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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

COLUMBIA ENTERPRISES, LLC, Plaintiff and Appellant, v. T.M. COBB COMPANY, Defendant and Respondent.	E069147 (Super.Ct.No. RIC1403333) OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge. Reversed.

Best Best & Krieger, Victor L. Wolf and Matthew C. Onyett for Plaintiff and Appellant.

Buchalter, Cheryl M. Lott and Aaron M. Levine for Defendant and Respondent.

Following a sale of commercial real property, the buyer, plaintiff and appellant Columbia Enterprises, LLC (Columbia Enterprises), brought this lawsuit against the seller, defendant and respondent T.M. Cobb Company (T.M. Cobb), alleging fraud and other causes of action. The trial court granted summary adjudication on the issue of

whether T.M. Cobb made a misrepresentation in connection with the sale, finding that no misrepresentation was made, and entered judgment in T.M. Cobb's favor. Columbia Enterprises appeals. Because the issue of whether a misrepresentation was made turns on the meaning of an ambiguous contractual term, the scope of that term is a triable issue of material fact precluding summary adjudication. Accordingly, we reverse.

I. FACTS

T.M. Cobb owned two adjacent buildings in Riverside, one located at 545 Columbia Avenue (the Columbia Property) and the other at 500 Palmyrita Avenue (the Palmyrita Property). Columbia Enterprises purchased only the Columbia Property from T.M. Cobb in 2011. In connection with the sale, T.M. Cobb executed a form (the Property Information Sheet) in which it "represent[ed] and warrant[ed] that the Property is served by . . . natural gas [and] telephone," among other utilities. Following the sale, Columbia Enterprises discovered that the natural gas and telephone lines in the Columbia Property were not separately metered but were instead "dependent upon" the Palmyrita Property. Columbia Enterprises then spent approximately $47,000 to segregate the gas and telephone systems and initiated this lawsuit.

T.M. Cobb moved for summary judgment or adjudication, contending in part that it made no misrepresentation with regard to natural gas and telephone service. The trial court agreed, finding that "based on the plain meaning" of the Property Information

Sheet, Columbia Enterprises "cannot establish that any false misrepresentation was made," and entered judgment in T.M. Cobb's favor.[1]

II. DISCUSSION

A. *T.M. Cobb's Procedural Arguments*

Columbia Enterprises' sole argument on appeal is that the plain meaning of the term "served" in paragraph 4 of the Property Information Sheet (the utilities clause) means stand-alone utility service; because the Columbia Property did not have stand-alone natural gas or telephone service, Columbia Enterprises contends that T.M. Cobb made a false statement and is liable for negligent misrepresentation. T.M. Cobb contends that, as a threshold matter, we should not consider this argument on a number of procedural grounds. We conclude that these arguments are without merit.

T.M. Cobb first observes that the trial court already determined the plain meaning of the term "served" in the utilities clause when T.M. Cobb demurred to the first amended complaint and the operative second amended complaint; because Columbia

[1] The reason that the trial court's ruling was not technically a grant of summary judgment is that the court denied summary adjudication as to a cause of action not at issue here. Specifically, the trial court granted summary adjudication as to whether T.M. Cobb made a misrepresentation but denied summary adjudication as to Columbia Enterprises' cause of action for declaratory relief, which is not part of this appeal. Judgment was entered the same day. The judgment (but not the summary adjudication order) noted that Columbia Enterprises had dismissed its cause of action for declaratory relief. For brevity, we will refer to T.M. Cobb's motion as simply the summary adjudication motion.

Enterprises did not appeal from the order overruling the demurrers, T.M. Cobb contends, it may not assert any plain meaning argument here.[2]

That the trial court considered plain meaning at the demurrer stage, however, did not foreclose Columbia Enterprises from raising the issue at a later stage in the trial court or on appeal here. An order overruling a demurrer is not directly appealable, though it can be challenged in an appeal from a final judgment, as here. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 912-913.) Moreover, Columbia Enterprises raised the issue again in opposing the summary adjudication motion, and the trial court determined that there was no misrepresentation based in part on the plain meaning of the utilities clause.[3] In making this determination, the trial court was not bound by its demurrer ruling. (See *Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156 ["the trial court retains the inherent authority to change its decision at any

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[2] At the hearing on the demurrer to the first amended complaint, the trial court stated that "the language of the contract on its face does not show any provision for independent gas [or] telephone . . . systems." Similarly, at the hearing on the demurrer to the second amended complaint, the trial court stated that the Property Information Sheet "does not indicate that the utility services would be separate." Both of these statements were made in the context of Columbia Enterprises' cause of action for breach of contract, which is not part of this appeal, but whether T.M. Cobb was supposed to provide independent natural gas and telephone systems forms the basis for its cause of action for negligent misrepresentation as well.

[3] To be sure, Columbia Enterprises only raised the "plain meaning" issue at the hearing. T.M. Cobb objected that the argument was untimely, but given that the issue had previously been briefed at the demurrer stage, T.M. Cobb would not have been prejudiced by the trial court's decision to consider the argument, which it rejected in any event.

time prior to the entry of judgment"].) The trial court's rulings on the demurrers therefore do not preclude Columbia Enterprises from raising the issue here.

T.M. Cobb next argues that Columbia Enterprises waived and forfeited the right to make any plain meaning argument because it did not raise the argument in opposing summary adjudication. As mentioned, however, Columbia Enterprises opposed summary adjudication at the hearing on the basis of plain meaning, and plain meaning was a basis for the trial court's ruling, so nothing was forfeited or waived.

T.M. Cobb also contends that Columbia Enterprises is precluded from asserting "plain meaning" under the doctrine of judicial estoppel.[4] According to T.M. Cobb, because Columbia Enterprises alleged in the operative complaint that the term "served" has a special meaning in the industrial real estate brokerage community, it has prevailed in asserting a special meaning and therefore may not advocate the term's plain meaning now. Columbia Enterprises, however, merely advocated a special meaning theory, and "judicial estoppel does not apply to a party who merely *advocates* inconsistent positions . . . ." (*Tiffin Motorhomes, Inc. v. Superior Court* (2011) 202 Cal.App.4th 24, 32.) The trial court rejected the theory of special meaning: as it stated in its summary

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[4] """Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position."""" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986.) "The doctrine applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" (*Id.* at pp. 986-987.)

adjudication order, Columbia Enterprises "claimed that the statement . . . meant, in the industrial real estate brokerage community, that the telephone and gas lines were stand-alone gas and telephone systems" but that it "did not establish this special meaning . . . and did not offer any evidence to support the interpretation that 'served' meant by stand-alone systems."[5] At a minimum, therefore, Columbia Enterprises was not "'successful in asserting the first position'" (see *Aguilar v. Lerner*, *supra*, 32 Cal.4th at p. 986), and judicial estoppel does not apply.

Finally, T.M. Cobb's invocation of the invited error doctrine fails for similar reasons. "'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) The doctrine, however, does not include situations "wherein a party . . . did not in fact mislead the trial court in any way." (*Ibid.*) The trial court was not misled in any way by a special meaning argument—it simply rejected it—so the invited error doctrine does not apply.

B. *The Meaning of "Served" in the Property Information Sheet*

1. *Applicable Law*

"On review of an order summarily adjudicating issues, we review the record de novo to determine whether the prevailing party has conclusively negated necessary elements of his opponent's case or demonstrated under no hypothesis is there a material

[5] Columbia Enterprises does not contend on appeal that the term "served" has any special meaning in the industrial real estate brokerage community.

issue of fact which requires the process of a trial." (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350, fn. omitted.)

"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, 359.)[6]

Whether or not T.M. Cobb made a misrepresentation here turns on interpretation of the Property Information Sheet, a contract. "'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.'" (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.) "The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the

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[6] The operative complaint did not make clear whether the relevant cause of action here is for intentional misrepresentation or negligent misrepresentation. The complaint captions the relevant cause of action as "negligent misrepresentation." "The tort of negligent misrepresentation is similar to fraud, except that it does not require scienter or an intent to defraud." (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 845.) To recover for negligent misrepresentation, however, a plaintiff must establish that "the defendant made the representation without reasonable ground for believing it to be true." (*Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1307.) The body of the cause of action alleges an intent to defraud, suggesting that the cause of action is actually for intentional misrepresentation. At oral argument, T.M. Cobb asserted that we should construe the cause of action as one for intentional misrepresentation; the lack of fraudulent intent was undisputed in the summary judgment proceeding. We conclude that the complaint sufficiently alleges a negligent misrepresentation, and the sole issue raised on appeal is whether there was a misrepresentation at all through the use of the term "served."

contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." (*Ibid.*; see also *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 195 [""[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case . . . .""]) "'The "clear and explicit" meaning of [contract] provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation. [Citation.]'" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.)

Extrinsic evidence is admissible "to interpret the language of an integrated written instrument where such evidence is relevant to prove a meaning to which the contractual language is 'reasonably susceptible.'" (*Morey v. Vannucci*, *supra*, 64 Cal.App.4th at p. 912, fn. 4., citing *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40.) "Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible." (*Morey v. Vannucci*, *supra*, 64 Cal.App.4th at p. 912; see also *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 37 ["A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or

presuppose a degree of verbal precision and stability our language has not attained."].) ""The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal."" (*Wolf v. Superior Court*, *supra*, 114 Cal.App.4th at p. 1351.)

If an ambiguity exists, resolution of the ambiguity is a question of law if the external evidence is not in conflict. (*Wolf v. Superior Court*, *supra*, 114 Cal.App.4th at p. 1351.) However, "[w]here the interpretation of contractual language turns on a question of the credibility of *conflicting* extrinsic evidence, interpretation of the language is not solely a judicial function." (*Morey v. Vannucci*, *supra*, 64 Cal.App.4th at pp. 912-913.) The trier of fact must "resolve any conflict in the extrinsic evidence properly admitted to interpret the language of a contract." (*Id.* at p. 913.) The existence of such a conflict precludes summary judgment or adjudication. (See *Wolf v. Superior Court*, *supra*, 114 Cal.App.4th at p. 1359 ["it is apparent triable issues of fact remain regarding the proper meaning to be given the term 'gross receipts,' thus precluding our independent interpretation of the contract as a matter of law"].)

2. *Application*

The trial court determined that the term "served" in the utilities clause did not mean stand-alone service. The fact that it reached this conclusion without considering external evidence means that the trial court believed the term "served" was unambiguous. However, there is "more than one possible meaning to which the language of the [utilities clause] is yet reasonably susceptible" under the circumstances here—namely, the commercial purchase of a stand-alone building. (*Morey v. Vannucci*, *supra*, 64

Cal.App.4th at p. 912.) As Columbia Enterprises' CEO stated in opposing the summary adjudication motion, the company sought to purchase a "free-standing building" for its various businesses. In our view, it is reasonable that a purchaser in that context would likely *not* understand the terms of the contract to mean it must share a meter with the owner of a separate building and either: (1) come to an additional agreement about access to the meter and how to apportion bills, or (2) pay to segregate its utility connections and install individual meters. Rather, expecting stand-alone natural gas and telephone service would be a commonsense interpretation of the term "serve," even if it is not the only plausible one. Although it is true that this property purchase occurred with a set of Covenants, Conditions, and Restrictions (known as "CC&Rs") that are typical of homeowners' associations or groups of businesses sharing common rules and regulations (thereby suggesting that Columbia Enterprises should have tested any assumptions regarding stand-alone utility service it may have had), this fact goes to demonstrating a *conflict* in the extrinsic evidence and points in favor of having the trier of fact determine what "served" meant.

As T.M. Cobb points out, Columbia Enterprises agreed to purchase the Columbia Property on an "as-is" basis, and the Property Information Sheet states that it is "NOT a warranty" and that it "'shall not relieve a buyer . . . of responsibility for independent investigation of the Property.'" These do not change the fact that T.M. Cobb explicitly "represent[ed] and warrant[ed] that the Property is served by . . . natural gas [and] telephone" service in the Property Information Sheet. Language preceding the "as-is" provision in the purchase agreement, as well as other language contained in the Property

Information Sheet, indicate that the specific language in the utilities clause controls. An addendum to the purchase agreement states: "*Except as set forth in the Agreement*, upon the close of escrow, Seller shall sell and convey to Buyer and Buyer shall accept the Property and Improvements 'AS-IS' and 'WITH ALL FAULTS.'" (Italics added.) And although the preface to the Property Information Statement says that it is "NOT a warranty as to the actual condition of the Property/Premises" and that its purpose is to provide potential buyers "with important information . . . which is currently in the actual knowledge of the Owner," it is significant that nearly every other paragraph in the Property Information Statement begins with the phrase "Owner has no actual knowledge" and contains no representation, whereas, the utilities clause says nothing about actual knowledge and does contain a representation. Under these circumstances, the provisions T.M. Cobb points to do not negate potential liability on a misrepresentation concerning utility service.

Regardless of what may be the "correct" way to interpret the term "served" here, it was error for the trial court to conclude that the term was unambiguous. Rather, it should have reserved the issue for the finder of fact at trial and denied summary adjudication.

D. *Attorneys' Fees*

A party may be entitled to recover attorneys' fees by statute or contract. (Code Civ. Proc., § 1021.) Here, the purchase agreement allows the prevailing party to recover

attorneys' fees on appeal.[7] Because we reverse the trial court's grant of summary adjudication in favor of T.M. Cobb, Columbia Enterprises is the "Prevailing Party" under the purchase agreement and shall be awarded reasonable attorneys' fees.

III. DISPOSITION

The judgment is reversed with directions to the trial court to vacate its ruling on summary adjudication and enter a new order denying the motion on this issue. Columbia Enterprises is awarded its costs and attorneys' fees on appeal.

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RAPHAEL
J.

We concur:

RAMIREZ
P. J.

MCKINSTER
J.

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[7] Section 16 of the purchase agreement states: "If any Party or Broker brings an action or proceeding (including arbitration) involving the Property whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereinafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. Such fees may be awarded in the same suit or recovered in a separate suit, whether or not such action or proceeding is pursued to decision or judgment. The term 'Prevailing Party' shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense. The attorneys' fees award shall not be computed in accordance with any court fee schedule but shall be such as to fully reimburse all attorneys' fees reasonably incurred."