Filed 8/9/16

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LUYEN, LLC et al., Plaintiffs, Cross-Defendants, and Appellants, v. PHUONG PHAM et al., Defendants, Cross-Complainants and Respondents.	H041609 (Santa Clara County Super. Ct. No. CV245311)

I. INTRODUCTION

Appellants Karen Lao, Paul Lao and Luyen, LLC (hereafter, collectively Luyen) owned two commercial condominium units in the Vietnam Town shopping center. They entered into a lease agreement with respondents Phuong Pham and Thang Nguyen, who intended to open a restaurant. After the Vietnam Town Homeowners Association (hereafter Vietnam Town HOA) refused to allow a restaurant on the leased premises, the lease automatically terminated.

Luyen filed the instant action against Pham and Nguyen alleging that they had breached the lease agreement by failing to obtain approval for restaurant use of the leased premises. Pham and Nguyen filed a cross-complaint alleging that Luyen owed a refund for their security deposit, first month's rent, and certain other expenses pursuant to the

termination clause in the addendum to the lease agreement. The judgment after bench trial filed on September 8, 2014, provides that Luyen take nothing by way of its complaint and that Pham and Nguyen recover $20,000 on their cross-complaint, plus costs.

On appeal, Luyen contends that the trial court erred in failing to find that Pham and Nguyen owed rent as tenants at sufferance after the lease automatically terminated and in awarding $20,000 on the cross-complaint. For the reasons stated below, we find no merit in Luyen's contentions and we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Pleadings*

In April 2013 Luyen filed a complaint[1] naming Pham and Nguyen as defendants. According to the allegations of the complaint, Luyen was the owner of two commercial condominium units, No. 8015 and No. 8018, in the commercial center in San Jose known as Vietnam Town. Luyen entered into a written lease agreement for No. 8015 and No. 8018 with Pham and Nguyen on September 21, 2012. The lease agreement stated that the premises were to be used for a Vietnamese restaurant. The addendum to the lease stated, among other things, that the lease term was to be five years "commencing 8 months (tentatively May 1st 2013) from the date the lease is signed or the day the restaurant is open for business. . . . However, in case restaurant can not be opened at 8 months due to delay of city permit, landlord will [waive] the rent if the delay does not exceed 2 months or the date business opens."

Regarding termination of the lease, the lease addendum stated: "If the subject units #8015 and #8018 are not approved by City of San Jose and/or Vietnam Town HOA as business location for restaurant/food, then all lease terms and agreement wil[l] be

[1] On our own motion, we take judicial notice of the complaint, answer, and cross-complaint filed in this action and have augmented the record with these state court documents. (Evid. Code, § 452, subd. (d)(1); Cal. Rules of Court, rule 8.155(a)(1)(A).)

terminated, and landlord to refund the tenant his deposit and first month rent of $14,000. Tenants are responsible to verify the location is allowed for restaurant business by city and for all design fees/costs paid to date. If permit is not approved at a later date, due to food, grease trap, or gas line not allowed for the location, landlord and tenant will [split] the cost of architect drawings, health and building permits submit costs up to date with landlord agreement. By the time these expenses reach $12,000.00, landlord and tenant will meet again to determine the next step. . . . Security deposit of $10,000.00 to be refunded to tenants at lease ends [*sic*]."

Luyen further alleged that Pham and Nguyen had failed to obtain approval for a restaurant, grease trap and gas line from the City of San Jose and/or the Vietnam Town HOA. Although Luyen had offered to terminate the lease agreement and return the security deposit and first month's rent, Pham and Nguyen had allegedly "refused to execute a termination agreement stating all conditions of the lease have been met."

Based on these allegations, Luyen asserted causes of action for breach of contract, fraud, intentional misrepresentation, negligent misrepresentation, breach of the covenant of good faith and fair dealing, and rescission of contract, and sought declaratory relief.

Pham and Nguyen answered the complaint and filed a cross-complaint against Luyen. In their cross-complaint, Pham and Nguyen asserted that they had received approval from the City of San Jose for construction of a food facility in a letter dated January 14, 2013. They also asserted that Xin Tran, a representative of Luyen, had promised to provide approval from the Vietnam Town HOA for unit Nos. 8015 and 8018 to operate as a restaurant.

Pham and Nguyen further asserted in their cross-complaint that after they received the January 14, 2013 approval letter from the City of San Jose, they received a letter from Lap Tang, the president of the Vietnam Town HOA, stating that the Vietnam Town HOA "is not able to obtain a waiver from the City of San Jose to permit the operation of a restaurant at units 8012 & 8015."

Based on these and other allegations, Pham and Nguyen stated causes of action for breach of contract and common counts. They sought damages of $32,000 plus interest and attorney's fees.

B. *Court Trial*

The matter proceeded to a court trial in April 2014. We provide a brief summary of the trial testimony and the documentary evidence admitted at the time of trial.

In 2012, Pham was looking for units she could lease for the purpose of opening a full service restaurant in San Jose. Nguyen was her silent investor. Pham met with a real estate agent, Doan Tran, who was representing Luyen, the owner of unit Nos. 8015 and 8018, in the Vietnam Town shopping center.[2] Pham then entered into negotiations with Xin Tran, who was also a representative of Luyen, to lease unit Nos. 8015 and 8018. At that time, the units were empty shells except for restrooms.

Jonathan Tran, Pham's husband, was involved in negotiating the lease for unit Nos. 8015 and 8018 and developing the restaurant since he was to be one of the restaurant managers. Both Doan Tran and Xin Tran told Jonathan Tran that those units were not designated for restaurant use and that he would have to get approval for a restaurant from the City of San Jose and the Vietnam Town HOA. According to Doan Tran, it was understood, although not express in the lease agreement, that the tenants had the obligation to obtain Vietnam Town HOA approval. Xin Tran's role was to take the tenants' plans for the restaurant and present them to Lap Tang, the president of the Vietnam Town HOA. Xin Tran acknowledged that he had told Jonathan Tran on numerous occasions that the Vietnam Town HOA would approve unit Nos. 8015 and 8018 for restaurant use.

[2] At the time the lease agreement was executed, Karen Lao and her brother Paul Lao owned unit No. 8018 and Meng Lao owned unit Nos. 8012 and 8015. Luyen became the owner of unit Nos. 8012 and 8015 in December 2013. Unit No. 8012 is not involved in this case.

Pham knew that she would have to obtain permits from the City of San Jose for a sewer line, a gas line, power, and a grease trap in order to operate a restaurant in unit Nos. 8015 and 8018. When Pham signed the lease agreement drafted by Doan Tran on September 21, 2012, Pham understood that its terms included a provision that the lease would terminate if she did not obtain approval from the Vietnam Town HOA to put a restaurant in unit Nos. 8015 and 8018. However, Xin Tran, who was working directly with Lap Tang, the president of the Vietnam Town HOA, had told her that it would be "okay for us to build a restaurant there." Xin Tran also told Pham to go ahead with the restaurant project without worrying about Vietnam Town HOA approval. Pham relied on Xin Tran, as the representative of the landlord, to obtain the Vietnam Town HOA approval letter for the restaurant.

Lap Tang told Pham during a meeting that before giving Vietnam Town HOA approval he needed to see the plans for the restaurant. It was Pham's responsibility to hire an architect to prepare the plans and submit them to the Vietnam Town HOA for approval. The architect prepared plans that Xin Tran told her needed to be larger for Lap Tang to review. According to Pham and Jonathan Tran, full-sized plans were delivered to Xin Tran and Lap Tang. Xin Tran recalled that Jonathan Tran agreed to provide full-sized plans for reference only. The architect charged a total of $15,500 for preparing the plans for the restaurant, including full-sized plans. Pham paid the architect $15,500.

Pham understood that if the lease terminated due to lack of approval for the restaurant from the City of San Jose or the Vietnam Town HOA, the landlord would return her $10,000 deposit, her $4,000 first month's rent, one-half of the architect's fees, and permit fees. She also understood that the County of Santa Clara Environmental Health Department had approved the premises for restaurant use in a letter dated January 14, 2013.

Sometime later, Xin Tran emailed to Pham a letter from Lap Tang dated January 6, 2013. The letter was addressed to Xin Tran and stated that the purchase

agreement for unit Nos. 8012 and 8015 indicated that the units were for office or retail uses only and the Vietnam Town HOA "is not able to obtain a waiver from the City of San Jose to permit the operation of a restaurant at units 8012 and 8015."

Pham also received a letter from Luyen's attorney enclosing a proposed termination agreement and offering to refund her deposit and first month's rent in the amount of $14,000. She responded by sending a letter to Luyen's attorney asking for a signed letter from the Vietnam Town HOA board since Lap Tang's letter regarding the lack of a waiver for the restaurant was not signed. Pham did not sign the proposed termination agreement because it did not refund all the money due to her under the lease agreement. According to Pham, she was owed the $10,000 security deposit, $4,000 for first month's rent, and some of the permit and architecture fees. As of the time of trial, the landlords had not refunded any of the money that Pham believed was owed under the lease agreement.

When the lease agreement terminated on January 6, 2013 (the termination date of January 6, 2013, was stipulated by the parties at the time of trial), unit Nos. 8015 and 8018 were empty, as they had been throughout the lease period. Doan Tran was not able to re-lease the units at that time because she did "not know how this lease will be terminated or not or negotiation will continue on. . . ."

According to Xin Tran, Pham and Jonathan Tran would not agree that the units could be re-leased unless they were paid $50,000 in addition to $14,000 he had offered to refund for the security deposition and first month's rent. Pham and Jonathan Tran denied that they had asked Xin Tran to pay $50,000 and also denied that he had offered to write a check for a refund. The parties entered into a lease termination agreement in August 2013 that expressly allowed for re-leasing of unit Nos. 8015 and 8018 and did not provide for a refund.

Xin Tran told Doan Tran in August 2013 that the tenants had released the units and she could now re-lease them. Unit No. 8015 was leased in March 2014 and unit No. 8018 was leased in September 2013.

C. *Statement of Decision and Judgment*

The trial court filed its tentative decision on August 11, 2014. In the tentative decision, the trial court noted that "[o]ne of the principal issues in this case is which party, or parties, were responsible for seeking the required approval (or waiver) from the homeowner's association in order to allow a restaurant use. The lease, including addendums, is silent on this point." The court found that "neither party breached its responsibility to seek approval of a restaurant by the Homeowner's Association and that any evidence regarding other approvals is irrelevant."

Regarding Luyen's complaint, the trial court stated: "In considering the terms of the lease and the testimony and credibility of the parties, the Court finds that [Luyen] are not entitled to rent for the period of time from January 6, 2013 through July 1, 2013 and that [Pham and Nguyen] did not breach the terms of the lease." The trial court also found that its "decision regarding [Luyen's] claim for breach of contract effectively disposes of the causes of action for fraud, negligent misrepresentation, intentional misrepresentation, breach of the covenant of good faith and fair dealing, rescission and declaratory relief. These causes of action are based on the same facts as the breach of contract count; having found no breach of contract by [Pham and Nguyen], the Court, of necessity finds for [Pham and Nguyen] on all remaining causes of action."

As to Pham and Nguyen's cross-complaint, the trial court found that "[t]he termination clause of the lease provides that the landlord will return to the tenant the $10,000 security deposit, the $4,000 first month's rent and 50% of certain expenses up to $12,000 (50 percent equals $6,000). This totals $20,000. The lease provided for the possibility of an additional contribution by the landlord toward expenses exceeding $12,000 . . . but only upon agreement; no agreement exists. [¶] The Court finds that

[Luyen] breached the terms of the lease by failing to refund a total of $20,000 to [Pham and Nguyen] within a reasonable period of time after January 6, 2013."

No party filed an objection to the tentative statement of decision and therefore the tentative decision became the trial court's statement of decision. The judgment after bench trial was filed on September 8, 2014. The judgment provides that Luyen take nothing by way of its complaint and that Pham and Nguyen recover $20,000 on their cross-complaint, plus costs. Luyen filed a timely notice of appeal from the judgment.

III. DISCUSSION

On appeal from the judgment, Luyen contends that "[t]he sole issue before this court is whether the trial court erred by failing to find that [Pham and Nguyen], by their own acts, became tenants in sufferance when the lease automatically terminated by its own terms on January 6, 2013." Luyen also contends, however, that the trial court erred in awarding Pham and Nguyen $20,000 on their cross-complaint.

We will begin our evaluation of Luyen's contentions with the applicable standard of review for a judgment based upon a statement of decision following a bench trial.

A. *Standard of Review*

In conducting our appellate review, we presume that a judgment or order of a lower court is correct. The general rule is that "[a]ll intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 (*Arceneaux*).)

Accordingly, " 'in reviewing a judgment based upon a statement of decision following a bench trial, "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. [Citations.]" [Citation.] In a substantial evidence challenge to a judgment, the appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving

conflicts in support of the [findings]. [Citations.]" [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]' [Citation.]" (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.)

B. *Tenancy at Sufferance*

Luyen contends that by denying Luyen's claims the trial court failed to find that Luyen is entitled to damages because Pham and Nguyen became "tenants in sufferance." According to Luyen, the trial evidence showed that Pham and Nguyen did not agree that the lease had automatically terminated on January 6, 2013; Pham and Nguyen demanded more money to agree to terminate the lease; and Doan Tran's testimony that she could not re-lease the property due to the parties' dispute was uncontradicted.

Pham and Nguyen respond that Luyen may not raise for the first time on appeal the legal theory of tenancy at sufferance. We agree.

Tenancy at sufferance has been defined as follows: "[W]hen a tenant continues in possession after the expiration of a fixed term, a 'tenancy-at-sufferance' is created. Civil Code section 1945 provides: 'If a lessee of real property remains in possession thereof after the expiration of the hiring, *and the lessor accepts rent from him*, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year.' (Italics added.) 'When the term of a lease expires but the lessee holds over without the owner's consent, he [or she] becomes a tenant at sufferance. [Citation.]' " (*Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 740; see also *Colyear v. Tobriner* (1936) 7 Cal.2d 735, 742.)

Our review of the record shows that Luyen did not argue during the trial proceedings below that Pham and Nguyen owed rent on the theory that they were tenants at sufferance after the lease automatically terminated on January 6, 2013. "Appellate courts generally will not consider matters presented for the first time on appeal.

[Citations.]" (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143.) An argument raised for the first time on appeal is generally deemed forfeited. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226.) Moreover, "[t]he general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial. [Citation.]" (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780 (*Bogacki*).)

Luyen argues that the evidence shows that Pham and Nguyen became tenants at sufferance because they did not agree that their lease had terminated, they refused to sign the termination agreement proposed by Luyen, and they disagreed about the amount to be refunded by Luyen under the lease agreement. In other words, Luyen asserts that this evidence should be construed to show that Pham and Nguyen refused to surrender the premises of unit Nos. 8015 and 8018. However, the evidence also showed Pham and Nguyen never paid any rent, other than $4,000 for the first month, for unit Nos. 8015 and 8018; the units remained empty; and the units were never occupied or improved by Pham and Nguyen. Thus, Luyen's new theory of tenancy at sufferance depends on "controverted factual questions" regarding whether Pham and Nguyen could be considered to have remained in possession of the unit Nos. 8015 and 8018 after the lease automatically terminated on January 6, 2013. (See *Bogacki*, *supra*, 5 Cal.3d at p. 780.) For these reasons, we determine that Luyen has forfeited[3] the issue of whether Pham and Nguyen owed rent on the theory that they were tenants at sufferance. (See *Stalberg v.*

[3] Our Supreme Court has instructed that "the correct term is 'forfeiture' rather than 'waiver,' because the former term refers to a failure to object or to invoke a right, whereas the latter term conveys an express relinquishment of a right or privilege. [Citations.] As a practical matter, the two terms on occasion have been used interchangeably. [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 881, fn. 1.)

Western Title Ins. Co. (1991) 230 Cal.App.3d 1223, 1232; see also *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 744-745.)

C. *Judgment on Cross-Complaint*

Luyen also contends that the trial court erred in awarding Pham and Nguyen a total of $20,000 on their cross-complaint.

The lease agreement included the following provision regarding the landlord's refund obligation regarding expenses: "If permit is not approved at a later date, due to food, grease trap, or gas line not allowed for the location, landlord and tenant will [split] the cost of architect drawings, health and building permits submit costs up to date with landlord agreement. By the time these expenses reach $12,000.00, landlord and tenant will meet again to determine the next step."

The trial court found that "[t]he termination clause of the lease provides that the landlord will return to the tenant the $10,000 security deposit, the $4,000 first month's rent and 50% of certain expenses up to $12,000 (50 percent equals $6,000). This totals $20,000. . . . [¶] The Court finds that [Luyen] breached the terms of the lease by failing to refund a total of $20,000 to [Pham and Nguyen] within a reasonable period of time after January 6, 2013."

We understand Luyen to argue that Pham and Nguyen were not entitled to reimbursement of $6,000 for architectural fees because they did not provide invoices to Luyen. In addition, Luyen argues that the trial court erred in finding that it breached the lease agreement by failing to refund $20,000 to Pham and Nguyen within a reasonable period of time after lease termination because they never provided invoices or other evidence that architectural fees were incurred.

Pham and Nguyen contend that the evidence is sufficient to support the award of $6,000 to reimburse them for architectural fees because the trial evidence included the architect's invoices and copies of checks that paid the invoiced amounts, and the

evidence also showed that Luyen never reimbursed them as required by the lease termination clause.

Our resolution of the issue is governed by the rules applicable to a judgment upon a statement of decision. "[U]nder [Code of Civil Procedure] section 634,[4] the party must state any objection to the statement [of decision] in order to avoid an implied finding on appeal in favor of the prevailing party. The section declares that if omissions or ambiguities in the statement are timely brought to the trial court's attention, the appellate court will not imply findings in favor of the prevailing party. The clear implication of this provision, of course, is that if a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment. Furthermore, [Code of Civil Procedure] section 634 clearly refers to a party's need to point out deficiencies in the trial court's statement of decision as a condition of avoiding such implied findings, rather than merely to request such a statement initially as provided in [Code of Civil Procedure] section 632." (*Arceneaux*, *supra*, 51 Cal.3d at pp. 1133-1134, fn. omitted.) "[I]t would be unfair to allow counsel to lull the trial court and opposing counsel into believing the statement of decision was acceptable, and thereafter to take advantage of an error on appeal although it could have been corrected at trial. [Citations.]" (*Id.* at p. 1138.)

In this case, the trial court did not specify in the statement of decision whether the "certain expenses" in the amount of $6,000 that the court awarded to Pham and Nguyen on their cross-complaint included reimbursement of architectural fees. Luyen did not

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[4] Code of Civil Procedure section 634 provides: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue."

point out this ambiguity or deficiency in the statement of decision to the trial court pursuant to Code of Civil Procedure section 634 since Luyen did not file an objection to the tentative statement of decision. Therefore, we will imply findings to support the award of $6,000 in "certain expenses" to Pham and Nguyen. (See *Arceneaux*, *supra*, 51 Cal.3d at pp. 1133-1134.)

For these reasons, we find no merit in Luyen's appellate challenge to the judgment. Having reached this conclusion, we need not address the estoppel issue raised by Pham and Nguyen.

IV. DISPOSITION

The judgment on appeal is affirmed. Costs on appeal are awarded to respondents.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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