Perlegos v. Frontier Land Cos.

Court of Appeal of California, Third Appellate District
September 3, ***2009***, Filed
C054852

Reporter: 2009 Cal. App. Unpub. LEXIS 7158; 2009 WL 2836789

GEORGIA PERLEGOS et al., Plaintiffs, Cross-defendants and Appellants, v. FRONTIER LAND COMPANIES, Defendant, Cross-complainant and Respondent.

Prior History: **[*1]** Superior Court of San Joaquin County, No. CV028465.

Core Terms

finished, close of escrow, trial court, specific performance, subdivision map, the Map Act, rescission, reasonable time, deposit, escrow, parcel, purchase price, subdivided, final subdivision map, extrinsic evidence, free and clear, non-premium, annexation, convey, void, reasonably susceptible, parol evidence, parcel map, equitable, acre, title to a lot, single-family, ambiguous, homesites, seller

Judges: BUTZ, J. We concur: SCOTLAND, P. J., BLEASE, J.

Opinion by: BUTZ

Opinion

This action arises from a written contract between plaintiffs, cross-defendants and appellants Georgia Perlegos, John L. Perlegos and Jeff L. Perlegos (the Perlegoses) to sell approximately 50 acres of undeveloped land to defendant, cross-complainant and respondent Frontier Land Companies (Frontier). In addition to paying a per-acre price for the land in multiple escrow stages, the agreement called for Frontier to convey to the Perlegoses clear title to a single, standard ″finished″ lot within the purchased parcel.

The Perlegoses refused to go through with the sale and brought this action for rescission based on a number of different theories. Frontier cross-complained for specific performance. The trial court found in favor of Frontier and ordered specific performance of the contract.

On this appeal, the Perlegoses raise several assignments of error, all of which center around the claim that the single-lot facet of the agreement violated the Subdivision Map Act (Map Act) (*Gov. Code, § 66410 et seq.*). [1] The Perlegoses claim this violation rendered the entire contract void, and that the **[*2]** only proper judgment in this case was rescission.

We will reject the Perlegoses' various assignments of error and conclude that the trial court properly exercised its equitable powers in granting specific performance. We shall affirm the judgment.

FACTUAL [2] AND PROCEDURAL BACKGROUND

Prior relationship of the parties

Plaintiffs are three individuals: Georgia Perlegos and her adult sons John and Jeff Perlegos. All three are knowledgeable and sophisticated in real estate matters. Frontier is a real estate company that has built high-quality residential homes throughout the Central Valley.

In 1977, Georgia Perlegos, along with her late husband, acquired 49.9 acres of undeveloped land in the northwest corner of Lower Sacramento Road and Sargent Road in Lodi (Sargent property). In 1999, Frontier expressed interest in purchasing the Sargent property. However, the Perlegoses were not interested in selling at that time.

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[1] Undesignated statutory references are to the Government Code.

[2] In accordance with settled principles of appellate review (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429), our statement of facts is derived primarily from the trial court's statement of decision.

Before entering **[*3]** into the contract that is the subject of this action, the Perlegoses and Frontier had other real estate dealings. Between November 1999 and April 2000, the Perlegoses and Frontier negotiated the sale of an 11.5 acre parcel known as the Cherokee property for approximately $ 1.2 million. The ″Cherokee Agreement″ was signed in May 2000 and escrow closed in October 2001. Pursuant to the Cherokee Agreement, Jeff and John Perlegos purchased back single finished lots on Creekside Drive, while Georgia Perlegos purchased a house next door that was custom built by Frontier.

The ″Sargent Agreement″

In April 2002, the parties renewed discussions on Frontier's prospective purchase of the Sargent property. The Perlegoses indicated they would be willing to sell the land for $ 130,000 per acre. Frontier's president, Thomas Doucette, told the Perlegoses it would take four years to close escrow. The Perlegoses requested that Frontier reserve a lot in Frontier's development, to be transferred to them when it was entitled and improved to a finished condition. Doucette promised to insert such a provision, using the Cherokee Agreement as a template.

The contract for the sale of the Sargent property (Sargent **[*4]** Agreement) was drafted by Attorney John Gibson, general counsel for Frontier. The Perlegoses asked for several changes to the draft before it was signed. Frontier made every change requested by them.

The Sargent Agreement, dated May 22, 2002, calls for the closing of escrow in stages, with final closing on May 31, 2006. Under the heading ″Purchase Price,″ paragraph 2 recites that Frontier is to furnish the following consideration: (a) $ 130,000 per acre payable in cash at the close of each escrow; and ″(b) Free and clear title to a standard interior (non-premium) single[-]family lot to be finished by Frontier[] (at Frontier['s] expense) and to be selected prior to the (last) close of escrow at the sole determination of [the] Perlegos[es].″

The contract called for a two-month ″feasibility period,″ during which Frontier would conduct an investigation, ″concerning the use, sale, development or suitability of the Property,″ and ″may investigate appropriate capital and construction loan commitment sources for the acquisition, development and build-out of the Property.″ Frontier could cancel the sale and escrow if, prior to the expiration of the feasibility period, it discovered facts adversely **[*5]** affecting its ability to develop the property.

Paragraph 8 provided that Frontier would process, at its discretion, all necessary applications, including subdivision maps and other entitlements, for the purpose of developing the property into single-family homesites.

The Sargent Agreement required an initial deposit of $ 100,000, another $ 100,000 deposit following successful annexation of the Sargent property into the City of Lodi, and the balance of the purchase price (crediting the deposit on a per-acre, pro rata basis) at the close of each escrow.

Post-contract events

In May 2002, Frontier deposited the first $ 100,000 into escrow; the deposit was released to the Perlegoses in July of 2002.

Frontier thereafter applied to the City of Lodi to annex the Sargent property and submitted development applications, but ran into significant administrative delays. Frontier submitted its annexation application in May 2004, but the State of California had not yet approved the City of Lodi's updated Housing Element to the General Plan. Although changes in city administrative personnel further delayed the processing of Frontier's applications, Frontier diligently pursued applications for annexation **[*6]** and development throughout 2004 and 2005. Frontier's president estimated that, at the time of trial, Frontier was approximately a year away from recording a final subdivision map, although the process could take longer.

In April 2006, Frontier offered the Perlegoses their choice of lots pursuant to paragraph 2(b) of the Sargent Agreement, but they refused, advising Frontier they were under no obligation to make the selection.

Litigation and judgment

On January 27, 2006, four months prior to the scheduled last close of escrow, the Perlegoses filed suit against Frontier for rescission of the Sargent Agreement based on unilateral mistake of fact, fraud and failure of consideration. Frontier filed a cross-complaint for specific performance of the Sargent Agreement.

In their first amended complaint, the Perlegoses prayed for rescission of the contract on theories of fraud and unilateral mistake of fact, alleging that Frontier made misrepresentations and concealed material facts to induce the Perlegoses to enter into the Sargent Agreement. These claims were all resolved adversely to the Perlegoses by the trial court, and its findings thereon are not challenged here.

The Perlegoses' third cause **[*7]** of action for rescission, based on failure of consideration, avers that Frontier's failure promptly to seek subdivision and annexation of the Sargent property prevents them from receiving ″free and clear title″ to the lot of their choice prior to close of escrow, ″since no such lot exists.″ At trial, the Perlegoses refined this theory to embrace the position that the contract could not be performed without violating the Map Act.

The case was tried by the court, sitting without a jury. The trial court gave judgment of specific performance in

favor of Frontier. The court rejected the Perlegoses' claim that the contract violated the Map Act because (1) the Sargent Agreement is not an agreement by Frontier to sell property for which a subdivision map was required; (2) even if the Map Act applied, the contract did not violate it because it was expressly conditioned on Frontier's obligation to deliver a ″finished lot″ to the Perlegoses, i.e., one which is described in a recorded map; and (3) in any event, the provision for transfer of the single finished lot to the Perlegoses was not a material part of the contract and was capable of severance. Thus, even if enforcement of paragraph 2(b) **[*8]** did result in a Map Act violation, the interests of justice would require that it be severed from the remainder of the agreement on condition that Frontier compensate the Perlegoses for the failure to provide the finished lot.

The judgment of specific performance orders the Perlegoses to transfer title to the entire Sargent property to Frontier; for Frontier to transfer free and clear title to a standard non-premium lot to the Perlegoses within a reasonable time after close of escrow; and for the Perlegoses to select the lot from among those offered by Frontier within 30 days from the filing of an approved subdivision map.

The Perlegoses appeal from the judgment.

DISCUSSION

I. Principles of Review

The Perlegoses' various assignments of error require us to interpret the Sargent Agreement. Our inquiry is governed by settled principles of review.

In interpreting a contract, a court must ″give effect to the mutual intention of the parties as it existed at the time of contracting.″ (*Civ. Code, § 1636*.) If a contract is written, that intention must be determined from the written language alone, if possible. (*Civ. Code, § 1639*.) In certain circumstances, parol evidence can be admitted to interpret **[*9]** an ambiguous written agreement. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 (*Winet*).) The test of whether parol evidence is admissible to construe ambiguous language is not whether the language appears to a court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is reasonably susceptible. (*Ibid.*) The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine whether the language is ambiguous, i.e., whether the language is ″reasonably susceptible″ to the interpretation urged by a party. (*Ibid.*) If the language is not reasonably susceptible to the interpretation advanced by a party, the parol evidence is not relevant, and the contract is construed without it. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393.) However if, in light of the extrinsic evidence, the court decides the language is ″reasonably susceptible″ to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the contract. (*Winet, supra,* 4 Cal.App.4th at p. 1165.)

On **[*10]** appeal, the trial court's threshold determination of ″ambiguity,″ i.e., whether contract language is reasonably susceptible to a given interpretation, is a question of law subject to independent review. (*Winet, supra,* 4 Cal.App.4th at p. 1165.) The second step, the ultimate construction of a contract, is subject to differing standards of review depending on the parol evidence used to interpret the contract. When competent extrinsic evidence is in conflict, a reasonable construction of an agreement by the court or a jury will be upheld so long as it is supported by substantial evidence. (*Id.* at pp. 1165-1166; *Curry v. Moody* (1995) 40 Cal.App.4th 1547, 1552-1553.) However, when no parol evidence is introduced or when the competent parol evidence does not conflict, the construction of a contract presents a question of law, subject to independent review. (*Winet,* at p. 1166.)

II. Violation of the Map Act

The Perlegoses' primary contention is that the trial court specifically enforced a contract that was void because it violated the Map Act. ″The Subdivision Map Act is 'the primary regulatory control' governing the subdivision of real property in California.″ (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 996-997 **[*11]** (*Gardner*).) When ″a landowner wishes to subdivide its property, the proposed subdivision must be consistent with applicable zoning ordinances and the landowner must comply with [the Map Act].″ (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1197.)

″As used in the [Map] Act, 'subdivision' means 'the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future.' (§ 66424.) Ordinarily, subdivision under the [Map] Act may be lawfully accomplished only by obtaining local approval and recordation of a tentative and final map pursuant to section 66426, when five or more parcels are involved, or a parcel map pursuant to section 66428 when four or fewer parcels are involved. [Citation.] A local agency will approve a tentative and final map or a parcel map only after extensive review of the proposed subdivision and consideration of such matters as the property's suitability for development, the adequacy of roads, sewer, drainage, and other services, **[*12]** the preservation of agricultural lands and sensitive natural resources, and dedication issues. (See, e.g., §§ 66451-66451.7, 66452-66452.13, 66453-66472.1, 66473-66474.10, 66475-66478.)″ (*Gardner, supra,* 29 Cal.4th at p. 997.)

Section 66499.30, subdivision (b) (hereafter section 66499.30(b)) provides that ″No person shall *sell,* lease or finance any parcel or parcels of real property or commence construction of any building for sale, lease or financing thereon, . . . or allow occupancy thereof, for which a parcel map is required by this division or local ordinance, until the parcel map thereof in full compliance with this division and any local ordinance has been filed for record by the recorder of the county in which any portion of the subdivision is located.″ (Italics added.) An exception to this prohibition is set forth in section 66499.30, subdivision (e), which provides: ″Nothing contained in subdivisions (a) and (b) shall be deemed to prohibit an offer or contract to sell, . . . real property or to construct improvements thereon where the sale, . . . or the commencement of construction, is expressly conditioned upon the approval and filing of a final subdivision map or parcel map, **[*13]** as required under this division.″

The Perlegoses contend that paragraph 2 of the Sargent Agreement contemplates a transfer in violation of the Map Act, since it does not require Frontier to deliver to the Perlegoses title to a lot that complies with section 66499.30(b), nor was the sale ″expressly conditioned″ on the transfer of a legally subdivided lot prior to close of escrow. (§ 66499.30, subd. (e).) In their view, this case is on all fours with *Black Hills Investments, Inc. v. Albertson's, Inc.* (2007) 146 Cal.App.4th 883 (*Black Hills*), in which the appellate court declared that a contract for the sale of two subdivided parcels, which gave the seller the option of terminating it without liability if it did not receive subdivision map approval prior to close of escrow, was not ″expressly conditioned″ on a recorded map and therefore void for noncompliance with the Map Act. (*Black Hills,* at pp. 892-895.)

Paragraph 2 of the contract calls for Frontier to tender to the Perlegoses the following consideration in exchange for the 50-acre parcel: (a) $ 130,000 per acre, payable in cash at the close of each of several stages of escrow, and (b) ″Free and clear title″ to a standard (non-premium) **[*14]** lot, to be finished by Frontier at its own expense and to be selected by the Perlegoses prior to close of the last escrow.

We shall assume the Perlegoses have standing to raise the Map Act as a defense notwithstanding their putative status as sellers of the Sargent property rather than buyers. (See *Sixells, LLC v. Cannery Business Park* (2008) 170 Cal.App.4th 648, 654 [goals of the Map Act are ″broader than simply protecting the individual real estate buyer″ and include ″encourag[ing] orderly community development and prevent[ing] undue burdens on the public″]; *Pratt v. Adams* (1964) 229 Cal.App.2d 602, 605-606 [goal of the Map Act is ″to prevent fraud and exploitation″ and ″to protect both public and purchaser″].)

Nevertheless, we must uphold the trial court's finding that the contract falls within the statutory exception created by section 66499.30, subdivision (e), which authorizes a ″contract to sell . . . real property . . . where the sale . . . is expressly *conditioned* upon the approval and filing of a final subdivision map or parcel map, as required under this division.″ (Italics added.) This is so for a number of reasons.

First, paragraph 2(b) of the Sargent Agreement requires Frontier **[*15]** to deliver ″free and clear title″ to a single-family lot ″to be *finished* by Frontier[] (at Frontier['s] expense)″ and selected prior to close of escrow. (Italics added.) The word ″finished″ is a term of art not readily understood by laypersons. Consequently, the trial court properly admitted expert testimony to aid in its interpretation. Each party's expert described a ″finished lot″ in identical terms. The Perlegoses' expert, Richard Oliver, characterized a finished lot as a ″legal lot,″ one ″you could build a home on,″ and that has been approved by the local jurisdiction with a recorded final subdivision map. Frontier's counsel, Gibson, described it as one that ″has received all of the discretionary and required approvals by the governmental agencies, and that [] culminates in a final map which is then recorded,″ so that the buyer could ″go down and pull a building permit.″ Thus, expert testimony confirmed that the contract called for the transfer of a Map Act-compliant lot.

Second, both the contract language and extrinsic testimony establish that the chief object of the Sargent Agreement was to enable Frontier to subdivide, entitle, and develop homesites on the Sargent property. **[*16]** The agreement calls for an initial two-month feasibility study, during which Frontier would investigate the suitability of the property for development giving it the right to cancel if it determined its ability to sell new homes would be adversely impaired. Frontier was obliged to proceed with an application for annexation of the property into the City of Lodi. The contract permitted it to seek one or more tentative and final subdivision maps, including ″application for building allocations for developing the Property into single[-]family homesites *following the close of escrow.*″ (Italics added.) And, as the trial court found, following the execution of the contract, Frontier, in good faith, ″devoted substantial time and expense to comply with all of the regulatory requirements for the subdivision and development of the Sargent Property,″ and was ″very close to obtaining the entitlements it seeks for the Sargent Property.″

Thus, the Sargent Agreement did not violate the prohibition of section 66499.30(b) because the ″sale″ (i.e., transfer) of the standard non-premium lot to the Perlegoses was predicated on it being ″finished,″ i.e., improved with a recorded subdivision map.

In challenging **[*17]** this conclusion, the Perlegoses raise a number of objections, none of which are convincing. First, they say the recording of a subdivision map is not an express condition, because the contract only calls for a lot ″to be finished,″ not one that is finished.

However, the phrase ″to be finished″ is consistent with the parties' intent, as evidenced by the terms of the contract and their conduct. Paragraph 2(b) calls for the lot ″to be finished″ (without specifying when), but specifies that the Perlegoses select the lot prior to close of escrow. This wording indicates that the *selection* would take place before close of escrow but leaves open the possibility that recordation of the final map might not occur until sometime later. Thus, the contract is subject to an interpretation that Frontier might not have completed the cumbersome process of obtaining all desired entitlements for the Sargent property before the close of escrow, but that the lot chosen by the Perlegoses under paragraph 2(b) would not be conveyed to them until after it was ″finished.″ As Attorney Gibson testified, ″I would never have drafted an agreement where we were going to try to supervise some illegal piece of dirt, **[*18]** nor would I expect the Perlegos[es] to accept a piece of dirt that was not legal. You note the phrase 'free and clear title.' The significance of that was that our duty is to transfer title that is without encumbrance and without a cloud.″ Any attempt to transfer a lot that was not legally subdivided, Gibson explained, would expose both the Perlegoses and Frontier to sanctions by the Department of Real Estate for violating the Map Act. Accordingly, the phrase ″to be finished,″ meant ″it is going to be a legal lot before we part with it, and, therefore, transfer it to [the] Perlegos[es].″

This construction is also supported by the principle that, where two interpretations of a contract are reasonable, courts are bound to give effect to the one that ″'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.'″ (*Robbins v. Pacific Eastern Corp.* (1937) 8 Cal.2d 241, 273, quoting *Civ. Code, § 1643*; see also *Civ. Code, § 3541*; accord, *Strong v. Theis* (1986) 187 Cal.App.3d 913, 919.) The Perlegoses' interpretation of the agreement, which calls for the transfer of an unfinished and thus illegally **[*19]** subdivided lot, contravenes this maxim. On the other hand, the trial court's construction renders the contract lawful rather than void, without doing violence to the intent of the parties. Section 66499.30, subdivision (e) only requires that the ″sale″ be conditioned on the recordation of a subdivision map; it does not dictate the timing of the recordation or the transfer of title. Since the contract called for the transfer of a ″finished″ lot (i.e., one *with* a recorded final subdivision map), the Map Act was not violated.

The Perlegoses nevertheless insist that, even if paragraph 2(b) did require the transfer of a ″finished″ (i.e., legally subdivided) lot, the obligation is illusory because paragraph 8 expressly *absolved* Frontier from any duty to file a subdivision map.

Paragraph 8 reads: ″ENTITLEMENT PROCESSING. At any time following the execution of this Agreement by Frontier[] and [the] Perlegos[es], Frontier[] shall proceed at Frontier['s] cost with all necessary applications for the annexation of the Property to the City of Lodi, and *may proceed* to thereafter seek one or more Tentative and Final Subdivision Maps, all for the benefit of Frontier[], including the application for **[*20]** building allocations for developing the Property into single[-]family homesites following the close of escrow, along with any other entitlements sought by Frontier[] *in its sole discretion.* Notwithstanding the foregoing, any required or optional entitlements sought by Frontier[] are *not guaranteed* even though Frontier[] will use appropriate efforts to seek such entitlements as it sees fit.″ (Italics added.)

Based on the italicized language, the Perlegoses assert that whatever obligation paragraph 2(b) imposed to convey a finished lot to them, paragraph 8 removes, by making the filing of a subdivision map optional and discretionary with Frontier. Thus, the Perlegoses reason, the Sargent Agreement suffers from the same defect as the contract in *Black Hills,* which conditioned the sale on a recorded subdivision map but gave the seller the unilateral right to terminate the contract without liability if it could not obtain the map or waived the condition in writing. (*Black Hills, supra,* 146 Cal.App.4th at pp. 893-894.)

Black Hills is distinguishable because, in that case, the clause giving the seller the right to cancel specifically referred to the two parcels being sold. (*Black Hills, supra,* 146 Cal.App.4th at p. 893.) **[*21]** Nothing in paragraph 8 mentions the lot to be transferred to the Perlegoses. In fact, paragraph 2(b) and paragraph 8 speak to different subjects. Paragraph 2(b) refers to the single lot to be finished by Frontier and conveyed to the Perlegoses. Paragraph 8 speaks to ″entitlement processing″ with respect to the entire 50-acre tract for the purpose of ″developing the Property into single[-]family homesites.″ As Attorney Gibson explained, he inserted the clause to foreclose any claim by the Perlegoses that Frontier was guaranteeing specific entitlements for the entire tract, even if the contract fell out of escrow. ″I'm trying to walk the line between an expectation on the part of the seller[, the Perlegoses], that somehow Frontier[] was going to get entitlements whether or not we were going to purchase the property, in a generic sense or general sense, versus the requirement in paragraph [2(b)], that we have to turn over a finished lot to them.″ Gibson clarified that paragraph 8 was, in no way, intended to eliminate Frontier's duty to ″deliver that finished lot to [the Perlegoses].″

Even an outright inconsistency between paragraph 2(b) and paragraph 8 would not render the contract void. **[*22]** ″[U]nder well[-]established principles of contract interpretation, when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision.″ (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1235, citing *Code Civ. Proc., § 1859*; see also *Loughrin v. Superior Court* (1993) 15 Cal.App.4th 1188,

1195-1196.) ″The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.″ (*Civ. Code, § 1641*.) ″[W]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.″ (*Code Civ. Proc., § 1858*; see *Loughrin, supra,* 15 Cal.App.4th at pp. 1195-1196.) A common sense application of these principles dictates that, while paragraph 8 relieved Frontier from guaranteeing entitlements as to the *entire 50-acre tract,* it was still required, under paragraph 2(b), to transfer to the Perlegoses a finished (legally subdivided) standard lot. We therefore reject the Perlegoses' contention that paragraph 8 renders the entire agreement void.

III. Failure of Consideration

The Perlegoses **[*23]** argue that the trial court erred in failing to order rescission of the contract because the evidence showed Frontier was unable to deliver a standard non-premium legal lot prior to close of escrow. They claim that the *only* reasonable interpretation of the Sargent Agreement is that they would receive the finished lot by the close of escrow, and therefore the court's specific performance decree was fatally infirm in ordering the transfer to take place at some ″reasonable time″ afterward. We disagree.

There is no dispute that Frontier had not obtained a subdivision map for the property by the date recited in the contract for close of escrow. However, the trial court found that the contract did not *require* that the finished lot be conveyed prior to close of escrow, but rather contemplated its transfer within a reasonable time after Frontier acquired title to the 50-acre parcel. That is a reasonable interpretation of the contract.

Although paragraph 2(b) called for the Perlegoses to *select* a lot prior to close of escrow, it did not specify when ″free and clear″ title to the standard non-premium lot would be transferred to them. It is a cardinal principle of interpretation that ″[i]f no time **[*24]** is specified for the performance of an act required to be performed, a reasonable time is allowed.″ (*Civ. Code, § 1657*.) ″This rule is as applicable to a contract for the sale of real estate as to any other contract.″ (*Henry v. Sharma* (1984) 154 Cal.App.3d 665, 669 (*Henry*).)

Second, as we have indicated, the extrinsic evidence surrounding the agreement showed the parties were aware of the significant hurdles that Frontier might encounter in entitling the Sargent property and being able to deliver a finished lot. Understandably then, the language of the contract was silent as to when the transfer would take place. To illustrate, suppose Frontier were a manufacturer of custom-built cars and paragraph 2(b) called for the Perlegoses to receive a custom automobile ″to be built″ by Frontier and ″selected″ prior to close of escrow. It would be unreasonable to assert that the only meaning of that provision was that the car had to be built *and delivered* to the buyer prior to closing. Likewise, it is unreasonable to insist, as the Perlegoses do, that the *only* meaning of which paragraph 2 is susceptible is that Frontier was obliged to convey a ready-to-build-on lot prior to the closing date.

We **[*25]** also reject the Perlegoses' claim that the ″plain language″ of paragraph 3(c), calling for the ″purchase price″ to be deposited into escrow, mandates that the deed to the standard lot be deposited as well, since the single-family lot is listed as part of the ″Purchase Price″ in paragraph 2(b). Paragraph 3(c) requires depositing ″the balance of the Purchase Price (taking into consideration any and all Deposit(s) *then previously made by Frontier[] on a per-acre, pro-rata [sic] basis*).″ (Italics added.) No mention of the lot transfer is made in paragraph 3(c), and the italicized language strongly suggests that the term ″purchase price″ refers solely to the money consideration paid by Frontier. At the least, paragraph 3(c) is reasonably susceptible to a different interpretation than the one the Perlegoses put on it, and the trial court's adoption of such interpretation, based on extrinsic evidence of intent, is binding on this court. (See *Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360-361 [reviewing court defers to trial court's factual determinations if extrinsic evidence is in conflict or does not eliminate an ambiguity]; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § **[*26]** 365, pp. 421-422 [where extrinsic evidence has been properly admitted and is in conflict, any reasonable construction by the trial court will be upheld under the general rule of conflicting evidence].)

Furthermore, the trial court found that the primary objective of the agreement was the sale of the 50-acre tract and that the transfer of the single lot to the Perlegoses was ″incidental″ consideration, representing only 1.5 percent of the purchase price. [3] Based on this finding, the court could conclude that it would be inequitable to cancel the Sargent Agreement solely because a single finished lot could not be delivered prior to closing. This finding is more compatible with the intent of the parties than the tail-wagging-the-dog theory espoused by the Perlegoses, that a small delay in transferring the lot should void the entire contract.

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[3] In challenging the sufficiency of the evidence to support this finding, the Perlegoses cite only their own testimony that the lot had great importance to them. This argument not only disregards the trial court's rejection of their testimony as ″wholly not credible and . . . contradicted by[] the testimonial and documentary evidence admitted at trial,″ **[*27]** but is forfeited due to the Perlegoses' failure to summarize *all* of the material evidence on the issue, not just the evidence favorable to themselves. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

The Perlegoses also claim the consideration failed because the transfer of the Sargent property, transfer of the lot and the deposit of the purchase price were all ″mutually dependent, concurrent conditions″ that had to be performed simultaneously. While that is true in the typical delivery of deed/deposit of purchase price situation (Miller & Starr, California Real Estate (Oct. 2008 rev.) (3d ed. 2000) § 1:161, pp. 676-677), paragraph 2(b), calling for the transfer of ″[f]ree and clear title″ to a single lot ″to be selected″ and then ″to be finished″ was anything but typical. As we have explained, the language of the contract, clarified by extrinsic evidence, supported the construction that Frontier could perform its obligation under paragraph 2(b) within a reasonable time after close of escrow. Where time is not expressly declared to be of the essence, a reasonable delay in performance by one party will not defeat its right to specific performance. (Miller & Starr, *supra,* at **[*28]** p. 681.) What constitutes a reasonable time for performance is a question of fact for the trial court (*Henry, supra,* 154 Cal.App.3d at p. 672), and the trial court resolved this question in Frontier's favor. [4]

Regardless of the Perlegoses' legal arguments, the trial court's refusal to grant the prayer for rescission was independently justified by its findings that the Perlegoses were equitably *precluded* from seeking that remedy. The court found that the Perlegoses' ″primary motivation in attempting to set aside the Sargent Agreement is their desire to reap an unwarranted, unjust, and inequitable windfall at the substantial expense of Frontier in disregard of Frontier's four-year effort to entitle the [p]roperty″; that they failed to raise **[*29]** any of their claims with Frontier before filing suit, thereby prejudicing Frontier; and that they were guilty of laches and unclean hands with respect to the Sargent Agreement. The sufficiency of the evidence to support these findings is not contested. [5]

Rescission is an *equitable* remedy, the benefit of which may be forfeited by a party's own inequitable conduct. (*Gill v. Rich* (2005) 128 Cal.App.4th 1254, 1264; see also *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1551-1552 [rescission is an ″equitable remedy″ and trial courts have ″broad equitable power to fashion any appropriate remedies″ to avoid ″unjust or harsh results, and adopt means to avoid them″]; *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1422 **[*30]** [*Civ. Code, § 1692* ″in essence restates the equity jurisprudence applicable in the rescission context″]; *Hicks v. Clayton* (1977) 67 Cal.App.3d 251, 265 [propriety of granting equitable relief by way of, inter alia, rescission is a matter within the trial court's discretion].)

Thus, the trial court's finding that the Perlegoses were guilty of prejudicial delay, unclean hands and other inequitable conduct with respect to the transaction constituted an independent basis for denying rescission of the Sargent Agreement, regardless of the merit of their contractual arguments. (See generally 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, §§ 6, 7, 16, pp. 286 -287, 302.)

IV. Alleged Defects in Judgment

In its judgment ordering specific performance of the Sargent Agreement, the trial court (1) ordered the Perlegoses to cooperate and execute all documents necessary to close escrow and transfer the Sargent property to Frontier; (2) ordered the Perlegoses to select a ″standard interior (non-premium) single-family lot″ from among those offered by Frontier within a reasonable time but no later than 30 days after a tentative map is approved by the City of Lodi; and (3) required Frontier to transfer **[*31]** to the Perlegoses ″free and clear title″ to the lot ″within a reasonable time after the close of Escrow and after Frontier, at its expense, has obtained final subdivision map approval and improved the [l]ot into a buildable lot.″ The Perlegoses contend this decree suffers from irremediable defects.

Initially, the Perlegoses assert that ″order of performance required by the judgment will leave [them] without recourse if Frontier fails to deliver the lot,″ since the decree only directs such delivery ″within a reasonable time″ and the evidence showed that Frontier may never have the ability to improve the lot to ″finished″ condition.

The point is unpersuasive. In its statement of decision, the court found that Frontier was ″very close″ to obtaining the entitlements it sought for the Sargent property. Moreover, as the Perlegoses admit, ″the court found one year would be a 'reasonable time' within which Frontier was required to convey 'free and clear' title to [the] lot.″ Although the court did not expressly retain jurisdiction to supervise the terms of the transfer, every court has the power to amend its orders and process to conform to law and justice (*Code Civ. Proc., § 128, subd. (a)(8)*) **[*32]** and a court of equity retains inherent au-

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[4] Assuming a transfer of the single lot were deemed a concurrent condition, the court may excuse the condition or grant equitable relief from its performance where it is ″not [a] material part of [the] agreed[-upon] exchange.″ (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 827, pp. 915-916.) By finding the single lot transfer was ″incidental″ consideration, the court impliedly found that transfer was not a material part of the exchange.

[5] In their reply brief, the Perlegoses claim we should ignore these findings, because the court stated elsewhere that it ″need not reach″ Frontier's affirmative defenses. Points raised for the first time in a reply brief may be disregarded. (*Sacramento Cable Television v. City of Sacramento* (1991) 234 Cal.App.3d 232, 244.) In any event, the court's dictum that it ″need not″ reach Frontier's affirmative defenses does not compel the conclusion that it *did not* reach them. Obviously, it did.

thority to enforce its own judgment (*Security Trust & Sav. Bank v. Southern P.R. Co.* (1935) 6 Cal.App.2d 585, 588).

The court's statement of decision gives adequate assurance that the Perlegoses are not without recourse in the event that Frontier is unable to perform its obligation to deliver the lot. The court found that the single lot transfer called for in paragraph 2(b) was severable and, if necessary, the remainder of the contract could be enforced by requiring Frontier to reimburse the Perlegoses for the value of the lot, which the court estimated at no more than $ 200,000. Accordingly, if Frontier is unable to transfer a standard finished lot to the Perlegoses within a reasonable time, the court can still enforce the Sargent Agreement on the condition that the Perlegoses be compensated for their failure to receive the lot.

Anticipating this response, the Perlegoses contend that money damages can never be an adequate remedy for their failure to receive title to the lot, citing the presumption of *Civil Code section 3387* that "breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation."

However, **[*33]** the presumption is only *conclusive* in the case of a single-family dwelling that the buyer intends to occupy; otherwise the presumption is rebuttable. [6] The lot in question was unimproved. Therefore, the trial court's finding that plaintiff Georgia Perlegos's testimony that she intended to build a "dream retirement home" on the lot was "wholly not credible," coupled with its finding that the lot transfer was only "incidental consideration," resoundingly rebutted any presumption.

In any event, *Civil Code section 3387* deals only with remedies for *breach* of contract. The court's judgment here was for specific performance. The applicable statute was *Civil Code section 3392*, which provides that specific performance cannot be ordered on behalf of a party who has not performed all covenants and conditions of the contract, **[*34]** "*except* where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, *in which case specific performance may be compelled, upon full compensation being made for the default.*" (Italics added.)

The court's findings make it clear that the Perlegoses' failure to receive the lot, if it materializes, is capable of full compensation, and therefore presents no obstacle to granting specific performance.

DISPOSITION

The judgment is affirmed. Frontier shall recover its costs on appeal. (*Cal. Rules of Court, rule 8.278(a)(1)*.)

BUTZ, J.

We concur:

SCOTLAND, P. J.

BLEASE, J.

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[6] Civil Code section 3387 provides: "It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. In the case of a single-family dwelling which the party seeking performance intends to occupy, this presumption is conclusive. In all other cases, this presumption is a presumption affecting the burden of proof."