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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MANISH GUPTA et al.,

Plaintiffs and Appellants,

v.

BASCOM HOTEL, LLC et al.,

Defendants and Respondents.

H040818

(Santa Clara County

Super. Ct. No. CV227118)

Plaintiffs Manish and Dipesh Gupta (the Guptas) appeal from a judgment in favor of defendants Bascom Hotel, LLC and Kenneth S. Manrao (collectively Manrao) on the Guptas' causes of action for specific performance, declaratory relief, and estoppel.

The Guptas' causes of action arose out of a June 2009 lease-option agreement under which they leased a hotel from Manrao for a five-year term and would have an option to purchase the hotel if they paid \$1 million in "[n]on-refundable option consideration" to Manrao by June 25, 2010. In 2009, the Guptas paid \$500,000 of the option consideration. They also gave Manrao a \$500,000 note secured by a deed of trust. Although the remaining \$500,000 of option consideration was due by June 25, 2010 and the note was due on June 30, 2010, the Guptas did not pay Manrao the remaining \$500,000 of "option consideration" by June 25, 2010 or by June 30, 2010. In July 2010, Manrao declared the option to be cancelled. In July 2011, the Guptas sent Manrao a

request for a payoff demand on the deed of trust, and he responded with a demand for \$500,000, which they paid to him. In June 2012, the Guptas attempted to exercise the option, but Manrao insisted that it had been terminated due to their failure to pay the second \$500,000 of option consideration by June 25, 2010, as required by the lease-option agreement. The trial court found that the Guptas did not have an option to buy the hotel because they failed to pay the second \$500,000 in option consideration by the June 25, 2010 due date.

The Guptas claim that the trial court erred in finding that the secured note did not satisfy the required “option consideration,” and they claim that Manrao waived the requirement of a cash payment and of timely payment by accepting the note and deed of trust and by submitting the 2011 payoff demand. They also contend that, even if the trial court was correct, Manrao was obligated to return to them the \$500,000 he was paid to obtain reconveyance of the deed of trust. We reject the Guptas’ contentions concerning the option, and we find that the propriety of Manrao’s retention of the \$500,000 he was paid in 2011 is not before us in this appeal.

I. Factual Background

On June 25, 2009, the Guptas and Manrao executed a negotiated “lease with option to purchase” agreement under which Manrao agreed to lease the Bristol Hotel to the Guptas for a term of five years. This agreement provided that the Guptas would have an “option to purchase” the hotel if they paid \$1 million in “[n]on-refundable option consideration” by June 25, 2010, which would be applied to the purchase price if they exercised the option.¹ “So long as Lessee is not in default in the performance of any term

¹ The agreement contained numerous provisions about the exercise of the option. The purchase price “during years 1 to 3” was to be “all cash” \$5.8 million. The purchase price “during year 4th and 5th years” was to be \$6.8 million. The agreement provided:

(Continued)

of this Agreement, Lessee will have the option to purchase the real property” for “all cash.”² The agreement acknowledged that the Guptas had paid \$500,000 of the option consideration at the time the agreement was executed and required that the remaining \$500,000 in option consideration be paid by June 25, 2010. The initial \$500,000 was paid with a cashier’s check. The agreement provided that “[n]o failure of Lessor to enforce any term of this Lease will be deemed to be waiver.” It also provided: “Time is of the essence of this Lease.”

On June 29, 2009, the Guptas executed a note promising to pay Manrao \$500,000 by June 30, 2010. The note was secured by a deed of trust on a parcel of real property. Manrao “approved” and “accept[ed]” the note.³ The Guptas did not pay the remaining \$500,000 of option consideration that was due by June 25, 2010 nor did they pay the \$500,000 note that was due by June 30, 2010. On July 10, 2010, Manrao notified the

“The Option to Purchase will be exercised by mailing or delivering notice to the Lessor prior to the expiration of this Option and by an additional payment . . . of \$200,000 . . . for account of Lessor to the authorized escrow holder within 10 days after the exercise of the Option to Purchase. [¶] . . . [¶] In the event the Option to Purchase is exercised, the consideration paid for the Option . . . will be credited toward the purchase price.” “Within 60 days from exercise of the Option to Purchase, both parties will deposit with an authorized escrow holder, to be selected by the Lessee, all funds and instruments necessary to complete the sale in accordance with the terms of this Agreement.”

² We have omitted for readability the full capitalization used in both the agreement and Manrao’s communications to the Guptas.

³ Manish Gupta testified that Manrao agreed to accept the note and deed of trust as payment of the second \$500,000 of option consideration. He also testified: “The second \$500,000 the payment of that was the note itself. The note was a form of payment fully secured by a deed of trust. . . . [¶] . . . Mr. Manrao had the ability to go foreclose on the property and collect his money. He chose not to.” Manrao testified that the note and deed of trust were unrelated to the remaining \$500,000 of option consideration but were instead intended to recompense him for the “supplies” belonging to him that would be “depleted” by the end of the five-year lease term.

Guptas that the option was “cancel[led]” due to their failure to pay the remaining \$500,000 in option consideration: “Lessee has no option to purchase the property effective 6/26/2010.” The Guptas did not respond to Manrao’s notice.

In June 2011, the Guptas’ escrow agent contacted Manrao concerning the deed of trust securing the \$500,000 note and requested “a demand for payment in full of that loan together with a Full Reconveyance.” Manrao submitted a payoff demand for \$500,000 under the deed of trust and executed the full reconveyance. At the same time, he reiterated to the Guptas that they had failed to timely pay the \$500,000 in option consideration that had been due by June 25, 2010, and therefore they did not have an option to buy the hotel. The Guptas’ real property was sold, and Manrao was paid \$500,000 out of the escrow.

On June 7, 2012, the Guptas sent a letter to Manrao purporting to exercise the option. Manrao immediately responded by again reiterating that the Guptas did not have an option because they had failed to pay the \$500,000 in option consideration due by June 25, 2010. The Guptas had obtained approval of two loans to finance the purchase: a \$2.9 million loan from SV Capital and a \$1.9 million SBA loan. They deposited \$200,000 into escrow and expected that the \$1 million they had paid to Manrao would satisfy the remainder of the purchase price of \$5.8 million. Their SBA loan was only available until June 29, 2012. The Guptas expected their loans to fund on June 21, 2012.⁴ When Manrao did not fully cooperate in closing the transaction, the Guptas filed suit against him.

⁴ Manish Gupta testified at the court trial that the Guptas “were absolutely ready, willing and able to close” the escrow on June 22, 2012.

II. Procedural Background

On June 22, 2012, the Guptas filed an action against Manrao for specific performance, breach of contract, fraud, unjust enrichment, unfair business practices, equitable estoppel, and declaratory relief.⁵ The parties agreed to bifurcate the trial with the court first trying the specific performance, equitable estoppel and declaratory relief causes of action.

The court found that the Guptas did not have an option to purchase the hotel because they had not paid the remaining \$500,000 in option consideration that was due by June 25, 2010.⁶ The court found that the \$500,000 secured note was not a payment but “only a promise to pay.”⁷ The court expressly found that, although Manish Gupta “was not generally untruthful,” he was “not always reliable.”⁸ The court also found that Manrao “was biased in his interpretation of the facts surrounding the transaction between the parties.” In March 2014, the court entered judgment in favor of Manrao and found him to be the prevailing party and therefore entitled to his costs and attorney’s fees under the agreement. The Guptas timely filed a notice of appeal from the judgment.

⁵ Manrao filed a cross-complaint, which is not at issue in this appeal.

⁶ The court also found that, even if the Guptas had an option, they were not entitled to specific performance because they did not have the ability to perform. And the court concluded that, even if the Guptas had an option and had had the ability to perform, the purchase price would have been \$5.8 million only if escrow closed by June 22, 2012, and would have been \$6.8 million if the escrow closed after June 22, 2012.

⁷ The court also reasoned that this was a breach of the agreement.

⁸ The court also did not credit Dipesh Gupta’s testimony about their ability to perform because there was no evidence to support it.

III. Discussion

The Guptas challenge the trial court's finding that they did not have an option to purchase the hotel. They claim that they "paid" the remaining \$500,000 of option consideration that was due by June 25, 2010 when they provided Manrao in June 2009 with a secured note in which they promised to pay him \$500,000 by June 30, 2010. Alternatively, the Guptas claim that they satisfied the agreement's option consideration requirement when they paid \$500,000 to Manrao in 2011 in order to obtain reconveyance of the deed of trust. They assert that Manrao's acceptance of their 2011 payment waived any requirement that the option consideration be paid earlier. Manrao contends that the agreement did not permit the option consideration to be paid by means of a note and that he did not waive the agreement's requirement that the option consideration be paid by June 25, 2010.

A. Option Consideration Could Not Be Paid by Secured Note

We begin by considering the express provisions of the agreement regarding the payment of the option consideration. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.) Thus, if the meaning a lay person would ascribe to contract language is not ambiguous, we apply that meaning." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822.)

The Guptas claim that we exercise de novo review because there was no conflicting "competent" extrinsic evidence concerning this issue so the interpretation of the agreement is a legal question. Manrao contends that we review for substantial

evidence because the trial court’s resolution of this issue depended on conflicting extrinsic evidence.

“The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is ‘admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible’ [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument *unless the interpretation turns upon the credibility of extrinsic evidence*. Accordingly, ‘[a]n appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation].’” (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, italics added.)

In contrast, “when . . . ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact” (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.) “To the extent that the testimony adduced by the parties revealed a meaning of which the contract was reasonably susceptible, we defer to the court’s determination of those witnesses’ credibility and apply the substantial evidence rule to that determination.” (*Tin Tin Corp. v. Pacific Rim Park, LLC* (2009) 170 Cal.App.4th 1220, 1225.)

The trial court’s decision on this issue did not involve the resolution of any credibility issues regarding the extrinsic evidence. In its statement of decision, the trial court identified just two bases for its finding on this issue. It primarily based its finding on the language of the agreement. To a lesser extent, it relied on Manrao’s *undisputed*

conduct shortly after June 25, 2010, when he told the Guptas that the option was cancelled.⁹ Since there was no dispute about the only extrinsic evidence relied upon by the court to support its finding on this issue, we apply *de novo* review to this issue.

The agreement stated that the Guptas would have an option only if they “paid” \$1 million in “[n]on-refundable option consideration.” It did not expressly identify what form or forms of payment were permitted for payment of the option consideration. The Guptas argue that the agreement would have expressly required a cash payment of the option consideration if that was the only form of payment that would satisfy the agreement. In their view, the fact that the agreement specified that the purchase price for the hotel must be paid in cash if the option was exercised and its failure to so state as to the option consideration necessarily established that a form of payment other than cash was acceptable. They argue that because a secured note has “value,” they “paid” Manrao the required option consideration when they gave him the note.

The agreement is not reasonably susceptible of the Guptas’ proposed construction. While the agreement expressly stated that the purchase price for the hotel must be paid in “cash” and did not specify the form of payment for the option consideration, this fact does not justify a conclusion that the agreement permitted the option consideration to be satisfied by a secured note. The agreement did not consistently specify the form of payment for the various monetary obligations that it set forth. First, it did not specify the form of payment for the monthly rent. Yet the agreement’s provisions for a late charge and interest on delinquent rent and its provisions requiring payment “in advance” of rent due after the expiration of the lease necessarily precluded the agreement from being

⁹ Manrao contends that there was a dispute of fact regarding whether he accepted the secured note as payment of the remaining \$500,000 of option consideration. This is true but irrelevant. The trial court expressly identified the bases for its finding on this issue, and that was not one of them.

construed to permit payment of rent by a note. Second, the agreement did not specify the form of payment for the \$200,000 that it required the Guptas to deposit in an escrow account upon exercise of the option. The agreement could not reasonably be construed to permit this deposit to be made by means of a note since the agreement plainly did not contemplate the deposit of *a note* into an escrow account. Third, even with respect to the purchase price for the hotel, the agreement did not consistently specify that the purchase price be a “cash” payment. On the printed form, the agreement contained a handwritten requirement that the purchase price be “all cash.” However, it also expressly, in handwriting, incorporated the “price & terms” in exhibit A into the agreement, and exhibit A was inconsistent regarding the “all cash” provision. Exhibit A stated: “Purchase price: all cash during years 1 to 3. 5,800,000 [¶] Purchase price during year 4th and 5th years: 6,800,000.” Thus, the agreement did not state that the purchase price in the 4th and 5th years must be “all cash” even though the agreement elsewhere provided that the purchase price must be paid in “all cash.”

Because the agreement did not expressly specify “cash” as the form of payment for multiple monetary obligations that could not reasonably be construed to permit satisfaction with a note, the fact that the agreement did specify cash for one monetary obligation does not mean that a note was permitted as a form of payment for the option consideration simply because the agreement did not expressly state otherwise. And the other provisions of the agreement were consistent with a construction that precluded payment of the option consideration with a note. The option consideration was expressly identified as “[n]on-refundable,” but a note is not something that can reasonably be understood to be “refundable.” The agreement clearly did not contemplate permitting the rent to be paid by a note, and the fact that the agreement provided a specific date for payment of the option consideration, just as it did for the rent, would be inconsistent with allowing a note to itself satisfy the option consideration payment obligation.

The Guptas contend that any ambiguity in the agreement must be construed against Manrao because “Manrao drafted the Lease.” An agreement will not be given an unreasonable interpretation regardless of who drafted it. Civil Code section 1654 provides: “In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.” One of the “preceding rules” is that “[a] contract must receive such an interpretation as will make it lawful, operative, definite, *reasonable*, and capable of being carried into effect, if it can be done without violating the intention of the parties.” (Civ. Code, § 1643, italics added.) Since the construction that the Guptas seek is unreasonable, it does not come within the parameters of Civil Code section 1654. Nor would it in any event. Manish Gupta testified that Manrao drafted the terms of the agreement, but he explained that Manrao simply wrote up the terms that they agreed on. The trial court expressly found that all parties “actively participated” in the negotiation of the agreement and that Manrao was simply the person who handwrote the provisions upon which they agreed. Where the provisions of an agreement are negotiated, the rule that ambiguities are construed against the “drafter” does not apply. (*County of San Joaquin v. Workers’ Comp. Appeals Bd.* (2004) 117 Cal.App.4th 1180, 1186; cf. *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 438.)

The Guptas’ reliance on Civil Code section 1605 is misplaced. Civil Code section 1605 simply provides that “[a]ny benefit” is “good consideration for a promise.” It does not override the provisions of an agreement requiring that a specific payment be made by a specific date. Nor can we accept the Guptas’ claim that the mere fact that the secured note had some “value” meant that it satisfied the agreement’s option consideration payment requirement. The agreement required that the Guptas pay Manrao \$500,000 by June 25, 2010. The provision of a secured note to Manrao did not constitute the payment of \$500,000 so it is irrelevant that the note may have had some value.

The Guptas also argue that, “[i]f the \$500,000 consideration could not be deemed ‘paid’ until Manrao received cash, . . . then the secured note served no purpose and the execution and recordation of it would have been a meaningless and idle act.” Whether the Guptas engaged in an “idle act” when they gave a secured note to Manrao is irrelevant. The issue is whether they satisfied the agreement’s option consideration payment provisions. The agreement did not require them to provide Manrao with a secured note, so their decision to do so did not relate to an obligation under the agreement.

The Guptas contend that we must construe the agreement as they wish because they would otherwise forfeit what they paid in option consideration. “‘If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so.’” (*McNeece v. Wood* (1928) 204 Cal. 280, 284.) Here, the agreement cannot be reasonably interpreted so as to avoid a forfeiture. The agreement expressly and unambiguously stated that the option consideration was “[n]on-refundable”—that is, forfeited—if the Guptas failed to satisfy the agreement’s preconditions for exercise of the option. No amount of contract construction can eliminate this express forfeiture provision to which the Guptas explicitly agreed. And, as we have already concluded, the agreement cannot be reasonably construed to permit the option consideration to be paid by a secured note.

B. 2011 Payment to Manrao

The Guptas alternatively contend that Manrao “waived any time requirement by demanding, and then accepting \$500,000 in 2011 -- a year after the alleged deadline.” “Whether a waiver has occurred is usually a question of fact the determination of which, if supported by substantial evidence, will not be disturbed on appeal [citation], unless the

only inference which can be drawn from the evidence is to the contrary.”¹⁰ (*Silva v. National American Life Ins. Co.* (1976) 58 Cal.App.3d 609, 615; accord, *Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 679.)

The agreement provided that “[n]o failure of the Lessor to enforce any term of this Lease will be deemed to be waiver,” and “Time is of the essence of this Lease.” Two weeks after the Guptas failed to pay the remaining \$500,000 in option consideration by the June 25, 2010 deadline, Manrao sent them a written notice informing them that the option was “cancel[led]” due to their failure to pay the remaining \$500,000 in option consideration. When Manrao received the Guptas’ 2011 request for a payoff demand, he reiterated to the Guptas that they did not have an option due to their failure to pay the remaining \$500,000 in option consideration by June 25, 2010. The no-waiver and time-is-of-the-essence provisions of the agreement coupled with Manrao’s explicit statements to the Guptas in July 2010 and June 2011 provide the requisite substantial evidence to support the trial court’s finding that Manrao did not waive the June 25, 2010 deadline for the payment of the remaining option consideration.

The Guptas also contend that Manrao’s 2011 acceptance of \$500,000 in exchange for reconveyance of the deed of trust necessarily established that he waived the deadline for payment of the option consideration because he would otherwise have accepted a benefit when “he was not owed anything under the Note and he should have submitted a payoff demand statement stating that no money was due and owing to him.” While Manrao may not have been entitled to \$500,000 under the note at the time he demanded that payment in exchange for reconveyance of the deed of trust, Manrao’s possibly

¹⁰ The Guptas fail to acknowledge that we review the trial court’s finding on the waiver issue for substantial evidence. They implicitly ask us to reweigh the evidence, which we cannot do.

wrongful acceptance of that payment does not mean that he waived timely payment of the option consideration.

The Guptas contend that, if they did not have an option, they are entitled to “recover the \$500,000” that Manrao was paid in 2011. The only causes of action resolved by the trial court were the Guptas’ causes of action for specific performance, declaratory relief, and equitable estoppel. None of those causes of action sought recovery of the 2011 \$500,000 payment to Manrao. The Guptas *pleaded* an unjust enrichment cause of action that sought recovery of the full \$1 million that they had paid to Manrao. However, their unjust enrichment cause of action was never tried or resolved by the trial court, and the parties stipulated that the court’s resolution of the specific performance, declaratory relief, and equitable estoppel causes of action “rendered moot” their other issues. Consequently, this issue was not preserved for appellate review.

The Guptas claim that they preserved this issue for appellate review, and they cite to three spots in the record that they believe support this contention. First, they cite to the court’s oral statement at the end of the trial that “whether or not they paid that \$500,000 on time, it was still due no matter what . . . that money was owed no matter what, even if they lost the right to the option” Second, they rely on their subsequent proposed statement of decision in which they asserted that “it would be unjust enrichment for Defendant to keep the money and not sell the hotel.” (Boldface omitted.) Third, they cite to one page of the court’s statement of decision.

The trial court’s oral statement at trial was not directed toward the issue of whether Manrao was entitled to retain the \$500,000 he received in 2011 but to the issue of whether the Guptas were in breach of the lease for failing to pay the second \$500,000 by June 2010. The Guptas’ assertion in their proposed statement of decision was not made in support of a contention that Manrao was required to return the \$500,000 he received in 2011 but only as an argument in support of the Guptas’ equitable estoppel claim. Nowhere in the court’s statement of decision did it address Manrao’s potential

liability for unjust enrichment or restitution as a result of his retention of the \$500,000 he received in 2011. Because this issue was neither tried to nor resolved by the trial court, it is not before us in this appeal.

IV. Disposition

The judgment is affirmed.¹¹

¹¹ The agreement contained an attorney's fees clause entitling the prevailing party to recover reasonable attorney's fees and costs. In the last sentence of his response brief, Manrao asks us to award him reasonable attorney's fees. He has not filed a motion or submitted any supporting documentation. While Manrao is the prevailing party on appeal under the agreement's attorney's fees clause, the trial court is the appropriate forum for a motion for appellate attorney's fees under California Rules of Court, rule 3.1702(c).

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Grover, J.

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