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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 4

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| PROMETHEUS REAL ESTATE GROUP, INC.,<br>Plaintiff and Appellant,<br>v.<br>RONALD JOSEPH MARAZZO, Individually and as Trustee of the Ronald J. Marazzo Living Trust dated 8/2/1990,<br>Defendant and Respondent. | A143364<br><br>(Santa Clara County Super. Ct. No. 1-12-CV-228173) |

Respondent Ronald Joseph Marazzo (Marazzo) owned a commercial property in Mountain View, California which he sought to develop into a multi-unit apartment complex with appellant Prometheus Real Estate Group, Inc. (Prometheus). To that end, the parties entered into an agreement under which Marazzo agreed to transfer the property to a jointly owned limited liability company once certain conditions were met, and Prometheus agreed to develop the property and to secure entitlements and financing for the project. As part of its due diligence on the property, Prometheus obtained a title report which revealed that the property was subject to a reciprocal parking easement in favor of an adjoining property. Prometheus negotiated an agreement extinguishing the easement with the adjoining property owner, but Marazzo refused to sign, and the due diligence period specified in the agreement expired. Prometheus brought suit for breach of contract, alleging that Marazzo had breached the implied covenant of good faith and

fair dealing by unreasonably refusing to remove the parking easement. After a bench trial, the trial court concluded that Prometheus's contract claims failed because the agreement gave Marazzo the absolute right to refuse to remove exceptions to title and the agreement had terminated at Prometheus's election when it allowed the due diligence period to expire. For the reasons that follow, we affirm.

## I. FACTUAL BACKGROUND[1]

### *A. The Parties and the Property*

From 1973 until recently, Marazzo was the owner of two adjacent commercial properties in Mountain View, California.[2] The larger parcel, consisting of 3.74 acres, included a Safeway store with a large parking lot (the Property). The smaller, 0.9 acre adjoining parcel included a building rented out to various retail stores. The Property is subject to a recorded parking easement, personally executed by Marazzo, which was created in 1973 and amended in 1994. The easement allows tenants and invitees of an adjoining office property to park on the Property and likewise permits Marazzo's tenants and invitees to park on the adjoining property.

In early 2010, Marazzo learned that Safeway planned to vacate the Property at the end of its lease in 2016 in order to move to a new development across the street. Marazzo began considering developing the Property into a multi-unit luxury apartment building, and he asked the City of Mountain View (the City) to recommend an experienced developer to partner with him. Mountain View's planning director recommended Prometheus, and the parties began negotiations to develop an apartment complex on the Property in March of 2010.

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[1] The facts as described are drawn from the trial court's statement of decision and the testimony at trial, and are undisputed, except where indicated.

[2] Marazzo and his daughter testified that the properties were actually owned by the Marazzo Family Trust, a revocable inter vivos trust of which Marazzo's two children were beneficiaries, and which was also named as a defendant below. We will refer to Marazzo and the trust together as Marazzo.

### *B. Preliminary Discussions and Letter of Intent*

During the following months, the parties discussed the terms of the development, met with city planning officials, and began to draft a joint venture agreement and a letter of intent regarding the project. During these negotiations, both sides were represented by counsel.

On February 17, 2011, Prometheus and Marazzo executed a non-binding letter of intent regarding the project (Letter of Intent). The Letter of Intent contemplated that Marazzo would contribute the Property to a proposed joint venture (either a limited liability company or limited partnership, of which Prometheus would be the manager or general partner) in exchange for not less than a 50% interest. The Property would be valued at no less than $16 million, and possibly more depending on a future appraisal. Prometheus would be responsible for developing the Property and securing construction financing, and would receive a proportional ownership interest in the joint venture based on those costs. The Letter of Intent also provided that the apartment complex would utilize a "wrap" design,[3] and would include at least 238 units, or more "if permitted by the City." The Letter of Intent contemplated the parties' negotiation of both an agreement to form a joint venture and a joint venture agreement, and specified that Prometheus would have 60 days after executing the agreement to form to perform due diligence on the Property.

### *C. Agreement to Form*

After further negotiations, on July 28, 2011, the parties executed an Agreement to Form (the Agreement). The Agreement obligated the parties to form a limited liability company to develop the Property once certain conditions were met. In particular, as outlined in the Letter of Intent, Marazzo was responsible for transferring the Property, to be valued at no less than $16 million, to the joint venture in exchange for an ownership

[3] A "wrap" building is one that surrounds an above-ground parking structure in the middle of the property, whereas a "podium" building sits on top of a parking structure, which can be above or below ground.

interest. Marazzo was also responsible for terminating the Safeway lease and paying off any outstanding mortgage on the Property.

Under the Agreement, Prometheus was responsible for securing all required city entitlements, securing financing for the development, and paying all costs of construction and the costs of construction financing. The Agreement also provided for a "Due Diligence Period" of 60 days from the Agreement's effective date, during which Prometheus would perform "due diligence with respect to the Property." Before the end of the due diligence period, if Prometheus elected to proceed with the transaction, it was to deliver a "Due Diligence Approval Letter" to Marazzo. If Prometheus did not deliver this letter prior to the end of the due diligence period, the Agreement would automatically terminate. As part of "Prometheus's review and approval of title to the Property," Prometheus was to obtain a title report and a survey of the Property. The Agreement then provides: "Prometheus shall advise Marazzo, at least fifteen (15) days prior to the end of the Due Diligence Period, what exceptions to title, if any, are objected to by Prometheus. The Company shall acquire title to the Property subject to any exceptions reflected in the Preliminary Report and not objected to by Prometheus prior to the end of the Due Diligence Period. Marazzo shall have seven (7) days after receipt of Prometheus's objections to give Prometheus: (i) notice that Marazzo will remove such objectionable exceptions on or before the Closing Date; or (ii) notice that Marazzo elects not to cause such exceptions to be removed. If Marazzo gives Prometheus notice under clause (ii) or fails to give any notice within such seven (7) day period (which shall be deemed to be notice under clause (ii)), Prometheus shall have until the end of the Due Diligence Period to elect to proceed with the purchase or terminate this Agreement. If Prometheus shall fail to give Marazzo notice of its election on or before the end of the Due Diligence Period, Prometheus shall be deemed to have elected to terminate this Agreement. If Marazzo shall give notice pursuant to clause (i) and shall fail to remove any such objectionable exceptions from title prior to the Closing Date, and Prometheus is unwilling to take title subject thereto, Marazzo shall be in default and Prometheus shall have the rights and remedies set forth in Section 6.03 below."

Because the Agreement's "Effective Date" was August 2, 2011, the initial due diligence period expired at the end of September, 2011.

### *D. Extensions of Due Diligence Period*

The parties' discussions and work on the project continued through August and September of 2011. On October 3, 2011, the parties entered into a first amendment to the Agreement, which reaffirmed the terms of the original Agreement and extended the due diligence period until November 2, 2011.

On October 10, 2011, Prometheus obtained a preliminary title report for the Property which reflected the reciprocal parking easement.[4] Prometheus executive John Millham called Marazzo to discuss the easement. Prometheus was able to locate the owner of the adjoining property, and eventually negotiated an agreement with him to relinquish the easement upon the termination of the Safeway lease.

Millham provided a copy of the draft agreement extinguishing the easement to Marazzo on October 26, 2011, but Marazzo refused to sign. Marazzo had two concerns regarding the agreement: (1) he believed that he needed consent from Safeway, with whom he had a difficult and contentious relationship; and (2) he believed he needed consent from his lender in order to avoid violating his note and deed of trust. Millham had specifically negotiated the agreement terminating the easement to take effect at the end of Safeway's lease in order to address Marazzo's first concern and avoid obtaining

[4] On appeal, the parties disagree about whether this was the first time Prometheus learned of the easement. Marazzo asserts that Prometheus learned of the easement in March of 2011 based on a trial exhibit detailing meetings between the parties that indicates a March 22, 2011 telephone call took place regarding "[p]arking easements on Ron Marazzo[']s property." Prometheus argues that this call refers to a separate easement on the Property for emergency vehicles. The trial court did not expressly resolve this issue, finding only that "[t]he preliminary report disclosed the existence of a cross parking easement." Because the timing of Prometheus's discovery of the cross parking easement is not relevant to our disposition of this appeal, we need not resolve this issue.

Safeway's consent. However, Marazzo continued to object that he needed his lender's consent in order to sign the agreement.[5]

On November 1, 2011, the parties agreed to a second amendment to the Agreement further extending the due diligence period until January 12, 2012. Later that month, the parties presented the 238-unit wrap design to the City. Although the City did not reject the proposal outright, it reacted negatively. Shortly after this meeting, Prometheus provided Marazzo with a financial analysis of different project configurations, including a 238-unit wrap design and 228, 280 and 310-unit podium designs. Going forward, Prometheus began to process the project as a podium, apparently with Marazzo's approval.

In early March 2012, Marazzo hired a third party to perform an appraisal of the Property. Meanwhile, as the parties continued to discuss and negotiate the project, they executed two more amendments to the Agreement, extending the due diligence period until March 7, 2012, and then until April 10, 2012.[6]

On April 3, 2012, with the due diligence deadline approaching and negotiations over the project ongoing, Prometheus sent Marazzo a proposed fifth amendment to the Agreement.[7] In addition to extending the due diligence deadline to April 30, 2012, the proposed amendment made modifications to several substantive terms of the original Agreement, including changing the proposed design from a "wrap" to a "podium" style, and modifying the calculation of Marazzo's equity share. Marazzo did not sign the proposed fifth amendment to the Agreement, and Prometheus intentionally elected not to

[5] Prometheus argues that Marazzo's lender's consent was unnecessary because the loan on the Property would have been paid off on or before September 1, 2016, and the Agreement required Marazzo to terminate the Safeway lease no later than October 1, 2016.

[6] Prometheus appears to have proposed substantive changes in a draft fourth amendment, but the version executed by the parties merely extended the due diligence deadline while affirming the terms of the original Agreement.

[7] Millham had previously sent Marazzo other versions of this proposed fifth amendment.

send the due diligence approval letter by the April 10, 2012 deadline because of the outstanding issue of the parking easement.

### *E. Post April 10, 2012 Conduct*

Despite the passage of the April 10, 2012 deadline, Prometheus continued to work with Marazzo and the City to move the project forward, paying a $149,000 California Environmental Quality Act (CEQA) fee and a $40,000 cost recovery fee to the City, securing access to the Property for soil testing, and negotiating with Marazzo for the design of the penthouse that was to be his special unit in the development.

Meanwhile, around April 10, 2012, Marazzo received the third party appraisal of the Property, showing that the Property's fair market value if developed as a podium style apartment complex was $27.9 million. This appraisal led Marazzo to seek the advice of a real estate consultant named John Shenk, who in turn recommended that Marazzo hire new counsel at Berliner Cohen, LLP to advise him regarding the project. Marazzo did so on or around May 10, 2012. Berliner Cohen reviewed the Agreement, the proposed Operating Agreement, and Prometheus's proposed fifth amendment, and opined that the Agreement was "completely one-sided." Berliner Cohen proposed substantial changes to the original Agreement in a meeting with Prometheus on May 21, 2012.

On June 4, 2012, Shenk called Millham to tell him that Marazzo was "no longer interested in a venture with Prometheus" and that Prometheus should stop working on the project. By letter dated June 8, 2012, Marazzo stated that: "As John Shenk indicated, the contract has terminated. Therefore, Prometheus should not have further discussions with the City regarding the project or incur any more costs in seeking entitlements."

## II. PROCEDURAL BACKGROUND

On July 11, 2012, Prometheus sued Marazzo in Santa Clara County Superior Court. Prometheus's operative complaint brings claims for breach of contract, anticipatory breach of contract, specific performance, unjust enrichment, and intentional interference with prospective economic advantage (the last of which Prometheus voluntarily dismissed before trial). Prometheus asserted that Marazzo breached the implied covenant of good faith and fair dealing by refusing to cooperate in removing the

parking easement, that Marazzo breached the Agreement itself by failing to execute the proposed fifth amendment, and that Marazzo waived the Agreement's requirement that the due diligence period ended on April 10, 2012 orally and by conduct and was therefore estopped from asserting that provision as a defense. Prometheus also sought specific performance of the Agreement, and restitution for the value it had added to the Property through its unjust enrichment claim.

After a lengthy detour during which the parties attempted to resolve their dispute through mediation and a judicial reference proceeding,[8] a bench trial was held in early 2014, and the trial court issued its final statement of decision on July 30, 2014.[9] The trial court concluded that Prometheus's claims for breach of contract and for specific performance failed because the contract had been terminated at Prometheus's election on April 10, 2012: "Pursuant to written contract and subsequent amendments, the due

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[8] Initially, Marazzo moved pursuant to the Agreement to compel mediation at Judicial Arbitration and Mediation Services, Inc. (JAMS), and if that failed, for a judicial reference proceeding pursuant to Code of Civil Procedure section 638. The parties then agreed to refer the matter to the Honorable Elaine Rushing (Ret.) from JAMS as judicial referee, and the trial court so ordered.

After six days of trial before the JAMS judge, the parties interrupted the proceedings so that the judge could attempt to mediate the dispute. When the mediation failed, Marazzo filed a series of motions seeking to disqualify the judge on the basis of her failure to disclose that while serving as a Superior Court judge, she had been censured by the Commission on Judicial Performance (CJP). Marazzo also sued JAMS, alleging that it violated Business and Professions Code sections 17200 and 17500 because failure to disclose the judge's prior CJP rebuke was an unfair, unlawful, and fraudulent business practice. Eventually, the JAMS judge was disqualified, and the trial court then ruled that the parties would have a bench trial, rather than a judicial reference proceeding, because a second reference proceeding would not be practical given Marazzo's pending lawsuit against JAMS. Another trial court judge was appointed to preside over the bench trial.

[9] During the bench trial, Marazzo transferred ownership of the smaller retail parcel to his children, who then transferred it to Whiteacre Site, LLC. Whiteacre Site, LLC filed a complaint in intervention in this matter, seeking a declaration that Prometheus has no interest in the retail parcel. The trial court severed the proceedings on Whiteacre Site, LLC's complaint, which proceeded to trial and judgment, and are now the subject of a separate appeal pending before this court (A152185).

diligence period expired at midnight on April 10, 2012. . . . Marazzo balked at signing the extension, leaving Prometheus with a decision to accept title as it was, encumbered by a cross-parking easement, or to terminate the agreement expressly or by inaction. Prometheus intentionally elected to do nothing. Pursuant to the express language of the Agreement to Form, the contract terminated at midnight on April 10, 2012. Prometheus understood it was then out of a contract with Marazzo. The Court so finds."

The trial court rejected Prometheus's argument that Marazzo waived the expiration of the due diligence period orally or by his conduct. With respect to Prometheus's claim for breach of the covenant of good faith and fair dealing, the trial court found: "[T]he duty of good faith presupposes that Marazzo had a duty to attempt to clear title to the easement. Viewed in broad terms, it makes sense that Marazzo's failure to sign a document prepared and set before him and/or to make a call to his lender frustrated and hampered the clearing of title. However, the language of paragraph 3.01 (a) (ii) could not be clearer that Marazzo may elect " 'not to cause the exceptions to be removed[.]' " The evidence indicates Marazzo exercised his right not to participate in removing the exception. It would be inconsistent to find that Marazzo could be in breach of the implied covenant of good faith for exercising a specific expressly stated right provided to him under the terms of the contract."

Finally, on Prometheus's unjust enrichment claim, the trial court found that, pursuant to sections 3.02(d) and 6.01 of the Agreement limiting the parties' damages in the event the deal did not close, Prometheus was entitled to restitution only as to expenses incurred after April 10, 2012. The trial court awarded Prometheus $149,737.60 for post-termination out-of-pocket expenditures, and $180,000 for Prometheus's post-termination internal overhead, for a total award of $329,737.60.

Both parties moved for attorney fees. The trial court denied Prometheus's motion, and granted Marazzo's motion in part, awarding Marazzo $1.5 million.[10] Prometheus appealed the judgment, and both parties appealed the fee award.[11]

At Marazzo's request and on the Sixth District's recommendation, the Supreme Court ordered all three appeals transferred from the Sixth District to this court.[12]

## III. DISCUSSION

On appeal, Prometheus argues that: (1) the trial court erred in concluding that Marazzo did not breach the implied covenant of good faith and fair dealing; (2) that this court should find that Marazzo breached the implied covenant of good faith and fair dealing based on the undisputed facts, or in the alternative, reverse and remand for a new trial; (3) that the trial court should determine the appropriate remedy for the breach of contract claim on remand; and (4) that because the judgment should be reversed, the trial court's award of attorney fees to Marazzo should be reversed as well. Marazzo argues that: (1) any duty of good faith and fair dealing was never triggered because Prometheus never formally objected to the parking easement; (2) that Marazzo had no duty to cooperate in removing the easement because such a duty conflicts with the Agreement's express terms, and because the Agreement as a whole was supported by adequate consideration; and (3) that substantial evidence supports the trial court's factual findings.

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[10] The $1.5 million award represented an approximately 33% reduction of the $2,174,291.57 in fees sought by Marazzo.

[11] Shortly before Marazzo's brief was filed, we dismissed his cross-appeal of the fee award at his request.

[12] After these appeals were filed, Marazzo transferred the Property to Blackacre Site, LLC, which in turn transferred it to Marazzo Realty Holdings, LLC (MRH). The smaller retail parcel was also transferred from Whiteacre Site, LLC, to MRH. MRH was then substituted for Whiteacre Site, LLC as plaintiff in the severed intervention proceedings. MRH filed an amended complaint in those proceedings, seeking a declaration that Prometheus had no interest in either the Property or the retail parcel. Prometheus unsuccessfully moved to stay the declaratory relief proceedings pending the resolution of this appeal. Prometheus then filed a petition for writ of mandate in the Sixth District, requesting that the trial court be directed to grant the stay. The petition was transferred from the Sixth District to this court, and we denied it.

### *A. Standard of Review*

We will uphold the trial court's factual findings if they are supported by substantial evidence, and " 'any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision.' " (*TME Enterprises, Inc. v. Norwest Corp.* (2004) 124 Cal.App.4th 1021, 1030; see *Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, 1558.) We review the trial court's legal conclusions de novo. (See *Westfour Corp. v. California First Bank, supra,* 3 Cal.App.4th at p. 1558; *Del Taco, Inc. v. University Real Estate Partnership V* (2003) 111 Cal.App.4th 16, 22.) We also interpret a contract de novo where the interpretation does not turn on the credibility of extrinsic evidence. (See *Windsor Pacific LLC v. Samwood Co., Inc.* (2013) 213 Cal.App.4th 263, 273.)

### *B. Prometheus Advised Marazzo of its Objections to Title*

We first consider Marazzo's argument that Prometheus was required to, but did not, object to the parking easement in writing in order to trigger Marazzo's duty to elect whether or not to cause the parking easement to be removed. Marazzo does not appear to have adequately raised this argument before the trial court, which did not address the issue and appeared to assume that Prometheus had adequately objected to the parking easement under Section 3.01(a)(ii).[13] (See *Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 863 [arguments not made before trial court are waived on appeal].)

In any event, to the extent that Marazzo's argument is not waived, we reject it. Marazzo bases his argument on Section 7.01 of the Agreement, which provides that "[a]ny notices required or permitted to be given hereunder shall be given in writing." But as Prometheus notes, Section 3.01(a)(ii) requires only that Prometheus "advise" Marazzo of its objections to exceptions to title, whereas Marazzo is required to give "notice" that he will or will not remove those exceptions, and Prometheus is then to give "notice" of its

[13] Marazzo's only mention of this issue in his briefing before the trial court appears to be his statement in his opening trial brief, without further explanation, that a "written objection to [the parking easement] on the title report, the evidence will show, was something Prometheus itself never bothered to send to [Marazzo] in the first place."

election either "to proceed with the purchase or terminate this Agreement." We must give effect to this difference in word choice. (See *In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 49 ["We must give significance to every word of a contract, when possible, and avoid an interpretation that renders a word surplusage"].)

The undisputed facts show that Prometheus raised its objection to the parking easement in discussions with Marazzo beginning in October of 2011. In late October, Prometheus sent Marazzo an email attaching a draft agreement extinguishing the easement and indicating that doing so was "obviously critical to the development project moving forward." We are satisfied that this was sufficient to "advise" Marazzo of Prometheus's objection to the parking easement under Section 3.01 of the Agreement.

***C. The Implied Covenant Conflicts with the Express Terms of the Agreement***

We next consider Prometheus's argument that Marazzo breached the implied covenant of good faith and fair dealing. The parties' dispute centers on the following language from Section 3.01 of the Agreement: "Marazzo shall have seven (7) days after receipt of Prometheus's objections to give Prometheus: (i) notice that Marazzo will remove such objectionable exceptions on or before the Closing Date; or (ii) *notice that Marazzo elects not to cause such exceptions to be removed*." (Italics added.)

Prometheus concedes that by providing that Marazzo may give notice that he "elects not to cause such exceptions to be removed," the Agreement by implication gives Marazzo the right to decline to remove title exceptions, such as the parking easement at issue here, objected to by Prometheus. The parties disagree regarding how that right could be exercised.

Prometheus characterizes Section 3.01 as providing Marazzo "discretion" to refuse to remove title exceptions, and argues that the implied covenant of good faith and fair dealing required Marazzo to exercise that discretion in good faith. Prometheus relies on the trial court's findings that "Marazzo's failure to sign a document prepared and set before him and/or to make a call to his lender frustrated and hampered the clearing of title," that "[t]here is no evidence that Marazzo's lender would have objected had it been requested to sign," and that "[i]t appears that the release would not be contested and, in

fact, would be voluntarily provided." Prometheus argues that these findings establish that Marazzo unreasonably refused to sign the agreement extinguishing the easement, and thereby breached the covenant of good faith and fair dealing and thus the Agreement. (See *Mattei v. Hopper* (1958) 51 Cal.2d 119, 122; *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 367.)

Marazzo argues that the implied covenant does not apply because this case is governed by the "exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374, quotation omitted (*Carma*).) Marazzo asserts that the Agreement granted him an "express right to elect to refuse to remove objectionable title exceptions," and that right "conclusively precluded any implied duty requiring [him] to do the opposite." In support, Marazzo relies on cases holding that the implied covenant does not apply to vary contractual terms giving one party broad and express discretion. (See *Carma, supra*, 2 Cal.4th at pp. 351-352, 373-376 [landlord had "right by written notice to Tenant to terminate this Lease"]; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 328, 350-51 (*Guz*) [employee could be "terminated at the option" of his employer]; *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1061-1064 (*Thrifty Payless*) [parties "shall each have the right to terminate" the lease if "for any reason" it had not commenced by a certain date]; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1121-1123 & fn. 7 (*Wolf*) [right to grant licenses "as [defendant] may see fit"].) Prometheus argues that these cases are all distinguishable because the contractual language at issue in them expressly granted unfettered discretion, whereas the language here merely grants it by implication.

We agree with Marazzo and read the contractual language here as granting him unfettered discretion to decline to remove title exceptions. (See *Carma, supra*, 2 Cal.4th at p. 376.) Considering the Agreement as a whole, Section 3.01 is intended to protect Prometheus and provide it with the option not to go forward with the transaction if the

due diligence process reveals problems with the Property. Section 3.01(a), titled "Prometheus's review and approval of title to the Property," sets forth a multi-step process for identifying and resolving Prometheus's objections to title exceptions. First, 15 days before the end of the Due Diligence Period, Prometheus "shall advise Marazzo . . . what exceptions to title, if any, are objected to by Prometheus." Marazzo then has seven days to provide either: "(i) notice that Marazzo will remove such objectionable exceptions on or before the Closing Date; or (ii) notice that Marazzo elects not to cause such exceptions to be removed." The Agreement then provides that if Marazzo gives notice under clause (ii) (or fails to give any notice, "which shall be deemed to be notice under clause (ii)"), "Prometheus shall have until the end of the Due Diligence Period to elect to proceed with the purchase or terminate this Agreement." Read together, these steps contemplate that Marazzo may "elect" not to remove objectionable title exceptions, and Prometheus's remedy, should Marazzo make such an election, is to either "proceed with the purchase" of the Property subject to the exceptions or to "terminate [the] Agreement." We find this language and structure closely resembles situations in which courts have found that the implied covenant of good faith and fair dealing will not be applied to vary contractual grants of broad and unfettered discretion. (See, e.g., *Carma*, *supra*, 2 Cal.4th at pp. 351-352, 373-376; *Guz*, *supra*, 24 Cal.4th at pp. 328, 350-351; *Thrifty Payless*, *supra*, 185 Cal.App.4th at pp. 1061-1064; *Wolf*, *supra*, 162 Cal.App.4th at pp. 1121-1123 & fn. 7.)

Prometheus argues that because the Agreement elsewhere uses the phrase "in its sole and absolute discretion" in describing Prometheus's right to take certain actions, the absence of that language in the provision at issue here means that unfettered discretion was not intended. Although the use of the phrase "sole and absolute discretion" would more clearly convey that Marazzo has the unfettered right to refuse to remove title exceptions, as discussed above, courts have found such discretion based on less clear and decisive language, and we conclude that the language here is intended to do the same. (See *Carma*, *supra*, 2 Cal.4th at pp. 351-352, 373-376; *Guz*, *supra*, 24 Cal.4th at pp. 328, 350-351; *Thrifty Payless*, *supra*, 185 Cal.App.4th at pp. 1061-1064; *Wolf*, *supra*, 162

Cal.App.4th at pp. 1121-1123 & fn. 7.) In addition, as Marazzo observes, the Agreement elsewhere uses the term "reasonably" or "reasonable" in limiting the parties' rights, suggesting that the parties knew how to limit their discretion under the Agreement and chose not to do so here. The parties neither gave Marazzo "sole and absolute discretion" nor required his election not to remove title exceptions to be "reasonable." We are, accordingly, not dissuaded from our conclusion that the language bespeaks a grant of unrestricted discretion.

In arguing that the implied covenant applies, Prometheus relies on *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354 (*Locke*). Sondra Locke, an actor and director, was romantically involved with actor Clint Eastwood for several years. (*Id*. at pp. 357-358.) After the relationship soured, Locke sued Eastwood and the parties entered into a settlement agreement. (*Id*. at p. 358.) At the same time, and in exchange for dropping her case against him, Eastwood secured Locke a development deal with Warner Bros. (*Ibid*.) The deal provided that Locke would receive $250,000 per year for three years for a "non-exclusive first look deal." (*Ibid*.) Locke was required to submit any picture she was interested in developing to Warner before any other studio, and then Warner had 30 days to approve or reject the submission. (*Ibid*.) Unbeknownst to Locke, Eastwood had agreed to reimburse Warner for the cost of her contract if no projects were produced. (*Ibid*.) Warner paid Locke the guaranteed compensation under the contract but did not develop any of her films. (*Ibid*.) Locke alleged that the deal was a sham, that Warner had never intended to make any films with her, and that Warner had entered into the contract only to help Eastwood settle his litigation with her. (*Id*. at pp. 358-359.) She brought suit against Warner, alleging that it had violated the implied covenant of good faith and fair dealing in the contract. (*Id*. at p. 359.) The *Locke* court held that summary judgment was improperly granted for Warner on Locke's breach of contract claim because she had raised a triable issue of fact as to whether Warner had breached the implied covenant by categorically refusing to consider her proposals, irrespective of their merits. (*Id*. at p. 365.)

Prometheus's reliance on *Locke* is misplaced. "The Locke/Warner agreement did not give Warner the express right to refrain from working with Locke. Rather, the agreement gave Warner *discretion* with respect to developing Locke's projects." (*Id*. at p. 367.) Warner was "entitled to reject Locke's work based on its subjective judgment, and its creative decision" regarding the merits of her work, but the *Locke* court held that there was a triable issue of fact as to whether Warner had made that creative decision in bad faith, that is, whether Warner had "categorically reject[ed]" her work. (*Id*. at p. 364; see *id*. at p. 363 [" 'Where the contract involves matters of fancy, taste or judgment, the promisor is the sole judge of his satisfaction. If he asserts *in good faith* that he is not satisfied, there can be no inquiry into the reasonableness of his attitude' "].) But this case does not involve the exercise of artistic or creative judgment, or a contract in which "it is a condition of an obligor's duty that he or she be subjectively satisfied with respect to the obligee's performance." (*Id*. at p. 363.) Rather, as discussed above, and unlike the contract in *Locke*, the Agreement here grants Marazzo an express right to elect "not to cause [title exceptions] to be removed." (See *Carma*, *supra*, 2 Cal.4th at p. 374.) Accordingly, the trial court did not err in concluding that "Marazzo could [not] be in breach of the implied covenant of good faith for exercising a specific expressly stated right provided to him under the terms of the contract."

### *D. The Agreement As a Whole is Supported By Adequate Consideration and Is Not Illusory*

Prometheus next argues that even if the Agreement permitted Marazzo to refuse to remove title exceptions for any reason, the implied covenant should nevertheless restrict the exercise of that right in order to prevent the contract from being illusory and unenforceable. According to Prometheus, because Marazzo knew the parking easement would make the contract's purpose (creating a joint venture to develop the Property) impossible, and yet could refuse to remove it even at no cost to himself, he "held the unilateral power to determine whether or not the contract's purpose could be achieved," thus making the Agreement unenforceable and illusory. Marazzo argues that there is no

necessity to imply the covenant because the Agreement is otherwise supported by adequate consideration.

"[W]hen a party is given absolute discretion by express contract language, the courts will imply a covenant of good faith and fair dealing to limit that discretion in order to create a binding contract and avoid a finding that the promise is illusory. However, when the contract is adequately supported by adequate consideration regardless of the discretionary power, there is no need to impose a covenant of good faith in order to create mutuality." (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 57; see *Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1207 [same].) "[C]ourts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement." (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 808 (*Third Story Music*).)

In *Third Story Music*, Third Story Music transferred rights in the music of singer and songwriter Tom Waits to Warner Communications under an agreement which gave Warner the right to manufacture, sell, distribute, and advertise the recordings, but also provided that Warner " 'may at [its] election refrain from any or all of the foregoing.' " (*Id*. at p. 801, fn. omitted.) Third Story Music was to receive a royalty from Warner as a percentage of the amount earned from licensing the music, as well as a small specific dollar amount as an advance on royalties. (*Id*. at p. 801 & fn. 3.) When Warner declined to enter into a licensing deal without Waits's consent (which he withheld), Third Story Music sued for breach of contract, alleging that Warner had breached the implied covenant of good faith and fair dealing by permitting Waits to decide whether particular licensing arrangements were or were not acceptable. (*Id*. at p. 802.) The *Third Story Music* court held that Warner's demurrer to Third Story Music's breach of contract claim was properly sustained. (*Id*. at p. 809.) The court held that while Warner's ability to refrain "at [its] election" from all marketing efforts created "a textbook example of an illusory promise" and would ordinarily require application of the implied covenant, its

application was not required in that instance because Warner promised to pay a guaranteed minimum amount no matter what licensing efforts were undertaken. Accordingly, the contract was supported by legally adequate consideration and the covenant did not need to be read into the parties' agreement. (*Id*. at pp. 808-809.)

We agree with Marazzo that the Agreement as a whole was supported by adequate consideration, putting aside the discretionary power granted to Marazzo under Section 3.01.[14] Under the Agreement, Marazzo agreed "not to market or show the Property to any other prospective purchasers," not to in any way "change the current condition of title to the Real Property," and not to "transfer all or any portion of the Property" during the term of the Agreement "without the prior written consent of Prometheus." This was sufficient consideration to prevent the contract from being entirely illusory. (See *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 423 [consideration may consist of "an act, forbearance, change in legal relations, or a promise"].)

In addition, Prometheus had the option under the Agreement of going forward with the purchase of the Property subject to the parking easement, in which case Marazzo would have been obligated to transfer it. Under Section 3.01, after notice from Marazzo, Prometheus could "elect to proceed with the purchase," and once Prometheus provides the due diligence approval letter, "then Prometheus and Marazzo shall proceed with the transaction." While proceeding with the purchase before resolving the issue of the parking easement may have been commercially risky, Marazzo's obligation to do so at Prometheus's election is enough to prevent the Agreement from being entirely illusory. (See *Third Story Music*, *supra*, 41 Cal.App.4th at p. 809 [" 'It is not enough to say that without the proposed implied covenant, the contract would be improvident or unwise or would operate unjustly' "].) In sum, as in *Third Story Music*, we conclude that the Agreement was supported by "more than the peppercorn of consideration the law requires." (*Third Story Music, supra,* 41 Cal.App.4th at p. 808, fn. 5; see *Thrifty Payless*,

[14] As Marazzo notes, Prometheus argued before the trial court in seeking specific performance that the Agreement was supported by adequate consideration.

*supra*, 185 Cal.App.4th at p. 1063 [agreement supported by adequate consideration to avoid covenant where "there were explicit promises included in the lease, and the termination provisions were part of freely negotiated contingencies"]; *Avidity Partners, LLC v. State of California*, *supra*, 221 Cal.App.4th at pp. 1207-1208 [no necessity to imply the covenant where discretionary act was not "essential part of [defendant's] performance" and contract was otherwise supported by adequate consideration].) We therefore conclude the trial court did not err in declining to imply the covenant of good faith and fair dealing.[15]

## IV. DISPOSITION

The judgment and the order awarding attorney fees are affirmed. Marazzo shall recover his costs on appeal.

[15] Because we conclude that Prometheus's claim for breach of contract fails, we need not reach the parties' additional arguments regarding the appropriate remedy, or Prometheus's argument that if the judgment is reversed, the trial court's fee award should be reversed as well.

_____
Rivera, J.

We concur:

_____
Ruvolo, P.J.

_____
Kennedy, J.[*]

[*] Judge of the Superior Court of California, County of Contra Costa, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.