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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITRUS EL DORADO LLC,

Plaintiff, Cross-defendant and  
Appellant,

v.

THE CITRUS COURSE HOMEOWNERS  
ASSOCIATION,

Defendant, Cross-complainant and  
Respondent.

G052227

(Super. Ct. No. INC1103055)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County,  
Gloria Trask, Judge. Affirmed in part, reversed in part, and remanded. Requests for  
attorney fees on appeal. Denied.

Phillip B. Greer and Everett L. Skillman for Plaintiff, Cross-defendant and  
Appellant.

Guralnick & Gilliland, Daniel M. Parlow, Michael C. Knighten; Parlow Law Office and Daniel M. Parlow for Defendant, Cross-complainant and Respondent.

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## **INTRODUCTION**

Citrus El Dorado LLC (CED) appeals from a judgment entered after the trial court granted a motion for nonsuit brought by The Citrus Course Homeowners Association (the Association) on CED's complaint and granted the Association's motion for judgment on the pleadings on its own cross-complaint. As set forth in the disposition, we affirm in part, reverse in part, and remand for further proceedings.

The litigation arose out of an agreement called "Supplemental Declaration for Establishment of Covenants, Conditions, Restrictions and Reservation of Easements for The Citrus Course Homeowners Association and Notice of Annexation" (the Annexation Agreement). Under the Annexation Agreement, a parcel of real property was to be subdivided into 29 residential lots and two common areas, developed in accordance with a tentative tract map, annexed into the Association's subdivision, and made subject to the Association's declaration of covenants, conditions, restrictions, and reservation of easements (CC&R's).

CED's complaint asserted causes of action for breach of the Annexation Agreement, unjust enrichment, and conversion. CED alleged the Association breached the Annexation Agreement by failing to approve and/or sign documents necessary to convey the common areas to the Association, including a proposed subordination agreement, and by failing to return a security deposit. CED also claimed the Association converted the security deposit. The Association's cross-complaint sought a declaration that CED was obligated by the Annexation Agreement to indemnify the Association for the cost of litigation.

We conclude the trial court did not err by granting nonsuit on CED's breach of contract cause of action based on the theory that the Association failed to

approve and/or sign certain documents. The trial court erred, however, by granting nonsuit on CED's breach of contract cause of action based on the theory that the Association failed to return the security deposit, and by granting nonsuit on the conversion cause of action. We also conclude the trial court erred by granting the Association's motion for judgment on the pleadings on the Association's cross-complaint. We deny both CED's and the Association's requests that we award appellate attorney fees.

## **FACTS**

### **I.**

#### **The Annexation Agreement**

The Association is a nonprofit, mutual benefit corporation that governs a community of 548 single-family homes in the City of La Quinta. The Association is subject to CC&R's recorded in 1990 and an amendment to the CC&R's recorded in 1999.

In March 2005, Grove Partners, LQ, LLC (Grove), and the Association entered into the Annexation Agreement. Upon approval by the Association's membership, the Annexation Agreement resulted in the annexation by the Association of a parcel of real property, previously intended to be part of a golf course, to be subdivided into 29 residential lots and two common areas and developed by Grove in accordance with tentative tract map No. 32751.

The Annexation Agreement states that "Developer desires to develop certain real property (. . . hereinafter '*Annexable Area*') into twenty-nine (29) residential lots and two (2) common area lots" and that "the Association desires to annex all of the Annexable Area into the Subdivision, so that the Subdivision will be a single project, consisting of approximately five hundred seventy[-]seven (577) residential lots with residences constructed thereon and related common area, subject to the Governing Documents of the Association."

Several provisions of the Annexation Agreement are of particular importance to this appeal. One is paragraph 17.a., which provides: “Further Assurances. Each party shall execute, acknowledge and deliver such other documents and instruments as are reasonably necessary to carry out the intents and purposes of this Agreement.” Under paragraph 2.a., Grove was required to tender to the Association a security deposit of \$50,000. The Association could draw against the security deposit in the event that Grove did not correct any “non-compliance to any of the provisions of this [Annexation] Agreement.”

Another provision is paragraph 12 of the Annexation Agreement. Grove was to convey to the Association by grant deed the common area lots (lots C and D) of tentative tract map No. 32751. Under paragraph 12.a., the Association had an obligation to accept the grant deed only if (1) the common areas were “free and clear of monetary encumbrances”; (2) the developer had provided the Association with “all Plans and Specifications, as well as any reports or studies for the common area lots”; (3) “[a]ll improvements have been installed, as set forth in the Plans and Specifications approved by the City of La Quinta”; and (4) the Association’s board of directors consented to acceptance of the grant deed.

Under paragraph 12.d. of the Annexation Agreement, the Association had no obligation to accept title to lot C of tentative tract map No. 32751 unless title had been cleared of an indemnification agreement recorded in 1990. The City of La Quinta had required the indemnification agreement from the original developer to indemnify the city for any damage caused by a golf cart tunnel constructed underneath Jefferson Street. Paragraph 12.d. required the developer to obtain a title policy, issued in the Association’s name, to ensure title to lot C was not encumbered by the indemnification agreement.

In February 2005, the City of La Quinta had approved tentative tract map No. 32751 with conditions including—(1) “abandon” the golf cart tunnel under Jefferson Street, (2) reconstruct the perimeter wall along Jefferson Street, (3) construct various

street improvements including an entry street and an emergency exit, (4) construct redesigned storm water retention basins on lot C and lot D to conform to the approved hydrology and drainage report for “The Citrus Development,” (5) install utilities, and (6) install landscaping and irrigation.

## **II.**

### **Completion of Common Area Improvements**

Later in 2005, CED purchased tentative tract map No. 32751 and Grove’s interest in the Annexation Agreement. CED, a single purpose limited liability company, had been organized for the purpose of developing that tentative tract map.

CED commenced work constructing the retention basins on lot C and lot D. In the process of clearing vegetation and debris, CED found two buried markers of unknown origin or purpose. CED investigated and learned the markers had been placed by the Coachella Valley Water District (CVWD) to identify the location of an underground force sewer main.<sup>1</sup> Before acquiring tentative tract map No. 32751 and assuming the Annexation Agreement, CED did not know of the existence of the force sewer main. Tentative tract map No. 32751 did not reveal the existence of the force sewer main. It had not been discovered by the title insurer’s soils engineer and was not mentioned by the City of La Quinta in its conditions for approval.

CED moved the force sewer main to develop tentative tract map No. 32751. Because the CVWD opposed moving the force sewer main, CED had to sue CVWD for inverse condemnation and declaratory relief to do so. CED incurred over \$159,000 in unreimbursed expenses in moving the force sewer main.

CED completed the common area improvements required by the Annexation Agreement and the City of La Quinta’s conditions, including the abandonment of the golf cart tunnel and the construction of the retention basins. CED

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<sup>1</sup> A force sewer main is a large pipe used to carry sewage by force of pressure rather than by gravitational force.

obtained a final tract map for tract No. 32751 from the City of La Quinta. CED provided the Association with all plans and specifications, and reports or studies, for the common area lots. CED built three model homes and began constructing seven more.

To develop tract No. 32751, CED obtained a loan from First Heritage Bank which, in exchange, received a construction deed of trust against all of CED's property. CED sued First Heritage Bank after it failed to fund the loan. The first amended complaint alleged construction was halted in June 2008 because First Heritage Bank failed and was taken over by the Federal Deposit Insurance Corporation, which resold the construction financing agreement. The second amended complaint alleged construction ceased in February 2009. The common areas of tract No. 32751 remained encumbered by the construction deed of trust.

### **III.**

#### **Submission of Documents to the Association**

In June 2009, CED submitted to the Association a proposed grant deed for the common areas, a subordination agreement, and various other documents purportedly required by the California Department of Real Estate (now called the California Bureau of Real Estate)<sup>2</sup> to effect annexation of real property to an existing subdivision. The Association declined to sign the grant deed and approve the other documents.

Paragraph 9.a. of the Annexation Agreement required the developer to pay "regular assessments to the Association for all residential lots within the Annexable Area" at the initial amount of \$1,450 per month starting at "the first full month following the Developer's initiation of construction, including grading, within the Annexable Area." CED paid the developer assessments up to a point and then stopped paying them.

In a letter dated August 14, 2009, the Association's counsel notified CED that it was in breach of the Annexation Agreement for failure to pay assessments and

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<sup>2</sup> The parties refer to the Department of Real Estate/Bureau of Real Estate as the "DRE." For consistency and to avoid confusion, we shall do likewise.

maintain landscaping. The letter stated the Association intended to draw against the \$50,000 security deposit to bring the assessments current and to remedy the lack of landscape maintenance. The delinquent assessments totaled \$48,596.75 and the landscape maintenance costs were \$1,200, thereby leaving a balance of \$203.25 in the security deposit. The letter concluded by placing CED on notice that further construction activity would not be permitted until the security deposit had been replenished to \$50,000.

### **PROCEDURAL HISTORY**

CED sued the Association and, in the first amended complaint, asserted causes of action for breach of contract, unjust enrichment, conversion, and declaratory relief. CED alleged the Association breached the Annexation Agreement by failing to execute documents “necessary for [CED] to secure approval from the [DRE] so as to be able to sell the homes it has built.” CED alleged in the unjust enrichment cause of action that CED relocated the force sewer main and constructed the two retention basins, and assumed responsibility for the maintenance and security of the basins, all of which benefitted the Association. CED alleged in the conversion cause of action that the Association converted to its own use assessment payments made by CED.

The Association answered and brought a cross-complaint against CED. In the first amended cross-complaint (the Cross-Complaint), the Association asserted three causes of action based on an indemnity provision in the Annexation Agreement.

In September 2013, a few days before trial was set to begin, the Association filed four motions in limine. The trial court granted three of the motions, two of which (Motion in Limine No. 1 and Motion in Limine No. 2) are relevant to this appeal. Motion in Limine No. 1 sought to exclude all parol evidence relating to the Annexation Agreement. The court granted Motion in Limine No. 1 and excluded all extrinsic evidence regarding the Annexation Agreement. Motion in Limine No. 2 sought to exclude all evidence that CED had satisfied the conditions precedent to the Association’s

performance under the Annexation Agreement. The court altered the disposition sought in Motion in Limine No. 2 by ruling that CED had to “show compliance with conditions precedent” or excuse before it could produce evidence that the Association breached the Annexation Agreement. One such condition precedent was delivery of title to the common areas, free and clear of monetary liens and encumbrances.

The Association brought a nonstatutory motion for judgment on the pleadings. In response, CED moved for leave to file a second amended complaint. CED’s motion was granted.

The second amended complaint asserted causes of action for breach of contract, unjust enrichment, and conversion. In the breach of contract cause of action, CED alleged the Annexation Agreement imposed on the Association the obligation “to execute any and all documents necessary for [CED] to transfer the common areas to [the Association], thus allowing [the Association] to assume responsibility for the maintenance and management of the common areas.” CED alleged: “Despite numerous requests by [CED], starting on June 10, 2008, [the Association] ha[s] failed to execute all documents necessary for [CED] to transfer said common areas. Furthermore, [the Association], in violation of the terms and conditions of the agreement, ha[s] failed to act reasonably, especially in light of standards in the industry, to facilitate the transfer of the common areas so as to carry out the intent and purpose of the Annexation Agreement.” CED alleged that if the Association had acted reasonably and in accordance with the Annexation Agreement and industry standards, CED would have transferred the common areas to the Association and would not have been responsible for their maintenance and management.

The second amended complaint altered the theory of the conversion cause of action by alleging the Association “unilaterally increased the assessment rate at least twice” and “regularly altered and modified the assessment payment procedure so as to

force [CED] to be in default of its assessment obligations, face foreclosure of various lots and pay additional fines and penalties.”

Jury selection began four days after the second amended complaint was deemed filed. Scott Shaddix, CED’s managing member, testified for CED. When Shaddix was done testifying, CED made an offer of proof as to its only other witness, Michael Chulak, who was designated as an expert. Counsel for CED stated, “Mr. Chulak will testify as to the impossibility of performance by [CED] [as to] both the deed and the title insurance.” The trial court ruled Chulak could not testify because “it is the court’s intention to not allow him to interpret the contract for the court.”

When CED rested, its counsel stated: “Given the court’s rulings which we have objected to and we feel it [*sic*] improper, we have no option other than to rest at this time.” The trial court granted a motion for nonsuit brought by the Association.

Several months later, the Association brought a nonstatutory motion for judgment on the pleadings on the Cross-Complaint. The trial court orally granted the motion at a hearing in April 2014. Three days later, the Association voluntarily dismissed its cause of action for breach of contract. In June 2014, a formal order granting the Association’s motion for judgment on the pleadings and a judgment in favor of the Association and against CED were entered. CED timely filed a notice of appeal from the judgment.

## **DISCUSSION**

### **I.**

#### **Order Granting Nonsuit Against CED**

##### *A. Standard of Review*

CED’s appeal challenges the order granting the Association’s motion for nonsuit on the second amended complaint. “In reviewing a judgment of nonsuit, ‘we must view the facts in the light most favorable to the plaintiff. “. . . The rule is that a trial court may not grant a defendant’s motion for nonsuit if plaintiff’s evidence would

support a jury verdict in plaintiff's favor. [Citations.] [¶] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give 'to the plaintiff[']s evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff[']s favor . . . .'" [Citation.] The same rule applies on appeal from the grant of a nonsuit. [Citation.] [Citation.]" (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 347.)

#### B. *Breach of Contract*

CED sought to prove the Association breached paragraph 17.a. of the Annexation Agreement, which states: "Further Assurances. Each party shall execute, acknowledge and deliver such other documents and instruments as are reasonably necessary to carry out the intents and purposes of this Agreement." Paragraph 12.a. states, in relevant part, "Developer understands that the Association shall only accept a grant deed to the common area lots and/or other maintenance areas within the Annexable Area *free and clear of monetary encumbrances.*" (Italics added.) Paragraph 2.a.i. required the developer to tender a security deposit of \$50,000 to cover "non-compliance to [*sic*] any of the provisions of this Agreement and/or the Association's Governing Documents."

The theory of CED's breach of contract cause of action has been something of a moving target during the litigation. On appeal, CED argues it produced, or could have produced, evidence to prove the Association breached the Annexation Agreement in three ways: (1) the Association breached paragraph 17.a. by failing to provide information, and to review, approve, and execute documents, required by the DRE for phased development through annexation; (2) the Association breached paragraph 17.a. and prevented CED from complying with paragraph 12.a. by failing to review, approve,

and execute the subordination agreement; and (3) the Association breached paragraph 2 by halting all construction work until CED had replenished the security deposit.

1. *DRE Information and Documents*

To complete the annexation and to construct and sell homes, CED was required to comply with the Subdivided Lands Act, Business and Professions Code section 11000 et seq. (See *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1093-1095.) Among other things, CED had to obtain approval of the DRE of a plan for phased development through annexation. (Cal. Code Regs., tit. 10, § 2792.27.) A plan for phased development through annexation must include the following:

“(1) Proof satisfactory to the Commissioner that no proposed annexation will result in an overburdening of common facilities.

“(2) Proof satisfactory to the Commissioner that no proposed annexation will cause a substantial increase in assessments against existing owners which was not disclosed in subdivision public reports under which pre-existing owners purchased their interests.

“(3) Identification of the land proposed to be annexed and the total number of residential units then contemplated by the subdivider for the overall subdivision development.

“(4) A written commitment by the subdivider to pay to the association . . . appropriate amounts for reserves for replacement or deferred maintenance of common area improvements in the annexed phase necessitated by or arising out of the use and occupancy of residential units under a rental program conducted by the subdivider which has been in effect for a period of at least one year . . . .” (Cal. Code Regs., tit. 10, § 2792.27, subd. (b) (section 2792.27(b).)

CED argues that to provide the information required by subparts (1), (2), and (3) of section 2792.27(b), it needed the Association’s cooperation. This cooperation, CED contends, was “reasonably necessary” within meaning of paragraph 17.a. of the

Annexation Agreement, and the Association breached the Annexation Agreement by refusing to cooperate with CED in providing such information to the DRE.

We agree with the Association that CED waived its theory of breach of contract based on section 2792.27(b) by not presenting that theory at trial. Throughout the lengthy pretrial arguments on the motions in limine and during trial itself, CED's counsel often referred to a "DRE form" and the DRE documents and argued the Association's failure to approve them was a breach of the Annexation Agreement. But CED's trial counsel never mentioned any failure by the Association to cooperate in providing the information required by section 2792.27(b). CED's counsel never even mentioned section 2792.27(b). Before trial, CED's counsel identified the DRE documents as trial exhibit No. 125 ("the packet of documentation that is required to go to the Department of Real Estate") and argued that the Association failed to approve and sign the documents comprising exhibit No. 125. Exhibit No. 125 consists of (1) a cover letter to the Association, (2) irrevocable escrow instructions for conveyance of the common areas, (3) a grant deed of the common area lots, (4) sample purchase agreement and escrow instructions for sale of the individual lots (with addenda and exhibits), (5) common area grant deeds, street access and maintenance easement deeds, and irrevocable escrow instructions, and (6) subordination agreement. CED has not identified anything within exhibit No. 125 that relates to information required by section 2792.27(b).

"Issues presented on appeal must actually be litigated in the trial court—not simply mentioned in passing. "[W]e ignore arguments, authority, and facts not presented *and litigated* in the trial court."'" (*Natkin v. California Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1011.) At trial, CED's theory regarding the DRE documents was that the Association breached paragraph 17.a. of the Annexation Agreement by failing to sign documents supposedly necessary to enable CED to convey title to the common areas free and clear of monetary liens and encumbrances. CED did

not present, or attempt to present, evidence that the Association failed to cooperate with it in providing the information required by section 2792.27(b).

We have discretion to consider a new theory on appeal when it involves a pure question of the application of law to undisputed facts. (*Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388, 396.) We can assume that the Annexation Agreement and the implied covenant of good faith and fair dealing as a matter of law imposed an obligation on the Association to cooperate, as necessary, with CED in providing the DRE with the information required by section 2792.27(b). Whether the Association did cooperate in providing the information required by section 2792.27(b), and whether the Association's cooperation was necessary, are questions of fact. CED did not produce evidence on the issue of the Association's cooperation in providing the information required by section 2792.27(b). There are no facts, disputed or undisputed, on that theory and, therefore, we have no discretion to consider it.

## 2. *Subordination Agreement*

Paragraph 12.a. of the Annexation Agreement required CED to convey to the Association a grant deed of the common area lots "free and clear of monetary encumbrances." CED argued at trial, and argues on appeal, that the Association breached paragraph 17.a. of the Annexation Agreement by refusing to execute the subordination agreement, which, according to CED, was "reasonably necessary" to provide a grant deed to the common areas free and clear of monetary liens and encumbrances.

The trial court concluded the term "free and clear of monetary encumbrances" was clear and unambiguous on its face and refused to allow CED to present any extrinsic evidence that it could have provided free and clear title to the common areas by means of a subordination agreement. The trial court also concluded, in granting Motion in Limine No. 2, that providing free and clear title to the common areas

was a condition precedent to the Association's continued performance under the Annexation Agreement, and, therefore, CED had to present evidence it had satisfied that condition before CED could present evidence of breach by the Association.

The trial court erred by categorically excluding all extrinsic evidence of the meaning of the Annexation Agreement. "Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. [Citations.] 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. [Citations.] Thus, '[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.'" [Citation.]"

*(Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc. (2003) 109 Cal.App.4th 944, 955.)* The trial court should have received the extrinsic evidence before determining the Annexation Agreement was clear and unambiguous.

But the trial court's erroneous exclusion of extrinsic evidence was not prejudicial. The trial court prevented CED from presenting evidence that (1) the Association refused to approve the subordination agreement and (2) the subordination agreement would have enabled CED to provide title to the common areas free and clear of monetary liens and encumbrances.

On point (1), the subordination agreement did not require the Association's approval or signature, but only required execution by the construction lender, First Heritage Bank. CED could have presented the subordination agreement to First Heritage Bank at any time without the Association's approval. Thus, the Association's failure to execute or acknowledge the subordination agreement did not constitute a breach of paragraph 17.a. of the Annexation Agreement.

On point (2), CED argues: “A subordination agreement would have indeed been essential, because the grant deed for the common areas, as required by the Annexation Agreement, would have been recorded about two years after the bank’s trust deed had been recorded.” CED argues that at trial, it was prepared to have its expert witness, Chulak, testify industry custom and usage permitted the use of subordination agreements to clear title to common areas being conveyed to common interest developments.<sup>3</sup> In making an offer of proof in support of Chulak’s testimony, CED’s counsel stated Chulak would testify “the homeowners association has an obligation to accept the common areas upon the presentation of a completed project” and “the HOA [(homeowners association)] has an obligation to sign off on DRE forms, including the documents relative and relating to the grant deed.” CED’s counsel never made an offer of proof that Chulak would testify industry custom and usage (whatever the industry might be) permitted the use of subordination agreements to clear title to common areas being conveyed to a common interest development as part of a phased annexation.

Indeed, a subordination agreement, and in particular the proposed subordination agreement in this case, would not have removed monetary liens and encumbrances from the common areas. We invited and received supplemental letter briefs on the effect of the subordination agreement from the parties. As the Association points out, a subordination agreement does not remove liens and encumbrances, but rearranges their priority. A treatise explains: “The objective of a subordination agreement is to alter the priority of interests affecting a parcel of real property contrary to

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<sup>3</sup> Words in a contract may be interpreted according to trade usage if both parties are engaged in that trade. (*Ermolieff v. R.K.O. Radio Pictures* (1942) 19 Cal.2d 543, 550.) The contractual parties are deemed to have used the words according to such trade usage. (*Ibid.*) “Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense. [Citations.]” (*Ibid.*)

the usual rules of priority that ‘first in time is first in right,’ except for the rights of a subsequent bona fide purchaser or encumbrancer. Subordination is accomplished by a contract, which may be express or implied, whereby the senior lienor agrees to change the priority of interests and to accept a junior lien position when he or she would have a senior lien under the rules of priority.” (4 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 10:201, p. 10-748; see *Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn.* (1971) 18 Cal.App.3d 1023, 1029-1030.)

The proposed subordination agreement here would not have made title to the common areas, conveyed by the grant deed, superior in position to the construction lender’s earlier-recorded deed of trust and would not have released that deed of trust. A subordination agreement is a contract subject to the general rules of contract interpretation. (4 Miller & Starr, Cal. Real Estate, *supra*, § 10:201, p. 10-748.) The proposed subordination agreement stated the construction lender would agree to subordinate its deed of trust to four encumbrances: (1) the CC&R’s of the Association and amendments to them; (2) the Annexation Agreement; (3) any supplementary CC&R’s and notice of annexation for each phase of the development previously or later recorded; and (4) all easements to be conveyed to the Association.

The proposed subordination agreement would not have released the common areas from the construction lender’s deed of trust and therefore would not have enabled CED to give the Association a grant deed of the common areas “free and clear of monetary encumbrances,” as required by paragraph 12.a. of the Annexation Agreement. A reconveyance, not a subordination agreement, is the instrument used to clear title to property subject to a recorded deed of trust. (*Ricketts v. McCormack* (2009) 177 Cal.App.4th 1324, 1327, fn. 1.) Partial reconveyances of blanket construction deeds of trust are used to enable a developer to sell individual lots free and clear of the deed of trust. (5 Miller & Starr, Cal. Real Estate, *supra*, § 13:150, p. 13-565; 8 Miller & Starr, Cal. Real Estate, *supra*, § 29:35.) Exhibit No. 125 does not include a partial

reconveyance. CED did not make an offer of proof at trial, and does not argue on appeal, that it could and would have removed the construction lender's deed of trust by a partial reconveyance of the construction lender's deed of trust.

CED argues, "subordination agreements are common in California and are actually encouraged by the State in the context of building common interest developments." CED cites a DRE publication called Subdivision Public Report Application Guide (rev. June 2011) available at <<http://www.dre.ca.gov/files/pdf/sprag.pdf>> (as of Mar. 7, 2016), which states, at page 113, that subordination is required "when unsold lots/units will be subject to monetary encumbrances recorded prior to the CC&Rs [(covenants, conditions, and restrictions)]." The DRE explains the purpose of such a subordination agreement is to ensure a construction lender's lien is junior to the CC&R's of individual lots: "Subordination is a means to protect the homeowners' association and individual owners in cases of foreclosure by a lien holder. For example, without subordination, a construction lender could take possession of unsold units in the development without being bound by the CC&Rs, including assessment payment obligations. Subordination ensures that in such a case, the foreclosure will not jeopardize the operation of the HOA [(homeowners association)] as specified in the CC&Rs, because all interest holders in the subdivision are bound by them." (*Id.* at p. 114.) The DRE does not say anything about using a subordination agreement to clear title to common areas.

The proposed subordination agreement was reasonably necessary for the purpose identified by the DRE—to protect the Association by ensuring that unsold lots in the annexation area would be bound by the CC&R's. The proposed subordination agreement would not, however, have satisfied the Annexation Agreement, paragraph 12.a.'s requirement that the grant deed to the common areas be "free and clear of monetary encumbrances." Thus, the Association could not have breached paragraph 17.a. of the Annexation Agreement by failing to review and approve the

proposed subordination agreement because it was not “reasonably necessary to carry out the intents and purposes” of the Annexation Agreement.

### 3. *Security Deposit*

Paragraph 2.a. of the Annexation Agreement required the developer to tender to the Association a security deposit of \$50,000 to be held in a deposit account. The purpose of the security deposit was “to secure compliance with this Agreement (inclusive of all Exhibits) and the Association’s Governing Documents.” CED argues the Association breached paragraph 2.a. in two ways. First, CED contends the Association misappropriated the security deposit by applying nearly all of it to unpaid assessments without following the procedures set forth in the CC&R’s. Second, CED contends the Association breached the Annexation Agreement by halting construction until CED replenished the \$50,000 security deposit. The first theory has merit; the second does not.

#### a. *Drawing Against Security Deposit*

Paragraph 9 of the Annexation Agreement required CED to pay developer assessments to the Association at the rate of \$1,450 per month for each of the 29 residential lots. Shaddix, the managing member of CED, testified that CED paid the developer assessments required under paragraph 9 up to a point and then stopped paying them. CED requested the return of its security deposit, but the Association refused. Trial exhibit No. 177 was a letter, dated August 14, 2009, from the Association’s counsel to CED, regarding CED’s breach of the Annexation Agreement. Shaddix testified that, according to the letter, the Association deducted \$48,596.75 from the security deposit for “payment of delinquent assessment and lien fees” and \$1,200 for “landscape maintenance.” Paragraph 2.a.i. of the Annexation Agreement sets forth the procedure for the Association to follow to draw against the security deposit “to bring the substandard work into compliance” with the Annexation Agreement. The CC&R’s set forth a different procedure for collecting delinquent assessment fees.

CED argues the Association was required to follow the procedures set forth in the CC&R's to recover unpaid developer assessments. We agree. Although the purpose of the security deposit was to "secure compliance" with the Annexation Agreement, which required the developer to pay assessment fees, the security deposit was intended only to cover the cost of correcting substandard work. The following italicized words from paragraph 2.a.i. of the Annexation Agreement demonstrate this point: "If the Association's Board of Directors determines that there has been non-compliance [with] any of the provisions of [the Annexation] Agreement and/or the Association's Governing Documents, then as soon as is reasonably practical under the circumstances, the Association shall send written notice to Developer of the non-compliance. Developer shall thereafter have thirty (30) days to initiate *remedial measures* and complete any such *corrections* within sixty (60) days of the Association's written notice. If Developer fails to *initiate and/or correct the problem* to the satisfaction of the Association within the above time constraints, then the Association may take a reasonable draw against the Security Deposit *to bring the substandard work* into compliance with this Agreement and/or its Governing Documents. . . . Should Developer fail to make *the necessary corrections*, the Association has the right to do so and the *cost of such correction* shall be paid for from the Security Deposit." (Italics added.)

While paragraph 2.a. of the Annexation Agreement generally refers to noncompliance with the Annexation Agreement, paragraph 2.a.i. specifically refers to remedial measures, correcting problems, and bringing substandard work into compliance with the Annexation Agreement. If a general provision of a contract is inconsistent with a more specific provision, then the specific provision governs over the general one. (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 834.) Paragraph 2.a.i. relates specifically to drawing against the security deposit. Paragraph 2.a.i. permits the Association to draw against the security deposit only to bring substandard work into compliance with the Annexation Agreement. Delinquent

developer assessments do not constitute “substandard work.” The CC&R’s contain procedures specifically relating to collecting delinquent assessments, and it was those procedures the Association was required to follow.

The trial court erred by granting nonsuit on the breach of contract cause of action based on the Association’s retention of the security deposit and by preventing Shaddix from testifying fully about CED’s attempts to have the Association return the security deposit and about the amount of assessments paid by CED.

The Association’s obligation to return the security deposit appears to be an independent covenant. When covenants are independent, breach by one party does not excuse performance by the other party or relieve the other party of liability for breach. (*Keys v. Mother Lode Extension Mines Inc.* (1933) 218 Cal. 542, 543; *Fresno Canal and Irr. Co. v. Perrin* (1915) 170 Cal. 411, 416.) “Where the covenants of the respective parties are to be performed at different times they are held to be independent and the breach by one party of his covenant does not excuse the performance by the other of his covenant or relieve him of liability for damages for a breach thereof.” (*Fresno Canal and Irr. Co. v. Perrin, supra*, at p. 416.)

Paragraph 2.a.ii. of the Annexation Agreement states: “In the event that Developer ceases construction for four consecutive months and any damage that had been caused by Developer has already been repaired, any remaining portion of the Security Deposit, with accrued interest, shall be returned to Developer, provided, however, that upon any subsequent commencement of construction, another \$50,000 Security Deposit shall be required and reinstated under the same conditions described in Paragraph 2.a.” The conditions to the return of the security deposit (cessation of construction for four months and repair of damage caused by the developer) appear to be independent of the developer’s obligations under the Annexation Agreement and of any other conditions to the Association’s performance. The issue whether the return of the security deposit under

paragraph 2.a.ii. is independent of or dependent on CED's obligations can be tried by the parties after remand.

b. *Halting Construction for Failure to Replenish Security Deposit*

CED's other theory for recovery based on the security deposit is the Association "did literally halt the project when it said, in its August 14, 2009 letter to [CED], that all further construction activity would be prohibited, unless the \$50,000 security deposit . . . was replenished by [CED]." (Fn. omitted.) The August 14, 2009 letter (trial exhibit No. 177) stated: "Developer is hereby placed on notice that no further construction activity will be permitted within the Annexable Area unless and until the Security Deposit has been replenished (to \$50,000.00) in accordance with the Annexation Agreement."

But CED alleged in the second amended complaint that construction was halted in February 2009 "and has yet to resume" and alleged in the first amended complaint that construction was halted in June 2008 because the construction lender failed and had been taken over by the Federal Deposit Insurance Corporation, which resold the construction financing agreement. Those allegations constituted judicial admissions barring consideration of contrary evidence and establishing as fact CED had stopped construction no later than February 2009. (*Womack v. Lovell* (2015) 237 Cal.App.4th 772, 786; *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.) As a consequence, CED's theory that the Association halted construction in August 2009 could not survive a motion for nonsuit.

C. *Unjust Enrichment*

CED presents no argument directed to the unjust enrichment cause of action. CED argues only that restitution for unjust enrichment was an appropriate *remedy* for the Association's breach of the Annexation Agreement. CED argues it improved the Association's property by removing the force sewer main and relocating it and, therefore,

the interests of justice require the Association to compensate CED. The trial court erred by granting nonsuit on the breach of contract cause of action, but only with respect to the issue of the security deposit. Restitution for unjust enrichment based on removal of the force sewer main is not an appropriate remedy for the Association's failure to return the security deposit.

#### D. *Conversion*

““Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. . . .” [Citation.]” (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.) “A cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff's *possessory interest* in a specific, identifiable sum, such as when a trustee or agent misappropriates the money entrusted to him.” (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 284.)

CED argues the Association also committed conversion by drawing against the security deposit to pay the delinquent assessments. CED argues, “the specific, identifiable sum of \$48,596.75 was wrongfully taken by the Association out of the security deposit, which the Association was entrusted with keeping.” The trial court erred by granting nonsuit on the conversion cause of action: CED should have been allowed to go forward with its conversion cause of action based on that theory. As we have explained, the Association drew against the security deposit for allegedly unpaid assessments without following the procedures in the CC&R's. The trial court prevented Shaddix from testifying about the amount that CED had paid in assessments and the costs it had incurred in defending a foreclosure action brought by the Association to collect allegedly unpaid assessments.

## II.

### Order Granting Judgment on the Pleadings on the Cross-Complaint

The Cross-Complaint included two causes of action for declaratory relief: (1) declaratory relief—duty to defend and (2) declaratory relief—duty to indemnify. Both declaratory relief causes of action were based on paragraph 15, the indemnity provision, of the Annexation Agreement. CED challenged the trial court’s order granting the Association’s nonstatutory motion for judgment on the pleadings on the Cross-Complaint. We review an order granting judgment on the pleadings under the de novo standard. (*Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 296-297.)

Both CED and the Association present the relevant issue as interpretation of paragraph 15 of the Annexation Agreement (“Indemnification”), based on its language alone. Neither party contends extrinsic evidence is available or necessary to interpret paragraph 15. We therefore independently construe paragraph 15, based only on the language of the Annexation Agreement, with the goal of giving effect to the parties’ mutual intent at the time of contracting. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., supra*, 109 Cal.App.4th at p. 955.)

Paragraph 15 of the Annexation Agreement is entitled “Indemnification” and states, in relevant part: “Developer shall indemnify and hold the Association and all owners of Lots within the Subdivision harmless from all claims, demands, liability and/or expense (including without limitation attorneys’ fees) arising out of or encountered in connection with the acquisition of, permitting for, *breach of this Agreement* and/or performance of work in the Annexable Area, whether such claims, demands, liability and/or expense are caused by Developer, or its officers, agents or employees, subcontractors or sub-subcontractors employed on the project, their officers, agents or employees, or products installed on the project by Developer, its contractors,

subcontractors or sub-subcontractors, excepting only such injury or harm as may be caused solely and exclusively by Association's gross negligence or willful misconduct. Such indemnifications shall extend to claims, demands, expenses and/or liabilities occurring after completion of the project as well as during the work's progress." (Italics added.)

The italicized words are the focal point of the parties' disagreement. The Association contends the words "breach of this Agreement" make paragraph 15 of the Annexation Agreement a direct or first party indemnification provision requiring CED to indemnify the Association for litigation arising out of the Association's alleged breaches of the Annexation Agreement. CED contends the words "breach of this Agreement," when read in context, mean paragraph 15 is a third party indemnification provision only.

"Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.) Civil Code section 2772 defines "indemnity" as "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." The indemnitor is the party obligated to pay another, and the indemnitee is the party entitled to receive the payment from the indemnitor. (*Maryland Casualty Co. v. Bailey & Sons, Inc.* (1995) 35 Cal.App.4th 856, 864.)

"Although indemnity generally relates to third party claims, 'this general rule does not apply if the parties to a contract use the term 'indemnity' to include direct liability as well as third party liability.'" (*Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1024.) "[E]ach indemnity agreement is "interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract.'" [Citation.] When indemnity is expressly provided by contract, the extent of the duty to indemnify must be determined from the contract itself." (*Ibid.*) "[T]he question whether an indemnity agreement covers a given case turns primarily on

contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control.” (Ibid.)

CED has the better argument. The indemnification provision is not broadly worded but limits the indemnity obligation to claims, etc., arising out of four types of activity to be undertaken by CED, i.e., “[ (1) ] acquisition of, [ (2) ] permitting for, [ (3) ] breach of this Agreement and/or [ (4) ] performance of work in the Annexable Area.” As CED argues, the words “breach of this Agreement” appear in the middle of this list and therefore refer to breaches by CED only. In the next clause, paragraph 15 of the Annexation Agreement states that indemnification applies “whether such claims . . . are caused by Developer, or its officers, agents or employees, subcontractors or sub-subcontractors employed on the project.” Accordingly, the most reasonable interpretation of paragraph 15 is that it provides for indemnification of claims by third parties caused by the developer (or its officers, agents, or employees), arising out of the developer’s “acquisition of, permitting for, breach of this Agreement and/or performance of work in the Annexable Area.” In contrast, the Association’s argument is based on taking the words “breach of this Agreement” out of context.

Based on this contract language, we conclude that paragraph 15 of the Annexation Agreement covers only third party claims and does not cover direct claims for breach of the Annexation Agreement by the Association. Final judgment following proceedings on remand shall include judgment in favor of CED on the Cross-Complaint.

### **III.**

#### **Mutual Requests for Attorney Fees on Appeal**

Both CED and the Association request that we make an award of attorney fees on appeal based on paragraph 17.d. of the Annexation Agreement, with the amount of fees to be determined by the trial court. Paragraph 17.d. states, in relevant part: “In the event that any action, suit or other proceeding is instituted to remedy, prevent or obtain relief from a breach of this Agreement, or arising out of a breach of this

Agreement, the prevailing party shall recover all of such party's attorneys' fees incurred in each and every such action, suit or other proceeding, including any and all appeals or petitions.”

The prevailing party on appeal may request statutory or contractual attorney fees from the Court of Appeal before it loses jurisdiction. (*Harbour Landing-Dolfann, Ltd. v. Anderson* (1996) 48 Cal.App.4th 260, 264-265.) The Court of Appeal may determine the issue of attorney fees on appeal either in conjunction with a decision on the merits or by ruling on a separate motion for attorney fees. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 166.)

The prevailing party for purposes of awarding attorney fees on appeal means the party ultimately prevailing in the litigation. Thus, a party who prevails on appeal is not entitled to recover appellate attorney fees when the appellate decision does not decide the lawsuit but contemplates further proceedings in the trial court. (*Rich v. Schwab* (1984) 162 Cal.App.3d 739, 745 [where summary judgment is reversed on appeal, there is no prevailing party and thus no basis for an award of attorney fees]; *Presley of Southern California v. Whelan* (1983) 146 Cal.App.3d 959, 961 [successful appellant not entitled to attorney fees on appeal for reversal of summary judgment].) “A party who prevails on appeal is not necessarily the prevailing party in an action.” (*Wood v. Santa Monica Escrow Co.* (2009) 176 Cal.App.4th 802, 804.)

The Association and CED each prevailed in part on appeal. Our opinion does not resolve the lawsuit, but contemplates further proceedings after remand on CED's causes of action for breach of contract (based on the security deposit only) and conversion (also based on the security deposit only). The party prevailing on the contract is the party who recovered “greater relief in the action on the contract.” (Civ. Code, § 1717, subd. (b)(1).) Whether the Association or CED obtained greater relief in the action on the Annexation Agreement cannot be resolved until the litigation is concluded after remand.

## **DISPOSITION**

The judgment is reversed as to CED's causes of action for breach of contract and conversion (both as to the security deposit only) and as to the Cross-Complaint. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings consistent with the opinion. Because CED and the Association each prevailed in part, neither party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.