence not referenced in separate statement]; cf. *Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1149 [court is not required to “scour the record on our own in search of supporting evidence”].)

Plaintiffs’ reference to their own undisputed material facts fares no better. The asserted fact that comes closest to asserting a misrepresentation by Andrew or Julie concerning the septic system is the statement that Andrew attempted to sell the Property by listing it with Michael and Amabelle without disclosing any problem with the septic

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<sup>11</sup> All further references to rules are to the California Rules of Court.

system. Even if this was sufficient to create a triable issue of fact, it is without support in our record. The plaintiffs cite to certain pages and lines of Andrew’s deposition. However, our record does not include any portion of that deposition.

On appeal, plaintiffs rely on conspiracy allegations, and assert that each participant in the conspiracy is responsible for the wrongful acts of the others.<sup>12</sup> Conspiracy liability requires “the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.’ [Citations.] The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose.” (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582.) Andrew adequately addressed the conspiracy allegations in his declaration by stating that he never communicated or had any agreement with Michael or Amabelle as to the septic system, and had no understanding of Michael’s or Amabelle’s intentions regarding the same. Moreover, he was not involved in the repair or replacement of the system.

Plaintiffs argue that “Andrew must have known about the problems with the septic tank while he owned the property, and that he was required to connect the property to the city sewer line. Instead, he washed his hands of the problem by selling the property to his brother. He may not have signed a formal legal sized document, but he agreed to pass

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<sup>12</sup> Ortiz alleged the defendants “conspired and agreed among themselves to make unlawful repairs to the [Property] . . . , to take affirmative steps to conceal the unlawful repairs, and to sell the subject property to unsuspecting members of the public . . . .” Rivera did not explicitly allege such a conspiracy, although he arguably alleged facts that could support the existence of a conspiracy.

on an unlawful condition to Michael and Amabelle to let them deal with it.” Plaintiffs offer no citation to any evidence in the record to support these statements. Furthermore, even if Andrew knew of the defective septic tank and sold the Property to Michael and Amabelle “to let them deal with it,” there is no conspiracy without “actual knowledge of the planned tort” and the “intent to aid in its commission.” (See *Kidron v. Movie Acquisition Corp.*, *supra*, 40 Cal.App.4th at p. 1582.) Leaving the problem for Michael and Amabelle to deal with does not mean they knew Michael and Amabelle planned to commit a tort.

We conclude that Rivera and Ortiz have failed to satisfy their burden of establishing a triable issue of fact as to the element of misrepresentation. Because the undisputed facts establish that Andrew did not make any misrepresentation of any fact to either plaintiff, we agree with the trial court that Andrew is entitled to judgment as a matter of law.<sup>13</sup>

#### B. *Michael, Amabelle, and Ward*

##### 1. Motion for Summary Judgment Against Rivera

Michael, Amabelle, and Ward moved for summary judgment against Rivera based on a single ground: Rivera suffered no actual damages. As we explain below, these defendants have failed to satisfy their initial burden of production to establish a prima facie case that no triable issue of material fact exists as to the issue of damages for fraud.

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<sup>13</sup> Because we affirm the judgment on the ground that Andrew did not make a misrepresentation to plaintiffs, we do not reach the additional grounds asserted in Andrew’s motion.

Moreover, we agree with Rivera that regardless of the merits of the defendants' argument regarding damages, summary judgment was improper as to Michael and Amabelle because he is not required to establish actual damages to rescind the purchase agreement.

Relying on the “out-of-pocket” measure of damages codified in Civil Code section 3343, Michael, Amabelle, and Ward argued that Rivera “has not expended any money on the Subject Property at any time . . . .” Indeed, the evidence establishes that Rivera made no down payment toward the purchase of the Property, never personally paid a mortgage payment, did not pay property taxes, and expended nothing for repairs on the Property. Rivera, contends, however, that he is entitled to recover damages because he “remains liable on two notes for \$395,000”<sup>14</sup> and “it would cost him more than \$60,000 to make [the Property] habitable.” In addition, he has been fined by the city for owning property with an unlawful septic tank, suffers from emotional distress, and (he contends) is entitled to punitive damages.

Civil Code section 3343 limits recoverable damages by “[o]ne defrauded in the purchase, sale or exchange of property . . . to . . . the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction . . . .” (Civ. Code, § 3343, subd. (a).)<sup>15</sup> The statute thus has two components: (1)

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<sup>14</sup> According to Rivera’s response to Michael’s statement of undisputed facts, the two notes are in the amounts of \$317,200 and \$79,300—a sum of \$396,500.

<sup>15</sup> This “out-of-pocket” rule contrasts with the benefit of the bargain rule. Under the benefit of the bargain rule, the defrauded party may recover “the difference between  
*[footnote continued on next page]*

traditional out-of-pocket, or compensatory, damages, measured by the difference between the value of the property given (e.g., the price paid for the property) and the actual value of the property received; and (2) “additional,” or consequential, damages. (See generally 6 Witkin, Summary of Cal. Law., *supra*, Torts, §§ 1710, 1712, 1714, pp. 1238-1239, 1242-1243, 1245-1246.) Consequential damages include “[a]mounts actually and reasonably expended in reliance upon the fraud,” compensation “for loss of use and enjoyment of the property” proximately caused by the fraud, and lost profits under certain conditions. (Civ. Code, § 3343, subd. (a)(1), (2), (4).)

In determining a defrauded purchaser’s out-of-pocket loss in an exchange transaction, the value of that which the defrauded person parted is ordinarily the price paid for the property. (See, e.g., *Cory v. Villa Properties* (1986) 180 Cal.App.3d 592, 600.) The price paid generally includes the amount of any debt secured by the property even if the buyer is not personally liable for the debt. (See 12 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 34:86, p. 34-317; see, e.g., *Walters v. Marler* (1978) 83 Cal.App.3d 1, 23-24, overruled on another point in *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498; *Hancock v. Williams* (1950) 99 Cal.App.2d 80, 82.) Here, it is undisputed that the price paid by Rivera for the Property, including the amount of the debt secured by the Property, was \$396,500.

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*[footnote continued from previous page]*

the actual value of the property and the value it would have had if it had been as represented.” (6 Witkin, Summary of Cal. Law. (10th ed. 2005) Torts, § 1710, p. 1238.)

The actual value of that which the defrauded buyer *received* is the fair market value of the property as of the date of the fraudulent sale. (*Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 752-754; *McCue v. Bruce Enterprises, Inc.* (1964) 228 Cal.App.2d 21, 31-32.) The actual value of the property must take into account the true facts regarding the property that had been undisclosed or misrepresented to the defrauded buyer. (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1543 [Fourth Dist., Div. Two].) If the value of the property at the time of the sale was equal to or greater than the price paid, the buyer has suffered no compensatory damages. (See *Gagne v. Bertran* (1954) 43 Cal.2d 481, 490-492; *Cory v. Villa Properties, supra*, 180 Cal.App.3d at p. 600.) Therefore, in determining whether Rivera has suffered compensatory damages, the actual value of the property at the time of the sale is a material issue of fact. This fact is ordinarily established by the testimony of an appraiser or the owner of the Property. (*Buist v. C. Dudley DeVelbiss Corp.* (1960) 182 Cal.App.2d 325, 334; 12 Miller & Starr, Cal. Real Estate, *supra*, § 34:86, p. 34-319.)

The parties moving for summary judgment had the initial burden of producing evidence sufficient to establish a prima facie showing that no triable issue of material fact exists as to the issue of compensatory damages. (§ 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 850-851.) Here, there was no evidence presented to the court of the actual value of the Property at the time of sale. Therefore, the court had no evidentiary basis for determining whether Rivera is entitled to compensatory damages. The moving parties

simply failed to satisfy their initial burden of production on the sole issue raised by their motion.

Defendants contend that, although Rivera was obligated to pay the promissory notes secured by the Property, he did not actually pay any down payment or any installment payment on the notes.<sup>16</sup> This argument ignores the foregoing principles that the value given includes the amount of debt secured by the property and that damages are normally determined as of the date of the fraudulent transaction. (See, e.g., *Walters v. Marler*, *supra*, 83 Cal.App.3d at pp. 23-24; *Hancock v. Williams*, *supra*, 99 Cal.App.2d at p. 82.)

We are aware of the possibility that strict application of these principles would permit Rivera to recover damages if the secured lender foreclosed on its nonrecourse deeds of trust without Rivera ever paying anything to either the sellers or to his lender. (See, e.g., *Walters v. Marler*, *supra*, 83 Cal.App.3d at pp. 23-24.) As Miller and Starr notes: If “the buyer is not personally liable for the debt secured by liens on the property[,] the buyer could receive a windfall by accepting the damages and allowing the secured lenders to foreclose.” (12 Miller & Starr, Cal. Real Estate, *supra*, § 34:86, p. 34-321–34-322.) In such a situation, however, the court may take the subsequent foreclosure into consideration and calculate the amount of damages based upon the amounts actually paid by the buyer. (*Garrett v. Perry* (1959) 53 Cal.2d 178, 184-185; *Ford v. Cournale*

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<sup>16</sup> Ortiz did pay some of the mortgage payments. Rivera does not allege or contend on appeal that Ortiz made any of these payments on his behalf.

(1973) 36 Cal.App.3d 172, 183-184; *McCue v. Bruce Enterprises, Inc.*, *supra*, 228 Cal.App.2d at p. 32.) The foreclosure is viewed as a “supervening circumstance[]” that allows the court to disregard “both the value of the property and the contract price in calculating damages.” (*Garrett v. Perry*, *supra*, at pp. 184-185; accord, *Burkhouse v. Phillips* (1971) 18 Cal.App.3d 661, 665-666.) This exception to the usual method of calculating compensatory damages does not apply in this case (based upon the current record) because the papers and evidence submitted in connection with the motions for summary judgment do not establish that the deeds of trust have been foreclosed and that the lenders have no recourse against Rivera.

On appeal, Michael and Amabelle assert that Rivera lost possession of the Property when it was sold at a trustee’s sale in December 2010—after judgment was entered in this case.<sup>17</sup> We will not, however, consider this argument because the foreclosure, if it happened, was not asserted below. “Summary judgment, although a very useful tool in litigation, is also a drastic remedy. Because of this, it is important that all of the procedural requirements for the granting of such a motion be satisfied before the trial court grants the remedy.” (*Sierra Craft, Inc. v. Magnum Enterprises, Inc.* (1998) 64 Cal.App.4th 1252, 1256.) The party moving for summary judgment must “include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed.” (§ 437c, subd. (b)(1).) The requirement is not merely

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<sup>17</sup> Michael and Amabelle request that we take notice of the trustee’s deed and two other deeds showing the property was transferred to third parties in February 2011 and again in June 2011. We decline to do so.

technical. “[D]ue process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail.” (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra*, 102 Cal.App.4th at p. 316.) The separate statement serves this due process purpose by “inform[ing] the opposing party of the evidence to be disputed to defeat the motion.” (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.) Because the alleged foreclosure was not included in the moving parties’ separate statement, Rivera never had an opportunity to respond to the factual and legal issues raised thereby. As a matter of due process, we cannot affirm summary judgment on the basis of evidence of such foreclosure without depriving Rivera of due process.

Even if Michael, Amabelle, and Ward established that Rivera suffered no actual damages as a matter of law, Michael and Amabelle would still not be entitled to summary judgment because actual damages are not required for Rivera’s rescission claim.

A party to a contract may rescind the contract if that party’s consent “was given by mistake, or obtained through duress, menace, fraud, or undue influence . . . .” (Civ. Code, § 1689, subd. (b)(1).) Rivera bases his rescission claim on the theory of fraud. Unlike a claim for *damages* based on fraud, which requires proof of pecuniary damage as an element of the claim (*Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 374), it “is unnecessary to plead or prove specific pecuniary loss in order to obtain rescission; it is sufficient to show some substantial injury” (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 302, p. 329; see also 12 Miller & Starr, Cal. Real Estate, *supra*,

§ 34:4, p. 34-24 [“The rescinding party must have suffered some injury, prejudice, or damage, but it is not necessary that the rescinding party suffer a pecuniary loss” (fn. omitted)].

The “injury” that must be shown for rescission was discussed in *Earl v. Saks & Co.* (1951) 36 Cal.2d 602. In that case, the appellant sought to rescind the sale of a fur coat, priced at \$5,000, for which he agreed to pay approximately \$4,000. The seller relied on “cases which say that ‘fraud which has produced and will produce no injury will not justify a rescission,’” and argued that “a person is not injured by being induced to buy a \$5,000 coat for \$4,000.” (*Id.* at p. 611.) In rejecting this argument, the California Supreme Court explained: “[T]his ‘no injury, no rescission’ formula is not very helpful, because of disagreement in the authorities as to what is meant by ‘injury.’ In a sense, anyone who is fraudulently induced to enter into a contract is ‘injured’; his ‘interest in making a free choice and in exercising his own best judgment in making decisions with respect to economic transactions and enterprises has been interfered with.’ [Citation.]” (*Ibid.*) The court also rejected a definition of injury that had “appeared in some California cases” that required a party seeking rescission based on fraud to prove “‘an injury of a pecuniary nature.’” (*Ibid.*, quoting *Spreckels v. Gorrill* (1907) 152 Cal. 383, 388.) The proposition “that in every case there must be ‘pecuniary loss’ is incorrect.” (*Earl v. Saks & Co.*, *supra*, at p. 611.)

*Earl* was followed in *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, which stated: “A defrauded party has the right to rescind a contract, even

without a showing of pecuniary damages, on establishing that fraudulent contractual promises inducing reliance have been breached. [Citations.] The rule derives from the basic principle that a contracting party has a right to what it contracted for, and so has the right ‘to rescind where he obtain[ed] something substantially different from that which he [is] led to expect.’ [Citation.]” (*Id.* at p. 979.)<sup>18</sup>

As Witkin summarizes: “The plaintiff who elects the remedy of rescission is not demanding a sum of money as compensatory damages. Therefore the plaintiff need not show pecuniary damage of a specified amount . . . . It is enough if the plaintiff pleads the facts of legal injury from a change of position to his or her disadvantage. It is immaterial whether this injury is measurable in a large pecuniary sum or in a slight pecuniary sum, or is not subject to any pecuniary measurement at all.” (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 545, p. 672.)

Here, Michael and Amabelle do not challenge any of the elements of fraud underlying Rivera’s rescission claim. In light of the above authorities, the sole ground for summary judgment these defendants asserted—the absence of actual damages—is irrelevant to the claim for rescission. To the extent that the asserted ground could be construed as an argument that Rivera has not suffered an “injury” for purposes of rescission, we reject the argument. Rivera’s evidence that defendants unlawfully

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<sup>18</sup> In addition to *Earl*, the *Engalla* court cited to the Restatement Second Contracts, section 164, comment c, pages 446 and 447, which states: “In general, the recipient of a misrepresentation need not show that he has actually been harmed by relying on it in order to avoid the contract.”

installed a septic tank and failed to disclose its illicit nature to Rivera is sufficient evidence of such injury.

On appeal, Michael and Amabelle assert for the first time that Rivera's rescission claim is barred because his notice of rescission was not promptly made. As they point out, a party seeking to rescind a contract must, promptly upon discovering the facts entitling him to rescind, give notice of rescission to the other party. (Civ. Code, § 1691, subd. (a).) They also argue that Rivera cannot rescind the contract because he cannot restore the Property to them based on the postjudgment foreclosure. (See Civ. Code, § 1691, subd. (b); *Burkhouse v. Phillips*, *supra*, 18 Cal.App.3d at p. 665.)

Regardless of whether these arguments might have merit, we will not consider them. (See *Gonzales v. Superior Court* (1987) 189 Cal.App.3d 1542, 1545 [in evaluating a motion for summary judgment, “[o]nly the grounds specified in the notice of motion may be considered by the trial court”]; *San Diego Watercrafts, Inc. v. Wells Fargo Bank*, *supra*, 102 Cal.App.4th at p. 316 [“Appellate courts need not address theories that were not advanced in the trial court”].) Michael and Amabelle provided Rivera with no notice of the new theories. They did not suggest these arguments in their supporting memorandum of points and authorities or include facts in their separate statement supporting these grounds. Rivera was never given an opportunity to respond to the new arguments and demonstrate the existence of a triable issue of material fact on such issues. To affirm a summary judgment based upon theories and arguments that were never

asserted and which require evidence that was never presented would be fundamentally unfair to Rivera. (See, e.g., *Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 948-949.)

In sum, the granting of summary judgment for Michael, Amabelle, and Ward against Rivera was improper because the moving parties failed to establish that Rivera has not suffered compensatory damages. Additionally, Michael and Amabelle are not entitled to summary judgment because their motion was based on the sole ground that Rivera cannot prove actual damages and the evidence establishes that, regardless of whether Rivera can show actual damages, there is evidence that Rivera has suffered an injury for purposes of rescission.

## 2. Motion for Summary Judgment Against Ortiz

Michael, Amabelle, and Ward moved for summary judgment against Ortiz on the ground, among others, that she is not a real party in interest and therefore lacks standing to sue. We agree.

“Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.” (§ 367.) “The primary purpose underlying the requirement that an action be brought in the name of the real party in interest is to protect a defendant from a multiplicity of suits and the further annoyance and vexation at the hands of other claimants *to the same demand.*” (*Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144, 149 [Fourth Dist., Div. Two]; accord, *Keru Investments, Inc. v. Cube Co.* (1998) 63 Cal.App.4th 1412, 1424.) This concern for the multiplicity of suits is apt here: Both Rivera and Ortiz sued the defendants for damages arising from the

same fraudulent act—the failure to disclose the illegal status of the septic tank in connection with the sale of the Property to Rivera. The question of standing is who “owns” or “*doesn’t own*” this cause of action. (See *Krusi v. S.J. Amoroso Construction Co.* (2000) 81 Cal.App.4th 995, 999.)

Ortiz relies on *Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171. In that case, a real estate developer built homes and sold them without disclosing certain preexisting slides and springs near the property. (*Id.* at pp. 177-178.) When subsequent slides caused damage to homes, the plaintiff homeowners sued the developer. (*Id.* at pp. 179-180.) One of the plaintiffs, Self, purchased his property not from the developer but from the person who bought the property from the developer. (*Id.* at p. 191.) The Court of Appeal held that the lack of privity between Self and the developer did not preclude Self’s action for fraud. (*Id.* at pp. 191-193.) The court found the applicable rule in the Restatement Second of Torts: “‘The maker of a fraudulent misrepresentation is subject to liability . . . to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct . . . .’ (Rest.2d Torts, § 533.)”

(*Barnhouse v. City of Pinole, supra*, at pp. 191-192; see also *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605-606; *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1548.)

Applying this rule to the facts before it, the *Barnhouse* court stated: “Here, the jury could have inferred that [the developer] failed to make the initial disclosures with the

intention that subsequent purchasers would also act in ignorance. [Citation.] It was foreseeable that in a development of relatively inexpensive suburban tract homes, some would change hands. While an affirmative misrepresentation might not be repeated [citation], a nondisclosure must necessarily be passed on. Only [the developer] knew what his soils engineers had found and it was unlikely that others would find out on their own. It was also possible that resulting damage would be delayed depending on the extent of rainfall. Under these circumstances it would be anomalous if liability for damages resulting from fraudulent concealment were to vanish simply because of the fortuitous event of an intervening resale. Ultimately in such a case it is the subsequent purchaser who is directly damaged by the initial nondisclosure. [Citation.] The original purchaser neither suffers damage nor has knowledge to disclose.” (*Barnhouse v. City of Pinole, supra*, 133 Cal.App.3d at p. 192.)

*Barnhouse* does not help Ortiz. In *Barnhouse*, there was no danger to the developer that it would be subject to suits by both Self and the original purchaser of Self’s property. That is, the original purchaser had no cause of action against the developer because he or she suffered no damage. Thus, Self had standing to bring the action against the developer because the original purchaser did not.

As explained above, based on the current record, Rivera retains his cause of action. If he can prove that as a result of the defendants’ fraud he parted with value greater than the actual value of the Property he received (as well as the other elements of

fraud), he is entitled to relief.<sup>19</sup> Although Ortiz claims to hold equitable title to the Property, she does not contend that Rivera, as the legal title holder, lacks standing to sue. (See 4 Witkin, Cal. Procedure, *supra*, Pleading, § 124, p. 192 [holder of legal title has right to sue notwithstanding lack of beneficial ownership].) There is nothing in the record to suggest that Rivera has transferred or assigned his cause of action for fraud to Ortiz. Thus, even if he agreed to transfer title to the Property to Ortiz at some point in the future and upon certain conditions, Rivera still “owns” the cause of action. (Cf. *Vaughn v. Dame Construction Co.*, *supra*, 223 Cal.App.3d at pp. 148-149 [transfer of title to real property does not automatically transfer cause of action arising from defective construction on the property]; *Krusi v. S.J. Amoroso Construction Co.*, *supra*, 81 Cal.App.4th at pp. 1005-1006 [transfer of cause of action to subsequent property owner requires clear manifestation of intent].) Therefore, summary judgment was properly granted as to Ortiz’s claims.

### C. *The Creamers*

#### 1. Motion for Relief from Default

Rivera contends the trial court erred in granting Jeffrey Creamer’s motion to set aside the entry of default against him. We disagree.

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<sup>19</sup> As explained above, this method of determining damages may be modified if the nonrecourse loans on the property have been foreclosed.

(a) *Factual Background*

In August 2008, prior to consolidation of the Ortiz and Rivera actions, each plaintiff obtained an order for the entry of default in their respective cases against Jeffrey Creamer. Both plaintiffs were represented by Marvin Mayer.

Jeffrey Creamer was represented by Christopher Carter. When Carter first learned of the default in the Ortiz case, he contacted Mayer. The two attorneys agreed to set aside the default in the Ortiz case. Carter was unaware of the Rivera action at that time and Mayer did not inform Carter of that action or of the default in that case. They signed a stipulation to set aside the default in the Ortiz action, and the court so ordered. Jeffrey Creamer filed an answer to the Ortiz complaint in September 2008.

In a November 14, 2008, letter, Mayer informed Carter of the entry of default in the Rivera action and invited Carter to prepare a stipulation to set aside that default. Carter says he prepared and signed a stipulation and sent it to Mayer with the understanding that Mayer would sign it and submit it to the court. Mayer, however, says he never received the stipulation from Carter or a “response of any kind” to his letter.

After the two cases were consolidated under the Rivera case number, Jeffrey Creamer participated in court hearings and discovery, including having his deposition taken. Carter states that for two years he participated in the litigation “without a whisper of notice that [Jeffrey Creamer] ‘lacked standing’ to participate in any of the

proceedings.”<sup>20</sup> The Creamers filed their motion for summary judgment against Rivera in June 2010.

Carter learned of the entry of default when he read Rivera’s opposition to the motion, in which Mayer wrote: “The default of Jeffrey Creamer was entered . . . and he therefore lacks standing to bring this motion.” Carter responded by requesting that Mayer sign the stipulation that had been previously sent to him. In the alternative, Carter offered to prepare a new stipulation. If Mayer refused, Carter said he would file a motion to set aside the default.

Apparently, Mayer refused to stipulate; Carter filed his motion to set aside the default in September 2010. He argued that his motion “is directed to the court’s inherent equity power to grant relief from a default or default judgment procured by extrinsic fraud or mistake.”<sup>21</sup> Rivera opposed the motion. Following a hearing, the court granted the motion.

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<sup>20</sup> It does not appear from our record that Rivera obtained a default *judgment* against Jeffrey Creamer or an extension of time to do so. It thus appears he violated rule 3.110(h), which requires the party requesting entry of default obtain a default judgment within 45 days after the entry of default or obtain an extension of time for doing so.

<sup>21</sup> Jeffrey Creamer also relied on subdivision (d) of section 473. This subdivision provides: “The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.” We do not rely on this statute for our decision.

(b) *Discussion*

On appeal, Rivera argues that Jeffrey Creamer is not entitled to relief from default because he did not submit a copy of his proposed answer or other pleading along with his motion as required by section 473, subdivision (b). He further argues that while section 473 provides relief on grounds of mistake, inadvertence, surprise, or excusable neglect, Jeffrey Creamer's motion is based on the theory that *Rivera* was at fault for not setting aside the default.

Rivera's arguments are inapposite. Jeffrey Creamer's motion was based primarily on the court's inherent equitable power to grant relief from default, not on the statutory right to relief under section 473. Although section 473, subdivision (b), requires that a request for relief from default be made within six months of the entry of default, "[a]fter six months from entry of default, a trial court may still vacate a default on equitable grounds even if statutory relief is unavailable." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981; see also *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 314.) A court's ruling on such grounds is reviewed for an abuse of discretion. (*Rappleyea v. Campbell, supra*, at p. 981.)

Setting aside the default was well within the court's discretion. Weighing heavily in favor of granting relief is the absence of any prejudice to Rivera from the granting of relief. Jeffrey Creamer and his counsel participated fully in the litigation reasonably believing that the entry of default had been vacated by stipulation. Indeed, there is

nothing in Rivera's opposition or his brief on appeal that indicates that he was prejudiced in any way by the delay in seeking relief.

In addition, Jeffrey Creamer and Carter were diligent in acting to set aside the default. In November 2008, when they first learned of the entry of default, Carter (according to his declaration) promptly responded to Mayer's offer to stipulate by sending to Mayer a proposed stipulation with the understanding that Mayer would sign it and file it with the court. Then, within days after learning in September 2010 that the stipulation had never been filed, Carter filed his motion to set aside the default and applied to the court for an order shortening time for notice of the hearing.

Moreover, Rivera's counsel's 22-month silence regarding the entry of default before raising it in opposition to the motion for summary judgment strongly suggests he was waiting until he could use the default to gain a tactical advantage against Rivera. Even if, as Mayer suggests, he did not have a *duty* to set aside the default, his lengthy silence and the manner in which he broke that silence indicate gamesmanship, which may bear upon the exercise of the court's equitable power.

Based on the facts in the record, we hold that the court did not abuse its discretion in granting the motion to set aside the entry of default.

## 2. The Creamers' Motions for Summary Judgment

Rivera and Ortiz each assert a single cause of action, for fraud, against the Creamers. The claims are based primarily upon the Creamers' inspection of the septic system and the septic tank certification submitted to escrow in connection with Rivera's

purchase of the Property. This certification states that Jeffrey Creamer examined the septic tank at the Property, found that it appeared to be in good working order, and there was no “sewer within 200 ft. of system and abut property line.” Plaintiffs contend that these representations are false.

The Creamers based their summary judgment motion against Rivera on the grounds that Rivera: (1) cannot establish any misrepresentation by the Creamers; (2) cannot establish that the Creamers were part of a conspiracy to defraud him; and (3) has sustained no actual damages.<sup>22</sup> In support of the first of these grounds, the Creamers assert in paragraph 10 of their separate statement of undisputed facts that they never made any representations to Rivera regarding the Property or the condition of the septic tank. They point to Rivera’s deposition testimony in which Rivera said he has never met or spoken with Jeffrey Creamer. They also rely on their own declarations in which they state they were never hired by Rivera, never entered into any agreement with Rivera, never met or spoke with Rivera, and never communicated with Rivera in writing.

In his opposing separate statement, Rivera denies the assertion in paragraph 10. For his supporting evidence, he states: “See declarations of plaintiffs; Exhibit No. 11.” The reference to declarations of plaintiffs fails to comply with rule 3.1350(f). As with the similar responses to Andrew’s motion for summary judgment discussed above, this is

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<sup>22</sup> In their appellate brief, in addition to challenging the elements of misrepresentation and damages, the Creamers contend on appeal that the plaintiffs failed to provide any evidence to support the intent or reliance elements. Because these elements were not specified as grounds for summary judgment below, we do not consider them. (See *Gonzales v. Superior Court*, *supra*, 189 Cal.App.3d at p. 1545.)

an insufficient response. The reference to exhibit No. 11, however, complies with rule 3.1350(f). Exhibit 11 is the septic tank certification. According to Rivera's declaration, the certification was requested by his real estate agent. Jeffrey Creamer testified at his deposition that the certification was made in response to a request from an escrow company and that he was aware that a sale of the Property was pending. It is reasonable to infer from these facts that Jeffrey Creamer knew he was preparing the certification in connection with a sale of the Property and that it would be reviewed and relied upon by the purchaser of the Property. Although Rivera does not state that he saw the septic tank certification form, he does state that Ortiz informed him "that according to the [septic tank] certification, the tank had been inspected and was working properly." Thus, regardless of who hired the Creamers or whether any of the Creamers ever met or spoke with Rivera directly, the evidence is sufficient to establish that the Creamers made the representations set forth in the septic tank certification to the parties involved in the purchase and sale of the Property with the understanding that the purchaser would be relying on it. If the representations are false and the other elements of fraud are established, they can support a cause of action for fraud. (See *Gagne v. Bertran*, *supra*, 43 Cal.2d at pp. 487-488; cf. *Hardy v. Carmichael* (1962) 207 Cal.App.2d 218, 227; *Cooper v. Jevne* (1976) 56 Cal.App.3d 860, 865-866.)

Incorporating the check mark in the "No" box, the septic tank certification states that a "sewer [is not] within 200 ft. of system and abut property line." Although the statement is ambiguous, it is reasonable to interpret it in the context of, and in harmony

with, the Corona Municipal Code's requirement that the Property's plumbing be connected to a city sewer if the "sewer is located within a public street, alley or right-of-way on which the property containing the building or structure abuts and if such sewer is within 200 feet of such property." (Corona Mun. Code, § 13.12.060, subd. (A).) In this light, Jeffrey Creamer effectively certified that the sewer was not within an abutting public street, alley, or right-of-way and within 200 feet of the Property. The implication is that the residence did not need to be connected to the city sewer.

In his opposition separate statement, Rivera asserts that the statement in the septic tank certification regarding the lack of proximity of the sewer line to the Property is false. He relies on Ortiz's declaration and the declaration of Mike Moffett, a plumbing contractor who prepared a bid for connecting the residence to the sewer. Ortiz refers to a map provided by the City of Corona Building Department showing the Property, an existing sewer line located within a public alley abutting the Property, and a proposed connection between the residence and the sewer. Based on the map's legend, the length of the connection appears to be significantly less than 200 feet. Ortiz states that she measured the length of the proposed connection with a tape measure and found the distance to be 105 feet. Moffet's bid for constructing a pipeline to connect the property to the sewer indicates that the distance is approximately 115 feet. This evidence is sufficient to create a triable issue of fact as to whether the representation concerning the distance of the Property to the sewer was false. The Creamers have thus failed to

establish that they did not make a misrepresentation to Rivera and are not, on that basis, entitled to judgment as a matter of law.<sup>23</sup>

The Creamers also assert that summary judgment should be affirmed because Rivera has not suffered any damages. They, like Michael, Amabelle, and Ward, rely on Civil Code section 3343 and assert that Rivera has suffered no actual monetary loss. Our analysis regarding Michael, Amabelle, and Ward's argument on this point is applicable here: Under Civil Code section 3343, the value with which Rivera parted includes the amount of the loans for which he is personally liable; the value of what he received is the actual value of the property at the time of the transaction.<sup>24</sup> Like the other defendants, the Creamers do not offer any evidence of the actual value of the Property at the time of the transaction. They have thus failed to satisfy their initial burden of production to make a prima facie showing that no triable issue of material fact exists.

The Creamers' motion for summary judgment against Ortiz was based on Ortiz's lack of standing to sue. Our analysis regarding the same argument asserted by Michael, Amabelle, and Ward applies equally here. Accordingly, we will affirm the summary judgment as to Ortiz.

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<sup>23</sup> Because this triable issue of fact exists, we do not consider the Creamers' argument that they were not part of a conspiracy to defraud Rivera.

<sup>24</sup> As stated in our discussion regarding Michael, Amabelle, and Ward's argument regarding damages, this method of calculating damages may not apply if a subsequent foreclosure of the loans means that Rivera is no longer personally obligated to repay them.

V. DISPOSITION

The judgment in favor of Andrew Johnson against Rivera and Ortiz is affirmed.

The judgment in favor of Michael Johnson, Amabelle Johnson, and Gregory Ward is affirmed as to the complaint by Ortiz; it is reversed as to Rivera's FAC.

The judgment in favor of the Creamers is affirmed as to the complaint by Ortiz; it is reversed as to Rivera's FAC.

Andrew Johnson shall recover his costs on appeal from Rivera and Ortiz. Michael Johnson, Amabelle Johnson, Gregory Ward, and the Creamers shall recover their costs on appeal as to Ortiz. Rivera shall recover his costs on appeal from Michael Johnson, Amabelle Johnson, Gregory Ward, and the Creamers.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING  
J.

We concur:

HOLLENHORST  
Acting P.J.

RICHLI  
J.