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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY BEST INSURANCE SERVICES,
INC.,

Plaintiff and Appellant,

v.

CORONA TOWN CENTER, LLC,

Defendant and Respondent.

E053972

(Super.Ct.No. RIC519231)

OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson,
Judge. Affirmed.

The Amin Law Group, Ismail Amin, Tenny C. Rostomian-Amin, Jeffrey R.
Groendal, Rubina Andonian, Holly Townson, and Saehwa Kang for Plaintiff and
Appellant.

Sedgwick, Gregory H. Halliday, Frederick B. Hayes, and Jemma E. Ericksen for
Defendant and Respondent.

A third party leased space in a shopping center from defendant Corona Town
Center, LLC (the Center). That lease gave the third party the right to sublease up to

6,500 square feet of its space, for practically any retail use, without the Center's approval.

Thereafter, plaintiff City Best Insurance Services, Inc. (City) leased a different space in the shopping center from the Center. During the negotiations, City demanded the exclusive right to sell insurance in the shopping center, and the Center agreed. The lease, however, as it was ultimately drafted and signed, included a number of significant exceptions to and limitations on City's exclusive right to sell insurance; for example, it did not apply to any space in the shopping center if the Center did not control the use of that space.

Finally, the third party subleased a portion of its space to one of City's competitors. City claims that the Center approved the sublease in advance; the Center claims that it did not know anything about the sublease until after the sublease was already in effect. City sued the Center, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional misrepresentation, negligent misrepresentation, and declaratory relief. The trial court granted summary judgment in favor of the Center.

City appeals. Among other things, it contends:

1. On the contract claims:
 - a. There is a triable issue of fact as to whether the Center approved the sublease.
 - b. There is a triable issue of fact as to whether any of the exceptions and limitations in the lease apply.

c. There is a triable issue of fact as to whether the sublease was for more than 6,500 square feet.

2. On the misrepresentation claims: The parol evidence rule does not apply to evidence of fraudulent inducement.

3. The trial court abused its discretion by refusing to grant a continuance so City could conduct further discovery.

We will reject City's contentions and affirm the judgment.

I

FACTUAL BACKGROUND

The Center is the landlord of a shopping center in Corona. In 2004, it leased a space in the shopping center to Cardenas Markets, Inc. (Cardenas). This lease provided that Cardenas could use the premises for "[a]ny lawful nonobnoxious retail use typically found in a first class retail center," unless the use conflicted with an exclusive-use covenant previously granted to another tenant.

It provided that Cardenas could not sublease without the Center's prior written consent. However, it also provided: "Notwithstanding any other provision of this Lease, [Cardenas] shall have the right . . . to sublease a portion or portions of the Premises comprising in the aggregate 6,500 square feet or less. For said sublease, [Cardenas] shall not be required to obtain [the Center]'s consent"

In 2006, the Center leased another space in the shopping center to City. The lease was negotiated between Mohd "Mike" Hafez, the president of City, and Andrew McLean, of Lee & Associates, the Center's leasing agent.

City sells insurance. Hafez told McLean that City was interested in a lease if, and only if, it would have the exclusive right to sell insurance in the shopping center. McLean assured him that it would have such a right “and that no limitations whatsoever would be placed on this right.”

The final written lease included the following exclusive-use provision:

“9.7 Exclusive Use: From and after the Effective Date, [the Center] shall not execute and deliver any lease for space in the Project pursuant to which [the Center] authorizes the use of the premises demised by said lease primarily for the sale of insurance and insurance-related products (the ‘Exclusive Use’). . . . Further and notwithstanding anything in this Section 9.7 to the contrary, the Exclusive Use shall not apply: (i) to any portion of the Project . . . the use of which is not controlled by [the Center] as of the date of the Lease, (ii) to any portion of the Project in excess of 10,000 square feet of Floor Area lease to, or occupied . . . by, a single person or entity, and (iii) to any leases in existence as of the Effective Date, and any amendments, extensions, assignments or renewals thereof.”

The lease also included the following integration clause: “It is understood that there are no oral or written agreements or representations between the parties hereto affecting this Lease and this lease supersedes and cancels any and all previous negotiations, . . . agreements and understandings, if any, between [the Center] and [City].”

Hafez received and reviewed a copy of the lease before he signed it. In addition to signing the lease, he initialed every individual page. However, he was “not familiar

with . . . legal terms and leases.” He executed the lease in reliance on McLean’s assurance that City would have the exclusive right to sell insurance.

In 2008, Cardenas subleased a portion of its space in the shopping center to Fred Loya Insurance Agency, Inc. (Loya). Loya sells insurance; it competes directly with City. Loya has a branch in most “pretty much all” Cardenas locations in Southern California.

The sublease gave Loya an exclusive right to use the “Premises,” defined as an area of “approximately one hundred (100) square feet . . . located in [Cardenas’s] Supermarket” It also gave Loya a nonexclusive right to use the “Common Areas,” defined as “(i) the area within the Supermarket where Cardenas Markets’ customers are permitted and (ii) . . . the parking areas, sidewalks and other common facilities of the shopping center” Loya advertises its business by posting a sign or signs in Cardenas’s supermarket. It also distributes flyers throughout the shopping center. City has lost a significant amount of business at the shopping center to Loya.

The Center introduced evidence that it was not asked to approve and did not approve the sublease; in fact, it was not even aware of the sublease until Loya moved in and City complained. In opposition, City introduced the testimony of Monica Real, Cardenas’s property manager, that the Center did give prior written approval of the sublease. The Center objected to Real’s testimony. The trial court declared those objections moot, however, because, in its view, Real’s testimony did not affect the outcome of the motion.

II

STANDARD OF REVIEW

“A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

“[I]n moving for summary judgment, a ‘defendant . . . has met’ his ‘burden . . . if’ he ‘has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .’ [Citation.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

“We review the trial court’s decision de novo [Citations.]” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.)

III

CONTRACT CAUSES OF ACTION

A. *Additional Factual and Procedural Background.*

In moving for summary judgment, with regard to the contract causes of action, the Center argued that (1) it did not approve or authorize the sublease; and (2) the sublease did not violate the exclusive-use provision of the lease.

The trial court granted summary judgment on these causes of action, because “[the] Center’s lease with Cardenas gives Cardenas the right to sublease less than 6,500 square feet. They sublet about 100 square feet to Loya, well within their rights” It

stated, “I honestly don’t know if it matters, if it’s of any consequence whether they got, quote, permission. They didn’t have to ask for permission.”

B. *Analysis.*

1. *The Center’s approval of the sublease.*

City argues that there is a triable issue of fact as to whether the Center approved the sublease. Like the trial court, we find it unnecessary to decide this issue. Also like the trial court, we find it unnecessary to decide whether the Center’s objections to Real’s testimony were well taken. We may assume, without deciding, that the Center did give prior written approval. However, we conclude, much like the trial court, that this did not breach the lease, for two reasons.

First, the lease did not forbid the Center to approve a sublease. It merely provided that the Center would not “execute and deliver any lease . . . pursuant to which [the Center] authorizes the use of the premises . . . primarily for the sale of insurance and insurance-related products” The Center did not “execute and deliver” the sublease, and any approval that it did execute and deliver was not a “lease.”

Second, the lease carved out three exceptions to City’s exclusive-use rights. One was that those rights “shall not apply . . . to any portion of the Project . . . the use of which is not controlled[] by [the Center] as of the date of the Lease” Cardenas, under its own lease, had the right to sublease up to 6,500 square feet of space without the Center’s consent. It subleased just 100 square feet to Loya. Moreover, Cardenas had the right to use its space for “[a]ny lawful nonobnoxious retail use,” including the sale of

insurance. Thus, the Center did not control the use of the space that Cardenas subleased to Loya, and the subleased space fell within this exception to City's exclusive-use rights.

City argues that the Center retained some control, as landlord, over Cardenas's premises. However, it does not cite any *evidence* of this. (See Cal. Rules of Court, rule 8.204(a)(1)(C).) Rather, it cites a memorandum of points and authorities that it filed below. "Statements and arguments by counsel are not evidence. [Citations.]" (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 139.) In any event, the exception turns not merely on control, but on control of the "use" of the premises. Moreover, the "exclusive use" provision presumably uses "use" with the same meaning throughout — namely, as meaning the type of business conducted on the premises. Thus, regardless of whether the Center retained other typical powers of a landlord, it had forgone the control of the use of the premises in this sense.

City also argues that there is a triable issue of fact as to whether Cardenas subleased more or less than 6,500 square feet, because the sublease gave Loya the right to advertise throughout Cardenas's store as well as the right to use the common areas. This is a matter of the interpretation of Cardenas's lease and specifically of the provision allowing it "to sublease a portion or portions of the Premises comprising in the aggregate 6,500 square feet or less" without the Center's consent. In context, this clearly refers to the principal area subleased for the sublessee's exclusive use. It does not include advertising rights or common areas.

Finally, because City's cause of action for breach of contract fails, so does its cause of action for breach of the implied covenant. "[A]n implied covenant of good faith

and fair dealing cannot contradict the express terms of a contract. [Citation.]” (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55, fn. omitted.)

“We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms.” (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374.)

Accordingly, the trial court properly granted summary judgment on the contract causes of action.

IV

MISREPRESENTATION CAUSES OF ACTION

A. *Additional Factual and Procedural Background.*

With regard to the misrepresentation causes of action, the Center argued that (1) it did not make any misrepresentation; and (2) any misrepresentation claim was barred by the parole evidence rule.

The trial court granted summary judgment on these causes of action, explaining that “evidence of fraud can’t be introduced to contradict an existing provision of a written agreement [¶] . . . [A]nd we can’t get around the parole [*sic*] evidence exception by reframing the cause of action as fraud. The contract is what controls.”

B. *Analysis.*

“The parole evidence rule, codified in Code of Civil Procedure section 1856 and Civil Code section 1625, generally prohibits the introduction of either oral or written

extrinsic evidence to vary, alter, or add to the terms of an integrated written agreement [Citation.] The rule is one of substantive law based on the concept that a written integrated contract establishes the terms of the agreement between the parties and evidence that contradicts the written terms is irrelevant. [Citation.]” (*Duncan v. McCaffrey Group, Inc.* (2011) 200 Cal.App.4th 346, 363, fns. omitted.)

City relies on the fraud exception to the parol evidence rule. (Code Civ. Proc., § 1856, subd. (g).) However, “the fraud exception to the parol evidence rule does not apply where parol evidence is offered to show a fraudulent promise “directly at variance with the promise of the writing.” [Citation.]” (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 873; accord, *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263-264.) Here, the alleged misrepresentation was that City would have the exclusive right to sell insurance within the shopping center. This allegedly fraudulent promise is directly at odds with the much more limited exclusive-use provision of the lease. Accordingly, the parol evidence rule bars City’s claim.

City’s argument to the contrary is frivolous. City baldly asserts that “[f]raud in the inducement eliminates any bar imposed by the parol evidence rule.” However, this is simply not the law.

City also cites *Perry v. Magee* (1953) 116 Cal.App.2d 155. That case stated, “[P]arol evidence is admissible to prove fraudulent representations in the procurement of a written contract *for the purpose only of rescission but not for damages for fraud.*” (*Id.* at p. 159, italics added.) Here, the City is seeking damages, plus a declaration that the

Center is in breach of the lease; it is not seeking rescission. Thus, under the very case City itself has cited, its claims are barred.

Finally, City cites *McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784. There, a lessor had allegedly misrepresented—including in the lease itself—the square footage of the leased premises. (*Id.* at pp. 790-791.) The lease also provided that (1) this square footage was an “approximation” and (2) the lessee had performed its own investigation into the condition and suitability of the premises and “assumes all responsibility therefor” (*Id.* at p. 790.) Citing Civil Code section 1668, which prohibits a party from exempting itself from its own fraud, the court held that the misrepresentation claim was not barred. (*McClain*, at pp. 794-798.) Thus, in *McClain*, there was simply no issue as to whether the parol evidence rule barred evidence of a promise at variance with the lease.

In its briefs, City quotes *McClain*, as follows: “A party to a contract who has been guilty of fraud in its inducement cannot absolve himself or herself from the effects of his or her fraud by any stipulation in the contract . . . [.] Such stipulations or waivers will be ignored, and the parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable.” (Boldface omitted.)

The original quote, however, is: “. . . ‘A party to a contract who has been guilty of fraud in its inducement cannot absolve himself or herself from the effects of his or her fraud by any stipulation in the contract, *either that no representations have been made, or that any right that might be grounded upon them is waived.* Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason

that fraud renders the whole agreement voidable, *including the waiver provision.*' [Citation.]" (*McClain v. Octagon Plaza, LLC, supra*, 159 Cal.App.4th at p. 794, italics added.)

The italicized words betray the fact that *McClain* is irrelevant to this case. By omitting the first set and replacing them with an ellipsis, City has made the quote misleading. Even worse, by omitting the second set, without even indicating that anything has been omitted, City has affirmatively misrepresented the wording of *McClain*.

In sum, then, City has not shown any reason why the parol evidence rule does not bar its misrepresentation claims.

V

DECLARATORY RELIEF CAUSE OF ACTION

A. *Additional Factual and Procedural Background.*

With regard to the declaratory relief cause of action, the Center sought summary judgment on the ground that, among other things, City could not show that the Center had breached the lease. The trial court agreed. It granted summary judgment on this cause of action because “[the Center] did not breach its lease with City”

B. *Analysis.*

City argues that “there are material triable issues of fact on [the] breach of contract claim. By extension, the declaratory relief cause of action is also not disposable on summary judgment.”

In part III, *ante*, we held that the trial court properly granted summary judgment on the contract causes of action. It necessarily follows that it also properly granted summary judgment on the declaratory relief cause of action. (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1401-1402 [in declaratory relief action, on motion for summary judgment, “the defendant’s burden is to establish the plaintiff is not entitled to a declaration in its favor”].)

VI

DENIAL OF A CONTINUANCE

In the alternative to its other contentions, City contends that the trial court erred by refusing to grant a continuance so it could take additional discovery.

A. *Additional Factual and Procedural Background.*

When the Center was asked to designate its “person most knowledgeable” about the negotiations leading up to the lease, it designated Andrew McLean of Lee & Associates.

McLean was deposed in September 2010. He testified that he had negotiated the lease between the Center and City; he thought that other representatives of the Center were also involved, but he could not recall specifically. According to McLean, Jay Bruhn, also of Lee & Associates, had negotiated the lease between the Center and Cardenas; however, Bruhn was not involved in negotiating the lease between the Center and City. Bruhn left Lee & Associates sometime around 2006 or 2007.

In October 2010, Hafez was deposed. He testified that he negotiated the lease exclusively with McLean. He admitted signing a lease application that listed both

McLean and Bruhn as the leasing agents. However, he had never had any contact with Bruhn.

In February 2011, in response to City's third set of special interrogatories, the Center indicated that the person who had negotiated the lease between the Center and City was Bruhn. Thereafter, however, the Center realized that it had inadvertently omitted McLean. Accordingly, in March 2011, it served an amended response, indicating that person who had negotiated the lease between the Center and City was McLean and "possibly Jay Bruhn"

In February 2011, City noticed a deposition of the "person most knowledgeable" at Loya for a date in March 2011. There was a dispute as to whether the deposition subpoena was properly served. As a result, the deposition was rescheduled for later in March 2011.

As of the motion for summary judgment, City had not had an opportunity to depose Bruhn. It had requested the production of a floor plan of Loya's space, but it had not yet received one. It also had not yet conducted an "official survey" of Loya's space.

Thus, City argued that summary judgment would be "premature" (capitalization omitted) because it still needed to take the following additional discovery:

1. A deposition of Jay Bruhn, because the Center had indicated that he had negotiated the lease.
2. A deposition of Fred Loya, so City could determine whether the Center had approved the sublease and could determine how much space Loya was occupying.

3. A floor plan and a physical inspection of Loya’s premises, again so City could determine how much space Loya was occupying.

In response, the Center argued that City had not exercised diligence in conducting discovery.

In ruling on the motion, the trial court stated: “. . . I don’t want to be insensitive to the fact that I have been asked to give a little more time to the plaintiff, but the case is from February of 2009, and there is a trial date. So the case has been around for a little while”

B. *Analysis.*

“Section 437c, subdivision (h) of the Code of Civil Procedure provides that a motion for summary judgment or adjudication shall be denied, or a continuance shall be granted, ‘[i]f it appears from the affidavits submitted in opposition . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented’

The nonmoving party seeking a continuance ‘must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]’

[Citation.] The decision whether to grant such a continuance is within the discretion of the trial court. [Citation.]” (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633, capitalization omitted.)

Preliminarily, the Center argues that City did not actually request a continuance. However, City did cite and quote the language from Code of Civil Procedure section 437c, subdivision (h) allowing the court to “deny the motion *or* order a continuance”

(Italics added.) It also argued: “It would be an abuse of discretion to allow Defendant to obtain summary judgment when the testimony of the person most knowledgeable with regard to the contract in question [i.e., Bruhn] is still outstanding.” The trial court acknowledged that it “ha[d] been asked to give a little more time to the plaintiff” Thus, City adequately communicated a request for a continuance.

On the merits, the Center argues that City did not exercise diligence in discovery. The law is unclear, however, with respect to whether a request for a continuance under Code of Civil Procedure section 437c, subdivision (h) can be denied based on lack of diligence. (See *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 397-400.) Accordingly, we do not resolve this issue on this ground.

The Center also argues that City did not show that the discovery sought was essential to opposing the motion. This time, we agree. First, City did not need the deposition of Bruhn, because Hafez admitted that he had negotiated the lease exclusively with McLean and had had no contact with Bruhn. Whether Bruhn even knew anything about the negotiations was speculative. Second, City also did not need a deposition of Loya. As already discussed, it did not matter whether the Center did or did not approve the sublease. Also, if there was any serious doubt about how much space Loya was occupying, City could have made at least a rough determination simply by walking into Cardenas’s supermarket and taking a look around. Indeed, Hafez admitted that he had already done so. For the same reason, City did not need either a physical inspection or a site plan of Loya’s premises.

We therefore conclude that the trial court did not abuse its discretion by denying a continuance.

VII

DISPOSITION

The judgment is affirmed. The Center is awarded costs on appeal against City.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.