2d Civil No. B194349

COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GABRIEL GUERRERO,

Plaintiff, Appellant and Cross-Respondent,

vs.

CORDOVA ASSOCIATES, INC.,

Defendant, Respondent and Cross-Appellant.

Appeal from the Los Angeles Superior Court
Honorable Jane Johnson, Judge Presiding
Case No. BC329607

COMBINED RESPONDENT'S BRIEF AND CROSS-APPELLANT'S OPENING BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: **B194349**

Case Name: **Gabriel D. Guerrero v. Cordova Associates, Inc.**

Please check the applicable box:

☐ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

■ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
Henry Cordova	Owner of defendant, respondent, cross-appellant

Please attach additional sheets with Entity or Person Information if necessary.

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RESPONDENT'S BRIEF

INTRODUCTION

Appellant Gabriel Guerrero made a deal to buy some property from respondent Cordova & Associates. Cordova deposited a deed into escrow, just as called for in the escrow instructions. Guerrero was unhappy with the zoning, although that issue was not covered by the instructions. He delayed in paying the purchase price. Cordova ultimately sought to unilaterally cancel the escrow. Guerrero would not agree, but neither did he pay or tender the purchase price. Eventually, after the date for the escrow to close had come and gone without Guerrero paying, Cordova sold the property to a third party.

Guerrero then sued seeking the profits of that sale. Contrary to the maxim, "[h]e who takes the benefit must bear the burden" (Civ. Code, § 3521), Guerrero argues that he can have it both ways – enjoy the benefit of the right to purchase property without the burden of actually paying for it or even tendering payment. His reasoning: He asserts that even though Cordova had already submitted the called-for deed into escrow, Cordova's unilateral request to cancel the escrow acted as an anticipatory repudiation, relieving him of any obligation to perform but affording him the same rights as if he had tendered payment.

Controlling California Supreme Court authority, *Posthast v. Kind* – authority Guerrero barely mentions – rejects that very argument on identical facts. The anticipatory repudiation doctrine reflects the principle that the

law does not require futile acts. But where the seller has deposited a deed in escrow, making the payment as called for is not futile; it results in the actual transfer of title. For that reason, the Supreme Court in *Pothast* held that a seller's attempt to cancel an already-open escrow after depositing a deed is ineffective and does not constitute an anticipatory repudiation.

When the trial court examined *Pothast*, it vacated its earlier judgment favoring Guerrero and entered a new judgment for Cordova consistent with *Pothast*. Guerrero quibbles that Cordova's performance might not have been good enough. But, it is undisputed that Cordova had promptly deposited into escrow a signed grant deed made out just as required by the escrow instructions. Had Guerrero paid, title would have been transferred. To the extent necessary, the escrow officer, a notary, could have notarized the signature of Cordova's president, whom she personally knew, at any time. Under *Pothast*, Guerrero could not sit back and claim the benefit of ownership without paying the purchase price. The present judgment for Cordova should be affirmed.

STATEMENT OF FACTS

A. The Parties Open Escrow For The Purchase Of Property.

Southern California Commercial Real Estate (SCCRE), by and through its owner plaintiff Gabriel Guerrero, and defendant Cordova Associates, Inc., by and through its owner Henry Cordova, entered into an escrow agreement on February 27, 2004. (1 AA 34.) The escrow agreement was the only written contract between the parties for the sale of the designated property. (1 RT 31.) The escrow instructions provided that SCCRE would purchase property from Cordova for $995,000. (1 AA 34.) Title to the property was to be vested in "Southern California Commercial Real Estate, Inc., and/or assignee." (*Ibid.*)[1]

B. Cordova Deposits Into Escrow A Signed Deed In The Form Required By The Instructions.

Within a week of opening escrow, Cordova deposited a grant deed with the escrow agent, specifying the new owner exactly as called for in the escrow instructions: "Southern California Commercial Real Estate, Inc., and/or assignee." (3 AA 436 [grant deed dated March 2, 2004]; 6 RT 780.) It is undisputed that Henry Cordova, as Cordova's president, signed the deed. Although the deed was not notarized, it could have been notarized at

[1] In the present litigation, plaintiff contends that SCCRE was acting as an agent for Guerrero individually. (1 AA 5 [complaint alleging that "Plaintiff and Defendant Corporation" entered into the escrow agreement].) For simplicity we refer simply to Guerrero.

any time; escrow agent Betty Kimura, a notary, personally knew Henry Cordova, who had signed the deed. (6 RT 777.) Depositing and signing the deed were the only things that Cordova had to do to close the escrow. (2 AA 377; 6 RT 781.)

C. Guerrero Never Deposits Or Tenders The Purchase Price.

The escrow instructions required Guerrero to pay the full purchase price of $995,000 "prior to the close of escrow." (1 AA 34.) Guerrero never deposited anything close to this sum into escrow. Rather, an issue arose as to the zoning of the property, leading Guerrero to refuse to pay until the issue was resolved as he wanted. (4 RT 579; 5 RT 606; see also Cross-Appellant's Opening Brief, below, at pp. 27-28.)

D. Cordova Instructs The Escrow Officer To Draft Cancellation Instructions.

After five months of nonperformance by Guerrero, in August 2004, Cordova instructed the escrow agent to "draft the cancellation instructions for the terminating of this escrow." (3 AA 556.) Guerrero responded, informing the escrow agent that "I have no intention of canceling this escrow, and I am hopeful that we can continue amicably toward a successful close." (3 AA 555.) Cordova also asked the escrow agent to draft cancellation instructions on September 21, 2004. (3 AA 420.) There was no evidence that such cancellation instructions were ever drafted or signed by anyone.

E. After The Last Possible Date Set For The Close Of Escrow, Cordova Enters Into Escrow With Another Buyer.

The last possible date for escrow to close was September 30, 2004. (1 AA 34-35 [setting close for July 31, 2004, subject to a 60-day extension].) Guerrero neither deposited nor tendered the purchase price before then. In January 2005, Guerrero still having not paid, Cordova accepted an offer from a third party to purchase the property *plus* an additional lot. (1 AA 275-276.)

F. Guerrero Sues Cordova.

Guerrero thereafter sued Cordova for specific performance, breach of contract and fraud. (1 AA 1.) While the suit was pending, Cordova completed the third-party sale. (1 AA 268.)

G. The Court Rejects Guerrero's Contract Damages And Fraud Claims But Enters Judgment For Guerrero For Specific Performance.

Following a bench trial, the court rejected Guerrero's contract claim because he "presented no admissible evidence with respect to the difference between the price agreed on and the value of the property at the time of breach." (1 AA 281.)

The trial court also rejected Guerrero's claim of fraud arising out of the alleged zoning issue. It found that Guerrero could not reasonably have

relied on any representation about zoning when zoning information was readily available and that he did not seek to cancel the escrow when he learned of zoning issues. (1 AA 281-282.)

The trial court, however, held that Guerrero was entitled to specific performance of the escrow. It awarded the difference between his purchase price and the third party's purchase price from the resale of the property. It reasoned that Cordova committed an anticipatory breach by notifying the escrow agent to draft cancellation instructions during the pendency of the escrow and that this breach excused Guerrero from tendering the purchase price. (1 AA 280.)

The trial court entered judgment on June 26, 2006. (1 AA 286.)

H. The Court Vacates Its Judgment And Enters Judgment For Cordova.

On July 10, 2006, Cordova timely moved to vacate the June 26 judgment on the ground that it conflicted with controlling precedent, *Pothast v. Kind* (1933) 218 Cal. 192 (*Pothast*). (2 AA 293-301.) Cordova noted that *Pothast* held that once a seller deposits a deed in escrow, any later attempt to cancel the escrow is futile and does not excuse the buyer from performing. (2 AA 297-299.)

The court heard the motion to vacate on August 3, 2006. (7 RT 999.) Five days later, on August 8, 2006, Cordova filed a premature notice of appeal from the June 26 judgment. (2 AA 349.) On August 28,

2006, while that appeal was pending, the trial court issued a minute order granting the motion to vacate. (2 AA 352-356.)

Cordova then, on September 7, 2006, filed a notice abandoning the premature appeal. (2 AA 357; Cal. Rules of Court, rule 8.244(b).) Four days later, on September 11, the trial court notified the parties that the appeal had been abandoned, citing the Rule of Court that abandonment "effects a dismissal of the appeal and restores the superior court's jurisdiction." (2 AA 365 citing Cal. Rules of Court, rule 20(b)(1), now renumbered to rule 8.244(b)(1).)

On September 19, with its jurisdiction restored, the trial court signed a formal order vacating the judgment (prepared and submitted by Cordova pursuant to California Rule of Court, rule 391, now renumbered rule 3.1312) and entered judgment in favor of Cordova. (2 AA 372-378.)

Relying on *Pothast*, the court in its September 19 order found that "[d]efendant was powerless to recover the executed deed from escrow; thus, there could have been no anticipatory breach, which was the basis of the court's [June 26] decision . . . All Plaintiff had to do to close escrow was deposit the money, which he never did." (2 AA 377.) Because Guerrero never tendered payment and was not excused from performing by an anticipatory breach, he was not entitled to judgment. (*Ibid.*)

I. Guerrero Timely Appeals The September 19, 2006 Judgment.

Guerrero timely appealed the September 19 judgment in favor of Cordova on October 10, 2006. (2 AA 369.)

ARGUMENT

I.

THE TRIAL COURT HAD JURISDICTION TO VACATE THE JUNE 26 JUDGMENT AND TO ENTER A NEW JUDGMENT.

A. The Trial Court Had Jurisdiction When The Motion Was Filed, When It Was Heard, And When The Formal Order And New Judgment Were Entered.

There is no doubt that the trial court had jurisdiction when Cordova moved to vacate the June 26 judgment (on July 11) and when the court heard the motion (on August 3). (2 AA 293, 345.)

Cordova thereafter filed a premature appeal, but then abandoned it on September 7. (2 AA 357-358.) The trial court gave notice that the appeal had been abandoned on September 11. (2 AA 365.) Over a week later, on September 19, with its jurisdiction fully restored, the trial court entered the formal order vacating the prior judgment and entered the new judgment. (2 AA 371-379.) The abandonment of an appeal before the record is transmitted to the reviewing court "effects a dismissal of the appeal and restores the superior court's jurisdiction." (Cal. Rules of Court, rule 8.244(b)(1).)

Thus, at most, there was a short period of time when the trial court may not have had jurisdiction – from August 8 to September 7. But the operative judicial acts – the hearing of the motion, the filing of the formal

order vacating the prior judgment, the entry of the new judgment – *all* took place when the trial court possessed plenipotentiary jurisdiction over the matter. Guerrero's jurisdictional argument is baseless.

B. Cordova's Abandonment Of Its Premature Appeal Returned Complete Jurisdiction To The Trial Court Before It Entered A New Judgment, And Rendered Any Temporary Interruption Of Jurisdiction Irrelevant.

Guerrero asserts, without authority, that, "so complete is the loss of jurisdiction upon taking an appeal that even the abandonment of the appeal is ineffective to reinvest the trial court with subject matter jurisdiction to rule." (AOB 29.) Not so.

When an appeal is abandoned before the record is transmitted to the reviewing court, jurisdiction is restored to the trial court. That is the express directive of the governing rule. (Cal. Rules of Court, rule 8.244(b).) The rule codifies the Supreme Court's holding that an "appellant's abandonment of his appeal 'before the filing of the record or transcript in the (appellate) court' would not deprive the trial court, restored to *complete jurisdiction* in the matter, the power to modify or vacate the objectionable order in appropriate circumstances." (*Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 281 (*Winslow*).)

Winslow disposes of Guerrero's claim that the trial court lacked jurisdiction to vacate its June 26 judgment and enter a new judgment after an appeal had been filed and abandoned. In *Winslow*, the appellant filed a

notice of appeal, followed by a motion to vacate part of one of the judgments from which he had appealed. (*Winslow*, *supra*, 25 Cal.2d at p. 279.) The trial court denied the motion to vacate based on the pending appeal. (*Ibid.*) The appellant then abandoned his appeal before the record had been transmitted to the reviewing court, and filed a new motion to vacate. (*Id.* at p. 280.) The trial court ruled on the second motion to vacate. (*Ibid.*) On appeal, the Supreme Court held that the trial court had jurisdiction to rule on the renewed motion to vacate because, by abandoning the appeal, the appellant had returned jurisdiction to the trial court. (*Id.* at p. 281.)

This case is procedurally indistinguishable from *Winslow*. Here, as in *Winslow*, there was no appeal pending when the motion to vacate was filed, when the motion was heard, when the court entered the formal order on the motion to vacate, or when it entered the new judgment. That an appeal was brought and dismissed in the interim makes no difference. (*Winslow*, *supra*, 25 Cal.2d at p. 281; *Swan v. Riverbank Canning Co.* (1947) 81 Cal.App.2d 555, 558-559 [trial court did not have jurisdiction over a motion to vacate filed and heard while appeal was pending, but appellant could have avoided this situation by abandoning the appeal and restoring jurisdiction to the trial court].)

The opening brief mentions none of the above authority. Rather, it simply asserts, ipse dixit, that jurisdiction cannot be reestablished in the trial court once an appeal has been filed, even if the appeal is abandoned. (AOB 29.) It is not surprising that the brief cites no authority for this

sweeping proposition, for there is none. Under Guerrero's theory even filing an appeal and abandoning it the next day would not restore trial court jurisdiction. That is not the law. As discussed above, the converse is true: when an appellant abandons an appeal before the record is transmitted to the reviewing court, the trial court is "restored to complete jurisdiction in the matter." (*Winslow*, *supra*, 25 Cal.2d at p. 281; see Cal. Rules of Court, rule 8.244(b).)

The trial court undoubtedly had jurisdiction to enter its formal order vacating the prior judgment and to enter the new, September 19, 2006, judgment.

II.

THE TRIAL COURT CORRECTLY RECOGNIZED THAT THE SUPREME COURT'S CONTROLLING DECISION IN *POTHAST* COMPELS JUDGMENT FOR CORDOVA.

To be entitled to specific performance, a plaintiff must first "establish its own performance or excuse for nonperformance." (*Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1126; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading § 741, p. 199.) The undisputed record here is that Guerrero never performed or tendered performance of his part of the deal – paying the purchase price. (See 1 AA 179 [plaintiff's proposed chronology, with no entry indicating payment].) Guerrero therefore had to demonstrate that

his performance was excused. He did not do so. His theory was that Cordova anticipatorily breached, excusing performance on his part. But the Supreme Court has rejected that theory on just these facts.

A. Controlling Authority Establishes That A Futile Attempt To Cancel Escrow After Depositing A Deed Is Not An Anticipatory Breach.

The initial judgment rested on the trial court's conclusion that Cordova committed an anticipatory breach by asking the escrow agent to draft cancellation instructions before the last date to close escrow. (1 AA 280.) An anticipatory breach by one party to an agreement allows the other party to immediately pursue specific performance or breach of contract remedies without performing or tendering performance. (Civ. Code, § 1440.) It does not, however, give a party a free pass to forever claim the benefits of a deal without performing or tendering performance of its end of the deal.

In any event, there was no anticipatory repudiation here. The anticipatory repudiation theory is premised on the principle that a party should not have to perform a futile act – e.g., pay the purchase price when the other side has made clear that it will not perform its end of the bargain. But that's not the case when a party has already deposited a deed into escrow.

A virtually identical set of facts confronted the Supreme Court in *Pothast, supra*, 218 Cal. 192. There, as here, the parties opened an escrow

for a property purchase. (*Id.* at p. 194.) There, as here, the seller deposited executed deeds in escrow. (*Ibid.*) There, as here, the buyers were to deposit the purchase price by a certain date. (*Ibid.*) There, as the court found here, the seller "undertook to repudiate the escrow agreement" and the buyers contended that "they were thereby relieved of any further duty to deposit [the purchase price] and the deposit thereof was waived by such anticipatory breach of the agreement." (*Id.* at p. 195.)

The Supreme Court rejected the buyers' claim, explaining that because of the unique nature of escrow, the seller *could not* have unilaterally cancelled the transaction after depositing the deed:

> "When [the seller] delivered the deeds to the escrow party, pursuant to the mutual covenants of the parties, it became an irrevocable act upon his part and his attempted cancellation thereof during the escrow period was wholly ineffectual for any purpose." (*Pothast, supra*, 218 Cal. at p. 195.)

The seller's attempt at cancellation did not excuse the buyers from performing. Their duty to perform under the terms of the escrow "was a continuing one, which could not be waived by the unauthorized action of [the seller]." (*Id.* at p. 195.)

Pothast remains the law in California, as the leading treatise in this area explains:

> "[A]nticipatory breach of the agreement by one party to the escrow *does not excuse lack of performance by the other*

> *party* unless the breach is of such nature that it is clear that performance or a tender of performance by the other party would be useless. Therefore, a party who has neither performed each and every term and required escrow condition nor at least tendered this performance cannot have specific performance of the contract against the other party and cannot recover damages based on the other party's failure to perform." (3 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 6:20, p. 47, emphasis added, footnotes omitted.)

Guerrero mentions *Pothast* only in passing. He never directly discusses its holding. But it cannot be ignored. *Pothast* is controlling, dispositive authority. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["The decisions of (the Supreme Court) are binding upon and must be followed by all the state courts of California"].) It requires affirming the judgment.

B. No Other Circumstances Excused Guerrero From Performing.

Guerrero obliquely suggests that *Pothast* does not control for several reasons. None works.

1. *Pothast* is not distinguishable based on the terms of the escrow instructions.

First, Guerrero claims that the escrow instructions allowed Cordova to stop the escrow at any time. (AOB 37.) That is not so.

Guerrero relies on an instruction to the escrow agent affording the agent, in the event of conflicting demands, discretion to maintain the status quo until the conflicting demands are resolved:

> "If conflicting demands or notices are made or served upon you . . . you shall have the absolute right to withhold and stop all further proceedings . . . until you receive written notification satisfactory to you of the settlement of the controversy by written agreement of the parties, or by the final order or judgment of a court of competent jurisdiction." (1 AA 39 ¶ 21.)

The instruction does not permit either party to cancel escrow unilaterally. It merely allows the agent, upon receiving conflicting demands, to freeze the escrow – to stop, not to cancel and revert – until the parties settle their controversy. Cordova could not unilaterally cancel the escrow. Indeed, the escrow agent never froze or would have frozen the escrow as a result of Cordova's instructions. Had Guerrero deposited the requisite funds, escrow would have closed. Just as in *Pothast*, Cordova's was a futile attempt to cancel escrow, not an anticipatory breach.

2. Nothing about the form of the deed excused Guerrero from performing.

Guerrero next attempts to denigrate Cordova's irrevocable deposit of the signed deed, drafted strictly according to the signed the escrow instructions, as insufficient. Guerrero claims that the form of the deed excused him from depositing the balance of the purchase price. Not so.

Vesting. It is undisputed that Cordova's grant deed vested title verbatim as set forth in the mutually-executed escrow instructions. (3 AA 436.) The deed constituted full performance in that it "describes the property required by the escrow instructions." (*Porter v. Arnold* (1955) 136 Cal.App.2d 636, 637.) Had Guerrero paid before the closing date, he would have received the very deed called for in the instructions and the property would have been his. That he never did so dooms his claim.

Guerrero asserts nonetheless that the deed was insufficient as vested because it would not be recordable. A closer look at the facts demonstrates that Guerrero is trying to have it both ways. But Guerrero cannot take advantage of his own non-cooperation. (Civ. Code, § 3517.)

The escrow agreement required Cordova to execute a deed vesting title in "Southern California Commercial Real Estate, Inc., and/or assignee." (1 AA 34.) Cordova deposited into escrow a grant deed with precisely this vesting. (3 AA 436.) The escrow officer, Kimura, decided that the vesting might be improved and asked Guerrero to clarify how he wanted to take title, presumably so Cordova could provide a revised deed. (6 RT 783.) Guerrero did not provide the information. (6 RT 781.) The

record thus shows that Cordova did everything necessary to close escrow, while Guerrero failed to supply the more specific vesting information that, in the escrow officer's view, might have made the deed more properly recordable. (*Ibid.*) Any deficiency in the deed's vesting thus is either a product of the ambiguity in the signed escrow instructions or attributable solely to Guerrero.[2] Neither can justify specific performance.[3]

Notarization. Nor does it matter that the deed was not notarized when Cordova deposited it. A deed transfers title even if not notarized. (*Osterberg v. Osterberg* (1945) 68 Cal.App.2d 254, 262.) The recording statutes protect innocent or naive buyers. They are not a condition to the transfer of title. (5 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 11:2, pp. 12-13.) The later buyer knew about the earlier Guerrero escrow (3 AA 669) and its rights would have been subordinate to Guerrero's had he gone through with his deal. Nor is there *any* evidence that Cordova would have closed escrow with the third party had Guerrero performed.

Guerrero suggests that notarization was necessary to obtain title insurance (AOB 32), but there is *no evidence* in this record that title

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[2] Guerrero argues on appeal that the trial court initially found that he had until the close of escrow to specify the vesting but subsequently faulted him for failing to specify the vesting at some earlier point. (AOB 35.) But that just proves the point. Cordova had irrevocably performed. Any change in vesting was just that, a *change*, at Guerrero's option. Based on the deposited deed, SCCRE could have granted title to whomever it wanted.

[3] Guerrero argues for the first time on appeal that the deed was also deficient because it did not have the correct seller. (AOB 37.) He is wrong. Cordova was the seller. It assigned its interest in the *proceeds* of the escrow to the tax accommodator for purposes of a tax free exchange. (3 AA 594.) It did not assign its interest in the *property*.

insurance companies require a recorded or notarized deed. Even if notarization were required, the deed here *would* have been notarized had Guerrero deposited the purchase price. The escrow officer, Kimura, is a notary and personally knows Henry Cordova, who signed the deed. (6 RT 732, 777; 3 AA 436 [grant deed with notarization form providing that deed signatory personally known to notary appeared before notary and acknowledged that he executed the deed].) Had Guerrero paid the purchase price, Kimura's notarization of the deed that she held in escrow and was qualified to notarize would have been a mandatory ministerial act. She would have been required to notarize and deliver the deed to Guerrero.

Guerrero's Cases. The cases Guerrero cites on this point (AOB 32-34) do not require a recordable deed. They do not address the circumstance here and in *Pothast* – where the seller deposits a deed in escrow and the buyer never tenders performance. The seller in *Tatum v. Levi* did not, and could not, deposit a valid deed. (*Tatum v. Levi* (1931) 117 Cal.App. 83 (*Tatum*), cited at AOB 32.) The seller in *Lifton v. Harshman* never deposited any documents at all – and, unlike this case, the buyer "made a written tender and deposited in escrow all money and documents necessary for complete performance on his part." (*Lifton v. Harshman* (1947) 80 Cal.App.2d 422, 430 (*Lifton*), cited at AOB 33-34.) *Tatum* and *Lifton* are also inapposite because – unlike *Pothast* – they are not binding. *Tatum* is an intermediate appellate court decision predating *Pothast*. (*Tatum*, *supra*, 117 Cal.App. at p. 83.) Although *Lifton* was decided after *Pothast*, it

could not overrule *Pothast* even if it purported to, which it does not. (*Lifton, supra*, 80 Cal.App.2d 422.)

Pothast is the controlling law, and it is not limited to a deed that is recorded, notarized or recordable. The Supreme Court's decision was based on the irrevocability of depositing an executed deed into escrow and the necessary transfer of actual title that the deed provides, not on whether the deed was recordable. (*Pothast, supra*, 218 Cal.2d at p. 195.) If Guerrero had paid the balance of the purchase price into escrow, he would have taken title to the property, period. Whether the deed would have been recordable as-is does not impact the fact that it would irrevocably have transferred title, or Guerrero's obligation to perform.

3. The absence of a disclosure statement does not entitle a buyer to enforce a real estate contract after failing to perform.

Finally, Guerrero attempts to salvage his claim by asserting that he did not receive a mandatory disclosure form from Cordova. This fact-based theory was not argued in the trial court and therefore cannot be argued on appeal. "It is well settled that the theory upon which a case was tried in the court below must be followed on appeal." (*Gibson Properties Co. v. City of Oakland* (1938) 12 Cal.2d 291, 299.) "It is axiomatic that a party cannot try his case on one theory and on appeal shift to another theory which was neither presented to the [court] nor considered by it in deciding the case."

(*Graddon v. Knight* (1950) 99 Cal.App.2d 700, 705; see *Mathews v. Pacific Mut. Life Ins. Co.* (1941) 47 Cal.App.2d 424, 428 [same].)

In any event, the claim makes no sense. The purpose of the disclosure requirement is to "permit [the buyer] to assess whether or not to go through with the transaction, and if so, on what terms." (*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 202 (*Realmuto*).) Consistent with this purpose, a buyer may *rescind* an escrow agreement based on the information he learns from the required disclosure statement. (Civ. Code, § 1102.3.) A buyer also may assert the lack of a disclosure statement as a *defense* to a suit by the seller for specific performance. (*Realmuto, supra*, 110 Cal.App.4th at pp. 201-202.) But there is no support for Guerrero's claim that a buyer can use the absence of a disclosure form to *compel* a sale. A disclosure statement provides a buyer with a way to *avoid* a sale. But Guerrero wants to specifically *enforce* the sale.

A comparison to *Realmuto*, on which Guerrero relies, highlights the flaw in his position. There, the seller sued for specific performance, attempting to force the buyers to purchase his home despite not providing a disclosure statement. (*Realmuto, supra*, 110 Cal.App.4th at p. 196.) Emphasizing the statutory right of buyers to rescind a purchase contract based on information they learn in a transfer disclosure statement, the court explained that the Legislature "plainly contemplated that *buyers* would never be irrevocably committed to performing the contract without having received the required disclosures." (*Id.* at p. 201, emphasis added.) Awarding specific performance to the *Realmuto* seller would have

undermined this intent because the buyer would have to perform without having received the disclosure. But the converse is not true. A seller – especially one who has deposited a deed in escrow – *is* irretrievably committed to the sale regardless whether it provides a disclosure statement.

Here, Guerrero is not trying to avoid specific performance. To be sure, he argues that he did not have to perform in the absence of a disclosure statement. The logical extension of that argument, as in *Realmuto*, would be to assert that the agreement should be rescinded. But Guerrero does not follow that path. Instead, he leaps to the opposite conclusion, that Cordova *must* sell him the property. That cannot be right. Either Guerrero did not have to take the property because he did not receive a disclosure statement, or he wanted the property as-is despite the absence of a disclosure statement, in which case the fact that there was no disclosure is irrelevant. He cannot have it both ways.

4. The new buyer did not perform for Guerrero.

For the first time on appeal, Guerrero asserts that although he never actually deposited the purchase price into escrow, he *effectively* did so. He contends that when Cordova sold the property to a third party, it was as if Cordova received the purchase price from Guerrero in his capacity as the constructive owner. (AOB 39-40.) There are several problems with this rationale.

First, the argument is circular. Guerrero asserts that he was the constructive owner because he was entitled to specific performance and that

he was entitled to specific performance because he was the constructive owner. Second, on Guerrero's logic, he only performed when Cordova sold the property to a third party. There is no evidence in the record that Guerrero would ever have deposited the purchase price himself if Cordova had not sold the property. He therefore should not get the benefit of "performing." Finally, Cordova had not yet sold the property when Guerrero initiated this suit (1 AA 276), so even on Guerrero's theory, Guerrero had not performed when he sought specific performance.

The bottom line is that Guerrero never performed. *Pothast* establishes that any attempt by Cordova to cancel the escrow did not excuse him from performing. The trial court's September 19 order vacating the June 26 judgment and entering a new judgment for Cordova was correct.

CONCLUSION

In vacating the judgment, the trial court properly recognized that Guerrero could not have it both ways, enjoying the benefit of the right to purchase property without the burden of actually paying for it. Cordova irrevocably deposited a grant deed into escrow. Guerrero could have and would have taken title if he had deposited the purchase price. *Pothast* is clear that regardless of any interim attempt by Cordova to cancel the escrow, Guerrero had to tender the purchase price to be entitled to specific performance. Guerrero did not do so. *Pothast* controls. The September 19 judgment for Cordova should be affirmed.

CROSS-APPELLANT'S OPENING BRIEF

INTRODUCTION

This appeal from the now-vacated June 26, 2006 judgment is protective only. It need not be considered if the September 19, 2006 judgment is affirmed.

Even if the September 19 order vacating the June 26 judgment and the superseding September 19 judgment were not to stand, the earlier June 26 judgment in favor of Guerrero would have to be reversed. *Pothast v. Kind* still controls. Guerrero could not have it both ways. He could not both avoid depositing into escrow, or at least tendering, the purchase price and still be entitled to specific performance of the promised transfer of title reflected in the already-deposited deed.

But even without *Pothast*, the June 26 judgment would have to be reversed. Specific performance requires a definite deal that Guerrero was ready and willing to perform. Guerrero refused to deposit or tender the purchase price required by the escrow because he asserted that there was an unresolved zoning contingency. He was not willing to take the property as-is and only decided that he wanted it after another buyer appeared. That does not suffice for specific performance. And Guerrero himself now argues that the vesting in the escrow instructions was incomplete. If so, that too defeats specific performance. The June 26 judgment was also premised on a misreading of the escrow instructions that led the court to find that escrow lasted six months longer than it did.

Finally, the June 26 judgment cannot stand because Guerrero failed to prove the proper measure of damages. The only evidence Guerrero submitted – and the only amount awarded – was the difference in the *gross* sales price of the property to him and to a third party. Guerrero failed to provide any evidence of Cordova's *net* profit, if any. Although the trial court deducted the acquisition cost of a fourth parcel of property that was packaged in the sale to the third party, it did not deduct – or have evidence of – that parcel's value or profit, or any expenses of sale. As such, Guerrero failed to prove an essential element of his claim – net profits. The trial court also put Guerrero in a better position than the escrow agreement would have by awarding him costs that he would have incurred even if escrow had closed.

The June 26 judgment improperly allows Guerrero to have it both ways. It allows him to have refused to tender the purchase price because of supposed zoning issues and still to receive the full proceeds of the later property sale to another – in a condition he did not want to accept – undiminished by the expenses and transaction costs that he would have incurred had he actually bought and then resold the property, and increased by the profits from an additional parcel of land that was not part of the Cordova-Guerrero escrow. Because that result contravenes basic legal principles, the June 26 judgment must be reversed.

STATEMENT OF ADDITIONAL FACTS

In addition to the facts recited at pp. 3-8, *supra*, the following additional facts are relevant to Cordova's cross-appeal.

A. After The Time For Guerrero To Perform The Escrow, Cordova Sells The Property *Plus* An Additional Parcel To A Third Party.

In September 2004, Cordova closed an escrow (opened in June 2004) to purchase an additional parcel of land adjacent to the property in escrow for $200,000. (1AA 274-275; 1 RT 105.) There was no evidence – aside from Henry Cordova's testimony that Cordova got a $50,000 bargain on the property (1 RT 105) – whether this was fair market value.

The last possible day for escrow to close was September 30, 2004. (1 AA 34-35; 1 AA 275.) In January 2005, Guerrero still having not paid, Cordova accepted an offer from a third party to purchase the property which had been the subject of the escrow, plus the additional parcel of land that Cordova had acquired, for $1,525,000. (1 AA 275-276; 3 AA 668.) That transaction closed sometime after March 1, 2005. (1 AA 276.) There was no evidence of any change in value of the additional parcel from the time of its acquisition until its resale.

B. The Trial Court Fails To Resolve Whether Guerrero Would Have Performed Given The Zoning Dispute.

The escrow instructions signed by the parties contain no zoning contingency. (1 AA 34.) But Guerrero asserted in court filings and at trial that Cordova promised that a portion of the property designated for low density development (RD-1) would be rezoned for higher density development (RD-6) before the close of escrow. (4 RT 560; 1 AA 72.) Guerrero further testified that he told Cordova that he would not deposit the purchase price until the property was rezoned. (4 RT 579; 5 RT 606-607.) A portion of the property retained its RD-1 zoning when Cordova agreed to sell it to a third party in January 2005. (3 AA 669.)

The statement of decision found that Guerrero was "ready, willing and able" to perform, but couched that finding in purely financial terms. (1 AA 280.) Cordova objected to the omission of findings regarding Guerrero's willingness to perform in light of the zoning dispute and, accordingly, to the ambiguity of the statement of decision. (1 AA 239.) Specifically, Cordova sought findings:

- whether Guerrero believed there were zoning issues which made him unwilling to close escrow (1 AA 239);
- whether Guerrero, prior to learning of Cordova's intent to resell the property, would ever have been willing to deposit the purchase price into escrow as long as there remained what he believed were zoning issues (1 AA 239); and

- whether zoning approvals were an absolute contingency and condition precedent of the parties' agreement. (1 AA 239.)

Despite Cordova's objections, the trial court's statement of decision did not include findings on any of these issues. (1 AA 267-282.)

C. The Trial Court Awards Guerrero The Gross Proceeds Of Resale Without Any Deduction For Either Cordova's Sale Expenses Or His Own Acquisition Expenses.

Following a bench trial, the trial court found Guerrero entitled to specific performance of the escrow agreement. Accordingly it found that Cordova held the proceeds of the property in constructive trust for Guerrero.

The only evidence before the trial court was that Cordova sold the property *plus* an additional lot to a third party for $1,525,000. (3 AA 668; 1 AA 276.) There was *no* evidence as to the fair market value of the additional lot (aside from Henry Cordova's testimony that Cordova had gotten a $50,000 bargain (1 RT 105)), or whether it had increased in value since its acquisition or when packaged together with the three lots covered by the Cordova-Guerrero escrow. The trial court nonetheless simply subtracted the additional lot's acquisition price from the gross sale price to the third party to obtain a gross sales price for the Cordova-Guerrero property of $1,325,000. (1 AA 276.) It then awarded Guerrero $330,000, the difference between the gross price at which Cordova sold the property and the gross contract price agreed to between Guerrero and Cordova.

(1 AA 280, 276.) The court also awarded incidental damages for the purchase price of $20,000 and expenses of $9,500. (1 AA 280.)

D. The Trial Court Enters Judgment On June 26, 2006, With No Notice Of Entry Ever Sent.

The trial court entered judgment on June 26, 2006. (1 AA 286-287.) Neither the court nor Guerrero, nor anyone else, sent a notice of entry of judgment.

E. Cordova Timely Protectively Appeals From The June 26 Judgment.

The court vacated its June 26, 2006 judgment, and entered judgment for Cordova, on September 19, 2006. (2 AA 372-378.) Guerrero timely appealed from entry of the new judgment on October 12, 2006. (2 AA 380.) Cordova filed a protective cross-appeal on November 27, 2006 (2 AA 388), within the 180-day time for appealing the original judgment (Cal. Rules of Court, rule 8.104(a)).

ARGUMENT

I.

THE PROTECTIVE CROSS-APPEAL IS TIMELY.

A. Cordova Timely Cross-Appealed Within 180 Days Of The June 26 Judgment.

If no notice of entry of judgment or file-stamped copy of the judgment is served, a notice of appeal may be filed up to 180 days after entry of judgment. (Cal. Rules of Court, rule 8.104(a).) Cordova filed this protective cross-appeal on November 27, 2006, 154 days after the entry of the June 26, 2006 judgment and well within the 180-day window. (2 AA 387-388.)

No notice of entry or file-stamped copy of the judgment was ever served. Guerrero has not argued otherwise and the record contains no such document. (See 1 AA 287 [file-stamped judgment without certificate of mailing, proof of service, or "Notice of Entry" title].)

Therefore, the cross-appeal is timely.

B. Guerrero's Contention That The Cross-Appeal Is Untimely Misreads The Relevant Rule Of Court.

Somewhat prematurely, Guerrero argues in his Appellant's Opening Brief that this cross-appeal is untimely. (AOB 40.) Not so.

When one party timely appeals from an order vacating the judgment, "the time for any other party to appeal from the original judgment [i.e., to

file a protective cross-appeal] . . . is extended until 20 days after the clerk mails notification of the first appeal." (Cal. Rules of Court, rule 8.108(e)(2).) Guerrero argues this means that the notice of cross-appeal had to be filed within 20 days of his notice of appeal. (AOB 40.) Rule 8.108(e)(2) does not have that effect.

The advisory committee note to California Rules of Court, Rule 8.108 explains that the rule only works in one direction – to extend, not shorten, the time for an appeal:

> "The use of the word 'extended' limits the scope of the rule: i.e., the rule operates only to increase any time to appeal otherwise prescribed; it cannot shorten the time. Thus if the time provided by rule 8.108 would be less than the normal time to appeal stated in rule 8.104(a) [e.g., 180 days from entry of judgment or 60 days from service of notice of entry] . . . the rule 8.104(a) time governs." (Cal. Rules of Court, rule 8.108, Adv. Comm. Comment; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1997) ¶ 3:63, p. 3-27 ["[I]f a deadline prescribed by the extension rules precedes the applicable CRC 8.104(a) deadline, the longer (CRC 8.104(a)) deadline governs," citations omitted].)

This understanding of the rule is bolstered by the rule's title, "*Extending* The Time To Appeal." (Cal. Rules of Court, rule 8.108,

emphasis added.) It would be nonsensical for a rule with the word "extend" in the title to *shorten* the time to appeal. (*Maides v. Ralphs Grocery Co.* (2000) 77 Cal.App.4th 1363, 1369 [concluding, based on plain meaning of the word "extension," that former rule entitled "extension of time and cross appeal" could only expand, not contract, the usual time for filing notice of appeal].) Rule 8.108 does not truncate the time to appeal.

Cordova had 180 days from June 26 to appeal the judgment. It filed the notice of protective cross-appeal within that time frame. The cross-appeal is timely.

II.

THE JUNE 26 JUDGMENT WAS ERRONEOUS AS A MATTER OF LAW UNDER *POTHAST*.

The June 26 judgment rested on the trial court's conclusion that Cordova committed an anticipatory breach when he instructed the escrow agent to draft cancellation instructions before the date last set for escrow to close. (1 AA 280.) For the reasons discussed above, *supra*, pp. 12-23, and as recognized by the trial court, that conclusion was erroneous as a matter of law under *Pothast*. *Pothast* requires reversal of the June 26 judgment even if the trial court's vacation of that judgment were somehow not valid.

III.

THE UNRESOLVED ZONING CONTROVERSY AND OTHER UNCERTAINTIES PRECLUDED SPECIFIC PERFORMANCE.

Specific performance requires a clear obligation and a plaintiff at all times willing to perform. (12 Miller & Starr, Cal. Real Estate (3d ed. 2001) §§ 34:20, 34:22, pp. 75-76, 82-84.) A party can't refuse to accept the other party's performance but then demand specific performance of exactly what it had previously refused.

Here, the evidence is undisputed as to why Guerrero did not deposit the purchase price – he was unhappy with the property's zoning. He claimed that Cordova had promised that a portion of the property designated for low density development (RD-1) would be rezoned for higher density development (RD-6). (1 AA 72; 4 RT 560.) Guerrero testified that he repeatedly told Cordova that he would not deposit the purchase price until the property was rezoned. (5 RT 579; 6 RT 606.)

Guerrero thus made clear during escrow that he was not interested in purchasing the property unless and until it was rezoned RD-6. Regardless whether the trial court agreed with Guerrero (it did not, 1 AA 272), his demand illustrates both that he was *not* willing to close the deal as made *and* that the deal was too uncertain for *specific* enforcement. Given that the property was not rezoned before it was sold, Guerrero's position precludes an award of specific performance.

A. Guerrero's Insistence On Rezoning Meant That He Was Not Ready And Willing To Perform, Precluding Specific Performance.

Guerrero did not want the property as long as any portion of it was zoned RD-1. He only wanted it if was all zoned RD-6. It is undisputed that part of the property was still zoned RD-1 when Cordova sold it to a third party. (3 AA 669.) By his own testimony, then, Guerrero was not ready and willing to perform when the property was sold. It was only *after* Cordova sold the property with its RD-1 zoning to another that Guerrero decided that he wanted it in that condition.

To obtain specific performance, Guerrero had to have been ready and willing to perform at the time of contracting and throughout the suit. (*Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd., supra*, 113 Cal.App.4th at p. 1126; *C. Robert Nattress & Associates v. Cidco* (1986) 184 Cal.App.3d 55, 64.) There is no evidence that Guerrero would have wanted the property as zoned, or that he ever would have performed, absent the sale to another. Given his testimony that he did not plan to close escrow as long as the property was zoned RD-1 and that the property was sold with its RD-1 zoning intact, Guerrero was not ready and willing to perform at the relevant times.

The trial court never really confronted this fatal defect in Guerrero's case. Although it found Guerrero ready, willing and able to perform, in context, it is clear that the trial court was referring to Guerrero's financial ability to perform. (1 AA 280.) Cordova objected to the proposed

statement of decision on the ground that it did not address this issue – namely, whether Guerrero believed there were zoning issues that made him *unwilling* to close escrow and whether Guerrero would ever have deposited the purchase price as long as he believed there were zoning issues. (1 AA 239.) Despite Cordova's objections, the final statement of decision was silent on these questions. (1 AA 267-268.) Thus, even were there some evidence Guerrero would have performed with the zoning as-is (there is not), no finding can be implied as to Guerrero's willingness to perform despite the zoning controversy. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

Without a finding that Guerrero was ready and willing to perform, he is not entitled to specific performance. But even if there were such a finding, it would not be supported by the evidence. The uniform, undisputed evidence was that Guerrero had no intention of performing unless the zoning issues were remedied – until another suitor appeared on the scene. The fact that Guerrero did not attempt to cancel the transaction after learning of the zoning issue (1 AA 281) does not change anything. Failing to attempt to cancel escrow simply meant that Guerrero could use the zoning issue as an excuse to extend escrow indefinitely, tying up the property so that it could not be sold to anyone else while refusing to pay for it himself.

Equity bars Guerrero from receiving specific performance of an agreement that he did not want until after another deal was made. As our Supreme Court explained in rejecting a similar change of tune:

> "'[O]ne is not permitted to stand by while another develops property in which he claims an interest, and then if the property proves valuable, assert a claim thereto, and if it does not prove valuable, be willing that the losses incurred . . . be borne by the opposite party. This thought was expressed in one case by the following language: 'If the property proves good, I want it; if it is valueless, you keep it.'" (*Hamud v. Hawthorne* (1959) 52 Cal.2d 78, 86 quoting *Livermore v. Beal* (1937) 18 Cal.App.2d 535, 549.)

That is exactly the situation here. Guerrero was not willing to perform his part of the escrow when he perceived the property as less valuable because of its RD-1 zoning. But then, when another buyer was willing to pay more for the property despite the RD-1 zoning – that is, after "the property prove[d] good" – Guerrero suddenly changed his tune. Guerrero, like the plaintiff in *Hamud*, acted akin to the child who rejects a toy only to claim prior right when it is offered to a sibling.

Allowing Guerrero to recover in these circumstances would be inequitable. Because the undisputed evidence is that he was not willing to perform without resolution of the zoning controversy, he was not entitled to specific performance.

B. Because Of The Zoning Dispute, The Contract Was Too Uncertain For Specific Performance.

Guerrero's zoning claim also precludes specific performance for a second reason. Only a definite contract can be enforced through specific performance. (Civ. Code, § 3390, subd. (5); *Ussery v. Jackson* (1947) 78 Cal.App.2d 355, 358.) Uncertainty as to whether the parties' agreement included a zoning contingency renders the contract too indefinite for specific performance.

It is true that the escrow agreement includes material terms which are the prerequisites to specific performance of a land purchase contract: the identities of the buyer and seller; the price, time and manner of payment; and a description of the property at issue. (*Reeder v. Longo* (1982) 131 Cal.App.3d 291, 296.) But just because these elements are present does not make the contract susceptible to specific performance.

Specific performance is an equitable remedy. (*Capri v. L.A. Fitness Intern., LLC* (2006) 136 Cal.App.4th 1078, 1086.) It would be inequitable to enforce a contract through specific performance where there is uncertainty as to terms. (Civ. Code, § 3391, subd. (2) [specific performance cannot be ordered against a party "[i]f it is not, as to him, just and reasonable"]; *Mueller v. Chandler* (1963) 217 Cal.App.2d 521, 525 ["The contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained, as an indefinite contract cannot be enforced, because the courts do not know what the parties agreed. The meaning and

intent of the parties should be placed beyond the bounds of mere conjecture by full and clear proof," internal quotation marks omitted].)

It is particularly inequitable to order specific performance where the plaintiff made clear that he would not perform unless his additional demands were met. If Guerrero had wanted the property with zoning as-is, he could have and should have deposited the purchase price. Cordova was not required to wait around forever for performance by someone making unjustified additional demands.

In ordering specific performance, the court did not clearly determine whether zoning was in fact a condition of the agreement. On one hand, the court credited Guerrero's testimony, which included his claim that he entered the contract based on his belief that the property would be zoned RD-6, and found that "all prior representations are part of the contractual agreement." (1 AA 276, 278.) That finding suggests that the agreement may have included a zoning condition. On the other hand, the court found that Guerrero "did not justifiably rely on the zoning status" because he could have ascertained the status from public records during a 60-day due diligence period provided in the escrow agreement. (1 AA 281.) This finding suggests that the transaction was not contingent on the property being rezoned.

Cordova objected to the statement of decision on the ground that it did not address whether the parties' agreement was contingent on zoning. (1 AA 239.) The court did not respond to the objection. (1 AA 267-268.) Accordingly, no finding can be implied one way or the other. (*In re*

Marriage of Arceneaux, *supra*, 51 Cal.3d at pp. 1133-1134.) Without a finding on this point, the contract is too indefinite to support specific performance. In any event, either way the agreement was too indefinite to support specific performance. Guerrero cannot both have refused to pay asserting that the agreement was contingent on the entire property being zoned RD-6, and then turn around and seek specific performance without any such condition when another buyer appeared. To grant specific performance here would allow Guerrero to have it both ways. The June 26 judgment for Guerrero therefore must be reversed.

C. If The Vesting Was Ambiguous, As Guerrero Contends, The Agreement Is Too Uncertain For Specific Performance.

In opposing the application of *Pothast*, Guerrero argues that the vesting in the deed Cordova deposited into escrow was incomplete or ambiguous. (AOB 32; 2 AA 327.) But the deed's language was verbatim what the escrow agreement called for. If it was ambiguous or incomplete, then the escrow agreement as a whole – the *only* written agreement signed by both parties – was too uncertain to enforce.

IV.

TO THE EXTENT IT WAS PREMISED UPON AN EXTENSION OF THE ESCROW THAT DID NOT EXIST, THE JUNE 26 JUDGMENT IS ALSO FATALLY FLAWED.

The trial court's June 26 judgment rested on its conclusion that Cordova had committed an anticipatory repudiation that excused Guerrero's performance. (1 AA 280.) But the statement of decision does not specify what act constituted the anticipatory repudiation. Arguably, it can be read as premised upon an anticipatory repudiation consisting of a sale to another within the escrow period rather than of the mere notice to cancel the instructions.[4] There was no such sale, however. The escrow ended September 30, 2004, at the latest. (1 AA 280.) But the trial court hypothesized that the boilerplate escrow agreement language automatically extended the escrow by another six months. (1 AA 275-276.)

Once again, Cordova pointed out, in objections to the court's statement of decision, that the court's ruling in this regard was ambiguous, but the court failed to provide clarification. (1 AA 241; 1 AA 267-268.)

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[4] The court explained its ruling as follows: "Prior to September 30, 2004, Defendant notified the escrow holder to cancel escrow during the 60 day extension period. Defendant also met with and accepted another offer during the pendency of the escrow up to six months after the last date set for closing. One party's anticipatory breach (unequivocal repudiation) of the contract excuses the other party's duty to perform (or to tender performance of) its contractual obligations and entitles the latter (nonrepudiating party) to immediately pursue breach of contract remedies." (1 AA 280.)

No inference, therefore, can be made that the trial court's ruling was based on some sort of six-month grace period. (See *In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at pp. 1133-1134.) Even if such a conclusion could be inferred, it would be incorrect, requiring reversal.

The court found that the last date set for closing the escrow was September 30, 2004, but suggested that the escrow extended another six months. (1 AA 275.) It did so based on a boilerplate preprinted provision in the escrow instructions that the *escrow agent's* obligations extend six months after the date last set for closing:

> "*Your Escrow Holder agency* shall terminate six (6) months following the date last set for close of escrow and shall be subject to earlier termination by receipt by you of mutually executed cancellation instructions. If this escrow was not closed or canceled within the described six (6) month period, you shall have no further obligations as Escrow Holder."
> (1 AA 275, emphasis added; see also 1 AA 40 [paragraph 24 of the escrow instructions].)

There is no extrinsic evidence, so the meaning of this language is a question of law reviewed de novo. (*Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 988; *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 267.) The paragraph defines the *escrow* holder's rights and duties, not those of the parties. It is directed to the escrow holder's obligations, not to the time for the parties to perform. (Cf. *Pittman v. Canham* (1992)

2 Cal.App.4th 556, 560.) Treating the instruction to the escrow agent as extending the escrow six months beyond the date specified by the parties – July 31, 2004, subject to a 60-day extension – would contravene the principle that a specific term (the parties' date selection) prevails over boilerplate (the generic escrow holder instructions). (Code Civ. Proc., §§ 1859, 1862.) It would also mean that every escrow agreement that uses this boilerplate language would automatically be extended by six months, notwithstanding the parties' deliberate selection of an earlier date, unless the parties take affirmative mutual steps to terminate it at the preselected closing date. That cannot be the rule.

The instruction regarding the escrow agent's obligations could not implicitly extend by half a year the time for the parties to perform. To the extent that a contrary conclusion was a predicate to the June 26 judgment, it is erroneous and must be reversed.

V.

GUERRERO FAILED TO PROVE, AND THE JUDGMENT FAILED TO AWARD, THE REQUISITE *NET* GAIN FROM RESALE.

The purpose of specific performance is "to put the parties back in the position they would have been had the contract been timely performed." (*BD Inns v. Pooley* (1990) 218 Cal.App.3d 289, 298.) The trial court acknowledged this point, noting that "the equitable relief granted may have substantially the same legal effect as the promised performance under the

sales contract." (1 AA 278.) The court's award of specific performance, however, put Guerrero in a better position than he would have been had he performed the escrow agreement. It did so because Guerrero did not produce evidence of any other, proper measure of relief. In particular, he failed to proffer any evidence of the *net* benefit he would have gained had he acquired the property pursuant to the escrow agreement. This failure of proof, too, is fatal to the June 26 judgment.

A. The Judgment Must Be Reversed With Directions To Enter Judgment For Cordova Because Guerrero Proved Only Potential Gross Profits, Not The Requisite, Lesser Net Profits.

The trial court awarded Guerrero $330,000, finding that he "was the 'equitable owner' of the subject property, with a right to the Defendant's sale proceeds" from the third-party sale. (1 AA 280.) The trial court calculated its award by taking the $1,525,000 sale price of the "subject property" *plus* an additional parcel, subtracting the additional parcel's $200,000 purchase price from several months earlier, and then subtracting the $995,000 purchase price of the Cordova-Guerrero deal. That's it. The trial court made no other adjustments.

The trial court intended to compensate Guerrero as if he had purchased the property under the escrow agreement and then he, rather than Cordova, had sold it to a third party. But the award does not accurately reflect that scenario for two reasons.

First, the $330,000 figure is based on Cordova's *sale* price, not its *net* proceeds after the costs of the transaction. Because the award does not account for these costs, it puts Guerrero in a better position than if escrow had closed: He gets the benefits of the resale without the burden of the transaction costs. The award should have been based on Cordova's *net* profits, not the *gross* sales price. (12 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 34:26, p. 94 ["the buyer is entitled to the *net profits* he or she would have received had the buyer been timely placed in possession," emphasis added]; *Rogers v. Davis* (1994) 28 Cal.App.4th 1215, 1221 [in connection with award of specific performance, buyer is entitled to "*profits* from the time the contract should have been performed," quotation marks omitted, emphasis added]; *Ellis v. Mihelis* (1963) 60 Cal.2d 206, 219 [same].) The trial court could not award net profits, however, because Guerrero never presented *evidence* of them.

Second, Guerrero presented no evidence of the *value* of the additional property parcel that was sold to the third party. The only evidence was that Cordova had purchased that parcel months earlier for $200,000. (1 RT 105; 1 AA 275.) But there is no evidence that Cordova paid fair market value. It may have gotten a bargain. (See 1 RT 105 [Henry Cordova testimony that he believed the property was worth $250,000 when he purchased it].) Guerrero is not entitled to any profit from *that* transaction. Nor is there any evidence that the real estate market for that parcel remained flat. (Cf. 1 AA 281 [trial court rejecting contract damages because no evidence of value of Cordova-Guerrero property at

date escrow was to close].) Rather, the trial court's award assumes that the entire profit from a property resale months later was attributable to the property that was the subject of the Guerrero-Cordova deal and *none* of the price increase was attributable to the additional parcel that was also sold as part of the deal. There's no evidence of that and no rational basis for that conclusion. The trial court had to subtract the *value* of the additional parcel, not just its acquisition cost, from the total sales price to compute any net profit to Cordova. Without evidence of the value of the additional parcel, there is no evidence of any *net* profit Cordova might have made.

It was Guerrero's burden to present evidence of Cordova's *net* proceeds. (See 1 Dunn, Recovery of Damages For Lost Profits (6th ed. 2005) § 6.1, p. 469 ["Plaintiff must prove lost net profits. Evidence of gross revenue without proof of the costs incurred in obtaining it will not support a judgment for plaintiff"]; *Resort Video, Ltd. v. Laser Video, Ltd.* (1995) 35 Cal.App.4th 1679, 1700 ["'(w)hen loss of anticipated profits is an element of damages, it means net and not gross profits'"].) The failure to prove *net* proceeds is fatal to a plaintiff's case and must result in reversal with directions to enter judgment for the defendant. "When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed . . . ." (*McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661; accord *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919-920 [plaintiff who presented insufficient evidence of defendant's financial condition not entitled to retry punitive

damages]; see *Silberg v. Anderson* (1990) 50 Cal.3d 205, 214 ["For our justice system to function, it is necessary that litigants assume responsibility for the complete litigation of their cause during the proceedings"].)

B. The Judgment Must Be Revised Because It Awarded Guerrero Expenses That He Would Have Incurred Anyways Had He Acquired The Property.

The June 26 judgment also awarded Guerrero $9,500 for "expenses" he incurred during the escrow. (1 AA 280.) In doing so, it put Guerrero in a better position than he would have been had he closed the transaction. Guerrero would have incurred these $9,500 in expenses had he purchased the property. In that case, he would not have been reimbursed for the expenses. Instead, the expenses would simply have reduced his eventual profit by $9,500. The result should be the same here, if Guerrero is to be compensated as if the escrow agreement had been performed. The June 26 judgment must be reduced by $9,500.

CONCLUSION

The protective appeal from the June 26 judgment is timely. If for some reason the superseding September 19 judgment is reversed, the June 26 judgment would need to be reversed as well. *Pothast v. Kind* still applies.

But even if it did not, the June 26 judgment could not stand. This is not a circumstance for which specific performance was available. The

undisputed evidence is that Guerrero was unwilling to buy the property with the zoning as-is – which is exactly how it was sold to the third party. Guerrero cannot have it both ways. He cannot refuse to proffer payment because he wants a property with different zoning and then insist on specific performance when someone else steps up to buy the property. In any event, Guerrero never met his burden of proving *net* profits from the resale.

The September 19 judgment should be affirmed. Even if it is not, though, the June 26 judgment cannot be reinstated. That judgment independently would have to be reversed with directions to enter judgment for Cordova.

Dated: July __, 2007

Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **Combined Respondent's Brief And Cross-Appellant's Opening Brief** contains 10,623 words, not including the tables of contents and authorities, the caption page, and this Certification page.

Dated: July ___, 2007

Alana B. Hoffman