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Court of Appeal, Fourth District, Division 3, California.
PYROVEST CORPORATION, Plaintiff, Appellant and Cross-respondent,
v.
ANAHEIM PLAZA, LLC, et al., Defendants, Respondents and Cross-appellants.
Nos. G028421, G029127.
(Super.Ct.No. 812337).

Feb. 19, 2003.

Landlord brought action against tenant for breach of a commercial real estate sales agreement, alleging that tenant failed to follow through on exercise of its right of first refusal to purchase property that was contained in lease. The Superior Court, Orange County, No. 812337,Hugh Michael Brenner, J., granted summary judgment for tenant, and landlord appealed. The Court of Appeal, Aronson, J., held that: (1) tenant was not liable to landlord for alleged failure to follow through on exercise of its right of first refusal to purchase property; (2) liquidated damages clause was unenforceable; and (3) tenant was entitled to award of attorney fees.

Affirmed as modified.

West Headnotes

[1] Landlord and Tenant 233 92(1)

233 Landlord and Tenant
233IV Terms for Years
233IV(E) Options to Purchase or Sell
233k92 Option to Purchase Premises
233k92(1) k. In General. Most Cited Cases
Commercial tenant was not liable to landlord for alleged failure to follow through on exercise of its right of first refusal to purchase property that was contained in lease, as undisputed evidence indicated that a ready, willing, and able buyer was at all times waiting in the wings to consummate purchase for a sum $1 million in excess of contract price. West's Ann.Cal.Civ. Code § 3307.

[2] Damages 115 85

115 Damages
115IV Liquidated Damages and Penalties
115k84 Operation and Effect of Stipulations
115k85 k. In General. Most Cited Cases
Liquidated damages clause of assignment between prospective purchaser of property and assignee was not enforceable against tenant, since tenant never separately signed or initialed clause. West's Ann.Cal.Civ. Code § 1677.

[3] Costs 102 194.34

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.34 k. Leases. Most Cited Cases
Commercial tenant was entitled to award of attorney fees incurred in litigation of its alleged failure to follow through on exercise of its right of first refusal to purchase property contained in lease, even though its cross-complaint was unresolved, as issues framed in cross-complaint were raised in purely defensive fashion, and no action was taken to prosecute cross-complaint.

Appeal from a judgment of the Superior Court of Orange County, Hugh Michael Brenner, Judge. Affirmed.
Palmieri, Tyler, Wiener, Wilhelm & Waldron, Frank C. Rothrock and Paul B. La Scala for

Plaintiff, Appellant and Cross-respondent.
Enterprise Counsel Group, David A. Robinson, Jeffrey Lewis and Benjamin P. Hugh for Defendants, Respondents and Cross-appellants.

OPINION

ARONSON, J.

***1** Plaintiff Pyrovest Corporation (Pyrovest) challenges a summary judgment obtained by defendants Anaheim Plaza, Tushar Patel, Mayur Patel, and Tarsadia Hotels in an action for breach of a commercial real estate sales agreement. Pyrovest claims it raised triable issues regarding causation and damages, as well as the validity of a liquidated damages clause. In a consolidated appeal, Pyrovest attacks an award of attorney fees and costs to Anaheim Plaza as the prevailing party in the litigation. For the reasons set forth below, we affirm.

I

Anaheim Plaza is the lessee of real property owned by Pyrovest on South Harbor Boulevard in Anaheim. Anaheim Plaza, in turn, subleased the premises to RSP, a limited liability corporation, and that entity operates a hotel on the property.

At the heart of this dispute is a lease provision granting Anaheim Plaza a right of first refusal to purchase the property.[FN1] In September 1998, Pyrovest agreed to sell the property to Pointe Anaheim for $35 million. Pointe Anaheim immediately assigned its rights under the agreement to HAMC Business Partners, Inc. The agreement required HAMC to deposit $1 million into escrow, per a separately-initialed liquidated damages clause. (See Civ.Code, § 1677.) Anaheim Plaza received written notice of Pyrovest's intent to sell the property to Pointe Anaheim on October 1, 1998. By that time, HAMC had already made the required deposit into escrow.

> FN1.“[Pyrovest] shall not transfer, sell ... the [property], or any portion or interest therein, to any third person ... without first offering [Anaheim Plaza] the opportunity to acquire such interest in the [property] upon the same terms and conditions.... Such right of first refusal shall be exercised, if at all, by written notice from [Anaheim Plaza] to [Pyrovest] within fifteen (15) business days following the delivery to [Anaheim Plaza] of a written notice from [Pyrovest] specifying the terms and conditions ... and including copies of the purchase and sale documentation executed by [Pyrovest] and the prospective purchaser as of the date of the notice.”

Pyrovest's written notice to Anaheim Plaza omitted some information relevant to the proposed transaction.[FN2] For example, no mention was made that the property suffered from substantial asbestos and other environmental contamination requiring removal or abatement. Both Pyrovest and Pointe Anaheim had received reports from environmental firms suggesting the required clean-up costs would in the $1.5 million range.

> FN2. The right of first refusal set forth in the lease required Pyrovest to deliver written notice of the complete terms and conditions of any proposed sale of the property to a third party, “including copies of the purchase and sale documentation executed by [Pyrovest] and the prospective purchaser as of the date of the notice.”

On the final day of a specified 15-day window, Anaheim Plaza exercised its right of first refusal, conditioning its acceptance on receipt, and approval of the missing documentation. Six days later, Pyrovest produced most of the missing paperwork. Representing Anaheim Plaza, Tushar Patel discussed some concerns with Pyrovest President Jeff Kok and third-party broker Peter Hui during a November 3 telephone conference, including an unfavorable assessment of a late-produced settlement agreement with the Walt Disney Company and various environmental problems with the property. The

consensus was that Anaheim Plaza should drop out of the running so that Pyrovest and Pointe Anaheim could resume the original transaction. Along these lines, the parties agreed to treat the exercise of the right of first refusal as "waived" and Anaheim Plaza dropped any objections to Pyrovest resuming its negotiations with Pointe Anaheim.

Pointe Anaheim, it appears, was eager to resume its purchase of the property. Even before Anaheim Plaza bowed out of the transaction, Pointe Anaheim sent in supplemental escrow instructions requesting its escrow remain open and deposit kept on hand until the issue of Anaheim Plaza's offer was resolved. Pointe Anaheim reconfirmed its willingness to purchase the property in a December 1 letter to Pyrovest. Approximately one week later, Pointe Anaheim noted it was "ready, willing and able to consummate this transaction and looks forward to doing so in accordance with the terms of its purchase agreement...." Claiming there was some "risk" that Anaheim Plaza might try to revive its right of first refusal, Pyrovest agreed to go forward, but demanded that Pointe Anaheim complete its environmental review by February 5, 1999. Unknown to Pointe Anaheim, Anaheim Plaza had already mailed Pyrovest written notice confirming its intention to waive any right of first refusal.

***2** In September 1999, Pointe Anaheim twice offered to purchase the property, sweetening its offer with an additional $1 million. In December, Pointe Anaheim went even further offering *both* the additional funds *and* an equity interest in the property. Finally, as late as March 2000, Pointe Anaheim expressed an interest in purchasing the property on the same terms and conditions set forth in the September 15, 1998 purchase agreement.

Throughout this period, Pyrovest played Anaheim Plaza and Pointe Anaheim off against one another, presumably to induce a bidding war and drive up the potential purchase price. Pyrovest went so far as to threaten Pointe Anaheim with litigation in the event it shared any information with Anaheim Plaza regarding the sale of the property.

When the deal with Pointe Anaheim finally fell through, Pyrovest sued Anaheim Plaza, Tushar Patel, Mayur Patel, and Tarsadia Hotels for breach of contract, promissory fraud, promissory estoppel, and interference with contract.[FN3] Anaheim Plaza moved for summary judgment, claiming Pyrovest suffered no damages as a consequence of Anaheim Plaza's refusal to follow through on the exercise of its right of first refusal, noting Pointe Anaheim was, at all times, ready, willing, and able to purchase the property on the same or better terms. Anaheim Plaza also argued the liquidated damages clause was unenforceable because it never separately signed or initialed this provision.

> FN3. Mayur Patel and his wife, Kalpana, owned Anaheim Plaza, a limited liability company. Anaheim Plaza hired Tarsadia Hotels, and its CEO, Tushar Patel, to provide day-to-day management and consulting services, and maintain its financial records and books.

The trial court granted the motion, finding there was no triable issue on causation and Pyrovest "will not be able to offer proof of damages."Similarly, Pyrovest's failure to secure Anaheim Plaza's signature or initials on the liquidated damages provision doomed any possibility of recovery on that issue. Following this decision, the court granted a defense motion for attorney fees pursuant to a provision in the purchase agreement. (See Civ.Code, § 1717.) Anaheim Plaza received $11,463.87 in costs and $262,799.19 in attorney fees.

II

[1] Pyrovest attacks the order granting Anaheim Plaza's motion for summary judgment, claiming there were triable issues of fact on the issues of causation and damages. The trial court found Pyrovest failed to raise a triable issue as to the existence of a ready, willing, and able purchaser for the property, and there was no evidence it had suffered any damages. Our review of the record

confirms this analysis and we affirm.

On an appeal from an order granting summary judgment, we review the record de novo to determine whether the moving parties have conclusively proved that under no hypotheses is there a material issue of fact requiring a trial. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673-674, 25 Cal.Rptr.2d 137, 863 P.2d 207.)Along these lines, we note " 'the declarations and evidence offered in opposition to the motion *must* be *liberally* construed, while the moving party's evidence must be construed *strictly*, in determining a "triable issue" of fact.' " (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839, 89 Cal.Rptr.2d 540.)Anaheim Plaza, as the moving party, bore the initial burden to show the undisputed facts supported each element of their affirmative defense. (*Vahle v. Barwick* (2001) 93 Cal.App.4th 1323, 1328, 113 Cal.Rptr.2d 793.)Anaheim Plaza's showing on the issues of causation and damages shifted the burden to Pyrovest to raise a triable issue of material fact.

***3** Pyrovest devotes considerable time and space in its briefs to what is in effect a "red-herring," at least as far as the issues of causation and damages are concerned: Its ability to recover "benefit of the bargain" damages under Civil Code section 3307. True, the "measure of damages for the buyer's breach of an agreement to purchase real property is 'the amount which would have been due to the seller under the contract over the value of the property to him or her, consequential damages according to proof, and interest.'[Citation.] In practice, however, the seller's damages may be limited because he or she cannot recover ' "loss of bargain" damages if the property is worth more than the sale price when the buyer breaches, *or if the value exceeds the sale price at or before the time of the trial.*'(1 Cal. Real Property Sales Transactions (Cont.Ed.Bar 3d ed. 1998) The Purchase and Sale Agreement, § 4.128, p. 381; *Spurgeon v. Drumheller* (1985) 174 Cal.App.3d 659, 664, 220 Cal.Rptr. 195....)" (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1278, 114 Cal.Rptr.2d 898, italics added.) Here, the undisputed evidence showed another prospective purchaser, Pointe Anaheim, was ready, willing, and able to purchase the property for a sum greater than the contract price. Accordingly, there was no basis for Pyrovest to recover benefit of the bargain damages under Civil Code section 3307.

Pyrovest's failure to timely mitigate its damages is also fatal on this point. As *Spurgeon v. Drumheller, supra,* 174 Cal.App.3d 659, 220 Cal.Rptr. 195 explains, "the law imposes on the seller of the property the duty to exercise diligence and to make a resale within the shortest time possible." (*Id.* at p. 665, 220 Cal.Rptr. 195; compare *Royer v. Carter* (1951) 37 Cal.2d 544, 549, 233 P.2d 539 and *Van Buskirk v. McClenahan* (1958) 163 Cal.App.2d 633, 638, 329 P.2d 924 [reasonable diligence provisions of Civil Code section 3353 only apply to sales of personal property] with *Sutter v. Madrin* (1969) 269 Cal.App.2d 161, 169, 74 Cal.Rptr. 627 ["the requirement that such sales must be made 'with reasonable diligence' states a policy applicable to resales of real property"].)

Here, Anaheim Plaza offered evidence to show another prospective purchaser, Pointe Anaheim, stood ready to purchase the property for a sum $1 million in excess of the contract price. In his deposition, Pyrovest attorney Joel Kew confirmed there were no "ongoing attempts" to sell the property after January 1999. Asked whether there had been any "further attempt to sell the property" after the deal with Point Anaheim fell through, Kew responded "[T]o my knowledge, my client has not actively marketed the property, no."

To raise a triable issue on this point, Pyrovest relies on the following portion of a declaration submitted by Kew in opposition to the summary judgment motion: "Following defendants' breach, plaintiffs have continued to *receive and respond to* offers to purchase the property."(Italics added.) But Pyrovest's willingness to *receive* offers has no bearing on its own efforts to *market* the property. Be-

cause the evidence showed Pyrovest did not satisfy its duty to mitigate, it cannot maintain an action for damages.

***4** We turn next to the issue of causation, an essential element of each cause of action set forth in the complaint. Apart from a general and conclusory statement in counsel's declaration, Pyrovest offered no credible evidence to dispute the notion that a ready, willing, and able buyer (Pointe Anaheim) was at all times waiting in the wings to consummate the purchase. Even after Anaheim Plaza exercised its right of first refusal, Pointe Anaheim left its initial $1 million deposit in escrow and urged Pyrovest not to give up on its proposal. A short time after Anaheim Plaza backed out of the deal, it urged Pyrovest to go ahead and sell the property to Pointe Anaheim, explicitly waiving any right to a future purchase. In fact, as late as March 30, 2000, Pointe Anaheim was still willing and able to go through with its original proposal for the purchase of the property. Anaheim Plaza's showing was more than sufficient to shift the burden to Pyrovest to raise a triable fact on the issue of causation.

Pyrovest did not satisfy its obligations in this regard. According to Pyrovest, Pointe Anaheim's offers were all contingent on its ability to secure financing from the City of Anaheim, i.e., some form of sales tax rebate. But there was no credible evidence of any "financial contingency" preventing Pointe Anaheim from going forward with the purchase of the property. To bolster its case, Pyrovest submitted a declaration from Attorney Kew, stating the only "credible" prospective purchaser (i.e., the only entity able to purchase without assistance from the City of Anaheim) was the Walt Disney Company. The problem with Kew's declaration was that it was in direct conflict with his earlier deposition testimony, where he conceded *anyone* with $35 million could purchase the property. (See *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860, 84 Cal.Rptr.2d 157 [" 'A party cannot create an issue of fact by a declaration which contradicts his prior [discovery responses]. [Citation.] In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party' "], original brackets.) On the other hand, the deposition testimony of Pointe Anaheim representative David Rose confirmed Pointe Anaheim's ability to finance the purchase was *not* contingent on its " '*ability to get participation from the City* ' " and Point Anaheim had access to sufficient funding to buy the property outright. (Original italics.)

Pyrovest also claims Anaheim Plaza never furnished written notice of its intention to waive the right of first refusal. Not so. In a letter faxed and mailed to Pyrovest on November 25, 1998, Anaheim Plaza offered to "waive any further Right in connection with the Pointe Anaheim [deal], no matter when it closes, or whether there are subsequent modifications to its terms...."FN4

> FN4. Section XXI, subparagraph 21.1(b), of the agreement, entitled "RIGHT OF FIRST REFUSAL," specifies that "If Lessee does not elect to accept any offer to it pursuant to the terms of this Lease ... it shall thereafter execute and deliver, upon request, any document or documents reasonably necessary to enable Lessor to make any transfer permitted under this Section 21.1 free and clear of any right of first refusal, including the execution and delivery of a quitclaim deed."

[2] Turning to the issue of the liquidated damages clause, we reach the same conclusion. The undisputed evidence shows Anaheim Plaza never separately signed or initialed this provision, as required by California law. (See Civ.Code, § 1677 ["A provision in a contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to complete the purchase of the property is invalid unless: [¶] (a) The provision is separately signed or initialed by each party to the contract ..."].) Pyrovest's bare contention that Anaheim

Plaza simply "stepped into Pointe Anaheim's shoes" will not carry the day on this point.

***5** Viewed from any angle, we are drawn to the same conclusion. Pyrovest's failure to raise a triable issue is fatal to its appeal. There are no grounds for reversal.

III

Pyrovest also attacks the order granting Tarsadia Hotels and Mayur Patel's summary adjudication motions.FN5 Neither defendant had signed a contract with Pyrovest, and their liability was premised on an alter ego theory. Both defendants filed separate motions for summary adjudication on the breach of contract and promissory estoppel causes of action, claiming they were not alter egos of Anaheim Plaza as a matter of law.

> FN5. Curiously, after the trial court granted summary judgment, it issued a minute order containing the following notation: "Off the record-Motion for Summary Adjudication filed by defendants Tarsadia Hotels and Mayur Patel is granted."Both defendants were moving parties in the earlier granted summary judgment motion, and no doubt had filed separate motions for summary adjudication out of an abundance of caution, i.e., to cover their bases in the event the summary judgment motion was denied.

The matter is easily resolved. Our decision to affirm the order granting summary judgment for *all* of the defendants renders the rulings on the issues raised in the separate summary adjudication motions moot. (See *Petersen v. Securities Settlement Corp.* (1991) 226 Cal.App.3d 1445, 1450, fn. 3, 277 Cal.Rptr. 468.)

IV

[3] In a consolidated appeal (G029127), Pyrovest challenges an order granting Anaheim Plaza the attorney fees it incurred in this litigation, claiming any fee award was premature pending a final disposition of the issues raised in Anaheim Plaza's unresolved cross-complaint. (See, e.g., *Day v. Papadakis* (1991) 231 Cal.App.3d 503, 514, 282 Cal.Rptr. 548, disapproved on another ground in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, fn. 11, 29 Cal.Rptr.2d 804, 872 P.2d 143.)Should Pyrovest emerge victorious in that battle, we are told, there may be no prevailing party for purposes of a fee award.

In cases involving cross-actions, no appeal is permitted until the entry of a final judgment resolving all the issues between the cross-complaining parties: "Thus, when a judgment resolves a complaint, but does not dispose of a cross-complaint pending between the same parties, the judgment is not final and thus not appealable."(*Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 698, 86 Cal.Rptr.2d 657.)But exceptions exist where the cross-complaint can be deemed abandoned due to party inaction (*Roy Brothers Drilling Co. v. Jones* (1981) 123 Cal.App.3d 175, 180, 176 Cal.Rptr. 449) or where "the order on summary judgment effectively disposed of the issues raised by [the pending] cross-complaint...." (*Swain v. California Cas. Ins. Co.* (2002) 99 Cal.App.4th 1, 6, 120 Cal.Rptr.2d 808.)In these circumstances, the appellate court can amend the judgment to dispose of the cross-complaint, perfecting the right to appeal from what is then the "final" judgment. (*Ibid.*)

Such is the case here. In its brief, Anaheim Plaza notes the issues framed in its cross-complaint were raised in purely defensive fashion, to protect itself in the event the order granting summary judgment was reversed. Exactly no action has been taken to prosecute the cross-complaint, Anaheim Plaza going so far to obtain an order purporting to "stay" that action pending the final resolution of this appeal. Accordingly, we direct that the judgment be amended to reflect that the cross-complaint has been deemed abandoned and to dispose of the

cross-complaint as well as the complaint. As amended, the appeal is properly taken from a final, appealable judgment.

***6** Turning to the merits, we note the bulk of Pyrovest's opening brief on the fee issue is nothing more than a lengthy rehash of its attack on the propriety of the order granting Anaheim Plaza's motion for summary judgment. We decline the invitation to revisit these arguments.

V

Anaheim Plaza informs us that its cross-appeal, in which it argues the trial court erred in denying, among other things, its motion to strike the liquidated damages claim and request for leave to amend its cross-complaint, is protective only and that we should address it only if we reverse the judgment on Pyrovest's appeal. No more need be said on this point.

The judgment is amended to include the following language: “It is further ordered, adjudged and decreed that cross-complainants take nothing by way of their cross-complaint.”In all other respects, the judgment is affirmed. Respondents shall recover their costs on appeal.

WE CONCUR: RYLAARSDAM, Acting P.J., and BEDSWORTH, J.
Cal.App. 4 Dist.,2003.
Pyrovest Corp. v. Anaheim Plaza, LLC
Not Reported in Cal.Rptr.2d, 2003 WL 360038 (Cal.App. 4 Dist.)

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