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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MOOREFIELD CONSTRUCTION, INC.,

Plaintiff, Cross-defendant and  
Respondent,

v.

GARY KANTER,

Defendant, Cross-complainant and  
Appellant;

RONEN ARMONY,

Cross-defendant and Respondent.

G047550

(Super. Ct. No. 30-2011-00492636)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Luis A. Rodriguez, Judge. Affirmed.

Ryan Gordon for Defendant, Cross-complainant and Appellant.

Mahoney & Soll, Paul M. Mahoney and Richard A. Soll for Plaintiff,  
Cross-defendant and Respondent Moorefield Construction, Inc.

Blakely Law Group, Brent H. Blakely and Courtney Stuart-Alban for  
Cross-defendant and Respondent Ronen Armony.

\* \* \*

This is an appeal following a motion for judgment on the pleadings by cross-defendants Moorefield Construction, Inc. (Moorefield Construction) and Ronen Armony (collectively defendants) on Gary Kanter’s cross-complaint. We will delve more into the nature of the proceedings below, but Kanter’s first argument on appeal is that evidence necessary to prove his cause of action for fraud was excluded by the trial court based on *Bank of America, etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258 (*Pendergrass*), which was recently overturned by *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169 (*Riverisland*).

*Pendergrass* held that parol evidence of fraud “must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing.” (*Pendergrass, supra*, 4 Cal.2d at p. 263.) *Riverisland* overruled *Pendergrass*: “[W]e conclude that *Pendergrass* was an aberration. It purported to follow [Code of Civil Procedure] section 1856 [citation], but its restriction on the fraud exception was inconsistent with the terms of the statute, and with settled case law as well.” (*Riverisland, supra*, 55 Cal.4th at p. 1182.)

We find that Kanter, who acted as his own attorney below, failed to establish an adequate record as to which specific items of evidence were admitted and excluded, which precludes meaningful review. Further, even if he had done so, his fraud

cause of action was doomed to failure due to the lack of evidence of actual misrepresentations and reasonable reliance.

Kanter also argues that the court wrongfully denied his motion to dismiss filed with the clerk in the middle of trial. He is incorrect, because a motion to dismiss may only be filed with the clerk before trial commences. He never made such a motion to dismiss before the court. We therefore affirm.

## I FACTS

### *A. Background Facts*

For the sake of brevity, we summarize the parties' history as succinctly as possible. Kanter, through Bear Valley Family Limited Partnership (Bear Valley), owned real property in Victorville. In 2008, Moorefield Construction, a contractor, entered into three construction contracts with Bear Valley to develop these properties. Two of the three contracts involved parcels referred to as "pad 4" and "pad 6," while the other contract was for general site work. The contract price was \$1,027,694.

On February 27, 2009, Bear Valley and Armony<sup>1</sup> entered into a purchase and sale agreement for pad 4, and on March 27, they entered into a purchase and sale agreement for pad 6 (collectively the sales agreements). The agreements closed in May 2009 for pad 4 and August for pad 6. Separate sales agreements were also entered into for two other parcels, which are not part of this case. After the sales, Bear Valley continued to have a number of duties to perform, including completing construction and other matters pursuant to leaseback provisions.

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<sup>1</sup> Other individuals and entities were also involved as buyers, but as they are not parties to the present dispute, we omit them from the summary of the facts.

Between February 2009 and March 2010, Armony paid Kanter over \$7 million in cash for all the purchased properties, which represented approximately 40 percent of the purchase price, with the remainder financed.

On August 13, 2009, Moorefield Construction submitted a final pay application in the amount of \$405,122, the balance remaining on the construction contracts. Kanter, who, apparently, did not have the necessary funds, entered into a “Tolling Agreement and Personal Guarantee” (the guarantee) with Moorefield Construction on October 7, 2009. Moorefield Construction agreed not to record a mechanic’s lien on the properties until August 13, 2010, and the statute of limitations to record such a lien would be tolled until that date. In return, Kanter agreed to personally guarantee Bear Valley’s debt. Kanter signed both on his own behalf and on behalf of Bear Valley.

By late 2010, significant problems had arisen with respect to the sales agreements. Various demand letters were sent to Kanter/Bear Valley in September and October.

In an attempt to settle their differences, Kanter and Armony mediated their dispute on December 8, 10, and 14, 2012. On January 4, 2011, Kanter and Armony executed a “Mediation Agreement & Settlement” (the mediation agreement). The mediation agreement modified the parties’ duties under the sales agreements, and resulted in Armony paying approximately \$2 million towards Kanter’s financial obligations. Armony, in return, obtained an 80 percent share of Bear Valley, the holder of Armony’s promissory notes for pads 4 and 6. Bear Valley’s articles of partnership were amended to reflect Armony as a partner as of December 31, 2010. Armony later exercised an option to obtain an additional 18 percent of Bear Valley and removed Kanter as general partner.

In addition, paragraph 9 of the mediation agreement stated: “As to any and all amounts owed to Moorefield Construction, Inc., Ronen [Armony] has agreed to

negotiate and cover those costs. . . . [¶] a) In the case of default in scheduled, uncured payments of the total \$648,000.00 plus interest to Moorefield which results in any successful action, lien, hearing, and/or proceeding by Moorefield as against Gary [Kanter] (personally and directly) relative to those properties, Ronen agrees to transfer 18% of Pad 4 to Gary. [¶] b) However, Ronen will immediately negotiate with Moorefield to have Gary removed as a possible direct target of any action, suit, and/or proceeding by Moorefield based on any such default in payments. If Gary is so personally protected, the above noted paragraph 9 a) is void and/or moot.”

Meanwhile, Moorefield Construction had still not been fully paid for its work. On December 23, 2010, Moorefield Construction and Armony, on Bear Valley’s behalf, entered into an agreement (the Moorefield/Armony agreement). The parties noted that “ARMONY is in the process of acquiring an interest in BEAR VALLEY. . . .” Armony agreed to pay the amount due to Moorefield Construction, plus interest, for a total of \$715,561, to be paid in installments by January 2012. A first payment of \$129,000 was due within one business day after the Moorefield/Armony agreement was executed. Further, paragraph 6 stated: “As consideration for this Agreement, so long as ARMONY is current on all of the installment payments . . . MOOREFIELD shall refrain from . . . enforcing its rights against Gary Kanter under the terms of the guarantee . . . .” Michael Moorefield of Moorefield Construction actually signed the agreement on January 18, 2011.

On March 18, 2011, Armony filed suit in San Bernardino alleging breach of contract and fraud under the sales agreements and the mediation agreement. On June 2, this action was stayed as a result of a chapter 11 bankruptcy petition filed by Kanter on Bear Valley’s behalf. The petition identified Armony as the 80 percent owner of Bear Valley, although Armony had, by that point, purchased 100 percent, but Armony did not receive notice of the bankruptcy petition or agree to its filing. Eventually, in December

2011, the bankruptcy petition was dismissed. The stay on the San Bernardino action was lifted, and that case remains pending.

*B. The Instant Action*

On July 20, 2011, the still unpaid Moorefield Construction filed the instant action against Kanter personally for breach of the October 2009 guarantee. The single cause of action alleged that Kanter had failed to pay the \$473,648.66 (representing the principal and agreed-upon interest) under the terms of the guarantee. Kanter, representing himself, filed an answer in January 2012.

On February 23, 2012, Kanter filed a cross-complaint against Moorefield Construction and Armony, alleging fraud, breach of contract, conspiracy, and breach of fiduciary duty. The only fraud specifically alleged was that Armony and Moorefield Construction represented that they were going to remove Kanter from his obligations under the guarantee agreement. Kanter alleged that a string of e-mails between the parties formed an agreement under which Moorefield Construction and Armony agreed to remove Kanter from his role as guarantee, but instead they signed the Moorefield/Armony agreement which kept Kanter as guarantee if Armony defaulted. He also alleged these same essential facts constituted a breach of contract, a conspiracy, and breach of fiduciary duty.

*C. Trial*

Because it is critical to understanding this appeal, we go into some detail about what transpired during the trial. Trial began on July 30, 2012, with Kanter representing himself. The court chose to begin with Kanter's cross-complaint, because the existence of any fraud required a determination before the court could decide whether Kanter was liable to Moorefield on the guarantee. In his opening statement, Kanter said

the evidence would show that Moorefield and Armony conspired to defraud him and “avoid a clear explicit and implicit contract to take me off of the guarantees and replace them with Ronen Armony; that will be shown through e-mail correspondence.” He also stated that e-mail correspondence had initially contemplated him as a signatory to the Moorefield/Armony agreement, but he was eventually excluded and did not sign the agreement. Kanter also argued that Armony had no authority to sign the Moorefield/Armony agreement on behalf of Bear Valley at the time he signed it.

In his opening statement, Armony’s counsel argued, among other things, that Kanter’s complaint about being defrauded regarding his status as guarantor was contradicted by the mediation agreement, which explicitly stated that if Armony defaulted as to Moorefield Construction, Armony agreed to transfer 18 percent of pad 4 to Kanter. Thus, the e-mails Kanter was relying upon were parol evidence. Counsel also argued that Kanter did not substantially perform his obligations and therefore Armony was not under the obligation to transfer the 18 percent.

Kanter’s first witness was Michael Moorefield. At several points, Kanter had some difficulty asking questions in a manner that did not draw objections on a number of grounds besides parol evidence.

After a recess, the court noted: “So that the record is clear, there’s been a motion in limine with regard to parol<sup>2]</sup> evidence. This court is considering whether there’s a reasonable susceptibility to any language in the contract to whether it should interpret the contract based on any parol evidence. . . . [¶] The other issue you have raised is the question of whether you are allowed to introduce evidence in connection with the — that the contract was procured for — the agreements were subject to fraud or mistake or other issues that would void or render it voidable. [¶] So I’m assuming . . .

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<sup>2</sup> Parol evidence is erroneously spelled “parole” throughout the transcript. For clarity and readability, we use the correct spelling.

that is the evidence that you're going to direct this to or are you — just so from the court's clarification is the evidence that you're seeking to present, is it moving towards the question of reasonable susceptibility?" After Kanter answered yes, the court asked for "an offer of proof of parol evidence that you intend to introduce as to being reasonably susceptible and that then this court is reasonably admitting based on the interpretation of [the] contract." Kanter stated the exhibits he was "going to go to shortly should be spot . . . on that issue."

A few minutes later, the court noted: "The other purpose [besides reasonable susceptibility] is to show that the parol evidence is . . . because you're seeking to show the circumstances underlying as a product of fraud or mistake or some other aspect with regard to voidability." When Armony's counsel disagreed somewhat, the court stated: "Mr. Kanter has offered fraud, that parol evidence to establish the contracts . . . are void by fraud or legality, that doesn't necessarily contradict the terms of the agreement. [¶] It goes to the question of whether there's an agreement in the first place."

After hearing further argument, the court stated: "[T]he court grants the motion in limine with regard to and finds that there has been insufficient evidence presented to show that the language in exhibit 11 [the Moorefield/Armony agreement] is reasonabl[y] susceptible to any ambiguity . . . that [would require] this court to then impose a meaning to the interpretation by conditionally admitting parol evidence that would seek to supplement or add to and address whether that meaning is reasonably susceptible." The court reached the same conclusion with regard to the guarantee agreement and the mediation agreement.

When Kanter objected that he wanted to introduce evidence as to fraud regarding the mediation agreement, the court stated: "This is not about that. . . . [¶] If it's going to hear evidence on the question of the fraud, that's fine. I will hear evidence with regard to that on the parol evidence issue." Shortly thereafter, the court repeated:

“So your [Kanter’s] evidence will only be taken for purposes of establishing whether the agreements were void by reason of fraud or some other extrinsic circumstance that has a legal affect to render those agreements void.”

Only moments later, the court made it clear it had denied Armony and Moorefield Construction’s motion in limine with respect to using parol evidence to establish fraud. At that point, Armony’s counsel cited *Pendergrass*, stating “you can’t allege as a fraud something that’s clearly set forth in the agreement itself.” The court responded: “Well, that I think the court agrees with you and has tried to make sure that the evidence that’s offered, the extrinsic evidence goes to extraneous conditions or evidence supporting the fraud as to the agreement being void or voidable . . . .”

Armony’s counsel again stated, “. . . you can’t try to introduce something that’s directly at variance with the writing to show fraud,” but the court replied: “I’m going to allow [Kanter] to do that for purposes of the fraud.” The court granted a continuous objection, stating “I’m conditionally admitting this evidence at this time.”

Kanter then continued to question Moorefield about the various agreements, documents, and related matters, again drawing various non-parol evidence related objections. When Kanter asked Moorefield about a late added paragraph to the Moorefield/Armony agreement, counsel for Armony and Moorefield objected as to parol evidence, but the court overruled the objection. When defense counsel objected to a question about a deed of trust on parol evidence grounds, the court again overruled the objection, stating: “No, this is again going to the question of the issues raised as to a conspiracy and a question of whether there was fraud in connection with the execution of the agreement. [¶] So go ahead. Overruled.”

Kanter’s examination of Moorefield continued. Kanter referred to exhibit 21, a series of e-mails presumably leading up to the Moorefield/Armony agreement. Kanter specifically asked Moorefield about the need for a deed of trust Moorefield had

written about. Defense counsel objected, arguing the evidence was parol. The court overruled, stating: “The objection is overruled going to the court’s limited purpose of these — the evidence going to the question of whether there was a fraud or other circumstances rendering the agreement to be a product of fraud.” The court again clarified that while it would not admit parol evidence to change the terms of the agreements, it would admit the evidence on a conditional basis to determine whether the agreement is a manifestation or product of fraud. Further objections to the e-mails were overruled on the same basis.

Both questioning of Moorefield and argument continued. The court expressed it was somewhat confused by Kanter’s contention that an agreement between Moorefield and Armony could serve to directly defraud Kanter. The court noted Kanter had not alleged interference of any sort, but fraud. “You’ve alleged fraud and this court has allowed you to some extent to ask conditionally [about] parol evidence with regard to whether the agreements were the product of fraud.” The court continued: “They can agree between themselves, do whatever they want even if they’re lying to each other . . . . [¶] But you[] stand as a third party saying, well, wait a minute, my expectation and my obligation was contained therein and it’s becoming apparent to the court that you’re trying to present evidence of their negotiations but I’m not seeing how it becomes fraud to you.”

After further discussion, the court asked the parties to provide evidence of the bankruptcy court’s findings as to the ownership of Bear Valley. The court then stated: “[I]n terms of the evidence here it’s very ambiguous on intentional misrepresentation . . . that Armony and Moorefield intentionally misrepresented they were going to remove Kanter from the personal guarantee.”

Defense counsel further addressed the fraud issue, and the court stated: “I have a motion in limine being brought with regard to that no further evidence as to the

other agreements except the mediation agreement at this point on the state of the evidence because Mr. Kanter, you're not a party to that contract and therefore, you cannot allege direct fraud." Kanter stated he wanted to get to his further e-mails, and the court asked if the e-mails would show that he was either a party to or intended to be a party to the Moorefield/Armony agreement. Kanter said yes. The court asked for briefing on the issue of why it should receive further evidence on the issue of fraud as to the Moorefield/Armony agreement when Kanter was not a party to the contract. Kanter argued he was a "necessary party" and Armony had removed his signature block from the Moorefield/Armony agreement. The court asked for briefing.

In his brief filed the next day, Armony cited *Pendergrass*, without much discussion, for the proposition that the purported fraud was directly at variance with the terms of the agreement, and therefore inadmissible. The only issue Kanter briefed was whether he was a party to the Moorefield/Armony agreement. He argued that both Moorefield and Armony knew he was a "necessary party" and that he was the only person who could bind Bear Valley. He argued the evidence he sought to present (the nature of which was not specified) was admissible to show the circumstances under which the agreement (presumably the Moorefield/Armony agreement) was made.

The court once again reviewed its thinking on the evidentiary issue, noting it had excluded parol evidence because the agreements were not ambiguous. It then stated: "What the court did allow was the admission of the parol evidence on the cause of action . . . alleged in fraud. And although the remedy was not rescission, this is a damage remedy elected . . . and parol evidence does allow for the presentation or the submission of evidence as independent leading to the void or voidability of the agreement." Noting the continuous objections regarding the evidence of the negotiations, the court noted it had "requested briefing on the issue as to whether parol evidence is barred with regard to the evidence that has been taken and . . . is anticipated to a series of

e-mails between Moorefield and Armony which Mr. Kanter . . . seeks to offer into evidence as to whether this evidence is subject to [exclusion because it is] parol evidence because it is not going to an independent basis to establish the validity of the agreement but rather seeking to be directed to contradict the terms of the agreement.”

The court continued: “I have received briefing on this issue and, Mr. Kanter, my understanding is in reading your brief is that your position is that the court should deny the motion in limine because there’s an authorization issue . . . that goes outside of the terms of the agreement because there was a representation to your concerning authorization and the necessity for a signature with respect to the [Moorefield/Armony] agreement that . . . supports the admission of parol evidence; that you’re not seeking to contradict or deny, but rather that the agreement itself even though you were not a party to that, you can challenge with regard to the causes of action set forth; is that correct or do you have anything to add?” Kanter responded: “That’s one component . . . that the [Moorefield/Armony agreement] doesn’t have adequate authorization.”

The court then noted that the bankruptcy court had made a finding of fact that the properties were sold to Armony in 2009 and that the entire interest of Bear Valley had been conveyed to Armony. The court stated, if that was true, then parol evidence could only be admitted to “establish some independent fact or representation . . . or some breach of confidence concerning its use which is not a promise directly in variance with the promise of the writing.” The court asked Armony’s counsel if it understood correctly that the argument was that parol evidence should be barred because it did not “establish any independent fact concerning any ownership interest that would otherwise be part of any authorization.” Counsel responded that was correct.

After further colloquy, the court attempted to clarify the issue again. “If the position, Mr. Kanter . . . that you’re taking is that parol evidence should be admitted and

specifically about all the discussions, e-mails, concerning Moorefield [and] Armony as it related to the provisions of the guarantee . . . the transfer of ownership to Mr. Armony prior to the [Moorefield/Armony agreement] would seem to address the question of whether authorization evidence is relevant.” Kanter responded: “The revised tolling agreement that has been alleged to be between the parties of Armony and Moorefield require the signature block of Bear Valley because Bear Valley was the contracting party.”

Discussion continued, and again, the court tried to clarify Kanter’s argument: “You’re claiming that the parol evidence should be offered to challenge the agreement on the grounds that Bear Valley should have been included . . . and there was a fraud and that either a representation that [it] was going to be included, a deception or a concealment which the provision clearly sets forth leaving the Kanter obligation in [p]lace. [¶] I guess my question is it seems to the court the relevancy of Bear Valley in terms of being a party or a signatory has been negated by the . . . findings of the bankruptcy court that it had no interest in 2009.”

Kanter went on to state that the representation made to him was that his role as guarantor would be eliminated in what became the Moorefield/Armony agreement, and he sought to offer evidence of that in the form of the negotiations. The court asked: “You’re claiming that there’s a representation to you . . . you were to be excluded from the obligations that were set forth in the first tolling agreement; correct?” Kanter agreed. “And on that basis you’re seeking to undo the agreement by establishing what . . . should have been done as between them? But that goes to the terms of the agreement, does it not?”

As the court appropriately understood it, Kanter was attempting to introduce parol evidence to change the terms between the parties, specifically, to add a provision excluding Kanter as guarantor. The court appeared to believe that Kanter was

somewhat fixated on Bear Valley's participation in the Moorefield/Armony agreement, which the court felt was a moot point given that Armony owned it by this time, but the only issue actually subject to dispute was Kanter's personal liability as guarantor. The court again asked Kanter for an offer of proof on the issue of representations made that he would not have further personal liability as guarantor. Kanter only pointed to the inclusion of his original guarantee agreement as an exhibit to the Moorefield/Armony agreement. He claimed that by doing so, he had been made a party.

After a recess, the court heard argument on the evidentiary issue. Moorefield's counsel mentioned *Pendergrass* as an "exception to the exception" of the fraud rule. He also made an offer of proof that if Moorefield was asked the question directly, he never intended to release Kanter from his obligation as guarantee until the debt was paid in full. Armony's counsel also mentioned *Pendergrass*, but it was not the focal point of his argument.

Kanter then argued. He stated he felt that "rescission may be in order for the [guarantee] agreement, not the [Moorefield/Armony] agreement." He asserted the guarantee agreement "was modified by the further agreements that I've been trying to produce into evidence." Kanter felt the issues had "become quite legally complicated."

The court disagreed, stating that the question was "characterization of parol evidence to establish whether you're entitled to vary or contradict the terms of the agreements. . . . [¶] And I think that what has been fleshed out has been that the evidence that [Kanter] sought to introduce [was] that you had responses with Mr. Moorefield, and there were e-mails generated and there were discussions, negotiations concerning the creation of a second agreement between Mr. Armony and Mr. Moorefield of which the personal guarantee which you provided with regard to the [guarantee] agreement that . . . was inclusive in [the Moorefield/Armony] agreement but that's between them. [¶] . . . this court has found [the terms in the Moorefield/Armony] agreement to be unambiguous

and [Kanter] was not pointing to any ambiguity except to say that when they did that, they somehow created a consequence for [the guarantee agreement] that it carries over . . . . [¶] And so I think it's a question of whether there's a modification contemplated. And if there was a modification claimed, you would have at least given me an offer of proof. [¶] But at this point . . . what I have in front of me is that there's an agreement between Moorefield and Armony and at the time of [that agreement] Armony owned all the interest of Bear Valley pursuant to a finding of fact [by the bankruptcy court] which this court will take judicial notice of . . . with regard to the interest of Armony as it relates to Bear Valley . . . .”

The court then ruled on the issue: “. . . as a matter of law with regard to the admissibility of parol evidence as it relates to evidence that is directed either by an assertion that there was a representation to you relating to the personal guarantee by Moorefield and Armony and that the effect would be to undo the terms that were set forth in that agreement. [¶] This court is persuaded that evidence of discussions between Armony and Moorefield in relating to the [Moorefield/Armony] agreement are parol in nature . . . and to add to the relevance of those would only be to undo and unwind what is otherwise unambiguous terms. [¶] So in that respect, the motion in limine is granted. The court finds it's inadmissible parol evidence any testimony between Mr. Moorefield and Mr. Armony concerning the creation and the implementation of the [Moorefield/Armony] agreement of which you were not a party. They were the only parties. [¶] And so to that extent, the court will strike the testimony concerning the e-mails between Armony and Moorefield in connection with the [Moorefield/Armony] agreement. [¶] That agreement is totally separate and independent and any attempts of which you are offering to introduce parol evidence of a different understanding or a different interpretation or different representations is inadmissible parol evidence because it goes and contradicts the terms of an unambiguous term in the contract. [¶] So with

respect to that, the motion in limine is granted. [¶] Now . . . you brought a claim for intentional misrepresentation, fraud, and breach of contract. So the court is going to allow you to offer any evidence with regard to a representation[] made by either of the cross-defendants to you, but not in the context of representations that they engaged in . . . the creation of . . . the [Moorefield/Armony] agreement.” After Kanter said he understood, the court clarified: “If you want to offer representations or testimony or evidence in connection with an independent tort not connected thereto to any discussions, negotiations between the parties . . . you will be allowed to do that.”

Kanter then continued examining Moorefield, drawing numerous objections on grounds other than parol evidence. He then began examining Armony, which we will address further in our discussion. In our view, the record shows that Kanter spent almost no time attempting to establish what Armony said to him in any discussions, but instead asked questions about, for example, when Armony considered himself a general partner in Bear Valley. He did not offer specific documents into evidence.

After further questioning of Armony, the court indicated it was able to decide the fraud and conspiracy causes of action. The court noted: “[T]here’s been no evidence presented of any representations by Armony or Moorefield to Kanter in connection with that agreement of any misrepresentations.” Kanter said he had such evidence without offering any specifics. Armony’s counsel pointed out the rule that fraud had to be pled with specificity, and Kanter was attempting to invent new facts outside the scope of the complaint to avoid a dismissal. Kanter asked for more time, but the court granted the motion for nonsuit on the fraud and conspiracy causes of action. Kanter was directed to proceed with his breach of contract and breach of fiduciary duty claims the next day.

Because the issues on this appeal relate to Kanter’s fraud claim, we need not explore the rest of what happened in any great detail. The following day, Kanter

continued examining Armony, who was then examined by his own attorney. Kanter objected, arguing that Armony was attempting to raise issues relevant to the San Bernardino case, but Armony's counsel stated he was trying to show that Kanter breached the mediation agreement as a defense to the breach of contract claim. The court permitted examination to proceed. Questioning of Armony concluded that afternoon. Kanter testified at that point, with the court cautioning him that the issues were limited to the breach of contract and breach of fiduciary duty claims. He was then cross-examined before court concluded for the day. Court was not scheduled to resume the next day, Thursday, August 2, but on Friday, August 3.

On August 2, the next day, Kanter filed a dismissal form with the clerk, attempting to dismiss his entire cross-complaint with prejudice. Kanter asserts a copy was brought to the courtroom.<sup>3</sup> The clerk entered the dismissal the same day. The next morning, the court indicated it had received the dismissal. The court also noted it had received a motion for judgment on the pleadings on the two remaining claims from Armony. The court indicated it believed the dismissal implied that Kanter was finished presenting evidence, and Kanter agreed he had concluded his case. The court determined the clerk's dismissal was invalid because trial had already commenced. Kanter did not make another motion to dismiss. After argument, the court granted the motion for judgment on the pleadings as to both defendants.

Subsequently, the court entered judgment and issued statements of decision, both of which were drafted by counsel. Both mentioned *Pendergrass* with respect to the parol evidence rule. Moorefield received a judgment on its original

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<sup>3</sup> The record reference is a mention in Kanter's own reply memorandum on his motion to vacate, unsupported by a declaration on this point, and Kanter's counsel's statement during oral argument on the motion.

complaint, and Armony and Moorefield received judgment on the cross-complaint. A motion to vacate by Kanter did not alter the outcome.

## II

### DISCUSSION

#### *Requests for Judicial Notice*

We have a request for judicial notice from each party. An appellate court may consider matters that are properly the subject of judicial notice. (Evid. Code, § 459; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 672; *Evans v. Pillsbury, Madison & Sutro* (1998) 65 Cal.App.4th 599, 605, fn. 5.) Matter to be judicially noticed must be relevant to a material issue. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.) Further, the court may take judicial notice only as to the existence of a document, not the truth of any matters that are asserted in it. (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914.)

The first request is from Kanter, and is unopposed. He requests we take judicial notice of the complaint in the San Bernardino action. This is appropriate under Evidence Code sections 452, subdivision (d) and 459. It is at least marginally relevant, and as the request is unopposed, it is therefore granted.

The second request is from Armony. He requests we take judicial notice of two documents from the bankruptcy proceeding, a memorandum of dismissal (exhibit A) and a motion for sanctions (exhibit B). He also requests judicial notice of printouts from the online registers of cases in San Bernardino and Orange Counties identifying cases involving Kanter (exhibits C and D). Kanter has submitted an 18-page opposition, opposing each request on multiple grounds.

With respect to exhibit A, the memorandum of dismissal, this appears to be an original version of the bankruptcy court's order. The amended version was included

in Kanter's appendix,<sup>4</sup> and refers to the original order. Kanter claims this original version was not in the record below. A court will not normally take judicial notice of matters that were not brought to the attention of the trial court or presented to the trier of fact. (*Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1083, fn. 3.) The court did, however, have the amended version, and Kanter chose to include it in his appendix, suggesting at least marginal relevance. As the document is otherwise subject to judicial notice (Evid. Code, § 452, subd. (d)), the request is granted as to exhibit A.

The motion for sanctions (exhibit B), however, does not appear to have been before the trial court at all. Armony states he submitted this document because Kanter mischaracterized its nature in the opening brief. Kanter claims it is largely irrelevant to the issues on appeal, and we must agree. Whatever the nature of the document, it is unimportant to the issues presented in this appeal. The request is denied as to exhibit B.

The final two documents are printouts from online searches for cases involving Kanter from two court Web sites. Armony offers these documents to demonstrate Kanter's experience as a "litigant who understood the ramifications of proceeding at trial *in propria persona* and who can be held accountable to the operative procedural rules of law." Kanter argues this is simply irrelevant, and we agree. Self-represented litigants are required to follow the rules of procedure regardless of their level of sophistication. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229,

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<sup>4</sup> The cover page of Armony's request for judicial notice also includes this document, though it is not included in his filing or mentioned in his points and authorities. We can only surmise that Armony intended to include it and later realized it was already in the record. In any event, because the amended order is already in the record, any request for judicial notice of it is unnecessary and therefore denied.

1246.) These documents are, therefore, irrelevant, and the request is denied as to exhibits C and D.

### *Standard of Review*

As the facts are undisputed, we review Kanter’s request for a dismissal under Code of Civil Procedure section 581<sup>5</sup> de novo. (*321 Henderson Receivables Origination LLC v. Red Tomahawk* (2009) 172 Cal.App.4th 290, 301.)

“Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion. [Citations.]” (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.)

### *The Purported Dismissal*

This is not a difficult issue.<sup>6</sup> Section 581 is the relevant statute here. Section 581, subdivision (b) states that “An action may be dismissed in any of the following instances: [¶] (1) With or without prejudice, upon written request of the plaintiff to *the clerk*, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial . . . .” (Italics added.) This is the only subsection that refers to dismissals by the clerk; all other references are to

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<sup>5</sup> Subsequent statutory references are to the Code of Civil Procedure.

<sup>6</sup> In his opening brief, Kanter cites to a case he was aware was unpublished relating to this issue. Even after the impropriety of doing so was pointed out by Armony, in his reply brief, Kanter is unapologetic, stating he “merely cited the best cases he could find.” That does not relieve Kanter or his counsel from his obligation to comply with the California Rules of Court. Rule 8.1115(a) states: “Except as provided in (b) [which does not apply here], an opinion of a California Court of Appeal . . . that is not certified for publication or ordered published *must not be cited* or relied on by a court or any other party in any other action.” (Italics added.) Neither Kanter nor his counsel is exempt from this mandatory rule, and both are cautioned against attempting any such shenanigans in the future.

dismissals by the court. Subdivision (e) states: “After the actual commencement of trial, *the court* shall dismiss the complaint, or any causes of action asserted in it, in its entirety or as to any defendants, with prejudice, if the plaintiff requests a dismissal . . . .” (Italics added.)

It is undisputed that Kanter filed his request for dismissal with the clerk. The record does not show that he ever made a motion to dismiss *before the court*, and therefore, despite Kanter’s arguments about the legislative history and policy behind subdivision (e), that section simply does not apply here. It is not a question, as Kanter argues, of whether the clerk’s dismissal was merely a “ministerial function.” The only dismissal was filed with the clerk, who had no power to grant the motion because trial had commenced. Handing a copy of the request for dismissal to the clerk in the trial court’s department, if we presume that indeed happened, was ineffective. Once the court clerk entered the dismissal, which it did the same day it was filed, there was nothing left for the court to rule upon. It could and did vacate the clerk’s entry of dismissal, but doing so did not “revive” the request to dismiss without any further action by Kanter.

The cases on which Kanter relies address different factual situations. In *D & J, Inc. v. Ferro Corp.* (1986) 176 Cal.App.3d 1191, the primary issue was whether the dismissal was “voluntary” and precluded an award of attorney fees, but in any event, the motion to dismiss was made *to the court* during the examination of a witness. (*Id.* at p. 1193.) In *Marina Glencoe, L.P. v. Neue Sentimental Film AG* (2008) 168 Cal.App.4th 874, the issue on appeal was again whether a voluntary dismissal precluded attorney fees. The opinion does not state whether the request for dismissal was made of the court or of the clerk, simply that one party “filed a voluntary dismissal of the action with prejudice.” (*Id.* at p. 876.) It does not stand for the proposition that a dismissal during trial may be filed with the clerk.

Kanter's attempted dismissal was improper procedurally, because it was directed to the clerk and not to the court, and because he never attempted to renew his motion before the court. Further, it was improper substantively as well, because he was attempting to dismiss the two claims upon which the court had already ruled. Kanter has failed to demonstrate error on this point.

*The Trial Record is Inadequate to Show Error*

“A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ [Citations.]” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.) “The burden of affirmatively demonstrating error is on the appellant.” (*Fundamental Investment etc. Realty Fund v. Gradow, supra*, 28 Cal.App.4th at p. 971.) Kanter's fundamental problem here is that he failed to create an adequate record below to establish error.

What occurred in the trial court was, to some extent, confusing, which is why we set forth the events in such detail above. It does not appear to us that *Pendergrass* played much, if any, part in the trial court's decision to exclude the evidence of the negotiations of the Moorfield/Armony agreement, despite its later mention in the statements of decision. Indeed, it seems that Kanter had made the choice, as reflected both by his brief on the issue and his argument, to focus on whether Armony had signature power for Bear Valley, which the court felt he clearly did. When asked for a brief on the very e-mails Kanter now complains were excluded, Kanter chose to brief only whether he was a party to the Moorefield/Armony agreement. He even mentioned the idea that rescission of the guarantee agreement, signed years earlier, might be proper.

The court seemed to believe that Kanter was not trying to use evidence of the negotiations to prove the tort of fraud, but to persuade the court to either add an additional term to the Moorfield/Armony agreement or vitiate it entirely. Given Kanter's lack of focus, his inability to lay a foundation and his difficulty in asking relevant, unobjectionable questions, the court's lack of clarity about what Kanter was trying to accomplish is neither surprising nor the court's fault.

Although the court requested offers of proof at various points, Kanter never brought forth evidence that would have demonstrated the tort of fraud. While the only alleged misrepresentation in the cross-complaint was the allegation that Armony and Moorefield misrepresented that they would remove Kanter as guarantee, this was barely alluded to during the first day of trial. Contrary to Kanter's claims that *Pendergrass* was the sole reason for the court's decision, the court never mentioned *Pendergrass* during trial, and particularly throughout the first day of trial, it overruled a number of defense objections on the ground that parol evidence could be used to demonstrate fraud.

But even if *Pendergrass* was behind the court's ruling, Kanter has failed to make an adequate record to show error. According to Kanter, although not specified in the record, the trial court's evidentiary ruling had the effect of excluding exhibits 21-33, which consisted mainly of e-mails.<sup>7</sup> In his opening brief, Kanter argues the following statements from the e-mails were excluded. First, a statement by Moorefield in a December 21 e-mail to Armony that the agreement needed to be secured by a deed of trust and a personal guarantee from Armony. Second, an e-mail from Armony to Kanter and Armony's former attorney, in which Armony stated, with regard to the contract being

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<sup>7</sup> Kanter argues that “[t]hese were just some of the alleged misrepresentations which Kanter was barred from producing due to *Pendergrass*.” We do not consider the admissibility, however, of hypothetical evidence. “Because it is not our responsibility to scour the appellate record for evidence to support a party's position, we consider only evidence cited by the parties . . . .” (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1270.)

drafted, to make sure Moorefield could not go after Kanter personally. Third, an e-mail where Moorefield's attorney stated that Kanter would need to sign the agreement.

While he claims all of these e-mails were excluded, he does not point to specific locations in the record where he tried to introduce those e-mails and failed. Kanter also claims he was prohibited from introducing any evidence of oral statements made to him prior to the mediation agreement and the Moorfield/Armony agreement about his liability being replaced by Armony, or of any circumstantial evidence regarding the circumstances, such as that the Moorfield/Armony agreement was executed first. Kanter does not, however, cite to the location in the record where he tried to introduce such evidence. As the appellant, it is Kanter's responsibility to support his arguments "by appropriate reference to the record, which includes providing exact page citations." (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

Kanter argues that after the court's ruling, he tried to introduce various misrepresentations which were barred by the court's parol evidence ruling. But the questions to which he cites does not bear that out. One such question was whether Moorefield was "a responsible party" to the Moorefield/Armony agreement. He asked if Armony had provided Moorefield with one of the e-mails, to which an objection was sustained on relevance grounds.

Kanter also asked Armony about leases referred to in the mediation agreement, his counsel objected on the grounds that it was beyond the scope of the cross-complaint and not relevant. The court said Kanter could ask about what the agreement set forth, but that it was not going to reinterpret the agreement. When Kanter asked Armony about what he believed some of the provisions in the mediation agreement meant, his counsel again objected based on the parol evidence ruling, but the court ruled that Armony's belief was irrelevant. Armony then asked about the consideration for the agreement again drawing an objection about the scope of the case and parol evidence.

The court sustained that objection, but Kanter fails to explain how the issue of consideration is a misrepresentation to him.

Shortly thereafter, Kanter asked Armony about exhibit 37, which was a form amending Bear Valley's certificate of limited partnership. Armony's counsel again objected the document was irrelevant. The court asked for an offer of proof, and Kanter said he was trying to "lay a foundation for what Mr. Armony believed the property was held in ownership. . . ." The court responded that Armony's belief was irrelevant, and asked if he had any offer of proof as to any representations Armony made to him. No audible response was transcribed. The court told Kanter he could lay a foundation of representations by asking what he and Armony had discussed. A later objection to questions about the same document was sustained on the grounds of parol evidence, but Kanter fails to identify any misrepresentations therein.

The same issue arose with respect to other documents Kanter attempted to inquire about. The last exchange at trial that Kanter specifically identifies in his opening brief was a question to Armony about a line in an e-mail from Moorefield to Armony, in which Moorefield stated, ". . . also attach is a deed of trust for you to sign and have it notarized and send it back to me then I will hold on to it and not record it as we talked about." Defense counsel objected on parol evidence grounds, but Kanter again fails to identify what misrepresentations to him are contained therein.

In his reply brief, Kanter claims his evidence would have shown fraud in the creation of the mediation agreement. Yet the court's ruling, on its own terms, was expressly limited to the negotiations in the creation of the Moorfield/Armony agreement, and again, no record references are provided showing where Kanter tried to introduce such evidence. In court, Kanter even stated his understanding that parol evidence was barred as to the Moorfield/Armony agreement only. Again, he does not cite to a place in the record showing evidence he tried and failed to admit on these grounds.

Kanter appears to be aware of the problems with the record. He argues that “it is impossible, at present, to know how many specific representations he was going to allege. All the record contains is his emails, which may not be inclusive of all his evidence.” While he seems to feel this justifies reversal, in fact, it demonstrates that he failed to create the proper record below. We cannot review whether unknown, hypothetical questions or documents would have been admitted or excluded. If Kanter did not try to introduce a document or ask a question, he has waived the issue and cannot now raise it on appeal. (*14859 Moorpark Homeowner’s Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1403, fn. 1.) As Kanter admits, we cannot identify with specificity and certainty which items of evidence those were. Thus, there is simply not an adequate record here to support Kanter’s argument that certain questions and items of evidence were wrongfully excluded.

### *Substantial Evidence of Fraud*

Even if Kanter had created a proper record below, he has failed to establish prejudice, an indispensable element of reversible error. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.) Kanter cannot show prejudice because even if the e-mails he claims were excluded<sup>8</sup> had been admitted into evidence, they were insufficient for a reasonable trier of fact to conclude that Armony or Moorefield had committed the tort of fraud.

The elements of a cause of action for fraud are: (1) a misrepresentation; (2) knowledge of falsity; (3) intent to defraud or induce reliance; and (4) actual reliance by the plaintiff. (Civ. Code, § 1709; *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.)

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<sup>8</sup> We focus only on the e-mails and not any hypothetical evidence Kanter claims was also excluded.

Fraud must be pled with specificity. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Therefore, we look to the cross-complaint to determine the basis for Kanter's claim. Kanter's cause of action for fraud alleges: "ARMONY and MOOREFIELD intentionally misrepresented that they were going to remove KANTER from a personal guarantee." That is the only misrepresentation alleged.

The e-mails that Kanter points to show evidence of negotiation, and nothing more. Several of the purportedly excluded e-mails were not directed to Kanter, and several others are from Kanter himself. Kanter points to an e-mail from Armony directing his attorney to include a provision in the agreement with Moorefield that would preclude Moorefield from going after Kanter personally. But even that is not a false statement of fact in fraud parlance. The course of these e-mails simply shows negotiation over provisions in an agreement to be entered into — they do not state *facts*, much less false facts.

Moreover, even if one could argue that these e-mails did contain false statements of fact, Kanter had the burden of demonstrating reliance. The reliance necessary to prove a fraud claim is "reasonable reliance." (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1270.) Kanter offered nothing to show that a businessperson in his position would rely on language in e-mails negotiating a contract instead of the language in the final agreement he actually entered into. The language in the mediation agreement is clear: "Ronen will immediately *negotiate with Moorefield* to have Gary removed as a possible direct target of any action, suit, and/or proceeding by Moorefield based on any such default in payments." (Italics added.) The promise that Armony made was to negotiate; he did not make a promise that he would replace Kanter as guarantee, nor did he promise that Moorefield would agree to such an arrangement. Therefore, no reasonable trier of fact would find that a reasonable person in Kanter's position would rely on e-mails over actual contractual language. He did not and cannot demonstrate

reasonable reliance. Therefore, even if the purportedly excluded evidence had been admitted, Kanter's fraud cause of action would have failed.

### III

#### DISPOSITION

The judgment is affirmed. Armony and Moorefield are entitled to their costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.