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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DRAKK HOLDINGS, LLC, Plaintiff and Appellant, v. PSIP SN VERMONT LLC, Defendant and Respondent.	B343318, B346187 (Los Angeles County Super. Ct. No. 20TRCV00847)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Ronald F. Frank, Judge. Reversed and remanded.

Greines, Martin, Stein & Richland, David E. Hackett, Stefan Caris Love; Goodkin Law Group, Daniel L. Goodkin and Randy Aguirre for Plaintiff and Appellant.

Allen Matkins Leck Gamble Mallory & Natsis, Marissa M. Dennis, Marshall C. Wallace; Alan J. Droste and Alan J. Droste for Defendant and Respondent.

Plaintiff and appellant Drakk Holdings, LLC (appellant), appeals from the judgment of dismissal following defendant and respondent PSIP SN Vermont LLC's (respondent) successful motion for summary judgment. Specifically, appellant appeals the ruling granting summary adjudication as to its cause of action for "specific performance/breach of implied covenant of good faith and fair dealing." (Capitalization and boldface omitted.) Appellant contends a jury can find respondent breached the implied covenant by unreasonably refusing to allow an environmental assessment and an extension of the closing date necessary for appellant to purchase the property at issue in this case. Further, appellant argues it presented evidence showing a triable issue of material facts exists as to whether it is entitled to specific performance because appellant was ready, willing, and able to perform under the purchase and sale agreement.

Appellant also appeals from the order awarding respondent attorney's fees and costs and the order requiring appellant to post an appeal bond. Appellant asserts these orders should be reversed with the reversal of the judgment.

We conclude triable issues exist as to appellant's cause of action for breach of implied covenant of good faith and fair dealing, as well as its claim for specific performance. Thus, we reverse and remand.

BACKGROUND

Appellant's business and the property

Keith Kenneally[1] is a co-owner of Drakk Holdings, LLC. Keith operates a business that "acts like a travel agent for produce growers/farmers and produce brokers." The business enters into air cargo contracts and provides trucking and storage. Keith operates primarily through Jet Pro, Inc. (Jet Pro), which handles administration, and JPI Services, Inc. (JPI Services), which manages the warehouse workers.

Jet Pro leased a warehouse on La Cienega Boulevard near Los Angeles International Airport, an area where Keith had long wanted to buy a warehouse. With Jet Pro's lease expiring in October 2018, Keith's realtor, Sean O'Donnell, showed him a warehouse for sale in Gardena. Keith was interested in the property, indicating he "finally had an opportunity to build the showcase business facility of [his] dreams." The property was part of a larger parcel purchased by respondent in 2015. The parcel had four warehouses and had yet to be subdivided. Respondent worked with an experienced civil engineer to begin subdividing the parcel after the purchase. One of respondent's owners, Lonnie Nadal, oversaw the subdivision. By 2017, respondent had to comply with a list of conditions before it could complete the subdivision.

The purchase and sale agreement

While Keith wished to purchase the property, no one could take title to it until the subdivision was complete. Further, a

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[1] Keith Kenneally and his brother, Bernard Kenneally, who represented Keith's business in this matter, will be referred to by their first names to avoid confusion. We mean no disrespect.

tenant had not yet vacated the property. From March through April 2018, Keith through his realtor negotiated the sale of the property with respondent. Keith formed Drakk Holdings, LLC, to act as a holding company for the property. The proposed closing date was initially "15 days after the removal of Buyer's Contingencies and the recordation of the parcel map estimated [to] be August, 2018." Respondent later changed the estimated recordation date to September 2018.

Appellant and respondent entered into a purchase and sale agreement for the property (purchase agreement), with an effective date of May 24, 2018. Under the terms of the agreement, appellant was to pay $6.765 million for the property, including $200,000 in earnest money. Respondent was to "perform the Seller Work, at Seller's sole cost, in accordance with the Plans and Specifications … prior to the Closing." Respondent was also required to deliver or make available certain property documents, including environmental reports, within five days after the effective date of the contract. The agreement included an inspection period, defined as "[t]he period beginning on the Effective Date and ending on the date that is forty-five (45) days after the Effective Date."

During the inspection period, the physical due diligence clause of the agreement indicated appellant had, upon providing notice, "reasonable access to the Property at all reasonable times during normal business hours, upon appropriate notice to any tenants of the Property, for the purpose of conducting reasonably necessary tests, including surveys and architectural, engineering, geotechnical and environmental inspections and tests." Under this clause, however, "with respect to any intrusive inspection or test (i.e., core sampling) [the purchaser] must provide a proposed

scope of testing to Seller and obtain Seller's prior written consent (which may be withheld in Seller's sole and absolute discretion)."

Section 4.4, the "**Due Diligence/Financing/Termination Right**" clause of the purchase agreement, allowed appellant until the end of the inspection period to obtain financing to acquire the property and to inspect and investigate the property to determine, in its absolute discretion, if the property was acceptable. Section 4.4 allowed appellant to terminate the purchase agreement for any reason by giving written notice before the end of the inspection period, otherwise the purchase agreement continued in full force and effect.

The closing date of the sale was set as "Fifteen (15) days after the later of (a) Substantial Completion of the Seller Work or (b) expiration of the Inspection Period." Before closing, the property had to be "a separate legal parcel in compliance with the California Subdivision Map Act." Neither party could waive this condition. The agreement indicated "[t]ime is of the essence in the performance [of] each and every obligation of this Agreement."

Respondent was subsequently 15 days late in providing appellant certain environmental reports, thus failing to meet the contract's five-day deadline for providing property documents. Appellant agreed to amend the purchase agreement to extend the inspection period to July 30, 2018. Once appellant's consultant reviewed the environmental reports and recommended no further investigation, appellant made the decision to proceed.

The lease and second amendment

Shortly afterwards, respondent again changed its estimated map-recordation date to November 2018 from the September estimate. Keith was "shocked" by this delay because it

frustrated his financing, relocation (as the La Cienega warehouse lease was expiring before November 2018), and property-improvement plans. From Keith's perspective, the delay made all of the escrow closing dates listed in the purchase agreement useless. To deal with this issue, the parties agreed to negotiate a lease and another purchase agreement amendment (second amendment).

Under the lease, appellant would hold tenancy starting in October 2018 for five years or until closing. Jet Pro and JPI Services could take joint possession. The lease restricted the premises to be used solely for the following purposes: "General office and industrial/warehouse use for the purpose of receiving, storing and shipping products, materials and merchandise made and/or distributed by Tenant." However, appellant had a nonexclusive right to use the common areas and may be in possession of the premises when respondent performed the seller work. Appellant was prohibited from making any alterations to the premises without respondent's consent. Appellant was responsible under the lease for complying with "all laws, statutes, ordinances, orders and regulations, now or hereinafter enacted, affecting the Premises and the Project."

Under the second amendment, appellant was "entitled to a credit against the Purchase Price at Closing in an amount equal to the Base Monthly Rent … from the Term Commencement Date (as defined in the Lease) through the date immediately preceding the Closing Date." The second amendment had a time of the essence clause and also redefined the closing date to be "fifteen (15) days after the later of (a) Substantial Completion of the Seller Work and (b) satisfaction of the condition set forth in Section 7.2.5 of the Agreement." Further, the second amendment

indicated, prior to closing, the lease governs if there are any inconsistencies between the purchase agreement and the lease.

Shortly before the lease and second amendment were to be executed, Nadal sent an e-mail indicating the estimated recordation date had been pushed to 2019. A few weeks later, Nadal wrote: "County approved new improvements to the building and in line for committee approval of the tentative, then final maps. They say 6 months."

After the parties executed the lease and second amendment, dated September 7, 2018, appellant took possession of the property in October 2018. Appellant then spent nearly $3 million on improvements to the property. Jet Pro and JPI Services then moved their operations to the property.

Further delays in recordation

In December 2018 and January 2019, Nadal notified appellant the recordation will be completed in June 2019. However, recordation was not completed in June 2019.

The repeated delays in recordation interfered with appellant's loan application process. Keith received loan approval at favorable rates due to his net worth and financial strength, but the loan applications were only good for 90 days. Once the 90-day period expired, the process started again with Keith updating his financial profile.

In September 2019, Los Angeles County approved the property's tentative parcel map. Although the tentative approval had many unmet conditions, Nadal told appellant he expected the recordation of the tract map in January 2020. The final parcel map was not recorded until September 2, 2020.

Appellant's lender's request for updated environmental reports

In 2019, appellant's lender, Harvest Commercial Capital, LLC (Harvest), required new environmental assessments due to changes in California's environmental standards. Harvest engaged Fulcrum Resources Environmental (Fulcrum Resources) to prepare a phase I environmental site assessment for the property. Fulcrum Resources completed the report on August 6, 2020, recommending "a limited subsurface investigation of the Property or a Phase II Environmental Site Assessment." Fulcrum Resources recommended analyzing eight soil borings to a depth of 15 feet. Harvest accepted the recommendation and requested appellant to undertake the phase II environmental site assessment.

On September 2, 2020, appellant notified respondent of the need for the phase II environmental assessment. Bernard, who represented Keith's business, e-mailed Nadal indicating Keith was prepared to pay for the assessment immediately and wanted to confirm respondent granted permission for Fulcrum Resources to get on and off the property quickly.

Nadal replied the same day stating, "you had a year to conduct all of your investigations, rather than waiting until now. **You do not have permission to do this Phase 2, until I confirm in writing that you may proceed**. [¶] I need to see the Phase 1 that was done on your behalf. [¶] I need to be given the exact Phase 2 sampling that is contemplated. [¶] I will have to get this approved by all of ownership." On September 10, 2020, Nadal e-mailed Keith stating, "The tract map has recorded and the buildings can be sold now," but the phase II environmental assessment was not mentioned.

On September 16, 2020, Fulcrum Resources provided respondent a summary letter regarding the assessment, explaining why it was needed and that it was only for the lender's due diligence for appellant's loan. Fulcrum Resources also indicated the environmental reports would not be made public. Bernard e-mailed Nadal the next day reiterating appellant was not engaged in any new investigations of the property and the assessment was simply due to the lender's due diligence for the loan underwriting.

On September 23, 2020, Nadal sent Bernard the results of environmental tests conducted on the property in 2015. Bernard forwarded the documents to Fulcrum Resources, who responded, "Results from the previous investigation exceeded current regulatory screening levels hence our recommendation for further subsurface investigation at the site."

Termination of the purchase agreement

On September 25, 2020, respondent formally notified appellant of the parcel map recordation. The notification stated, "the Closing shall occur fifteen (15) days after the date hereof (i.e., October 12, 2020); provided, however, that in no event shall the Closing occur prior to the recordation of the CC&Rs … and the Access Easement …." The same day, respondent communicated to appellant in an e-mail stating, "As described in the letter, we are waiting for the CC&Rs and a related access easement to record before we can close, but we are hopeful that will … happen over the next week or so."

On September 30, 2020, in an e-mail communicated to Keith's realtor, Nadal indicated, "The Buyer's [inspection] period expired over a year ago, and we won't be reopening it. We aren't approving any phase 2 testing." In response, Bernard proposed

the phase II environmental assessment be allowed to proceed, the rent credit against the purchase price would stop on the recordation date, and escrow would close as soon as Keith funds it.

On October 7, 2020, respondent's counsel responded stating, "Seller has considered your request below to proceed with air sampling and is willing to permit the testing on the terms set forth in the attached PSA amendment." However, air sampling was not a substitute procedure for the soil sampling needed in the phase II assessment. Respondent proposed a third amendment to the purchase agreement, in which respondent required an additional deposit of $100,000. Further, the proposed amendment indicated the rent credit against the purchase price would be $140,717.50 and run to March 18, 2019, the date of the substantial completion of the seller work.

The closing did not occur before the October 12, 2020, deadline. On October 21, 2020, respondent sent appellant a letter indicating it is willing to proceed with the closing no later than October 30, 2020. Respondent asserted appellant's failure to perform its closing obligations by this date will constitute default under the agreement. On October 27, 2020, appellant responded to the letter, explaining, "Since May 2018, Keith has had his Bankers in line to close Escrow (everyone waiting for the Tract Map's recording). The **Phase II** update request somehow got blown way out of proportion with thoughts that Keith was still '*investigating*' the Property." Appellant further indicated, "the entire month of September and part of October were lost due to the **Phase II** update request. Keith has now moved on to alternative financing. He learned today that closing Escrow this week is impossible, but 2 or 3 more weeks are needed. [¶]

Further, if this Bank does not perform without much delay, Keith will be in a position to close Escrow with ***no*** Bank (all cash) in 4 to 5 weeks."

The next day, respondent responded with an e-mail stating, "I have discussed your email below with the seller group, and we remain focused on closing this Friday on the terms set forth in the purchase agreement. To that end, seller is delivering all documents and taking all other actions required of it to fully perform its closing obligations and expects buyer to do the same." The e-mail concluded by adding, "we are in this situation as a result of buyer's indication that it would not be able to close on the originally scheduled closing date and its subsequent failure to meaningfully respond to seller's proposed PSA amendment to accommodate buyer's concerns or otherwise engage with seller on this transaction over the past 3 weeks despite seller's multiple contact attempts."

On October 29, 2020, appellant e-mailed a response stating, "[Keith] intends to fully fund Escrow and consummate the Purchase & Sale" and offered "to wire an Additional Deposit of $150,000 (***non-refundable***) to be part of the Earnest Money and shall apply to the Purchase Price at Closing." Appellant also offered that "all rent (commencing November 2020) paid to the Seller will no longer qualify as a credit against the Purchase Price." On November 2, 2020, appellant followed up with an e-mail indicating arrangements were made to sell a warehouse near San Francisco Airport to acquire cash to close. Respondent replied the same day, stating, "seller made its closing deliveries to escrow on Friday, but we understand that buyer did not deliver its closing funds (as you had informed me and escrow in advance that buyer would fail to do). Per my earlier

correspondence, buyer is now in breach under the purchase agreement and the lease and seller is evaluating its rights and remedies. As such, buyer no longer has the right to purchase the property pursuant to the existing purchase agreement. If buyer still desires to purchase the building, it needs to make a new offer for such purchase for seller's consideration."

Towards the end of December 2020, Keith wanted to complete the phase II assessment for his own peace of mind. Keith proceeded with the assessment without asking permission from respondent, which was completed on January 26, 2021. The report from the assessment revealed nothing of concern as it concluded no further investigation was needed. Keith sought financing from Zions Bank and submitted the environmental assessment report. In May 2021, Zions Bank offered appropriately $6.34 million to purchase the property. Zions Bank approved a loan, but there were conditions to close the loan. On June 16, 2021, Bernard sent a final request to close escrow on the original terms by June 21, 2021, but respondent did not accept.

The lawsuit

On November 27, 2020, appellant filed a lawsuit against respondent. The operative complaint asserted six causes of action for (1) specific performance/express written agreement; (2) specific performance/promissory estoppel; (3) specific performance/breach of implied covenant of good faith and fair dealing; (4) promissory estoppel—money damages; (5) fraud and deceit—false promise; and (6) negligent misrepresentation. Under the third cause of action, the complaint alleged respondent in bad faith frustrated appellant's rights under the purchase agreement, the second amendment, and the lease by obstructing appellant's ability to fund the balance of the purchase price with

its loan. Respondent allegedly refused to cooperate with the harmless request by appellant's lender for an updated environmental report necessitated by the delay in recordation. Respondent allegedly failed to cooperate in setting a reasonable date to close escrow.

In addition, appellant alleged respondent wrongfully conditioned any further updated environmental report on whether appellant accepted the exploitative amendments respondent proposed. The complaint alleged respondent unreasonably interfered with appellant's ability to maintain the funding necessary to close on the closing dates unilaterally set by respondent. Appellant alleged the updated phase II report was unrelated to the allotted time that respondent maintained appellant was allowed in the inspection period under the purchase agreement. Respondent allegedly had no reasonable basis to deny the request for an updated phase II report since appellant was already committed to purchasing the property by not canceling the contract at the end of the inspection period. Appellant alleged, despite its willingness to accommodate respondent's own delays, respondent breached the implied covenant by arbitrarily denying appellant's ability to perform and receive the bargained-for benefits of the contract.

Appellant requested specific performance of the purchase agreement. As to specific performance, appellant alleged it was at all times ready, willing, and able to purchase the property. Appellant also requested damages if specific performance was not available.

The motion for summary judgment

In August 2023, respondent moved for summary judgment, contending the implied covenant of good faith and fair dealing

cannot impose a term that is contrary to the express obligations in the parties' written contract. Respondent argued appellant gave up its right to conduct any further inspections of the property, as well as its financing contingency, after the inspection period. Respondent maintained it had absolute discretion to disapprove any intrusive testing under section 4.3 of the purchase agreement. Respondent indicated it was concerned about having to disclose the test results to the other three buyers of the subdivided property. Respondent asserted it was willing to allow environmental testing by air samples and extend the closing date for appellant to pursue financing, but appellant did not respond to respondent's proposed third amendment.

As to specific performance, respondent contended appellant is not entitled to the remedy because appellant was not ready and able to perform under the purchase agreement. Respondent posited appellant did not have its own funds to purchase the property and had not secured financing. Respondent argued appellant cannot claim respondent's breach excused appellant from being ready and able to perform.

In opposition, appellant argued respondent's conduct in denying the phase II assessment and refusing an extension for appellant to pursue alternate funds was unreasonable. Appellant asserted air sampling was not a substitute for subsurface testing. Appellant indicated the phase II report would have been confidential. Appellant maintained it had already invested millions into the property and paid the purchase price early through rent to help subsidize respondent's efforts. Appellant contended the closing of the purchase agreement was years in the making due to the delays in recordation. Appellant posited there are issues of forfeiture because appellant stands to lose millions

of dollars, while respondent failed to articulate how it would suffer any legitimate harm.

Further, appellant contended its request for the phase II assessment was not a request under the due diligence sections of the purchase agreement or an attempt to reopen the inspection period. Appellant asserted the inspection period and financial contingency provisions are expressly connected to appellant's right as a buyer of the property to back out of the deal. Appellant maintained respondent's cooperation with the assessment would not relate to a reopening of the inspection period. Appellant indicated respondent was aware the second amendment and the lease did not cure appellant's obligations to constantly update its lenders to keep its loan application active.

As to specific performance, appellant argued it was always ready, willing, and able to purchase the property. Appellant asserted the ability to perform depends on all of the surrounding circumstances in the case. Appellant maintained it had command of resources to obtain the requisite credit or make an all-cash offer for the property.

The trial court heard the summary judgment motion over several dates. The first hearing was held on March 27, 2024, during which a tentative ruling was issued. The tentative ruling provided a discussion of the issues but continued the matter to address missing exhibits. The next hearing was held on May 14, 2024. The court issued a tentative ruling at this hearing granting the motion, in part, but requiring further oral arguments to determine other portions of the ruling. The third hearing was held on July 16, 2024, during which the court issued a tentative ruling continuing the matter to allow a deposition of Zions Bank to be completed. The final hearing was held on September 12,

2024. A tentative ruling was issued at this hearing granting the motion, noting the evidence from the deposition of Zions Bank does not raise a triable issue of material fact. The matter was taken under submission.

On September 12, 2024, the trial court issued a minute order indicating the motion for summary judgment is granted and ordered respondent to submit a proposed order. Respondent submitted a proposed order on September 26, 2024. Appellant objected to the proposed order, arguing it failed to comply with Code of Civil Procedure section 437c, subdivision (g).[2] Appellant also contended the proposed order improperly disposed of respondent's cross-complaint summarily in respondent's favor.

On October 8, 2024, respondent dismissed its own cross-complaint. On November 13, 2024, the trial court did not enter respondent's proposed order and instead issued a two-page order granting the motion for summary judgment, finding no triable issue as to any of the six causes of action. In the order, the court stated the truncated order for the summary judgment motion is entered instead because court reporters were present at most, if not all, of the hearings and a series of tentative rulings were issued outlining the standards the court employed in evaluating the motion and containing rulings on evidentiary objections. However, the order specified the court fully considered the evidence, the parties' oral argument, and all documents submitted.

The trial court entered judgment on December 5, 2024. Appellant timely appealed.

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[2] All undesignated statutory references are to the Code of Civil Procedure.

The motion for attorney's fees and costs and the motion to post an appeal bond

On December 16, 2024, respondent moved for an award of attorney's fees. Respondent argued it is entitled to an attorney's fees award as the prevailing party under the fees provision of the purchase agreement, Civil Code section 1717, and Code of Civil Procedure sections 1021 and 1032. Appellant opposed the motion, arguing respondent excessively litigated the case and the attorney hours spent contain duplicative work.

On January 21, 2025, the trial court heard the motion for attorney's fees and took the matter under submission. On January 27, 2025, the court issued its ruling granting the motion for attorney's fees.

An amended judgment was entered on January 29, 2025, which included an award of $800,796.70 in attorney's fees and $16,109.66 in costs.

On February 11, 2025, respondent moved for an order to require appellant to post a bond as a condition of maintaining the stay on appeal. Appellant opposed the motion. On April 17, 2025, the trial court heard and granted the motion, ordering appellant to furnish an undertaking in the amount of $816,906.36. Appellant thereafter posted the undertaking.

Appellant timely appealed.

CONTENTIONS ON APPEAL

Appellant asserts three main arguments. First, appellant contends the trial court erred in granting summary judgment because a triable issue of material facts exist as to whether respondent breached the implied covenant of good faith and fair dealing. Appellant argues it was obligated under the lease to

comply with all laws and regulations affecting the property, including environmental regulations. Appellant posits there is no provision in the purchase agreement or the lease specifically prohibiting or giving respondent absolute discretion over appellant's request to conduct the phase II environmental assessment. Appellant asserts respondent unreasonably refused the assessment required to comply with changing environmental standards and to update appellant's loan application to purchase the property. Appellant maintains triable issues exist as to whether respondent waived a strict closing date and the time-of-the-essence clause of the purchase agreement.

Second, appellant asserts the trial court erred in granting summary judgment because a triable issue of material facts exists as to whether appellant was entitled to specific performance of the purchase agreement. Appellant maintains it was ready, willing, and able to perform the purchase agreement. Appellant argues there is no iron-clad rule to show ability to perform, and it depends on all of the surrounding circumstances of the case. Appellant adds it had the financial resources to obtain the requisite credit or make an all-cash offer for the property.

Finally, appellant argues the trial court's award of attorney's fees and costs to respondent and the order requiring appellant to post an undertaking should be reversed with the reversal of the judgment.

DISCUSSION

I. Standard of review and applicable law

"The standard of review for an order granting a motion for summary judgment is de novo." (*Ryan v. Real Estate of Pacific,*

Inc. (2019) 32 Cal.App.5th 637, 642.) "We need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale." (*WFG National Title Ins. Co. v. Wells Fargo Bank, N.A.* (2020) 51 Cal.App.5th 881, 889 (*WFG National Title*).) "We resolve any evidentiary doubts or ambiguities in favor of the party opposing summary judgment." (*Ibid.*) "The appellant, however, still 'has the burden of showing error, even if he did not bear the burden in the trial court.'" (*640 Octavia, LLC v. Pieper* (2023) 93 Cal.App.5th 1181, 1189 (*640 Octavia*).)

"Summary judgment is generally appropriate 'if all the papers submitted show that there is no triable issue as to any material fact' and that it 'is entitled to a judgment as a matter of law.'" (*640 Octavia*, *supra*, 93 Cal.App.5th at pp. 1188–1189.) "[A] plaintiff can seek summary judgment by contending there is 'no defense' to the action, and it proves there is 'no defense' by establishing every element of its causes of action." (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 239–240.) "Once the plaintiff has met that burden, the burden shifts to the defendant to 'set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.'" (*640 Octavia*, *supra*, at p. 1189.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

As to specific performance, respondent argues summary adjudication of this issue is reviewed under an abuse of discretion standard. We disagree. Respondent cites *Petrolink, Inc. v. Lantel*

Enterprises (2022) 81 Cal.App.5th 156 (*Petrolink*) and *Petersen v. Hartell* (1985) 40 Cal.3d 102, 105 (*Petersen*), to support this argument, though neither of these cases are summary judgment cases.

Petrolink involved a motion to enforce judgment. (*Petrolink, supra*, 81 Cal.App.5th at pp. 160–161.) While the Court of Appeal in that case indicated a judgment or order for specific performance is reviewed under an abuse of discretion standard (*id.* at pp. 165–166), respondent fails to establish how such holding is relevant to reviewing a summary judgment motion.

Petersen involved a nonjury trial. (*Petersen, supra*, 40 Cal.3d at p. 108.) Our Supreme Court in that case only indicated the denial of specific performance was reviewed for abuse of discretion because the remedy is discretionary. (*Id.* at p. 110.) But again, respondent fails to show how such determination is pertinent to reviewing a summary adjudication of a specific performance claim.

Conversely, cases reviewing specific performance claims on summary judgment—particularly the "ready, willing and able to perform" issue argued here—have applied the de novo standard. (See, e.g., *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 888, 890–893 (*Gaggero*).) In *Gaggero*, the plaintiff sought specific performance and defendant moved for summary judgment on the ground the plaintiff "did not, and could not, establish that he was ready, willing, and able to perform under the Purchase Agreement." (*Id.* at p. 888.) In setting forth the standard of review, the *Gaggero* court stated: "In reviewing an order granting summary judgment, the appellate court independently determines whether, as a matter of law, the motion for summary judgment should have been granted." (*Ibid.*) The *Gaggero* court

ultimately reversed the grant of summary judgment because it determined the defendant failed to present evidence making a prima facie case. (*Id*. at p. 893.) Accordingly, we conclude the correct standard of review on this issue with respect to a summary judgment motion is also de novo.

II. Triable issues of material facts exist as to the cause of action for breach of implied covenant of good faith and fair dealing

A. *The order granting summary judgment does not comply with the Code of Civil Procedure*

Appellant contends the trial court's order granting summary judgment does not comply with section 437c, subdivision (g), because it does not specify the reasons and evidence relied upon for its determination. Appellant argues the court never discussed the evidence relevant to respondent's breach of the implied covenant of good faith and fair dealing. Appellant maintains it is entitled to an opportunity to submit supplemental briefing under section 437c, subdivision (m)(2), if the order is affirmed because the court failed to specify the grounds it relied upon in reaching its ruling.

Section 437c, subdivision (g), states in relevant part: "Upon the grant of a motion for summary judgment on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of and, if applicable, in opposition to the motion that indicates no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order."

Under section 437c, subdivision (m)(2), "[b]efore a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefs may include an argument that additional evidence relating to that ground exists, but the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefs to allow the parties to present additional evidence or to conduct discovery on the issue."

We agree the order granting summary judgment does not comply with section 437c, subdivision (g). The order does not specify the reasons for the trial court's determination of the summary judgment motion and the evidence relied upon. Instead, the order explains: "The parties had court reporters present for the hearings on most if not all of the hearings on the pending motion, eliminating the need for the Court to detail each point, each cause of action, each contended triable issue of fact, and each basis on which the Court finds in favor of PSIP. Further, the Court issued a series of tentative rulings which contained rulings on evidentiary objections, and outlined the standards employed by the Court in evaluating the motion. Accordingly, the Court will enter this more truncated MSJ order rather than the lengthy proposed order submitted by PSIP and objected to by DRAKK."

While it is understandable the trial court does not want to detail each basis of its decision, the order fails to clarify the reasons and evidence relied upon for the ruling. The order does not identify which hearings and what portions thereof formed the

oral orders, if any, for its determination. The order also indicates "the Court issued a series of tentative rulings," but it is unclear if any of these rulings were adopted and, if so, to what extent, as the order is silent on whether the tentative rulings were adopted. Further this issue is obfuscated by the follow-up statement in the order that the tentative rulings "outlined the standards employed by the Court in evaluating the motion." This statement suggests the trial court only used the tentative rulings to guide its decision and did not actually adopt them.

Further complicating this issue is the order's statement that the "series of tentative rulings … contained rulings on evidentiary objections." But despite sustaining some of the objections, the order indicates the trial court gave "full consideration of the evidence, oral argument by the parties, all documents submitted, including the Separate Statement, declarations, and authorities submitted by counsel, as well as supplemental briefing." If the tentative rulings were fully adopted, these statements are contradictory. Accordingly, it cannot necessarily be inferred the court entirely adopted the series of tentative rulings it issued.

The lack of an order compliant with section 437c, subdivision (g), results in unfairness because it frustrates appellant's ability in the underlying proceedings to directly challenge the trial court's bases for its ruling in a potential motion for reconsideration or new trial. Accordingly, we conclude it is appropriate to consider all of the matters the parties briefed on appeal here, whether or not such matters were fully briefed or developed in the trial court proceedings. Both parties here have discussed matters that were not fully briefed or developed in the underlying proceedings. We conclude such matters are not

waived and will be considered here. (See *Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 367, fn. 34 ["[I]n any case, appellate courts enjoy broad discretion *not* to hold an appellant to an implied waiver and may entertain an issue on appeal that might otherwise have been deemed waived by inaction or omission."].)

As to the requirement under section 437c, subdivision (m)(2), we conclude supplemental briefing is not necessary because the order granting summary judgment is not being affirmed.

B. *The lease obligated appellant to comply with laws and regulations affecting the property without specifying respondent had absolute discretion*

Appellant contends several provisions in the lease permitted appellant to conduct the phase II environmental assessment.[3] Appellant argues it was obligated to comply with all laws and regulations affecting the property under the lease, which governs when there are any inconsistencies with the purchase agreement. Appellant maintains it could conduct the environmental assessment given its obligations and nonexclusive right to use the property's common areas under the lease. We agree.

"Our review of the trial court's interpretation of a contract generally presents a question of law for this court to determine anew." (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009)

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[3] Respondent asserts appellant waived this argument on appeal because it was not raised in the underlying proceedings. As appellant argued the issue during the proceedings on September 12, 2024, appellant did not waive the issue on appeal.

176 Cal.App.4th 697, 713 (*DVD Copy Control*).) "We look to California's rules of contract interpretation to decide whether the questions we address are factual or legal. When interpreting contracts, courts must first determine whether the language is ambiguous, or, in other words, whether it is reasonably susceptible to the interpretation urged by a party." (*Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC* (2020) 53 Cal.App.5th 807, 816 (*Oakland*).) "The 'threshold determination of "ambiguity" … is a question of law … ,' 'subject to independent review.'" (*Ibid*.)

"Civil Code section 1638 provides that the 'language of a contract is to govern its interpretation, if the language is clear and explicit … ,' and section 1639 provides that when 'a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible ….' But, as explained by our high court over 50 years ago, the meaning of words can change depending on the circumstances." (*Oakland, supra*, 53 Cal.App.5th at p. 817.) "Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.) "But when … ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury [citation]." (*Ibid*.) "'Where … a conflict in the evidence exists, it must be resolved in the trial court, as with any question of fact, before the court can declare the meaning of the contract

as a matter of law.'" (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1359 (*Wolf*).)

Here, under section 6 of the lease, "Tenant shall promptly comply with all laws, statutes, ordinances, orders and regulations, now or hereinafter enacted, affecting the Premises and the Project …." The lease further states, "Except if and to the extent of Landlord's obligation to perform the Seller Work pursuant to the Purchase Agreement, notwithstanding any factors developed by the courts as a means of allocating the obligation to make alterations to the Premises and/or the Project in order to comply with present or future applicable laws, ordinances or regulations, it is the intention of the parties that such obligations are those of the Tenant."

Under section 1.3 of the lease, "Tenant and Tenant's employees, suppliers, shippers, customers and invitees, during the Term of this Lease shall have the nonexclusive right to use the Common Areas with other present and future tenants in the Project …." The term "Common Areas" is defined as "all areas and facilities outside the Premises and/or exterior boundaries of the Project that are provided and designated by Landlord from time to time for the general use and convenience of Tenant and other tenants of the Project and their respective employees, agents, representatives, invitees and licensees. The Common Areas shall include, without limitation, the common roadways, sidewalks, walkways, parkways, parking areas, driveways and landscaped areas and similar areas and facilities in the Project which are made available for the use or benefit of all Project tenants and their invitees and other visitors."

In addition, section 1.(f), of the second amendment to the purchase agreement expressly states: "Except as expressly set

forth in the Agreement [i.e., the purchase agreement and the first amendment to the purchase agreement], prior to Closing the terms of the Lease shall govern in the event of any inconsistencies between this Agreement and the Lease."

We conclude these provisions of the lease and the second amendment to the purchase agreement show appellant was not prohibited from conducting the phase II environmental assessment to comply with changing environmental regulations. The lease clearly indicates appellant was obligated to comply with all laws and regulations affecting the property. Section 6 of the lease does not limit or give respondent absolute discretion as to how appellant is to comply with the laws and regulations affecting the property. Appellant has a nonexclusive right to use the common areas of the property, which is not limited by respondent's sole discretion.[4] Given the plain language of the agreements, appellant was not prohibited or limited by respondent's absolute discretion from conducting the environmental assessment.

Respondent argues the environmental assessment is only the lender's requirement and there are no laws or regulations affecting the property that required it. However, appellant presents evidence showing that changes in California's environmental regulations was precisely why its lender required the assessment.[5] There is nothing showing why it would be

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[4] Under section 1.3 of the lease, appellant's right to use the common areas was "subject to the rules and regulations attached as Exhibit 'D.'" The items listed in Exhibit D do not expressly include or prohibit any environmental testing on the premises.

[5] Appellant's real estate expert, John Gebhardt, stated in his declaration: "It was discovered by Drakk's lender during loan due

material to appellant's obligations to comply with regulations affecting the property if the regulation also happened to be a lender's requirement. At most, it is a triable issue as to whether the new environmental laws that led to the request for the assessment came within the lease's provision requiring appellant to comply with regulations affecting the property.

Respondent also contends appellant was prohibited from conducting the environmental assessment because it was not within the designated purpose for which appellant could use the property. Section 6 of the lease states: "Tenant shall use the Premises solely for the purposes set forth in the Basic Lease Terms and for no other purpose without Landlord's prior written consent, which consent may be withheld in Landlord's sole and absolute discretion." The purposes are set forth in paragraph e of the basic lease terms, which states: "**Tenant's Use of Premises** (Section 6): General office and industrial/warehouse use for the purpose of receiving, storing and shipping products, materials and merchandise made and/or distributed by Tenant." These provisions have little relevance to appellant's request for the environmental assessment. Appellant was not requesting the property be used for a purpose other than as a general office and warehouse, such as using it as a residence. The assessment was simply to comply with environmental regulations affecting the property, not change the purpose for which the property was used. It is at best a triable issue as to whether the request for an

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diligence that environmental screening levels had changed in California due to an adjustment in early 2019 by the San Francisco Bay Area Water Quality Control Board and the California Department of Toxic Substance Control."

environmental assessment came within the lease's provision restricting the purpose for which the property was used.

In addition, respondent maintains appellant was prohibited from conducting the environmental assessment because it was an "alteration" to the property. Section 12 of the lease states: "Tenant shall not make any alterations to the Premises or Project, including any changes to the existing landscaping, without Landlord's prior written consent, which consent may be withheld in Landlord's sole, subjective and absolute discretion." The lease does not define the term "alteration." But the language of section 12 does not suggest this provision contemplates soil sampling for an environmental assessment. This section uses terms such as "changes to the existing landscaping," "work on the roof," and "tenant improvements," suggesting that alterations are any significant changes to the property that become part of the property. Indeed, section 12 indicates that "[a]ny alterations made shall remain on and be surrendered with the Premises upon expiration or termination of this Lease, except that Landlord, in its sole and absolute discretion, may elect to require Tenant at Tenant's cost to remove any alterations (including any initial tenant improvements) which Tenant may have made to the Premises." In contrast, while the environmental assessment required drilling to analyze "[e]ight soil borings to a depth of 15 feet," "[e]ach borehole will be abandoned/filled with bentonite, and restored to pre-drilling condition via applying patching materials." Given the contract language and the evidence, at best a triable issue of material facts exists as to whether the environmental assessment is an "alteration" to the property subject to respondent's discretion.

C. *Triable issues exist as to whether appellant's request fell under the physical due diligence clause*

Respondent further argues appellant could not perform the environmental assessment because the inspection period had ended. Respondent maintains it had sole and absolute discretion to prohibit the assessment under the physical due diligence clause of the purchase agreement.

Section 4.3 of the purchase agreement states: "**Physical Due Diligence.** Commencing on the Effective Date and continuing until the end of the Inspection Period, Purchaser shall have reasonable access to the Property at all reasonable times during normal business hours, upon appropriate notice to any tenants of the Property, for the purpose of conducting reasonably necessary tests, including surveys and architectural, engineering, geotechnical and environmental inspections and tests, provided that (a) Purchaser must give Seller two (2) full Business Days' prior telephone or written notice … and with respect to any intrusive inspection or test (i.e., core sampling) must provide a proposed scope of testing to Seller and obtain Seller's prior written consent (which may be withheld in Seller's sole and absolute discretion) …."

Section 4.4 states: "Purchaser shall have through the last day of the Inspection Period in which to (a) examine, inspect, and investigate the Property Documents and the Property and, in Purchaser's sole and absolute judgment and discretion, determine whether the Property is acceptable to Purchaser, (b) obtain all necessary internal approvals, and (c) satisfy all other contingencies of Purchaser, including, without limitation, obtaining financing for the acquisition of the Property."

The first amendment to the purchase agreement extended the inspection period to July 30, 2018.

We conclude triable issues of material facts exist as to whether these provisions of the purchase agreement apply to appellant's request for the environmental assessment.[6] While it

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[6] Respondent maintains appellant conceded this issue in its separate statement responses to undisputed material facts Nos. 30 and 31. Respondent contends appellant disputed only on legal grounds as to whether appellant had the right to conduct property inspections after the inspection period or if respondent had absolute discretion to refuse intrusive testing. We disagree that appellant's responses conclusively show it conceded this issue. Appellant's separate statement responses are at worst ambiguous. The fact appellant asserted the matters are legal contentions or conclusions does not preclude appellant from also arguing there are disputed material facts. As discussed herein, "the trial court's interpretation of a contract generally presents a question of law." (*DVD Copy Control, supra*, 176 Cal.App.4th at p. 713.) But "'[w]here … a conflict in the evidence exists, it must be resolved … as with any question of fact, before the court can declare the meaning of the contract as a matter of law.'" (*Wolf, supra*, 114 Cal.App.4th at p. 1359.) Thus, appellant's assertions on legal grounds could be a viable alternative argument given that contract interpretation was at issue. Further, appellant responded "disputed" in its separate statement responses, suggesting appellant also disputed the matters on the facts. While no evidence was cited in that specific portion of the responses, appellant later set forth its own undisputed material facts indicating it tried explaining to respondent that the environmental assessment request was not a request under the due diligence sections of the purchase agreement. Such facts contravene respondent's interpretation that sections 4.3 and 4.4 involving due diligence and the inspection period under the purchase agreement directly apply to this matter.

was past the inspection period when appellant sought the assessment, section 4.3 applies specifically to the purchaser's own "physical due diligence." "Physical due diligence" is a term of art and is not defined in the purchase agreement. Respondent asserts expert opinion on contract interpretation is inadmissible, "[h]owever, particular expressions may, by trade usage, acquire a different meaning in reference to the subject matter of a contract. If both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage and parol evidence is admissible to establish the trade usage even though the words in their ordinary or legal meaning are entirely unambiguous." (*Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 15.)

Here, appellant presents evidence demonstrating its request for the phase II environmental assessment was not a part of "physical due diligence." Appellant's real estate consulting expert, Gebhardt, attested appellant's request for the environmental assessment was not a request to reopen the due diligence period. Gebhardt explained that appellant was diligently pursuing the assessment for the loan as part of the loan process and not as a contingency. Gebhardt stated, "It is normal and customary, even after contingencies have been waived, that the parties work together to resolve any issues with a proposed loan, including environmental work and reports." (Underscoring omitted.)

Further, appellant's realtor, O'Donnell, attested appellant needed an updated phase II report for its banker and not to reopen an investigation of the property. O'Donnell explained "it is common knowledge that when Borrowers apply for loans and get

approval, the Banks do not hold the approval open for years …. Hence, to keep the loan transaction active, [appellant] constantly updated its Bankers with information to update its loan application and [respondent's] Track Map recording progress." O'Donnell added, "Parties and Realtors accommodate most Bankers' needs to consummate the transaction with a Close of Escrow." O'Donnell attested the changes in environmental standards merely represented a change of circumstances that all bankers and property buyers and sellers needed to address.

Hence, the foregoing evidence shows a triable issue exists as to whether appellant's request for the phase II environmental assessment constituted physical due diligence. Appellant presented industry experts establishing industry custom and practice that are at odds with respondent's interpretation of the purchase agreement. Appellant's experts showed the request for the environmental assessment is normal and customary as part of the loan process and does not fall within due diligence or investigation of the property.

Section 4.4 of the purchase agreement pertains to the purchaser obtaining financing to acquire the property. However, the section involves appellant's right to terminate the purchase agreement as the "Purchaser may terminate this Agreement for any reason or no reason" and the agreement continues to stay "in full force and effect" if appellant "does not timely and properly give a Due Diligence Termination Notice." "Due Diligence Termination Notice" is the purchaser's "written notice of termination to Seller and Escrow Agent … on or before the last day of the Inspection Period." It is true that, after the inspection period, the "Purchaser shall be deemed to have acknowledged that it has received or had access to all Property Documents and

conducted all inspections and tests of the Property that it considers important." But section 4.4 is silent as to whether appellant was prohibited from further requesting inspections or tests of the property to obtain financing. Section 4.4 is also silent as to what, if any, was respondent's discretion to deny such requests.

We note the subsequently executed lease extended appellant's rights and obligations with respect to the property. As discussed above, the lease governs if it has any inconsistencies with the purchase agreement. The lease's provisions granting appellant access to and imposing obligations to comply with laws and regulations affecting the property are certainly at odds with sections 4.3 and 4.4 of the purchase agreement. It should be noted the length of the extended recordation and changes in environmental regulations were events beyond what either party had contemplated when they entered into their agreements. None of the contract provisions directly address those circumstances sufficiently to conclude there are no triable issues in this case.

D. *Triable issues exist as to whether respondent waived a strict closing date and the time-of-the-essence clause*

Respondent also contends it was within its right to refuse further extensions of the closing date and did not waive the right to insist on the October 30, 2020, date certain for the closing date. Respondent asserts the antiwaiver provision under section 12.3 of the purchase agreement precludes any finding of waiver.

"Waiver is a question of fact for the trial court." (*Gould v. Corinthian Colleges, Inc.* (2011) 192 Cal.App.4th 1176, 1179 (*Gould*).) "California law defines waiver as the intentional relinquishment or abandonment of a known right or privilege.

[Citation.] Under this definition, waiver is based on intent. [Citation.] The intent to waive may be expressed in words, either oral or written, or implied by a party's conduct." (*Smith v. Ogbuehi* (2019) 38 Cal.App.5th 453, 475.)

Section 12.3 of the purchase agreement states: "The failure by either party to enforce against the other any term or provision of this Agreement shall not be deemed to be a waiver of such party's right to enforce against the other party the same or any other such term or provision in the future." While antiwaiver provisions are enforceable, they too can be waived. (See *Gould*, *supra*, 192 Cal.App.4th at pp. 1177, 1180 ["And Gould cites no authority that an antiwaiver provision in a lease cannot itself be waived."].)

To support its argument that antiwaiver provisions are enforceable, respondent cites *Hersch v. Citizens Savings & Loan Assn.* (1983) 146 Cal.App.3d 1002 (*Hersch*) and *Los Angeles Unified School Dist. v. Torres Construction Corp*. (2020) 57 Cal.App.5th 480 (*Torres*). However, neither of these cases indicate an antiwaiver provision cannot itself be waived.

Hersch is not a summary judgment case and simply indicates an antiwaiver provision is enforceable. (*Hersch, supra*, 146 Cal.App.3d at pp. 1007, 1009.) Indeed, a waiver issue was submitted to the jury. (*Id.* at pp. 1008–1009.) The *Hersch* court only held that antiwaiver provisions are enforceable in the context of affirming the trial court's decision to refuse to submit a different waiver issue to the jury. (*Id.* at pp. 1009–1010.) There is no discussion in *Hersch* as to whether antiwaiver provisions can be waived.

Torres is a summary judgment case, but there is little discussion of antiwaiver provisions other than the Court of

Appeal indicating the provision in that matter prohibited waiver by conduct. (*Torres, supra*, 57 Cal.App.5th at p. 505.) There is no discussion of waiving antiwaiver provisions in *Torres*.

Appellant presented evidence demonstrating triable issues of material facts exist as to whether respondent waived a strict closing deadline. After the subdivision map was recorded on September 2, 2020, the purchase agreement set the closing date to 15 days later, September 17, 2020. The September 17, 2020 deadline passed without respondent doing anything to enforce the closing date. Respondent only e-mailed appellant on September 10, 2020, stating "[t]he tract map has recorded and the buildings can be sold now," with nothing mentioned about a closing date or deadline.

It was not until September 25, 2020, when respondent mentioned a closing date in a letter to appellant, stating "the Closing shall occur fifteen (15) days after the date hereof (i.e., October 12, 2020)." The date provided in the letter was not even 15 days after the date of the letter, October 10, 2020, as two days were added. Further, the new October 12, 2020, deadline was not absolutely firm since respondent showed some uncertainty in the letter, indicating "provided, however, that in no event shall the Closing occur prior to the recordation of the CC&Rs … and the Access Easement …." This uncertainty was even more apparent in an e-mail sent the same day in which it was communicated to appellant, "As described in the letter, we are waiting for the CC&Rs and a related access easement to record before we can close, but we are *hopeful* that will … happen over the next week or so." (Italics added.) It can reasonably be implied from respondent's conduct of disregarding the agreement's strict

timeframes that respondent waived a strict closing deadline imposed by the contract's time-of-the-essence provision.

In addition, the October 12, 2020 deadline passed without respondent taking any action. It was not until nine days later on October 21, 2020, respondent sent a letter indicating "Seller is willing to proceed with the Closing by no later than Friday, October 30, 2020. Purchaser's failure to perform its Closing obligations under the Agreement by such date shall constitute a default under the Agreement, and Seller hereby reserves all rights and remedies under the Agreement, at law and/or in equity in connection with any such default …." Respondent explained it had "no obligation to further extend the Closing" and that the October 30, 2020 date was an "additional accommodation to Purchaser." It can be inferred from such evidence that respondent again waived a strict closing deadline by not adhering to the contract's timeframes.

Respondent maintains that at the time appellant acknowledged that neither party had waived their rights under the purchase agreement. Bernard wrote in an e-mail on October 29, 2020, to respondent's counsel, "Keith recognizes that neither Party is waiving any rights under the PSA. *See* PSA ¶ 12.3. He intends to fully fund Escrow and consummate the Purchase & Sale." This fails to establish no triable issues exist on this matter as it is only evidence opposing appellant's supporting evidence. Appellant asserts the statement was in direct response to respondent's earlier e-mail stating it "reserves all rights and remedies," acknowledging respondent was still entitled to performance in a reasonable time and had not forfeited all rights of enforcement. Bernard's statement in his e-mail is best

described as fairly general. At best, this is a triable issue of material facts not appropriate for summary judgment.

Moreover respondent's conduct poses the issue of forfeiture. "A forfeiture is '[t]he divestiture of property without compensation' or '[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.'" (*Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 877.) "[A] second indicator of a forfeiture or penalty, which is an unfair divestiture of property that bears no relationship to the actual damages anticipated by the parties when they negotiated the contracts." (*VFLA Eventco, LLC v. William Morris Endeavor Entertainment, LLC* (2024) 100 Cal.App.5th 287, 308–309 (*VFLA Eventco*).)

"Where a waiver prevents a forfeiture, the law ordinarily permits a liberal construction to be placed upon the acts of the parties waiving, with a view of bringing about a waiver of such a forfeiture." (*Miller v. Modern Motor Co.* (1930) 107 Cal.App. 38, 42.) ""'Forfeitures are not favored by the courts, and, if an agreement can be reasonably interpreted so as to avoid a forfeiture, it is the duty of the court to avoid it. The burden is upon the party claiming a forfeiture to show that such was the unmistakable intention of the instrument. [Citations.] 'A contract is not to be construed to provide a forfeiture unless no other interpretation is reasonably possible.'"'" (*VFLA Eventco, supra*, 100 Cal.App.5th at p. 308.)

Here, there is a triable issue as to whether respondent's conduct in strictly enforcing a closing date and the time-of-the-essence provision resulted in a penalty to appellant. When the parties negotiated the purchase agreement, appellant stood to lose only its $200,000 deposit if it failed to perform. Appellant

does not dispute the $200,000 bore a reasonable relationship to the anticipated range of harm caused by cancellation because recordation and closing were believed to be imminent. Appellant also had not expended resources to move to and operate on the property.

Since appellant moved its business to the property before closing and spent $3 million on proprietary improvements, strictly imposing the original agreement's timeframe and time-of-the-essence provision can reasonably be seen as imposing a harsh penalty on appellant beyond the parties' reasonable expectations when they negotiated those provisions. Respondent argues appellant never owned the property, negotiated only for a five-year lease without extensions, and knowingly took on the risks of investing in the property. Respondent asserts the improvements appellant made were unique to its business and had little value to respondent. Respondent adds further it has maintained the position appellant can take the improvements with it when it moves out.

Respondent's arguments fail to establish there are no triable issues on this matter as they provide only an opposing position on the facts. The parties entered the lease with the intent appellant would operate its business and eventually acquire the property. Appellant was certainly not a typical temporary lessee with no expectation of ever retaining any improvements made on the property. After the long delay in recordation, the costs to appellant were substantially increased if strict enforcement of a closing date prevented appellant from acquiring the property. While respondent suggests the costs can be mitigated, that too is a triable issue. Respondent's opposing arguments and interpretation of the situation shows this matter

at best involves triable issues of material facts not appropriate for summary judgment.

Given evidence of two waivers and issues of forfeiture, it is apparent there are triable issues of material facts as to whether respondent waived a strict closing deadline, the time-of-the-essence provision, and the antiwaiver clause. It can be implied through respondent's conduct that it intentionally relinquished or abandoned its right to strictly enforce a closing date and the time-of-the-essence provision. Respondent did not strictly adhere to the contract's closing timeframe on multiple occasions and ultimately set a unilateral final closing date. While respondent may have retained the right to appellant's performance within a reasonable time, triable issues exist as to whether respondent could strictly impose a closing date, which it unilaterally set.

E. *Triable issues exist as to whether respondent's denial of appellant's request to conduct the environmental assessment was reasonable*

Appellant argues it presented evidence demonstrating a triable issue of material facts exists as to whether respondent breached the implied covenant of good faith and fair dealing by unreasonably refusing to allow the phase II environmental assessment. We agree.

The elements for breach of the implied covenant of good faith and fair dealing are (1) the parties entered into a contract; (2) the plaintiff did all or substantially all of the significant things the contract required the plaintiff to do or the plaintiff was excused from having to do so; (3) all conditions required for the defendant's performance had occurred; (4) the defendant unfairly interfered with the plaintiff's right to receive the benefits of the

contract; and (5) the defendant's conduct harmed the plaintiff. (CACI No. 325.)

"Implied in every contract is a covenant of good faith and fair dealing." (*Cordoba Corp. v. City of Industry* (2023) 87 Cal.App.5th 145, 156.) "[I]t is 'a simple matter to determine whether given conduct is within the bounds of a contract's express terms.… Difficulty arises in deciding whether such conduct, though not prohibited, is nevertheless contrary to the contract's purposes and the parties' legitimate expectations.'" (*Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1204.) "The implied covenant prevents one side from unfairly frustrating the other's right to receive the benefits of the agreement actually made." (*Cordoba, supra*, at p. 156.) "The implied covenant protects the reasonable expectations of the contracting parties based on their mutual promises. [Citations.] The scope of conduct prohibited by the implied covenant depends on the purposes and express terms of the contract." (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885.) " 'If the cooperation of the other party is necessary for successful performance of an obligation, a promise to *give that cooperation,* and *not to do anything which prevents* realization of the fruits of performance, will often be implied.'" (*Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1131.)

"In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153.) "[T]he covenant of good faith

can be breached for objectively unreasonable conduct, regardless of the actor's motive." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 373.) "Good faith and objective reasonableness are questions of fact, based on all the circumstances." (*Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 106.)

We conclude triable issues of material facts exist as to whether respondent's refusal to allow the phase II environmental assessment was unreasonable and breached the implied covenant of good faith and fair dealing. As discussed above, appellant was responsible under the lease for compliance with all laws and regulations affecting the property. Thus, compliance with the new environmental regulations fell within appellant's obligations under the lease. Appellant's lender also required an updated loan application due to the new environmental regulations. Keith would have paid for the environmental assessment, the results of which would have been kept confidential. These circumstances developed due to the long delays in recordation and the changes to environmental standards, which neither party anticipated when they entered the purchase agreement.

In addition, appellant presents evidence showing respondent knew appellant was highly motivated to acquire the property and had already invested millions of dollars in improvements to the property. Appellant provides evidence that respondent operated in bad faith and attempted to take advantage of the situation. On October 7, 2020—only five days before the October 12, 2020 respondent-set deadline—respondent offered to allow appellant to conduct "air sampling." This was not, however, a substitute procedure for the soil sampling needed in the phase II assessment. Further, respondent demanded a third

amendment to the purchase agreement requiring an additional deposit of $100,000, and the rent credit against the purchase price to be $140,717.50 to run only to March 18, 2019, the date of the substantial completion of the seller work. This total amount in credit was about $500,000 less than if it ran through the end of October 2020. Appellant also shows the value of industrial property in the area had increased since the parties entered into the purchase agreement, giving respondent incentive to be uncooperative concerning the environmental assessment and closing the sale.

The foregoing evidence demonstrates respondent acted unreasonably and contrary to the contract's purposes and the parties' legitimate expectations. There is no evidence appellant was having doubts about purchasing the property. Indeed, evidence shows appellant was motivated to close, offering an additional $150,000 deposit and a cutoff of rent credit in exchange for an extension. There is no evidence appellant had suddenly experienced a financial downturn that impact its ability to acquire the property. To the contrary, appellant's lender indicated, "Keith's net worth and financial strength far exceeded what was necessary to be approved for a loan to acquire the Property." The parties had tolerated extensive delays in closing the transaction. The evidence is sufficient to show respondent's refusal to allow the environmental assessment under these circumstances unfairly interfered with appellant's right to receive the benefits of the contract.

Respondent contends it had sole and absolute discretion to decline any intrusive testing at the end of the inspection period, which could not be overridden by the implied covenant. While it is true the implied covenant is limited when a party is given

absolute discretion over a matter (see *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1121; *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 61), there are no express provisions giving respondent absolute discretion over how appellant satisfied its obligation under the lease to comply with all laws and regulations affecting the property. There are also no express provisions under the purchase agreement giving respondent absolute discretion to prohibit appellant from further requesting inspections or tests of the property to obtain financing. At most, triable issues exist as to whether appellant's request for the environmental assessment fell within a provision under which respondent had sole and absolute discretion.

Finally, there is the related issue of whether respondent allowed a reasonable time for appellant to perform. As discussed above, respondent allowed multiple closing dates to pass without acknowledgment. Respondent set a final closing date entirely on its own. At that point, the parties had already tolerated years in delay to the recordation. It is not apparent how allowing more time for the environmental assessment would have substantially prejudiced respondent. Given the circumstances, triable issues exist as to whether the final closing date was reasonable in light of appellant's need for the environmental assessment.

F. *Triable issues exist as to whether appellant is entitled to specific performance as a remedy*

As to specific performance, appellant posits triable issues exist as to whether it is "ready, willing and able to perform" on the purchase agreement. Appellant asserts it presented ample evidence of its ability to perform and that respondent hindered it

from performing. Appellant maintains this issue depends on a case's particular circumstances and not on any ironclad rule.

"To obtain specific performance after a breach of contract, a plaintiff must generally show: '(1) the inadequacy of his legal remedy; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract.'" (*Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472.) "[I]t is axiomatic that to obtain specific performance, a buyer must prove not only that he was ready, willing and able to perform at the time the contract was entered into but that he continued ready, willing and able to perform at the time suit was filed and during the prosecution of the specific performance action." (*C. Robert Nattress & Associates v. CIDCO* (1986) 184 Cal.App.3d 55, 64.)

"[I]n order to obtain specific performance, buyers must prove they had the ability to pay the purchase price within a reasonable time." (*Henry v. Sharma* (1984) 154 Cal.App.3d 665, 670 (*Henry*).) "What constitutes a 'reasonable time' for performance is a question of fact [citation] as is the question of the buyer's ability to perform." (*Ibid*.) "What constitutes reasonable time depends on the situation of the parties, the nature of the transaction and the facts of the particular case." (*Id*. at p. 672.) "[T]he proof needed to show ability depends on all the surrounding circumstances." (*Ibid*.)

We conclude appellant presented evidence establishing a triable issue exists as to whether it was ready, willing, and able to perform on the purchase agreement. The balance of the

property's purchase price was just under $6 million—the $6.765 million purchase price, minus the $200,000 earnest money deposit and $637,632.50 in rent credit. Keith attested, "from the beginning of this deal to the present, we have maintained enough liquidity and owned multiple properties that we could sell to close this deal with or without financing." From 2019 to 2021, these assets included cash/liquidity of about $4.45 million, commercial property of $2.18 million netted, and residential property of $3.48 million (after loan payoff).

As to financing, the senior vice president of Harvest, Chris Rabenold, whom Keith contacted for the purchase of the property, attested that "Keith's net worth and financial strength far exceeded what was necessary to be approved for a loan to acquire the Property. He had loan approval, but waiting for the Tract Map's recording became a nuisance and an ongoing paper-pushing nightmare." Rabenold indicated Harvest needed the phase II environmental assessment due to changes in California's environmental regulations. Rabenold stated, "DRAKK had loan approval, and Harvest required an updated **Phase II**. Due to screening law changes, the purchase money loan was available to fund escrow provided an updated Phase II was presented. [¶] … To underwrite a loan of this size, I needed the Property delivered to DRAKK clean or within acceptable toxins per California environmental regulations." Further, Rabenold attested, "It must always be remembered that DRAKK was never denied a loan. The Seller's refusal to allow an updated Phase II prevented DRAKK's loan Application from continuing."

In addition, Keith indicated appellant had always been ready, willing, and able to perform on the purchase agreement. Keith stated, "For example, on December 1, 2019, Bank of

America committed to loan $4,178,533.94 as a First Mortgage and $2,000,000.00 related to the [tenant improvements]." In May 2021, Zions Bank offered Keith appropriately $6.34 million to purchase the property. Donald Brian Franke, who worked in specialty loan servicing at Zions Bank, described the offer letter to Keith as a "commitment letter" for the approval of a loan as "[t]he loan was clearly approved under the appropriate process that was clearly documented in the system. And then once it's approved, it's presented to the borrower, and the borrower then can proceed to try and close with the loan officer or the borrower also can reject it and decide they don't want to do it."

Accordingly, the evidence shows appellant made at least a prima facie showing it was ready, willing, and able to perform on the purchase agreement. Appellant demonstrates the value of Keith's cash/liquidity and real property assets exceeded the balance of the property's purchase price. Appellant shows Keith's financial strength was far more than what was needed for appellant to obtain a loan for the property. This is evidence of appellant's ability to pay for the property since Keith had the resources to obtain the requisite credit. (See *Henry*, *supra*, 154 Cal.App.3d at p. 672 ["We believe the evidence supports the trial court's finding that the buyers had the ability to pay in the sense that they "'commanded resources upon which [they] could obtain the requisite credit.'"].) Indeed, Keith had more resources than the buyers in *Henry*, whose evidence of ability to pay for a house was upheld because they were employed, owned residential property worth about a quarter of the purchase price, owned other real property, and purchased another property on similar terms. (See *id*. at pp. 668, 672.)

Moreover, appellant had loan approval from Harvest to acquire the property, but it was respondent who refused to allow the phase II environmental assessment required to update the loan application. Keith also "requested 4-5 weeks to pay the Purchase Price with '*all-cash*,' eliminating the need for Financing." Keith indicated, however, "[respondent] denied [his] request and proceeded to terminate the transaction immediately." "[H]indrance of the other party's performance operates to excuse that party's nonperformance." (*Erich v. Granoff* (1980) 109 Cal.App.3d 920, 930.) This factor can be considered in specific performance cases. (See *Stratton v. Tejani* (1982) 139 Cal.App.3d 204, 211 ["Substantial evidence supports the court's finding that the conduct by the Tejanis in impeding the Strattons' performance operated to excuse the latter's performance on March 2, 1981."].) Keith attested he "was **shocked** that [respondent] refused to allow an updated Phase II … but became furthermore **astonished** when [respondent] declined an ***'all-cash'*** Escrow Closing." This evidence shows respondent obstructed appellant from obtaining financing for the property and thereby hindered appellant's performance.

Respondent argues the environmental assessment would have taken too long, estimating it would have taken around a month based on the secret testing appellant pursued towards the end of December 2020 and completed on January 26, 2021. Respondent also posits it would have taken at least an additional month after the four-to-five week extension appellant requested to obtain the funds needed for the cash offer. But as discussed earlier, "reasonable time" is a factual issue and depends on the parties' situation, the nature of the transaction, and the facts of the case. (See *Henry, supra*, 154 Cal.App.3d at pp. 670, 672.)

Given the yearslong delay of the recordation, the substantial nature of the transaction, and the large investments appellant had already made on the property, one can reasonably find the timeframes for either of appellant's requests were reasonable. And as previously mentioned, "any evidentiary doubts or ambiguities [are resolved] in favor of the party opposing summary judgment." (*WFG National Title, supra*, 51 Cal.App.5th at p. 889.)

As to Zions Bank's loan approval, respondent asserts it was not issued until May 2021, it was a conditional counteroffer, and there is no proof all of the loan's condition precedents were met for the funds to release. But the fact there are weaknesses in appellant's evidence regarding Zions Bank's loan approval only go to the weight of the evidence, not the absence of a triable issue. Further, there is no "iron-clad rule" requiring buyers to "establish ability to perform by proving they had obtained a legally enforceable loan contract. Rather, the proof needed to show ability depends on all the surrounding circumstances." (*Henry, supra*, 154 Cal.App.3d at 672.)

We note respondent's arguments here rely on its assertion the trial court's findings on specific performance are reviewed for abuse of discretion.[7] As discussed above, however, nothing shows summary adjudication of this issue is reviewed under an abuse of discretion standard. While an abuse of discretion standard may

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[7] Respondent asserts the order granting summary adjudication as to the first, second, and third causes of action seeking specific performance should be affirmed. However, appellant only appealed the third cause of action for "specific performance/breach of implied covenant of good faith and fair dealing." (Capitalization and boldface omitted.)

apply in other contexts, such as findings in a trial, nothing shows an exception exists for reviewing this matter raised on summary judgment. Hence, the proper determination is whether appellant presented evidence related to its ability to perform, not whether the trial court's findings thereof are reasonable. (See *Gaggero, supra*, 108 Cal.App.4th at pp. 888–889 ["[T]he appellate court independently determines whether, as a matter of law, the motion for summary judgment should have been granted.… [¶] … [¶] [T]he burden shifts to the plaintiff to show that a triable issue of one or more material facts exists …."].)

Respondent attempts to demonstrate the weaknesses of appellant's evidence and maintains the trial court's findings are not arbitrary or capricious. But that is not the proper analysis for a summary judgment motion. It is not appellant's burden to make an unassailable case that it was ready, willing, and able to perform on the purchase agreement. Respondent's arguments do not establish there are no triable issues as to specific performance. Respondent fails to show appellant provided no evidence making a prima facie showing. The fact there are weaknesses and counterarguments as to appellant's evidence do not establish summary adjudication is proper on the matter.

III. The order for attorney's fees and costs and the order to post an appeal bond must be reversed with the reversal of the judgment

Appellant asserts the order awarding respondent attorney's fees and costs and the order requiring appellant to post an appeal bond should fall with the reversal of the judgment. We agree.

When "we reverse the judgment, we also reverse the award of attorney fees because [the respondent] is no longer necessarily the prevailing party in this action." (*Lafferty v. Wells Fargo Bank*

(2013) 213 Cal.App.4th 545, 551.) Further, "[a]n order awarding costs falls with a reversal of the judgment on which it is based." (*Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402.)

Because we reverse the judgment entered in favor of respondent, respondent is no longer necessarily the prevailing party in this case. The order for attorney's fees and costs and the order requiring an undertaking therefore must be reversed because they were based on respondent being the prevailing party.

DISPOSITION

The judgment, the order for attorney's fees and costs, and the order to post an appeal bond are reversed. On remand, the trial court is directed to enter an order vacating the judgment, the order for attorney's fees and costs, and the order to post an appeal bond. The court is directed to enter a new order denying the motion for summary adjudication as to the third cause of action for specific performance/breach of implied covenant of good faith and fair dealing.

Appellant is awarded its costs on appeal.

CHAVEZ, Acting P. J.

We concur:

RICHARDSON, J. GOORVITCH, J.