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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KEVIN HENDRA et al.,	
Plaintiffs and Respondents,	G051124
v.	(Super. Ct. No. 30-2013-00641319)
FELIX POSOS et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed in part; Reversed in part and remanded.

Law Office of Michael G. York and Michael G. York for Defendants and Appellants.

Fasel & Associates and Frank R. Fasel for Plaintiffs and Respondents.

Felix Posos and Joanne Cohen Posos (the Posos, unless reference to each individual is necessary) entered into a partnership agreement with Kevin Hendra and Janai Hendra (the Hendras, unless reference to each individual is necessary) to purchase real property in Hawaii.[1] All did not proceed as planned, and in 2014 the Hendras prevailed against the Posos in their breach of contract action. The trial court awarded the Hendras $74,250 in damages, prejudgment interest, and full title to the property. On appeal, the Posos allege the court erred because the evidence showed the Hendras breached the agreement first, relieving the Posos of any duty to perform. The Posos also challenge the damage award, claiming it was not supported by admissible evidence and was improperly calculated. The first contention lacks merit, and we affirm this portion of the judgment. However, we conclude insufficient evidence supports the award of damages. The judgment is reversed in part to permit the trial court to conduct a limited retrial on damages only.

I

In 2007 the Hendras and Posos entered into a written partnership agreement (the Agreement) to share the ownership and rental operations of a two-bedroom, two-bathroom condominium unit located in Lahaina, Hawaii (the Property). The Property was approximately one thousand square feet and was located in a nine-story condominium complex.

Pursuant to the Agreement, the Hendras owned a one-half interest in the Property as husband and wife. Because the Posos had not yet married, the Agreement specified Felix owned a one-quarter interest as an unmarried individual, and Joanne owned the remaining one-quarter interest as an unmarried individual. The parties agreed the Property would be operated as a vacation rental property. The agreement referred to

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[1] When necessary we will refer to the parties by their first names for clarity and to avoid confusion. No disrespect is intended.

the individuals as “persons” but collectively each couple (representing a 50 percent interest in the Property) as Owners A and B.

The Agreement provided all expenses would be shared equally among Owners A and B, including the mortgage, property tax, repairs, maintenance, association dues, property management, advertising, and any other expenses arising as a result of the partnership. It was expected that on the first day of each month, each Owner would deposit into a bank account one-half of the funds necessary for payment of all the expenses that month. The parties anticipated this amount would vary, depending on whether there was any vacation rental income earned during the preceding month. They agreed any excess profit would be disbursed equally to Owner A and B.

Janai testified, and the Posos did not dispute, the parties each had unpaid administrative tasks to perform related to the vacation rental business. Janai’s job was to manage the property and the rentals, including advertising the Property on websites and answering questions from potential guests. She would process the deposits and payments for the rentals in a bank account the parties created for the partnership. Janai stated Felix’s job was to create and maintain a website displaying the property. Joanne’s job was to handle the monthly expenses and paying the bills online. Kevin testified his job was to handle any repairs needed on the Property and manage the work performed by third party contractors. He also prepared a yearly tax summary of the income and expenses for everyone to use for their personal tax returns. After the parties purchased the Property, they hired a property management company.

The Agreement outlined penalties and consequences for an Owner’s failure to pay the required expenses. “If adequate funds are not deposited by the seventh day of a month, a [five percent] late fee will be assessed against the delinquent Owner, which will be payable immediately. An Owner will be considered delinquent if full monthly payment is not received into [the] bank account within 30 days of the due date. If an

Owner is delinquent in payments for more than three months in any calendar year, they will be considered in Default of this Agreement, with remedies as follows:

"Non-defaulting Owner has right to purchase property from Defaulting Owner at a price equal to two times the penalty related to sale of an interest within the first five years, as outlined above, . . . but in no case will the penalty be less than 10 [percent], which would be applicable in all years beginning in year [five], and continuing for the duration of this Agreement.

"If the non-defaulting Owner does not wish to purchase the Defaulting Owner's interest . . . the non-defaulting Owner can compel a sale of the Defaulting Owner's interest or may sell the entire property, subject to the penalties outlined in the previous paragraph.

"In addition to the penalties above, the non-defaulting Owner is entitled to recoup all monies paid on behalf of the Defaulting Owner during the period of Default, plus 12 [percent] interest. Period of Default is defined as beginning on the date of first non-payment of required monthly funds through the date of final sale of property; OR repayment by Defaulting Owner to non-defaulting Owner prior to any agreement for sale of property.

"If an Owner Defaults six or more months in any calendar year, they relinquish their interest by quit-claiming their interest in the property to the non-defaulting Owner. The Defaulting Owner would still be obligated to reimburse non-defaulting Owner all monies paid on their behalf, plus 12 [percent] interest, as outlined in the previous paragraph."

The Agreement had several provisions to address the circumstances where one or more of the parties wished to sell their share in the Property. The share must first be offered to the remaining owner at a fair market value purchase price, calculated by the average price of two appraisals, less six percent sales commission. If the remaining owner desires to purchase, "then the selling [o]wner is obligated to follow through on that sale." Moreover, if any owner chose to sell within the first five-year period of the agreement, there would be a penalty assessed "as a reduction to seller's proceeds." For example, if the owner sold in the fifth year of ownership, a five percent penalty would be assessed against the fair market value calculation.

In 2012, for personal reasons, the Posos determined they could no longer afford to be owners of the Property. On August 11, 2012, Joanne wrote an e-mail to the Hendras stating she and Felix would be willing to transfer their interest to the Hendras or orchestrate a short-sale of the property. Specifically, she wrote, "We never wanted to throw any curveballs at you guys. As you have known, our financial situation has been progressively going downhill for sometime, but the news we received this week was the kill. [¶] The difficult part in a partnership is being fair to another, especially when our situations have outcomes [that] are no longer compatible."

Joanne made the following offer: "[A]fter speaking to a family member who has offered to support our financial commitment to [the Property] for 90 days, in an effort to create an amicable 'exit plan' with you guys. The proposal is that we continue to contribute our 50 [percent] of required funds . . . for 90 days. This timeframe allows for the loan modification process to continue (with a hopeful positive outcome) and also allows for you guys to complete your pending refinance on [your] house. At the end of the 90 days we will dissolve any partnership related to [the Property] and relinquish our 50 [percent] interest to you, if you choose to continue to support [the Property]. Otherwise, we all agree to cease making mortgage payments and expedite the short-sale process. This 90 days plan allows for the potential of increased rental income by the end of the term, so you are not suddenly 'stuck' with all expenses since there is no rental activity at this time. According to . . . [the] reservation log, there are several large payments expected in [October, totaling approximately] $9,500."

Kevin replied by e-mail and stated that although he and Janai understood and sympathized with the Posos' situation, they could not agree to the proposed plan.

After restating portions of the agreement, the Hendras stated they would be willing to accept the deed for the Posos' half of the property in return for providing a note for their half of the mortgage to Bank of America, this option would come at a cost because the value of the property was less than the loan. The Hendras explained this would "necessitate a payment by you in order to fairly compensate us for the risks of holding it in our name only." Kevin attached to the e-mail research he prepared on the value of comparable properties to help shed light on the fair market value of the property. He suggested they obtain appraisals to determine the fair market value.

Kevin clarified he and Janai were not interested in a short sale because it would not necessarily relinquish the full debt on the property. "If we fire sale the property that only means that we would likely have a larger remaining unpaid balance that we'd all be on the hook for under the deficiency judgment process . . . . Further we would unlikely qualify for a short sale. [¶] We too have other life considerations, and damaging our credit would negatively impact those, so we are going to avoid that at all costs. If the property can be refinanced through their loan modification process then it would be beneficial."

Kevin concluded the letter by stating, "[I]f you both would like to get out now, then we expect that our agreement will be followed in doing so. We would suggest that the best case scenario is the midrange of the buyout scenario I prepared and attached."

The Posos hired an attorney, Michael G. York. On September 26, 2012, York wrote the Hendras a letter stating he advised the Posos to stop contributing funds "towards the ownership of the [Property] without an agreement that their liability for future contributions will be capped at a certain amount and a mutually acceptable agreement for them to exit from their fifty percent . . . ownership of the [Property] is in place." York noted the Posos' prior offer was rejected and they were unable to accept the

Hendras' "counter-proposal." He stated the Posos intended to follow his advice to stop making payments.

York stated the Posos would be willing to cooperate in the short sale or refinancing of the property, however, they would not qualify for a loan themselves. York repeated, "But, unless and until such an agreement is entered into no more contributions can or will be made. In the meantime, they will continue to handle administrative functions."

York warned the Hendras that he anticipated they would threaten to sue the Posos and this was a bad idea. He explained any legal action would make the Posos' financial circumstances worse and force them into bankruptcy. York opined, "Forcing them into bankruptcy will be harmful to you because the condominium, including income from the condominium, will be tied up in bankruptcy." In addition, York told the Hendras that many of the penalties outlined in the agreement were unenforceable because the law "permits a co-owner of property to elect to have the property sold at any time, without penalty."

York sent the Hendras a second letter on November 20, 2012. It stated, "Based on the lack of progress and willingness to come to a fair and reasonable resolution, I am sending you this letter in a final effort to settle this matter without legal proceedings. The Posos have done everything in their means to amicably settle with you." He noted the Posos executed the recent loan modification in good faith and to resolve their eventual exit. York stated the Posos "put their legal proceeding in the State of Hawaii to compel the sale of the property on hold, in hopes of an amicable resolution."

York wrote the Posos, acting in good faith, agreed to base the Agreement's sales clause on "your significantly inflated appraisal price" of $470,000 rather than the other appraisal price of $345,000. He added the Posos had proposed a reasonable and fair payment plan of two installments. York stated it was reasonable to withhold the second payment until after his clients' names are removed from the loan. He explained, "Though this transaction will not be completed without an indemnification clause, as you are probably well aware, an indemnification only has limited value. If the lender comes after the Posos in the event of a default on your behalf, the recourse the Posos have against you does not prevent the lender from pursuing recourse against them."

York stated the agreement contained "no language beyond the six percent" of one-half of the fair market value based on an appraisal. Therefore, he stated the Posos would agree to the inflated appraisal "in the spirit of resolution" with payments broken into one-half upon execution of the agreement and one-half when their names are removed from the loan. York noted, "The timing of the second payment is completely up to you, based on when you remove their names from the loan." York clarified, "No additional amounts will be considered."

Several months later, in April 2013, the Hendras filed a complaint seeking $100,523 in damages against the Posos for breach of contract. They alleged that beginning in 2008 and continuing to the present, the fair market value of the property has been less than the mortgage. They stated the fair market value was approximately $310,000 and the current outstanding balance due for the Property was $481,000, creating $171,000 in negative equity.

In the complaint, the Hendras alleged the Posos gave notice of their intention to withdraw from the Agreement on September 27, 2012, and thereafter, "failed to contribute to the ownership and operation of the [Property]" and were therefore the defaulting parties under the terms of the Agreement. In the complaint, the Hendras stated the Posos ignored repeated demands to relinquish their interest in the property by a quitclaim deed and refused to pay the damages and penalties outlined in the Agreement. The complaint also contained a request for a declaratory judgment regarding the parties' respective rights and obligations under the Agreement.

The Posos filed a cross-complaint for declaratory relief, seeking a judicial determination of their rights and duties under the Agreement. They alleged the Hendras refused all offers to transfer or sell the Property. The Posos alleged that at the end of October 2012, the Hendras terminated the Agreement by the following actions: (1) they assumed sole and exclusive control of the Property; (2) they stopped depositing rental income in the joint bank account; (3) they stopped sharing the rental income with the Posos; (4) they ceased all accounting for income and expenses; (5) they changed the property management company without the Posos' knowledge or consent; (6) they stopped communicating with the Posos about the Property; and (7) they have "operated the property" for their sole benefit.

The case proceeded to trial. Janai testified regarding the history of the parties' relationship, the execution of the agreement, the use of property management companies, and the job duties of the parties. The Posos' counsel did not cross-examine her.

Kevin testified about the nature of the dispute. He discussed the Posos' August 2012 e-mail expressing a desire to withdraw from the partnership. He explained the Posos offered to relinquish their interest in the property, but he could not accept this offer because it was "not in conformance with our Agreement" and the offer was "essentially just to exit."

Kevin stated he and Janai took over the Posos' administrative duties after they received York's letter informing them the Posos were "withdrawing from the business altogether." Kevin explained they decided to take over Joanna's job of paying the Property's bills because they believed the Posos were not interested in participating further. He admitted they did not tackle Felix's website maintenance job because "running of the website" was not something they knew how to do. Kevin stated the reason they stopped communicating with the Posos was because York's letter told them to.

Kevin admitted that after receiving York's letter they began managing the vacation rental business and the Property on their own. Kevin recalled they used the original bank account until March 2013, but decided to open a new account due to the Posos' repeated threats of bankruptcy and because they were running the business themselves. They transferred approximately $3,000 to the new account. Kevin stated "we've never taken an owner distribution since the notice from the Posos." Kevin stated he was not sure of the exact date the Posos stopped making all payments, but recalled it was in April or May 2013. Janai acknowledged she and Kevin changed management companies in October 2012 but claimed the change was made because they visited the Property and noticed several items were missing and there was a hole in the wall.

Kevin offered testimony regarding damages. He prepared a spreadsheet showing damages from November 2012 to March 2013. As Kevin began to testify about the Property's value in comparison to the amount due on the mortgage, York objected to any testimony regarding the fair market value of the Property as lacking foundation. The court overruled the objection, stating Kevin could testify because he was the owner.

Kevin proceeded to explain how he arrived at the fair market value figure of $345,000. First, he referred to an appraisal recently prepared by Bank of America during the loan interest rate modification process. The bank appraised the property at $345,000. The court sustained the Posos' hearsay objection to the bank's appraisal.

Kevin stated there were two other methods he used to arrive at the value of $345,000. He noted York conceded in his November 2012 letter that the Property's value was $345,000. York objected to this testimony on the grounds the letter was produced as part of settlement negotiations. The Hendras' counsel stated the letter was admissible because it was used to support the Posos' verified responses to discovery requests. The court reserved ruling on the objection.

Kevin testified he also based his valuation on information he received from a local real estate agent on comparable properties. Kevin stated he visited the property in December 2013 and he obtained from the local real estate agent "an MLS run of all the properties that had been sold in the last twelve months at [their condominium complex]."

He explained there were three similar properties of the same size, having two bedrooms and two bathrooms. He stated, "[A]n average of those properties yielded a similar result."

When questioned further about the MLS printout, labeled exhibit No. 5, Kevin said he underlined three condominiums he saw were similar to the Property and had been sold within the last 12 months. He elaborated the average selling price was $365,000. When the Hendras moved to have exhibit No. 5 admitted into evidence, the court sustained the Posos' hearsay and lack of foundation objections.

Kevin testified he believed the fair market value of the property was $345,000, and to calculate the total amount of damages he reduced this valuation by 10 percent (due to the penalty clause in the Agreement), to reach a market value of $310,500. He stated the loan amount in November 2012 was $481,860, leaving a difference of $171,360.

Kevin asked the court to consider the following information when calculating damages: (1) there is a six percent sales commission penalty outlined in the Agreement for a defaulting Owner; (2) the Agreement specifies a 12 percent interest rate on all money owed. He calculated the interest owed to date was $19,461; (3) the Hendras should recover management fees for having to run the vacation rental business by themselves; and (4) the Hendras paid for repairs, upgrades, and other expenses. York cross-examined Kevin and confirmed the property had not been sold, there were no plans to sell the property, and the loan secured by the Property had not been paid.

After considering the testimony and briefing of closing arguments, the trial court found in favor of the Hendras and awarded them full ownership of the Property and $74,250 in damages plus 12 percent interest from September 27, 2012. The court refused to include in the damage award the six percent sales commission penalty, stating the claim was speculative because the property was not sold. It also denied the Hendras' request for attorney fees or fees related to administrative tasks, as those were not provided for in the Agreement.

II

A. Sufficiency of the Evidence

In this appeal, the Posos' first argument is the Hendras breached the Agreement and this termination relieved the Posos of any further performance. They provide legal authority supporting the general rule that a contract may be terminated by a party's conduct. They point to the body of favorable evidence supporting the conclusion the Hendras breached the express terms of the contract "in September 2012" when they took over sole control of the property and stopped sharing the rental income with the Posos. In essence, the Posos are asserting there was insufficient evidence to support the trial court's conclusion it was the Posos, not the Hendras, who first breached and terminated the contract.

"Where the appellant challenges the sufficiency of the evidence, the reviewing court must start with the presumption that the record contains evidence sufficient to support the judgment; it is the appellant's burden to demonstrate otherwise. [Citation.]" (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 368 (*Baxter*).) The appellant's brief must set forth all the material evidence bearing on the issue, not merely the evidence favorable to the appellant, and must show how the evidence does not sustain the challenged finding. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman & Clark*).) If the appellant fails to set forth all the material evidence, its claim of insufficiency of the evidence is forfeited. (*Ibid; Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 782.)

Moreover, "In reviewing the sufficiency of the evidence, we must consider all of the evidence in the light most favorable to the prevailing party, accept as true all the evidence and reasonable inferences therefrom that tend to establish the correctness of the trial court's findings and decision, and resolve every conflict in favor of the judgment. [Citation.] 'It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, in support of the judgment.' [Citation.]" (*Baxter, supra*, 120 Cal.App.4th at p. 369, italics omitted.)

In their briefing, the Posos fail to set forth all of the material evidence relevant to the question of who breached the Agreement first. Indeed, they only cite to the evidence in their favor, taking much of the evidence out of context, and thereby misrepresenting the actual substance of the testimony and evidence. For example, the Posos claim that after negotiations to sell the Property failed, the Hendras arbitrarily took control over the Property, stopped communicating, kept all the rental income for themselves, and hired a new property management company. They argue all these actions and more breached the terms of the Agreement, resulting in its termination.

The Hendras' actions with respect to the Property must be viewed in context. The decision to take over sole control of the Property was a reasonable and foreseeable reaction to receiving York's letter. It was sensible for the Hendras to take steps to protect their financial interests after learning the Posos were immediately stopping all financial contributions and were withdrawing from the partnership without any concern for the Agreement's terms. The Posos' e-mail and letter from counsel clearly conveyed they were unwilling to pay the defaulting owner penalties outlined in the Agreement or to accept liability for any portion of the Property's negative equity, which unfairly burdened the Hendras. The Hendras both testified they understood York's letter to mean the partnership relationship had ended and the Posos were on the brink of declaring bankruptcy. Moreover, York admonished the Hendras to stop communicating directly with the Posos and they simply complied with his demand.

Noticeably missing from the Posos' opening brief is any mention of the above evidence or why York's letter and Joanne's e-mail were insufficient to support the trial court's determination the Posos terminated the contract first. The Posos' failure to fully and accurately summarize the material evidence on this issue forfeits the claim on appeal, which in any event, is meritless.

B. Measure of Damages

The Posos assert the court erred in awarding damages for the following three reasons: (1) The Hendras did not present admissible evidence of the value of the Property; (2) Kevin's testimony regarding the value of the Property lacked foundation and was inadmissible; (3) the damages represent partial payment of a loan the Hendras have not paid, which is an impermissible windfall; and (4) the Posos are responsible, at most, for only six months of expenses associated with the Property. The first two contentions are related and both attack the sufficiency of the evidence supporting the trial court's award. The third and fourth arguments constitute legal challenges to the correct measure of damage and can be decided as a matter of law.

i. Sufficiency of Damage Evidence

Turning first to the sufficiency of the evidence argument, we conclude the Hendras submitted admissible and sufficient evidence regarding the Property's value. The trial court correctly recognized Kevin, as owner of the property, was authorized and qualified to offer an opinion on the value of his own property.

"As our Supreme Court explained in *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921: 'The opinion of an owner of personal property is in itself competent evidence of the value of that property, and sufficient to support a judgment based on that value. [Citations.] "The credit and weight to be given such evidence and its effect . . . is for the trier of fact." [Citation.]' [Citation.] Appellate courts accord broad deference to the trial court's decision to admit lay opinion testimony that is subject to cross-examination. [Citation.]" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 876-877.)

The relevant statutory authority is Evidence Code sections 813 and 814.1.[2] Section 813, subdivision (a), in pertinent part provides, "[t]he value of property may be shown only by the opinions of any of the following: [¶] (1) Witnesses qualified to express such opinions. [¶] (2) The owner . . . of the property . . . being valued." Section 814 provides, "[t]he opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in [s]ections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for an opinion."

Section 813 is the basis of "the maxim that an owner is always qualified to testify to the value of his own property." (*Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660-661.) Accordingly, the owner need not be qualified as an expert to do so. (See *Long Beach City H.S. Dist. v. Stewart* (1947) 30 Cal.2d 763, 772-773; *Padre Dam Mun. Water Dist. v. Burkhardt* (1995) 38 Cal.App.4th 988, 992-993.) Based on these principles, Kevin was entitled to testify as to the value of the Property as the owner and there was no requirement he be identified as an expert witness in order to give such testimony.

The Posos rely on *Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 950, 951 (*Jones*), to support their theory Kevin's testimony was inadmissible. The *Jones* case was a wrongful foreclosure action in which the foreclosing bank submitted evidence the property owners held no equity in the home. The bank presented evidence the homeowners owed $570,000 and that "just two months after the trustee sale, the home

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[2] All further statutory references are to the Evidence Code, unless otherwise indicated.

was listed on the open market for $589,950 [and a]fter a price reduction, the seller, who sought the highest price the market would bear, sold the home in October 2009 for $555,000. The fair market value of the home reflected in the price that a willing buyer paid to a willing seller in an arm's-length transaction in October 2009 was less than the $570,000 owed by plaintiffs, resulting in negative equity." (*Id.* at p. 950, fn. omitted.) The appellate court determined the homeowners were unable to refute this evidence because the trial court correctly sustained the bank's lack-of-foundation objection to one homeowner's opinion the $555,000 sale price was substantially below the current market value of the home due to the seller's demolition. (*Ibid.*)

The *Jones* court explained, "[A]n owner's right to testify regarding the value of real property under section 813 is not absolute. [Citations.] Contrary to plaintiffs' assertion that ownership itself supplies foundation under . . . section 813, a property owner is bound by the same rules of admissibility as any other witness regarding the value of real property. [Citations.]" (*Jones, supra*, 230 Cal.App.4th at pp. 950-951.) The court concluded the trial court's ruling was not an abuse of discretion because the opinion lacked foundation under section 814. (*Id.* at p. 951.)

The *Jones* court also held the trial court did not abuse its discretion in sustaining the bank's objection to the declaration of a realtor (the Realtor) who performed a market analysis of the foreclosed property. (*Jones, supra*, 230 Cal.App.4th at p. 951.) It reasoned, "[S]ection 816, governing the admissibility of expert testimony regarding real estate values based on comparable property sales, requires that such testimony establish that 'the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.' In excluding an appraiser's report setting forth supposedly comparable land values, *In re Marriage of*

Smith (1978) 79 Cal.App.3d 725, 752, explained: 'A foundation must be laid indicating the other property sold was sufficiently similar to the property in litigation to indicate "the price realized for the other land may fairly be considered as shedding light on the value of the land in question." [Citation.] It must also appear that the other sale was genuine and sufficiently voluntary to be a reasonable index of value and that the price was actually paid or substantially secured.'" (*Ibid.*)

The court in *Jones* concluded the Realtor's declaration lacked foundation, stating, "The declaration was supported by a report in which [the Realtor] wrote that his $695,000 estimate for the foreclosed property 'is based on not only the average price in the area, but also making adjustments for condition and location, as is typically done in an appraisal.' The comparable sales summary attached to the report listed 13 homes sold over a six-month period. The summary shows the amount each home sold for, with an average sale price just under the $695,000 figure [the Realtor] used in his report. But the summary does not identify the home or lot size, character, usability or improvements, as required by . . . section 816, and we will not assume these foundational requirements have been met, as plaintiffs urge." (*Jones, supra,* 230 Cal.App.4th at p. 951.)

In our case, the Posos assert there was "almost no foundation" for Kevin's opinion and Kevin testified to "barely more than his opinion of the value of the property." They complain Kevin's testimony regarding the realtor's list of similar properties was inadequate because his testimony did not establish the other properties were sufficiently alike in character, size, situation, usability and improvements as discussed in the *Jones* case.

These contentions are belied by the record. Kevin testified the real property comparables he used to establish his opinion of valuation were leasehold interests in the same condominium building, having the same numbers of bedrooms and bathrooms, and having similar dimensions. It is well settled a witness's reliance on comparable or similar sales within the vicinity of the property at issue is sufficient foundation for the admission of opinion. (See *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 676.)

Moreover, Kevin established he was familiar with the Property because he maintained the premises and visited it often. He became knowledgeable about the marketplace value of similar properties in the same neighborhood. These facts satisfied the foundational requirements for his opinion discussed in the *Jones* opinion. Contrary to the Posos' contentions, the Hendras were not required to hire an appraiser, real estate broker, real estate salesperson, or similar professional to testify regarding the value of the Property. Kevin had personal knowledge as to the value of the Property at the time of the breach of contract and relied on comparable or similar sales within the vicinity of the property. No more was required.

ii. Legal Measure of Damages

The Hendras sought a total of $115,195, plus 12 percent prejudgment interest of $23,039 for a total award of $138,234. They calculated the sum of $115,195 by requesting the following: (1) $94,995 for the difference between the loan amount and the Property's fair market value (referred to as "the negative equity"); and (2) $20,200 representing the Posos' half of the costs of repairs, contributions, and management expenses, i.e., one half of $14,000 for out-of-pocket expenses plus one half of $26,400 for management fees. They also sought specific performance of the agreement's remedy provision requiring the defaulting party to transfer their interest in the property to the non-defaulting party.

The trial court awarded the Hendras their requested specific performance remedy (forcing the Posos to quitclaim their interest in the property) plus a grand total of $90,995 ($74,250, plus 12 percent prejudgment interest in the amount of $16,745). The court did not give a detailed explanation on how it calculated the money portion of damages. It only said the award did not include the requested six percent sale commission penalty or the management fees. The parties did not request a statement of decision. Therefore, the doctrine of implied findings requires this court to presume the trial court "made all necessary findings supported by substantial evidence." (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970.)

The Hendras had a choice of remedies: specific performance or damages for breach. "'[A] party may not obtain both specific performance and damages for the same breach of contract . . . .' [Citation.]" (*Union Oil Co. of California v. Greka Energy Corp.* (2008) 165 Cal.App.4th 129, 136 (*Union Oil*).)

The rules regarding these options are well established. "To obtain specific performance after a breach of contract, a plaintiff must generally show: '(1) the inadequacy of his legal remedy; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract. [Citations.]' [Citations.]" (*Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472.) Whereas, "Contractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages). [Citations.]" (*Lewis Jorge Construction Management Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968.) "General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. [Citations.]" (*Ibid.*) "[S]pecial damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement. Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test). [Citations.] Special damages 'will not be presumed from the mere breach' but represent loss that ‘occurred by reason of injuries following from’ the breach. [Citation.] Special damages are among the losses that are foreseeable and proximately caused by the breach of a contract.” (*Id.* at pp. 968-969.) For example, lost profits may be awarded as special damages upon a proper showing. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 758.)

Based on our limited record, it appears the court awarded the Hendras specific performance of the agreement’s provision requiring the defaulting partner to quitclaim their interest in the Property to the non-defaulting partner. The contract provided the Hendras with three options in the event of a breach as follows: (1) purchasing the Posos’ interest at a discounted rate; (2) compelling the Posos to sell their interest to a third party or selling the entire property; or (3) force the Posos to quitclaim their interest and “reimburse” for “all monies paid on their behalf, plus 12 [percent] interest.”

The Hendras elected the third option and there is no dispute the court granted this requested specific performance relief. It ordered the Posos to quitclaim their interests to the Hendras. The only issue remaining was the monetary reimbursement obligation outlined in the contract. We conclude there is insufficient evidence in the record to support the court’s award of $74,250.

The contract specified the Posos’ obligation was limited to the amount of money required to “reimburse” the Hendras for money actually spent on their behalf. The Hendras presented evidence their out-of-pocket losses to pay for repairs and other expenses totaled $14,000 ($7,000 would be the Posos’ share). They also presented evidence of maintenance fees totaling $26,400 ($13,200 was the Posos’ share), but without explanation the court indicated this sum was not included in the award. These out-of-pocket expenses plus 12 percent interest do not come anywhere close to the court’s award of $74,250.

After carefully reviewing our limited record, it appears the court awarded general/special damages in addition to the remedy of specific performance. As mentioned above, the Hendras could not recover both remedies for the same breach of contract. (*Union Oil, supra,* 165 Cal.App.4th at p. 136.) For this reason, the judgment must be reversed for a retrial on damages only. (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1334, fn. 16 [appellate court may order limited new trial "if a new trial on limited issues would not cause such uncertainty or confusion as to deny a fair trial, as here"].)[3]

III

The judgment is reversed and remanded for a retrial of all available damages. In all other respects, the judgment is affirmed. In the interests of justice, neither party shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.

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[3] Based on this ruling remanding the matter for a full re-adjudication of the Hendras' damages, we need not consider the Posos' additional argument the court improperly calculated the sum of Hendras' out-of-pocket expenses.