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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NMT, LLC, et al.,

Plaintiffs and Appellants,

v.

C.E.C.W., LLC, et al.,

Defendants and Respondents.

G048907

(Super. Ct. No. 30-2012-00553907)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
James Di Cesare, Judge. Affirmed in part, reversed in part, and remanded.

Zfaty | Burns, Isaac R. Zfaty and Ryan N. Burns for Plaintiffs and
Appellants.

Feldsott & Lee and Stanley Feldsott for Defendants and Respondents.

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INTRODUCTION

Plaintiffs and appellants NMT, LLC (NMT), Tony Sharifi, Noah Sharifi, and Mohammed Juma sued C.E.C.W. Limited Partnership, LDK Enterprises, Inc. (LDK), and John Kalachian for declaratory relief, reformation of contract, fraudulent misrepresentation, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage.¹ The lawsuit arose out of an agreement made in 2004 to purchase a car wash business and a ground lease for the land on which the car wash is situated. The fundamental issue presented, and the issue that was the subject of the declaratory relief cause of action, is whether the parties agreed the ground lease and an option to extend the term of the ground lease would be assignable.

The trial court sustained, without leave to amend, Defendants' demurrer to the reformation, fraudulent misrepresentation, and interference with prospective economic advantage causes of action on the ground all were time-barred by the relevant statutes of limitations. The trial court later granted Defendants' motion for summary judgment of the declaratory relief cause of action and denied Plaintiffs' motion for summary judgment. Judgment was entered in favor of Defendants, and the trial court awarded them attorney fees.

We conclude there are triable issues of material fact concerning whether the parties agreed the ground lease and option to extend the term of the ground lease would be assignable, and therefore reverse the judgment on the declaratory relief cause of action. We conclude the trial court erred by sustaining the demurrer to the reformation

¹ We refer to the plaintiffs collectively as Plaintiffs. C.E.C.W. Limited Partnership did not appear in the action. A successor entity, C.E.C.W., LLC, appeared as a defendant in the trial court and is appearing as a respondent on appeal. C.E.C.W., LLC, contends C.E.C.W. Limited Partnership was erroneously named and served as a defendant. We refer to C.E.C.W., LLC, LDK, and John Kalachian collectively as Defendants.

cause of action, but affirm the judgment as to the causes of action for fraudulent misrepresentation, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage.

FACTS

The following statement of facts is based on the allegations of the complaint and the evidence submitted in connection with the parties' motions for summary judgment.

NMT is a single purpose limited liability company created for the purpose of owning and operating the car wash business located at 101 West Commonwealth in Fullerton, California (the Car Wash). Tony Sharifi, Noah Sharifi, and Juma are the members of NMT.

In early 2004, Tony Sharifi contacted Coldwell Banker about a listing it had posted for the Car Wash. He spoke with Earl Marshall Taylor and Chuck Iverson of Coldwell Banker, who represented the seller of the Car Wash, and expressed interest in purchasing it. Neither Tony Sharifi nor NMT was represented by an agent, so Coldwell Banker became the joint agent for and represented both the seller and the prospective buyer. The "point person" and representative for the seller was John Kalachian, and the "point person" and representative for the buyer was Tony Sharifi. Taylor and Iverson acted as liaison between John Kalachian and Tony Sharifi in negotiating the purchase and sale of the Car Wash.

The Car Wash was owned by LDK, while the land on which the Car Wash was situated was owned by C.E.C.W. Limited Partnership. Early in the negotiations, John Kalachian "indicated" LDK and C.E.C.W. Limited Partnership would not sell the land but would enter into a ground lease.

At Tony Sharifi's instruction, Taylor and Iverson prepared a document entitled "Business Purchase Agreement and Joint Escrow Instructions" (the Purchase Agreement). Under the terms of the Purchase Agreement, NMT offered to purchase the Car Wash for a total price of \$950,000, of which \$450,000 would be paid in cash, and LDK would take back a note (secured by the Car Wash and personal guaranties) for the balance. Paragraph 12.E. of the Purchase Agreement stated the sale would be contingent upon "[a] new lease with seller who is the owner of the real estate for a term of 20 years with a 10 year option to renew. See lease for terms and conditions."

In response to the Purchase Agreement, Taylor and Iverson delivered to Tony Sharifi a counteroffer addendum to the Purchase Agreement (the Counteroffer) prepared by LDK. Tony Sharifi signed the Counteroffer, and under his signature wrote, "See additional notes on back of this page." On the back of the page, he wrote four terms, the fourth of which was "Option can be assigned if the lease is assigned." He had told both Taylor and Iverson that he "absolutely" would not purchase the Car Wash if the option to extend the term of the lease was not assignable.

Taylor and Iverson sent the Counteroffer to John Kalachian. Upon its receipt, John Kalachian crossed out handwritten term No. 3 (concerning a two-week observation period) and initialed the cross-out. Taylor and Iverson delivered the Counteroffer, as revised, to Tony Sharifi, who placed his initials beside those of John Kalachian.

John Kalachian then instructed Taylor and Iverson to prepare and deliver to Tony Sharifi a supplemental counteroffer to the Purchase Agreement (the Supplemental Counteroffer), which included three paragraphs. Paragraph 2 provided that the lease option would not be assignable. After Tony Sharifi received the Supplemental Counteroffer, he told Taylor and Iverson that NMT required the option to extend the term of the lease be assignable. Tony Sharifi crossed out paragraph 2 and signed the

Supplemental Counteroffer. Taylor and Iverson delivered the Supplemental Counteroffer to John Kalachian.

When Taylor and Iverson delivered to John Kalachian the Supplemental Counteroffer (with Tony Sharifi's changes), they told him NMT would not accept the lease if the option to extend its term was not assignable. Iverson asked John Kalachian whether, if he were in the buyer's position, he would agree to a deal like this without the assignability of the option to extend the term of the lease. At that moment, John Kalachian picked up a pen and placed his initials next to the crossed-out paragraph 2.

John Kalachian's attorney, George Eadington, drafted a 36-page ground lease (the Ground Lease) with C.E.C.W. Limited Partnership as landlord and NMT as tenant. Section 30(a) of the Ground Lease provides that the tenant may not assign or transfer the lease without the landlord's express written consent, such consent "may be withheld in Landlord's sole and absolute discretion." Section 30(e) provides that "[a]ny attempted assignment or sublease by Tenant in violation of . . . Section 30 shall be void and such act shall constitute a material breach of this Lease." Section 37 of the Ground Lease states the 10-year option to extend the Ground Lease (the Ground Lease Option) "may only be exercised by the original Tenant" and "may not be assigned." Section 35(f) of the Ground Lease is an integration clause, stating in part: "This Lease contains the entire agreement of the parties hereto as to the subject matter of this Lease and no prior representations, inducements, promises, letters of intent or agreements, oral or otherwise, between the parties not embodied herein shall be of any force and effect."

An escrow for the purchase and sale of the Car Wash was opened at West Coast Escrow. Escrow closed on August 6, 2004, which was the effective date of the Ground Lease. In January 2006, C.E.C.W. Limited Partnership assigned its interest in the Ground Lease to C.E.C.W., LLC.

PROCEDURAL HISTORY

NMT, as the sole plaintiff, initiated this lawsuit in March 2012. Its complaint named LDK, John Kalachian, and C.E.C.W. Limited Partnership as defendants and asserted causes of action for declaratory relief, reformation, fraudulent misrepresentation, and injunction. Defendants brought a demurrer, motion to strike, and motion to dismiss for failure to join as indispensable parties all the tenants to the Ground Lease. The trial court sustained the demurrer and granted the motions with leave to amend.

Plaintiffs joined in the first amended complaint, which asserted causes of action for declaratory relief (first cause of action), reformation (second cause of action), fraudulent misrepresentation (third cause of action), intentional interference with prospective economic advantage (fourth cause of action), and negligent interference with prospective economic advantage (fifth cause of action). Defendants demurred to all five causes of action. The trial court overruled the demurrer to the declaratory relief cause of action, sustained the demurrer without leave to amend to the four other causes of action, and ordered them dismissed.

In the remaining cause of action, for declaratory relief, Plaintiffs sought a declaration that the Ground Lease Option was assignable and that the Ground Lease could not be terminated based only on a formal request to the landlord to consent to an assignment. Plaintiffs moved for summary judgment of the declaratory relief cause of action. Defendants also brought a motion for summary judgment of the declaratory relief cause of action. The trial court granted Defendants' motion for summary judgment and denied Plaintiffs' motion.

In July 2013, judgment was entered in favor of Defendants and against Plaintiffs. The judgment expressly states it is for C.E.C.W., LLC, rather than C.E.C.W. Limited Partnership. Plaintiffs timely appealed from the judgment.

DISCUSSION

I.

The Trial Court Erred by Granting Defendants' Motion for Summary Judgment.

A. Background and Standard of Review

The parties' cross-motions for summary judgment addressed Plaintiffs' declaratory relief cause of action, which sought a declaration on two issues: (1) whether the Ground Lease Option was assignable and (2) whether the Ground Lease could be terminated upon a formal request that the landlord consent to an assignment.² The trial court granted Defendants' motion and denied Plaintiffs' motion, and, on the first issue, the judgment declared, "the option contained in Paragraph 37 of the [Ground] Lease . . . is . . . not assignable." The judgment did not address the second issue because it had been rendered moot by the declaration on the first issue.

Defendants also sought summary judgment on the ground John Kalachian, LDK, and C.E.C.W. Limited Partnership were not parties to the Ground Lease and, therefore, "no causes of action can be validly prosecuted against [them]." Defendants' summary judgment motion asserted C.E.C.W., LLC, was "erroneously sued and served herein as C.E.C.W., a California Limited Partnership." The trial court did not rule on that ground for summary judgment, and the parties do not address this issue in their appellate briefs. As noted, C.E.C.W., LLC, has, since the inception of the lawsuit, appeared as a defendant, and the judgment was entered in its favor.

² In their motion for summary judgment, Defendants stated they did not contend the Ground Lease could be terminated if Plaintiffs merely requested an assignment. Rather, Defendants contended, "[t]he only assignment or attempted assignment which constitutes a material breach of the [Ground] Lease under Section 30(c) is one by the Tenant which violates Section 30." In the order granting summary judgment, the trial court noted, "Plaintiffs have represented that if the Court deems the lease non-assignable under the language of the contract, then the issue of the right to terminate the lease based on a request to assign is moot."

We review de novo the trial court's ruling on the parties' cross-motions for summary judgment. (*California Society of Anesthesiologists v. Brown* (2012) 204 Cal.App.4th 390, 399.) A motion for summary judgment or summary adjudication is properly granted if the moving papers establish there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

“Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] “We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.” [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.’ [Citation.]” (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286.)

Plaintiffs have not argued the trial court erred in denying their motion for summary judgment. They ask us only to reverse the summary judgment in favor of Defendants and “remand the matter for a trial on the merits.”

B. *Basic Principles of Contract Interpretation*

In *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 953-957 (*Founding Members*), a panel of this court set out the procedure for interpreting a contract and the relevant principles of contract interpretation. The first step, the court explained, is to determine which documents and instruments constitute the contract. (*Id.* at pp. 953-954.) The second step is to identify and apply relevant principles of contract interpretation. (*Id.* at pp. 955-957.)

In undertaking these steps, we keep in mind our goal is “to give effect to the parties’ mutual intent at the time of contracting. [Citations.]” (*Founding Members, supra*, 109 Cal.App.4th at p. 955.) “When a contract is reduced to writing, the parties’ intention is determined from the writing alone, if possible. [Citation.] ‘The words of a contract are to be understood in their ordinary and popular sense.’ [Citations.]” (*Ibid.*)

C. Step One: What Constitutes the Contract?

“The threshold issue is, what constitutes the contract?” (*Founding Members, supra*, 109 Cal.App.4th at p. 953.) Defendants argue the Ground Lease stands alone, is a fully integrated contract, and plainly states the Ground Lease Option is not assignable. Plaintiffs argue the contract was for the purchase and sale of the Car Wash and therefore consists of the Ground Lease, the Purchase Agreement, the Counteroffer with the handwritten notes, and the Supplemental Counteroffer, all of which must be read together.

1. Civil Code Section 1642

Civil Code section 1642 reads: “Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.” This is not, as Defendants contend, some “strange and novel doctrine for contract interpretation,” but is an integral part of California civil law that was codified in 1872 and has been reaffirmed and applied in many cases ever since. (E.g., *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 580 [informed consent agreement and arbitration form signed at the same time should be construed together]; *Freedland v. Greco* (1955) 45 Cal.2d 462, 468 [citing section 1642]; *Mayers v. Loew’s, Inc.* (1950) 35 Cal.2d 822, 827 [“Where two or more written instruments are executed contemporaneously, with reference to the other, for the purpose of attaining a preconceived object, they must all be construed together, and effect given if possible to the purpose to be accomplished.”]; *Symonds v. Sherman* (1933) 219 Cal. 249, 253 [“It is

a general rule that several papers relating to the same subject-matter and executed as parts of substantially one transaction, are to be construed together as one contract [citations].”]; *Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1060 [trial period plan and loan modification agreements should be construed together]; *Fillpoint, LLC v. Maas* (2012) 208 Cal.App.4th 1170, 1178 [purchase agreement and employment agreement entered at roughly the same time as part of a single transaction must be construed together]; *First National Ins. Co. v. Cam Painting, Inc.* (2009) 173 Cal.App.4th 1355, 1367 [performance bond and underlying contract must be read together as parts of substantially one transaction]; *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1675-1676 [employment agreement for salaried employees, registered representative agreement, and U-4 form “were parts of substantially one transaction and should be taken as one”]; *BMP Property Development v. Melvin* (1988) 198 Cal.App.3d 526, 531 [land trade contract and loan agreement must be read together because they were substantially related and had identical parties]; *Nevin v. Salk* (1975) 45 Cal.App.3d 331, 335, 338 [agreement of sale, two notes, real property deed of trust, and chattel mortgage formed a single contract for the sale of a veterinary practice]; *Prudential Ins. Co. v. Fromberg* (1966) 240 Cal.App.2d 185, 189 [several agreements must be construed together because they related to a single transaction]; *Baucum v. LeBaron* (1955) 136 Cal.App.2d 593, 595 [note, mortgage, and sale agreement construed as one contract].)

Whether multiple contracts are intended to be elements of a single transaction under Civil Code section 1642 is a question of fact. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 534.) As we shall explain, the relevant facts on this question are undisputed, and they establish the Purchase Agreement and the Ground Lease must be read together.

2. The Evidence

In opposition to Defendants' motion for summary judgment, and in support of their own motion, Plaintiffs submitted the declarations of Iverson and Taylor, both of whom were licensed real estate agents for Coldwell Banker. Iverson and Taylor declared Coldwell Banker was retained to sell the Car Wash, they handled the sale for the seller, and "[a]fter we listed the Carwash for sale, we were contacted by Buyer," who was interested in purchasing the Car Wash. "Accordingly," Iverson and Taylor declared, "we represented both Buyer and Seller in this transaction."

Plaintiffs also submitted the declaration of Tony Sharifi, who stated NMT was created for the purpose of owning and operating the Car Wash; in early 2004, NMT became interested in purchasing the Car Wash; and, at that time, he contacted Coldwell Banker about purchasing it. Tony Sharifi declared NMT was interested in both purchasing the Car Wash business itself and the real property on which it was situated. John Kalachian "indicated," early in the negotiations, that LDK and C.E.C.W. Limited Partnership would not sell the land but wanted to sell the Car Wash and enter into a ground lease for the land.

In their declarations, Iverson, Taylor, and Tony Sharifi explained how the parties negotiated and entered into the Purchase Agreement and the Ground Lease to accomplish the purchase of the Car Wash. Iverson and Taylor declared the agreement to purchase the Car Wash consisted of the Purchase Agreement, the Counteroffer with the handwritten notes, and the Supplemental Counteroffer with the redaction initialed by John Kalachian.

The Purchase Agreement was signed by Tony Sharifi on behalf of NMT. Paragraph 12.E. states the sale would be contingent upon "[a] new lease with seller who is the owner of the real estate for a term of 20 years with a 10 year option to renew. See lease for terms and conditions."

LDK prepared the Counteroffer, which Taylor and Iverson presented to Tony Sharifi. Tony Sharifi signed the Counteroffer, and under his signature wrote, "See additional notes on back of this page." On the back, Tony Sharifi wrote four terms, the fourth of which was "Option can be assigned if the lease is assigned." John Kalachian crossed out handwritten term No. 3 (concerning a two-week observation period) and initialed the cross-out. Taylor and Iverson delivered the Counteroffer, as modified, to Tony Sharifi, who placed his initials beside those of John Kalachian.

Taylor and Iverson declared that John Kalachian instructed them to prepare and deliver to Tony Sharifi the Supplemental Counteroffer, paragraph 2 of which provided the Ground Lease Option would not be assignable. In his declaration, Tony Sharifi stated that, after he received the Supplemental Counteroffer, he told Taylor and Iverson that NMT required the Ground Lease Option be assignable. Tony Sharifi crossed out paragraph 2 and signed the Supplemental Counteroffer, and Taylor and Iverson delivered the Supplemental Counteroffer, as modified, to John Kalachian.

Next to paragraph 2 of the Supplemental Counteroffer, which had been struck out by Tony Sharifi, are the initials "J.K." In their declarations, Taylor and Iverson stated they watched John Kalachian place his initials next to paragraph 2 of the Supplemental Counteroffer, which had been struck out by Tony Sharifi.

The Ground Lease was entered into by C.E.C.W. Limited Partnership as landlord and NMT as tenant and became effective on August 6, 2004. John Kalachian, Vera Kalachian, Lana Kalachian, and Dina Kalachian-Nagy signed the Ground Lease on behalf of C.E.C.W. Limited Partnership. An escrow for the purchase and sale transaction was opened at West Coast Escrow, and escrow closed on August 6, 2004, which was also the effective date of the Ground Lease.

In opposition to Plaintiffs' motion for summary judgment, and in support of their own motion, Defendants submitted the declaration of Eadington, the attorney who represented the Kalachians and their family enterprises. As to the 2004 transaction for

the sale of the Car Wash, Eadington declared he was “the family attorney for Landlord under the Lease in negotiating the Lease,” and “[s]ince 2004, declarant has been the attorney continuously up to March 14, 2012 representing Landlord under the Lease in any and all negotiations and/or discussions with plaintiffs regarding the terms of the Lease and/or any changes desired by plaintiffs in regard thereto.” Eadington’s declaration did not address the Purchase Agreement. In opposition to Defendants’ motion for summary judgment, Plaintiffs submitted a portion of the deposition transcript of Eadington, in which he testified, “there were a number of agreements that were related to this transaction. There was a purchase and sale agreement, and there was a promissory note. There was a security agreement. There was a lease agreement.”

3. *Integration Clause and Parol Evidence Rule*

Defendants argue the integration clause in the Ground Lease, section 35(f), “render[s] irrelevant any prior oral promises or written documents regarding lease terms.” (Underscoring omitted.) The trial court, without addressing Civil Code section 1642, found the Ground Lease was “an integrated agreement,” and, based on section 35(f) of the Ground Lease, concluded, “the parol evidence rule prohibits the Court from looking beyond the clear language in the lease agreement itself.”

California’s parol evidence rule is codified in section 1856 of the Code of Civil Procedure. Section 1856, subdivision (a) states: “Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement.” As explained by Justice Traynor, “[w]hen the parties to a written contract have agreed to it as an ‘integration’—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms.” (*Masterson v. Sine* (1968) 68 Cal.2d. 222, 225.)

The integration clause in the Ground Lease does not, however, preclude a court from addressing whether the Ground Lease was one of several contemporaneous

written agreements that should be construed together under Civil Code section 1642. (*Hilb, Rogal & Hamilton Ins. Services v. Robb* (1995) 33 Cal.App.4th 1812, 1826 & fn. 11.) Section 35(f) of the Ground Lease, the integration clause, states only that “prior . . . agreements” shall have no “force and effect.” The Purchase Agreement, the Counteroffer with the handwritten notes, and the Supplemental Counteroffer with the redaction initialed by John Kalachian, were *contemporaneous* with the Ground Lease as shown by the fact the escrow closed on the Ground Lease’s effective date.

An integration clause is one factor a court considers in determining whether a writing is integrated. Other factors are (1) whether the parol understanding on the subject at issue naturally might have been made as a separate agreement and (2) “the circumstances at the time of the writing.” (*Founding Members, supra*, 109 Cal.App.4th at pp. 953-954.) Here, the evidence established the Purchase Agreement, the Counteroffer with the handwritten notes, and the Supplemental Counteroffer with the redaction initialed by John Kalachian, would not have been made as separate agreements from the Ground Lease because they were part and parcel of the transaction for the purchase and sale of the Car Wash. Indeed, the Purchase Agreement stated it is contingent upon a lease. (See *Hilb, Rogal & Hamilton Ins. Services v. Robb, supra*, 33 Cal.App.4th at p. 1826 & fn. 11 [integration clause in merger contract does not prevent the court from concluding employee had to sign employment agreement as a condition of a merger].)

4. *Parties to the Ground Lease*

Defendants also argue the parties to the Ground Lease were not the same as the parties to the Purchase Agreement. The Ground Lease was entered into by C.E.C.W. Limited Partnership as landlord and NMT as tenant, while the Purchase Agreement was entered into by LDK as seller and NMT as buyer. However, John Kalachian represented both C.E.C.W. Limited Partnership and LDK in the negotiations and signed all documents on behalf of both entities. Eadington stated in his declaration that since 1978,

he has served as “the business and family lawyer for John Kalachian, Vera Kalachian, Lana Kalachian and Dina Kalachian Nagy and their family enterprises and/or partnerships, including the entity defendants in the within litigation.” The action by the board of directors of LDK to approve the sale of the Car Wash was signed by John Kalachian, Vera Kalachian, Lana Kalachian, and Dina Kalachian-Nagy as members of the LDK board of directors. The Ground Lease was signed by the same persons—John Kalachian, Vera Kalachian, Lana Kalachian, and Dina Kalachian-Nagy—as the partners of C.E.C.W. Limited Partnership. It is sufficient for purposes of Civil Code section 1642 that the contracts were entered into by related entities. (*Brookwood v. Bank of America, supra*, 45 Cal.App.4th at pp. 1675–1676.)

5. *Conclusion*

The relevant facts on the question of integration of the documents are undisputed, and they establish as a matter of law the Ground Lease did not stand alone but was intended to be an element of a single transaction including the purchase and sale of the Car Wash. The elements of that transaction also included the Purchase Agreement, the Counteroffer (with the handwritten notes), and the Supplemental Counteroffer (with the redaction initialed by John Kalachian). The Purchase Agreement was expressly made contingent upon a 20-year ground lease with a 10-year option to renew, and stated, “[s]ee lease for terms and conditions.” Under the undisputed facts, all of these documents related to the same subject matter, were made at the same time, closed through the same escrow, and were made by substantially the same parties. (See *Mayers v. Loew’s, Inc., supra*, 35 Cal.2d at p. 827.)

D. *Step Two: Application of Relevant Principles of Contract Interpretation*

Next, we identify and apply the relevant principles of contract interpretation to determine whether the Ground Lease Option was assignable, or, at least, whether there is a triable issue of material fact on that issue.

1. *Civil Code Section 1651*

Relevant here is Civil Code section 1651, which reads: “Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded.” (E.g., *Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 431 [“the written or specially prepared portions of a contract control over those which are printed or taken from a form”]; *Burns v. Peters* (1936) 5 Cal.2d 619, 623 [“The intention disclosed by the written portions of a contract should prevail over the printed portions thereof, where the two are conflicting.”]; *Gutzi Associates v. Switzer* (1989) 215 Cal.App.3d 1636, 1642-1643 [typewritten provision in note prohibiting prepayment prevails over printed provision].) A related provision in the Code of Civil Procedures provides, “[w]hen an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.” (Code Civ. Proc., § 1862.)

When Tony Sharifi signed the Counteroffer, he wrote four additional terms on the back. Term No. 4 was, “[o]ption can be assigned if the lease is assigned.” In response, LDK presented the Supplemental Counteroffer which included a provision stating the Ground Lease Option was not assignable. In the Supplemental Counteroffer signed by Tony Sharifi, that provision was crossed out, and the initials “J.K.” (standing for John Kalachian) appear next to it. In contrast, section 37 of the Ground Lease states the 10-year option to extend “may only be exercised by the original Tenant” and “may not be assigned.”

The Ground Lease is a 36-page document that was either printed or produced by word processing, and appears mainly to consist of boilerplate provisions “copied from a form originally prepared without special reference to the particular parties and the particular contract in question” (Civ. Code, § 1651). In contrast, the provision in the Counteroffer, stating the Ground Lease Option can be assigned is in handwriting, and the provision in the Supplemental Counteroffer, stating the option cannot be assigned was stricken out by hand and initialed by John Kalachian. Although sections 30(a), 30(f) and 37 of the Ground Lease conflict with the handwritten provisions of the Counteroffer and the Supplemental Counteroffer, under Civil Code section 1651, those handwritten provisions control.

2. *Extrinsic Evidence*

Next, as *Founding Members* teaches, we examine the extrinsic evidence offered to interpret the contracts. “Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible.” (*Founding Members, supra*, 109 Cal.App.4th at p. 955.) “If the trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract.” (*Ibid.*) Under the objective theory of contracts, recognized in California, “[t]he parties’ undisclosed intent or understanding is irrelevant to contract interpretation.” (*Id.* at p. 956.)

Plaintiffs submitted extrinsic evidence, relevant under the objective theory of contracts, to prove the parties intended the Ground Lease Option to be assignable.³ Iverson stated in his declaration that when he and Taylor presented to John Kalachian the Supplemental Counteroffer with paragraph 2 crossed out, “[w]e informed Kalachian that the Buyer would not accept the lease if the Option was not assignable. I specifically recall asking Kalachian at that time whether he would agree to a deal like this without the

³ Plaintiffs also submitted evidence that is irrelevant, and hence inadmissible, under the objective theory of contracts. We do not consider that evidence.

assignability of the Option if he was in the buyer's position. Kalachian agreed at that point to Buyer's demand that the Option be assignable and then picked up a pen (in front of Mr. Taylor and myself) and initialed the stricken Paragraph 2. The initials 'JK' can be seen to the left of the paragraph." Taylor declared to the same facts.

Defendants submitted extrinsic evidence seemingly to the contrary, but it is irrelevant under the objective theory of contracts. Eadington stated in his declaration: "Plaintiffs in 2004 requested the defendants to agree to the assignability of the extension option but at all times in the negotiations, Declarant confirmed the Clients would not agree to such assignability. Declarant was told to put Paragraph 37 in the Lease and Declarant did just that, making quite clear that the extension option was not assignable." Eadington did not state, however, that he actually told any of the Plaintiffs that his clients would not agree to making the Ground Lease Option assignable. Instead, he stated that he "confirmed the Clients would not agree" to assignability, and what that means is unclear. Eadington does not inform us who told him to put section 37 in the Ground Lease. His subjective belief that section 37 was "quite clear" is irrelevant. (*Founding Members, supra*, 109 Cal.App.4th at p. 956.)

3. Conclusion

The undisputed evidence shows the parties intended the Ground Lease Option would be assignable. The handwritten provision on the Counteroffer controls over the form provision in the Ground Lease, and admissible extrinsic evidence confirms the parties intended and agreed the Ground Lease Option would be assignable. Under the de novo standard of review, we conclude there is, at the very least, a triable issue of material fact precluding summary adjudication of the declaratory relief cause of action and remand for further proceedings. Our decision becomes law of the case governing those proceedings. (*People v. Barragan* (2004) 32 Cal.4th 236, 246-247.)

II.

Statutes of Limitations

A. *Background and Standard of Review*

The trial court sustained, without leave to amend, Defendants' demurrer to the causes of action for reformation, fraudulent misrepresentation, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage on the ground the statute of limitations had run on all of them. "We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context. [Citation.] 'We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. [Citation.]' [Citation.]" (*Entezampour v. North Orange County Community College Dist.* (2010) 190 Cal.App.4th 832, 837.)

Plaintiffs do not contend they should have been granted leave to amend. Thus, we do not decide whether there is a reasonable possibility any defect could be cured by amendment. (See *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

B. *Delayed Discovery Allegations*

After the trial court sustained, with leave to amend, Defendants' demurrer to the original complaint, Plaintiffs amended to allege delayed discovery, and the delayed discovery allegations were incorporated into each of the causes of action of the first

amended complaint. The legal effect of the delayed discovery allegations differs, however, for each cause of action.

The delayed discovery allegations of the first amended complaint were, as follows:

“34. In or about February 2012, Plaintiff was approached by a new buyer to purchase the Carwash Business. Plaintiff negotiated a purchase price with the new buyer of \$900,000.00. Of note, the potential purchaser is financially viable and is a suitable buyer.

“35. Subsequently, Plaintiff contacted Defendants to discuss the concept of a potential assignment of the Lease. Upon reviewing the Lease language, Plaintiff became concerned with the verbiage set forth in Paragraph 30 of the Lease. Plaintiff specifically conveyed to Defendants the identity of the proposed buyer (Real Estate Portfolio Management, LLC), as well as the proposed purchase terms (\$900,000). In addition, Plaintiff noted that the remaining portion of the outstanding note between Plaintiff and LDK would be paid off in full.

“36. Importantly, this was the first time that Plaintiff saw that the language in the Lease did not comport with what the parties had verbally agreed to, and with what had actually been set forth in the Purchase Contract. Even at that point, given the disparity in the Purchase Contract and the Lease, Plaintiff was unsure as to Defendants’ position. Plaintiff had been relying upon the language set forth in the Purchase Contract, in good faith, which specifically provided that the option was, in fact, assignable. Plaintiff could not have realized the disparity unless and until it had occasion to enter into an assignment agreement *and* had conferred with Defendants about their position on the matter. Prior to February 2012, no such opportunity was presented, and no discussions were had between Plaintiff and Defendants regarding such assignability. (Plaintiff was ignorant of these provisions that were directly contrary to the Purchase Contract, which as set forth more fully below, Plaintiff *still* contends is ambiguous at worst.) [¶] . . . [¶]

“39. Concerned about the potential ramifications of [the nonassignability] provision, Plaintiff contacted Defendants in good faith to try and ascertain Defendants’ position on the matter. Plaintiff specifically asked Defendants, in writing, if Defendants believed that the Lease permitted Defendants to, in fact, terminate the Lease upon a formal request for an assignment.

“40. In response, Defendants at first ignored Plaintiff, and then ultimately responded that they ‘would just go by the Lease.’”

C. Specific Causes of Action

1. Reformation Cause of Action

The statute of limitations for reformation is three years and commences when the aggrieved party discovers the facts constituting the mistake serving as the ground for relief. (Code Civ. Proc., § 338, subd. (d); see *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1470.) A plaintiff must prove facts showing lack of knowledge, lack of means of obtaining knowledge, and when the mistake was discovered. (*Western Title Guar. Co. v. Sacramento & San Joaquin Drainage Dist.* (1965) 235 Cal.App.2d 815, 825 (*Western Title*).

A party to a contract is charged with knowing its terms. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710; *Markborough California, Inc. v. Superior Court* (1991) 227 Cal.App.3d 705, 716 [“The parties are bound by the terms of the contract even if they do not read it.”].) That charge of knowledge, however, does not necessarily bar an action to reform a mistake in the contract or start the running of the statute of limitations for a reformation action. (*Western Title, supra*, 235 Cal.App.2d at p. 825.) In *Engbrecht v. Shelton* (1945) 69 Cal.App.2d 151, 154-155, the court, in rejecting a statute of limitations defense to a reformation cause of action, stated, ““[i]t has been frequently decided that the mere failure of a party to read an instrument with

sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it carelessly.” [Citations.]”

In *Western Title, supra*, 235 Cal.App.2d at page 825, the court concluded the predecessor of Code of Civil Procedure section 338, subdivision (d) did not bar a cause of action for reformation. The court in *Western Title* stated, “the mere fact that respondent and his predecessor in interest knew of or read the written description would not bar reformation if the negligence was excusable. ‘The fact that the party seeking relief has read the instrument and knows its contents does not prevent a court from finding that it was executed under a mistake.’ [Citations.]” (*Western Title, supra*, at p. 825.)

The question here is whether Plaintiffs’ failure to discover the alleged mistake in the Ground Lease was excusable. “‘Whether the failure to discover a mistake in a written document is inexcusable negligence so as to bar a party from the right to reformation is a question of fact for the trial court.’” (*Engbrecht v. Shelton, supra*, 69 Cal.App.2d at p. 154.)

The first amended complaint’s delayed discovery allegations, read in context, are sufficient to show excusable neglect in failing to read the Ground Lease and detect it provided the Ground Lease Option was not assignable. In essence, Plaintiffs alleged they relied on the terms of the Purchase Agreement, in which the parties agreed the Ground Lease Option was assignable. Thus, the trial court erred by sustaining the demurrer to the reformation cause of action.

2. *Fraudulent Misrepresentation Cause of Action*

A cause of action for intentional misrepresentation or fraud is subject to a three-year statute of limitations and does not accrue “until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.” (Code Civ. Proc., § 338, subd. (d).) Code of Civil Procedure section 338, subdivision (d) is interpreted to include a duty on the part of the aggrieved party to exercise diligence to discover the facts. (*Parsons v.*

Tickner (1995) 31 Cal.App.4th 1513, 1525.) ““The rule is that the plaintiff must *plead and prove the facts* showing: (a) Lack of knowledge. (b) Lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date). (c) How and when [he or] [s]he did actually discover the fraud or mistake. Under this rule constructive and presumed notice or knowledge are equivalent to knowledge. So, when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to [his or] [her] investigation (such as public records or corporation books), the statute commences to run.”” (*Ibid.*; see 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 659, pp. 870-872 [collecting cases].)

The delayed discovery allegations of the first amended complaint do not suffice to save the fraudulent misrepresentation cause of action. By reading the Ground Lease, Plaintiffs would have obtained knowledge placing a reasonable person on notice of a claim of fraudulent misrepresentation. Plaintiffs alleged they did not read the Ground Lease until 2012, when they were approached by a prospective buyer for the Car Wash, and only then became “concerned with the verbiage set forth in Paragraph 30.” But the Ground Lease was open to Plaintiffs’ investigation since at least its effective date of August 6, 2004. Having signed the Ground Lease, Plaintiffs knew, or, through reasonable diligence, had the means of obtaining knowledge of, the facts constituting the alleged fraud.

The allegation Plaintiffs “had been relying upon the language set forth in the Purchase Contract,” though sufficient to plead excusable neglect for purpose of the reformation cause of action, does not suffice to plead lack of knowledge or means of obtaining knowledge for purposes of invoking delayed discovery of the fraudulent misrepresentation cause of action. It is one thing to wait over seven years before seeking to reform a contract to reflect the parties’ agreement, it is quite another to wait over seven years before seeking compensatory and punitive damages for fraud.

3. *Interference with Prospective Economic Advantage*

The appellate briefs did not specifically address the causes of action for intentional interference with prospective economic advantage and negligent interference with prospective economic advantage. We issued an order inviting the parties to submit letter briefs addressing four issues related to those causes of action.⁴ We conclude the first amended complaint failed to state causes of action for intentional or negligent interference with prospective economic advantage.

The elements of a cause of action for intentional interference with prospective economic advantage are (1) an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional and wrongful conduct designed to interfere with or disrupt this relationship; (4) interference with or disruption of this relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's wrongful conduct. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153-1154 .) The elements of a cause of action for negligent interference with prospective economic advantage are (1) an economic relationship existed between the plaintiff and a third party, which contained a reasonably probable future economic benefit or advantage to the plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not

⁴ Those issues were (1) What is the statute of limitations applicable to causes of action for intentional interference with prospective economic advantage and negligent interference with prospective economic advantage? (2) When does the statute of limitations on causes of action for intentional interference with prospective economic advantage and negligent interference with prospective economic advantage begin to run? (3) Does the first amended complaint allege facts showing the causes of action for intentional interference with prospective economic advantage and negligent interference with prospective economic advantage were timely under the applicable statute or statutes of limitations? and (4) Does the first amended complaint allege facts stating causes of action for intentional interference with prospective economic advantage and negligent interference with prospective economic advantage?

act with due care its actions would interfere with this relationship; (3) the defendant was negligent; and (4) such negligence caused damage to the plaintiff in that the relationship was actually interfered with or disrupted. (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786.)

To recover for intentional or negligent interference with prospective economic advantage, a plaintiff must plead and prove “the defendant’s interference was wrongful ‘by some measure beyond the fact of the interference itself.’” (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393; see *National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440.) Plaintiffs have not met this requirement.

The causes of action for intentional and negligent interference with prospective economic advantage were based on allegations that C.E.C.W., LLC, interfered with the prospective sale of the Car Wash to Real Estate Portfolio Management, LLC. The prospective sale to Real Estate Portfolio Management, LLC, occurred in February 2012. The first amended complaint alleged the acts constituting the intentional interference were the following: “When first approached about the prospective purchase and sale deal, C.E.C.W. . . . ignored Plaintiff. [¶] . . . Then, C.E.C.W. . . . took a position that they would just ‘go by the lease.’ [¶] . . . Then, C.E.C.W. . . . affirmatively stated that [it] would rely upon the fraudulent Lease, and the fraudulent misrepresentations, and require significant compensation. [¶] . . . By taking these positions, C.E.C.W. . . . intended that the sale to Real Estate Portfolio Management, LLC be disrupted.” In the negligent interference claim, the first amended complaint alleged: “C.E.C.W. . . . had a duty to act reasonably, in a way that would not harm Plaintiff vis-à-vis Real Estate Portfolio Management, LLC. C.E.C.W. . . . breached that duty when [it] interfered with [the] deal with Real Estate Portfolio Management, LLC, and took the unreasonable position that the unenforceable provisions in the Lease were, in fact, enforceable.”

Plaintiffs do not contend any of those alleged acts of interference was independently wrongful. Instead, they contend the wrongful acts of interference occurred in 2004, during the negotiations for the Car Wash purchase, when, they allege, Defendants misrepresented the Ground Lease Option would be assignable. But, at that time, there was no economic relationship between Plaintiffs and a third party that could be the target of interference.

An analogous situation arose in *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 242. In that case, the plaintiffs argued that certain defendants interfered with an oral contract that existed for three days in February 2000. (*Ibid.*) The record did not reveal any interfering conduct during that short time period. (*Ibid.*) The plaintiffs argued the relevant timeframe for interfering conduct should extend back to July 1999 to include alleged fraudulent misrepresentations and omissions made in August 1999. (*Id.* at pp. 242-243.) A panel of this court concluded the plaintiffs failed to prove interference with prospective economic advantage because, as of August 1999, none of the plaintiffs had an existing economic relationship with a third party at all, much less an existing relationship with a probability of future economic benefit. (*Id.* at p. 243.) Here, the prospective economic relationship between Plaintiffs and Real Estate Portfolio Management, LLC, arose over seven years after the allegedly wrongful conduct.

III.

Attorney Fees

The trial court granted Defendants' motion for attorney fees based on an attorney fees clause in the Ground Lease. The court awarded Defendants \$102,320 in fees. In reaching this amount, the court treated the contract-based and tort causes of action as intertwined.

As Defendants argue, Plaintiffs do not challenge the order granting the motion for attorney fees. We are reversing the judgment in part and affirming it in part;

therefore, the order awarding attorney fees must also be reversed and the matter of entitlement to, and amount of, attorney fees must be reconsidered by the trial court after remand. (See *Apex LLC v. Sharing World, Inc.* (2012) 206 Cal.App.4th 999, 1024; *C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1488-1489.)

Defendants request, if we affirm the judgment, the remittitur include a direction to the trial court to award them their attorney fees on appeal. As we are reversing the judgment as to the declaratory relief and reformation causes of action, we deny the request.

DISPOSITION

The judgment is affirmed as to the third, fourth, and fifth causes of action. In all other respects, the judgment and the order granting Defendants' motion for attorney fees are reversed and the matter remanded for further proceedings consistent with this opinion. Because both Plaintiffs and Defendants prevailed in part, the parties shall bear their own costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.