NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

R. EARL REEDY et al.,

Plaintiffs and Appellants,

v.

ARTHUR R. SASSER et al.,

Defendants and Respondents;

C026950

(Super.Ct.No. 294882)

Plaintiffs R. Earl Reedy and Dorothy J. Reedy (the Reedys) appeal from the judgment in favor of defendants Arthur R. Sasser, and Grupe Development Associates-2 (Grupe Associates) following defendants' motions for summary judgment (Code Civ. Proc., § 437c; further section references are to the Code of Civil Procedure unless otherwise designated.)

On appeal, the Reedys contend triable issues of material fact exist as to whether defendants are obligated under contracts between the parties to pay the Reedys $285,000.

We affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Defendant Arthur R. Sasser (Sasser) had for many years been in the business of real estate sales and development. Sasser's brother-in-law,[1] plaintiff R. Earl Reedy, was also in the real estate business.

The dispute in this action involves the relationship between two written agreements involving real estate.

The Option Agreement

In the 1970s, Sasser purchased two parcels of property totaling 470 acres southwest of the city of Tracy, California, in the hope that Tracy would expand toward the southwest with the result that the property would become prime development land.

In or about early 1988, Sasser acquired an option to purchase an additional 4,730-acre parcel near the property he already owned. Around the same time, Sasser entered into a series of agreements with defendant Grupe Associates and related entities, in which Sasser granted to Grupe Associates the right or option to purchase certain of the property outside Tracy which Sasser owned or in which he held an interest.

In April 1991, Sasser and Grupe Associates entered into a written agreement entitled "Agreement for Acquisition of Option Rights" (the option agreement), which, among other things, gave Grupe Associates an option to purchase the 4,730-acre parcel from its then-current owner.

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[1] Sasser is Dorothy Reedy's brother.

Consideration to be paid to Sasser under the option agreement included several components. The purchase price included both a "fixed price" (to be paid by crediting Grupe Associates for prior advances to Sasser) and a "contingent price" of $13.5 million to be paid in cash after Grupe Associates received the various government approvals and entitlements permitting development of the proposed project. The option agreement required Grupe Associates to "use its best efforts to diligently obtain the governmental processing of the Project as needed to obtain Entitlements" which would trigger the payment to Sasser of the contingent price, but also permitted Grupe Associates to waive the requirement that all entitlements be in place before the contingent price became due.

In addition to the purchase price, the option agreement provided for a loan to Sasser (the loan), to be made in monthly advances of $30,000, up to $4.1 million.[2] The loan was evidenced by a nonrecourse, non-interest-bearing promissory note. If and when the contingent price was paid, Grupe Associates would receive a credit against the contingent price for any outstanding loan balance. If, however, the entitlements on the project were

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[2] The loan also incorporated prior advances by Grupe Associates to Sasser which are not at issue here. An amendment to the option agreement in June 1991 increased the monthly advance amount under the loan from $30,000 to $40,000 and modified provisions related to the house Sasser was to receive, but left unchanged the provisions related to the contingent price which are at issue in this action.

not obtained by June 2000, the "Sasser Loan shall be forgiven in consideration of Sasser's loss of any right to the Contingent Price."

The option agreement also contained Grupe Associates's agreement to build Sasser a house and allow him to live in it rent free for two years. If Grupe Associates obtained the entitlements which triggered payment of the contingent price, it would receive a credit equal to the value of the house against the contingent price.

The Settlement Agreement

The Reedys entered into a written contract in 1987 with Sasser and his corporation, defendant A. R. Sasser, Inc., in which the Reedys agreed to loan money to A. R. Sasser, Inc., in consideration of, among other things, a participation with Sasser in the profits realized from certain real properties he owned or controlled.

Over time, there arose a dispute between the Reedys and Sasser as to what sums Sasser owed the Reedys under their 1987 contract. In November 1991, the Reedys and Sasser agreed in writing to compromise their dispute in exchange for mutual releases and the payment to the Reedys by Sasser of $355,000 (the settlement agreement). Seventy thousand dollars of that amount was to be paid on or before the execution of the settlement agreement. The balance of $285,000 would be paid from a portion of the contingent price Sasser expected to realize under his option agreement with Grupe Associates. To that end, the settlement agreement provided:

"Payments. . . . The balance of Two Hundred and Eighty-Five Thousand Dollars ($285,000) shall be paid by Sasser to Reedy by the absolute assignment to Reedy, which is hereby made by Sasser, of Two Hundred and Eighty-Five Thousand Dollars ($285,000.00) of the amount payable to Sasser upon the obtaining of 'approvals' pursuant to that certain Agreement for Acquisition of Options Rights dated April 15, 1991, between Sasser and Grupe Development Associates-2 ('Grupe Agreement'). It is understood that such payment by Grupe Development Associates-2 to Sasser is contingent, and the payment to Reedy of the balance of Two Hundred and Eighty-Five Thousand Dollars ($285,000.00) is contingent and conditioned on said payment being made by Grupe Development Associates-2 under the Grupe Agreement. Reedy acknowledges and agrees that Sasser has not and does not make[,] covenant, represent, or warrant, expressly or impliedly that Grupe Development Associates-2 will make any contingent payment under the Grupe Agreement or duly perform thereunder and Reedy's rights to said sum shall be governed solely by his rights under the assignment provided by this Agreement."

Written notice was promptly given to Grupe Associates by Sasser that he had "made an absolute Assignment to R. Earl Reedy and to Dorothy J. Reedy, his wife ('Reedys') of the amount of Two Hundred and Eighty-Five Thousand Dollars ($285,000). This amount is assigned from the contingent payment payable to me pursuant to the Agreement for Acquisition of Option Rights between Arthur R. Sasser and Grupe Development Associates-2, dated April 15, 1991."

The Sasser Action

The condition of the real estate market and the unavailability of real estate financing for projects of the type and scope contemplated by the option agreement led Grupe Associates to notify Sasser in 1993 that it was terminating its development of the property which was the subject of the option agreement.

Sasser sued Grupe Associates and its related entities[3] for (among other things) fraud and breach of the option agreement and other agreements between Sasser and Grupe Associates (the Sasser action). Sasser alleged that Grupe Associates fraudulently represented that Sasser "would without question receive his full purchase price of $13,500,000"; unjustifiably delayed the process of obtaining the entitlements which would trigger its obligation to pay the contingent price provided in the option agreement; and breached (among other contracts) the option agreement by "failing to properly pursue the Entitlements for Tracy Hills; . . . [and] failing to make certain monthly payments" due Sasser under the option agreement and related agreements. The Sasser action also sought a judicial determination of the parties' respective rights and obligations under the option agreement. The Reedys were not parties to the Sasser action.

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[3] Other defendants named in the Sasser action were Grupe Development Company--Northern California and Grupe Ventures, Inc.

In a declaration filed in the Sasser action, Sasser averred that he and Grupe Associates always intended that his obligation under the loan would be forgiven when the transaction was completed.

Sasser's lawsuit against Grupe Associates settled. The effect of the written settlement agreement in that action was that Grupe Associates forgave the loan, reconveyed the real property security for the loan, and conveyed to Sasser a 108-acre parcel of real property. The Sasser action was dismissed with prejudice.

The Instant Lawsuit

The Reedys were never paid the $285,000 balance described in the settlement agreement.

After the Sasser's action against Grupe Associates settled, the Reedys brought the instant action against Sasser, A. R. Sasser, Inc., and Grupe Associates for breach of contract. The original complaint alleges that, by virtue of the settlement agreement, the Reedys became third party beneficiaries of the option agreement; the defendants are obliged under the settlement agreement and option agreement to pay the Reedys $285,000; and defendants' failure to do so constitutes a breach of those agreements.

The defendants filed general denials and raised various affirmative defenses.[4]

Following discovery, Grupe Associates moved for summary judgment on the grounds that (1) it cannot be required to pay the Reedys because the entitlements on the property were never obtained; hence, it never became obligated to pay the contingent price, and in fact never made any payment of the contingent price to Sasser; (2) the Reedys cannot be third party beneficiaries of the option agreement because the option agreement makes no mention of them, and expressly states to the contrary that there are no third party beneficiaries; (3) the Reedys have failed to plead an express breach of assignment, and in any event, the assignment is precluded by the "no oral modification" clause contained in the option agreement; and (4) the Reedys' claims are barred by the doctrine of res judicata by virtue of Sasser's dismissal of his action against Grupe Associates.

In support of its motion, Grupe Associates submitted the declaration of a vice president of its general partner, Douglas Unruh, who averred that "[a]t no time did [Grupe Associates] ever pay to Sasser the Contingent Payment, or any part of the Contingent Payment, because [Grupe Associates] never obtained Entitlements on the Tracy Hills Project . . . ."

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[4] No answer by A. R. Sasser, Inc., appears in the appellants' appendix.

Sasser brought a separate motion for summary judgment, in which he also averred that he never received any portion of the "contingent payments which would have been due had approvals and entitlement been received by Grupe" as contemplated by the option agreement; accordingly, he argued, no sums are due the Reedys.

The Reedys responded that their complaint competently alleges a claim for breach of assignment and argued (among other things) that there exist triable issues of fact as to whether sums advanced to Sasser under the loan after the settlement agreement in fact represent payment to Sasser of the contingency price. Specifically, they argued that Grupe Associates "made periodic payments of the contingent price through the vehicle of a sham loan. Each installment was made with no intention that Sasser would ever repay the amount and consequently the condition of obtaining entitlements was waived" by Grupe Associates.

In support of their opposition, the Reedys submitted a declaration filed by Sasser in his action against Grupe Associates in which Sasser averred as follows: "GRUPE had agreed to pay me approximately $40,000 to $45,000 per month in order to maintain my staff, office spaces and provide me with living expenses because I agreed to close my real estate business and spend my full time promoting the project toward the goal of obtaining Entitlements. Additionally, this would allow me to recoup the large sums of money I had expended over the years in pursuing my dream of seeking Tracy Hills completed. . . . [¶] Eventually, it was agreed that I would receive the aforementioned $40,000 per month payment, in addition to $4,000 at a later date

which was to compensate for the fact that Grupe never fulfilled their obligation to build a home for me in the Brookside subdivision, as stated in our written contract even after I spent approximately $40,000 of my own funds on engineering and design of the home to meet Grupe's Brookside requirements. (See below.) I reiterated that I would require at least $70,000 per month in order to meet my obligations including taxes, because the option was being picked up on the 400 acres and that would represent a taxable gain. [¶] GRUPE presented me with a plan to help me cover the taxes I would owe. Essentially, they proposed that I sign a note providing that I actually owed them the funds they had advanced to me, i.e., $40,000 per month, secured by the 34 acre parcel. According to the tax professionals present during this meeting under the scenario they contrived, no taxes would be due on the money until entitlements were obtained. GRUPE was then to forgive the note, and pay approximately 50% over the funds received by me up to that date in order to satisfy my obligation to the IRS. It was only on that basis that I agreed to give them a second deed of trust on those 34 acres. It was agreed that when the money was paid, the note would be forgiven. Further, I was assured that I could substitute security at any time, even though GRUPE had prohibited this. They now assert that I owe them $4,100,000 on an outstanding note, even though they actually advanced me less than $2,000,000 and the entire plan was designed as a subterfuge to avoid paying me the entire amount necessary to satisfy taxes." (Underscoring in original.)

The Reedys also submitted deposition testimony by Sasser's former associate, Patrick O'Brien, that the parties contemplated Sasser would not repay the loan advances; deposition testimony of a Grupe Associates representative that advances under the loan were intended to reduce the tax consequences to Sasser of the transaction with Grupe Associates; and deposition testimony of Grupe Associates's principal, Greenlaw Grupe, that he was not aware the transaction included any loan to Sasser and that, if his associates "made a loan for four million, I think it would have been brought to my attention."

Finally, the Reedys argued that triable issues of fact exist as to whether the transfer of property in settlement of Sasser's lawsuit against Grupe Associates constituted payment of the contingent price.

In reply, Grupe Associates submitted correspondence exchanged in the course of the Reedys' negotiation of the settlement agreement which informs the Reedys that "Art Sasser is not agreeable to paying any amounts to Earl Reedy from the loan payments being received by Art Sasser from Grupe Development Associates-2 ('Grupe')," and "[w]ith respect to the loan being made by Grupe to [Sasser], that money received from Grupe is a loan which is in accordance with the very documentation executed by Grupe. Contrary to any implication in your letter, monies received by Mr. Sasser are clearly loan proceeds and Grupe/Sasser documentation has been duly executed to that effect."

While defendants' motions for summary judgment were pending, the Reedys moved to amend their complaint to delete the

"erroneous legal conclusion" contained in the complaint that the Reedys are third party beneficiaries of the option agreement. They continued to maintain they were the assignees of certain of the rights set forth in the option agreement.

The trial court granted both the Reedys' motion to amend their complaint and defendants' motions for summary judgment, ruling that the contingent price -- upon which the Reedys agreed to rely for repayment of the $285,000 owed them by Sasser -- was never paid.

DISCUSSION

A motion for summary judgment is properly granted if the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (§ 437c, subd. (c).)

A defendant moving for summary judgment must show either that one or more essential elements of the plaintiff's cause of action cannot be established separately or that there is an affirmative defense which bars recovery. If the plaintiff fails in response to set forth specific facts showing a triable issue of material fact as to that cause of action or defense, summary judgment must be granted. (§ 437c, subds. (n), (o)(2).)

"Because the trial court's determination is one of law based upon the papers submitted, the appellate court must make its own independent determination regarding the construction and effect of the supporting and opposing papers. We apply the same three-step analysis required of the trial court. We begin by identifying the issues framed by the pleadings since it is these

allegations to which the motion must respond. We then determine whether the moving party's showing has established facts which justify a judgment in movant's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue." (*Hernandez* v. *Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 1279.) In the course of this analysis, we consider both the evidence submitted and "and all inferences reasonably deducible" therefrom. (§ 437c, subd. (c).)

Defendants contend they are entitled to judgment as a matter of law because the settlement agreement provides that the Reedys shall receive a portion of the $13.5 million contingent price paid by Grupe Associates to Sasser if, and only if, the contingent price were paid. Because, defendants argue, the contingent price never was paid, they never became obligated to pay the Reedys any part of the $285,000 balance under the settlement agreement.

When considering a question of contractual interpretation on summary judgment, we apply the following rules. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.) "When a contract is reduced to writing, the intention of the parties is to be ascertained from

the writing alone, if possible . . . ." (Civ. Code, § 1639; see *WYDA Associates* v. *Merner* (1996) 42 Cal.App.4th 1702, 1710.)

The settlement agreement states that Sasser shall assign to the Reedys the right to receive $285,000 "of the amount payable to Sasser upon the obtaining of 'approvals' pursuant to" the option agreement. The parties to this appeal agree this clause refers to the "contingent price" defined in the option agreement. Thereafter, express language of the settlement agreement reflects the Reedys were aware their right to receive $285,000 was conditioned on Grupe Associates paying the contingent price to Sasser, an event which the Reedys agreed was not guaranteed by Sasser or otherwise. The settlement agreement contained no alternative provision for payment of the $285,000 balance in the event Grupe Associates did not pay the contingent price described in the option agreement. The settlement agreement further states R. Earl Reedy's "rights to said sum shall be governed solely by his rights under the assignment provided by this Agreement."

The terms of the settlement agreement thus reflect without ambiguity the Reedys' agreement that, if the contingent price was never paid by Grupe Associates to Sasser, the Reedys would have no right to receive the $285,000 balance under the settlement agreement.

Defendants submitted unequivocal evidence in the form of sworn testimony by Sasser, a representative of Grupe Associates, and Sasser's former associate, O'Brien, that no part of the contingent price was ever paid. By this evidence, defendants have sustained their threshold burden of establishing that the

condition for defendants' payment to the Reedys under the settlement agreement was never satisfied and that defendants are entitled to summary judgment (§ 437c, subd. ((o)(2).) This showing shifts to the Reedys the burden of showing that a triable issue of fact exists as to whether the contingent price was paid. (§ 437c, subd. (o)(2).)

The Reedys respond by arguing that "Sasser received the contingent payments in the form of installment payments conceived as a sham loan, where the requirement for entitlements as a condition precedent were implicitly waived." Because at least a portion of the contingent price has been paid to Sasser, the Reedys argue, defendants should have paid the Reedys their $285,000 and the failure to do so is a breach of the parties' agreements.

Like the settlement agreement, we must interpret the option agreement in accordance with its clear language, so as "to give effect to the mutual intention of the parties as it existed at the time of contracting . . . ." (Civ. Code, §§ 1636, 1638.) Accordingly, we first reject the Reedys' characterization of the loan as a "sham," which they suggest was "designed to evade taxes, to also evade [Sasser's] obligations to plaintiffs." Because the option agreement and its loan provisions were executed months before the settlement agreement, they could not have been intended to assist Sasser in shirking his responsibilities under a contract not yet executed, and nothing

in the record suggests it was intended in any respect to affect the Reedys' ongoing contractual relationship with Sasser.[5]

Our review of the option agreement further compels the conclusion that the parties to that agreement did not intend that loan advances would constitute de facto payments of the contingent price. Not only is Grupe Associates's obligation to fund the loan unqualified, unlike its conditional obligation to pay the contingent price, but the option agreement provides that, should the entitlements required for development never be obtained and Grupe Associates thereafter terminate their participation in the project, advances under the loan would be forgiven "in consideration of Sasser's loss of *any right* to the Contingent Price." (Italics added.) If the parties to the option agreement had intended that the loan advances represent partial payment of the contingent price, Sasser's loss of *any right* to the contingent price would likely have required Sasser to reimburse the loan advances; in the alternative, the parties to the option agreement could have characterized events following Grupe Associates's termination of their participation in the program as Sasser's loss "of any [further] right to the Contingent Price." That is not what the option agreement

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5 At oral argument, the Reedys argued that the loan was a "sham," only to the extent it was intended to evade taxes. This argument fails to raise a triable issue as to whether advances under the loan constituted de facto payments of the contingent price.

provides. Accordingly, we reject the Reedys' assertion that the loan advances were themselves payment of the contingent price.

Our conclusion is not undermined by the fact that, had Grupe Associates obtained the requisite entitlements so as to trigger payment of the contingent price, the loan balance would have been credited against the contingent price. Grupe Associates's right under the option agreement to reduce the contingent price amount, if it had been paid, by the amounts loaned previously or otherwise paid to Sasser did not transform loan advances into "periodic payments of the contingent price to Mr. Sasser," as the Reedys argue.

Because the option agreement obligated Grupe Associates to advance Sasser money under the loan, we reject the Reedys' argument that by honoring that portion of the agreement, Grupe Associates "waived" its right to require all applicable entitlements to be in place before paying the contingent price.

In opposition to the motions for summary judgment, the Reedys submitted no direct evidence that the loan payments to Sasser were partial payment of the contingent price. They rely instead chiefly upon two pieces of evidence -- a declaration filed by Sasser in the Sasser action concerning the genesis of discussions related to the loan, and the deposition testimony of Patrick O'Brien -- which they contend demonstrate that loan advances represent periodic payments of the contingent price.

Although "[a] contract may be explained by reference to the circumstances under which it is made, and the matter to which it relates," (Civ. Code, § 1647) Sasser's explanation of the genesis

of Grupe Associates's decision to fund the loan does nothing to support the Reedys' argument that advances under the loan represent clandestine installment payments of the contingent portion of the purchase price for the property which was the subject of the option agreement. To the contrary, his declaration states the loan advances were intended principally to compensate Sasser for his time spent on the project and for the cost of the office space his work on the project required.

The deposition testimony of Patrick O'Brien provides no greater assistance to the Reedys. O'Brien, a former associate of Sasser's in the project, did not testify that advances under the loan represented payment of the contingent price. Instead, after testifying that it was his suggestion to delay Sasser's tax obligations by use of a loan, O'Brien gave the following testimony:

"Q. Was there any discussion with Grupe about whether Sasser would ever actually have to repay this loan?

"A. I think the documents speak for themselves. He was not going to have to repay that loan.

". . . . . .

"Q. Did you have a conversation with Art and the Grupe representatives that this loan would not have to be repaid, it would be forgiven?

"A. The loan -- the basis on which the loan would be forgiven would be if they filed a termination -- termination provision, or -- and I think the agreement states it. If I could review it, I could be more certain of this answer. [¶] I

believe if the event happens where the contingent price is paid, the then disbursed loan amount would have been an offset against the contingent price."

O'Brien's testimony adds nothing to the plain language of the option agreement: when the agreement was made, the parties intended that the entitlements would be obtained, the contingent price paid, and the loan balances credited toward the amounts owing under the contingent price. Not only is this conclusion unaffected by evidence that the loan was suggested as a tax-planning device, but it does not, as we explain above, mean that the parties to the option agreement intended loan advances to operate as payments of the contingent price.

This cannot be news to the Reedys. Although the Reedys assert they did not have a copy of the option agreement during the negotiations for the settlement agreement, the option agreement was a defined term in the settlement agreement and paragraph 3 of the settlement agreement, denominated "Payments," looked specifically and solely to the contingent payment provisions of the option agreement. To this extent the Reedys thus had agreed that their right to the remaining $285,000 would be governed by the terms of the option agreement. The contingent payment was the only conditional payment anticipated by the option agreement; the contingent payment was set forth in paragraph 2 of the option agreement and the loan payments to Sasser was provided for separately in paragraph 9.

In addition, during negotiations for the settlement agreement, the Reedys were made aware that at least one of the

parties to the option agreement -- Sasser -- did not regard the loan advances as payments of the contingent price. During the negotiations between Sasser and the Reedys, the Reedys asked Sasser to agree that they be permitted to recover the $285,000 balance from the loan advances they knew Sasser was receiving under the option agreement. After he refused, the Reedys agreed their recovery, if any, would depend solely on Grupe Associates's payment of the contingent price. The Reedys may not do indirectly through this litigation that which they were unable to do directly during arm's length negotiation for the settlement agreement, that is, implicate the loan payments either as a source of funds for the $285,000 portion of the settlement agreement or as a bootstrap to a claim that some portion of the contingent payment in fact was made, thereby triggering their right to payment of the $285,000.

In sum, the Reedys have not demonstrated that a triable issue of fact exists as to whether the loan advances Sasser received represented payments of the contingent price.

We also reject the Reedys' argument that property transferred to Sasser in settlement of his action against Grupe Associates constituted payment of the contingent price. As we explain above, the Reedys' right to receive the $285,000 balance owed under the settlement agreement was entirely conditioned on Grupe Associates's payment of the contingent price. It is undisputed that, according to the parties to the option agreement, no part of the contingent price was ever paid. Defendants thus never became obligated to pay the Reedys.

Finally, the Reedys argue that they had what they characterize as a "protected legal interest" in the Sasser litigation against Grupe Associates. In fact, they did not. Such an interest could have come into existence only if the contingent payment had been made. Because the payment was not made, no interest arose. The authorities upon which the Reedys rely to the contrary are inapposite.

In light of our decision that defendants are entitled to summary judgment as a matter of law for the reasons we have stated, we do not consider the alternative grounds for summary judgment advanced by defendants.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

DAVIS, Acting P.J.

SCOTLAND, J.