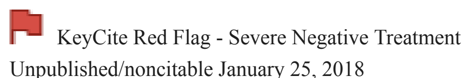
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Court of Appeal, First District, Division 4, California.

PARK LANE ASSOCIATES, LP, Plaintiff and Respondent, v. Joseph ALIOTO et al., Defendants and Appellants.

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(San Francisco County Super. Ct. No. CUD–13–647251)

Attorneys and Law Firms

David Paul Wasserman, Wasserman–Stern, 2960 Van Ness Avenue, San Francisco, CA 94109, Marina Rachele Franco, 2960 Van Ness Ave, San Francisco, CA 94019, Andrew Mayer Zacks, Zacks, Freedman & Patterson, PC, 235 Montgomery Street, Suite 400, San Francisco, CA 94104, for Plaintiff and Respondent.

Joseph Michelangelo Alioto, Alioto Law Firm, 1 Sansome Street—35th Floor, San Francisco, CA 94104, for Defendant and Appellant.

Opinion

Rivera, J.[*]

***1** Defendants Joseph and Michele Alioto (the Aliotos) appeal from several orders entered in this unlawful detainer action and the judgment. We shall affirm the orders and the judgment.

I. BACKGROUND

A. Renovations Commence

The Aliotos lived in an apartment in a building located at 1100 Sacramento Street, San Francisco, California (the building). The building, a historic landmark, contained 33 apartments, and was subject to the San Francisco Residential Rent Stabilization and Arbitration Ordinance (the rent ordinance), which, among other things, restricted the grounds for evicting tenants from their rental units. (See *Danger Panda, LLC v. Launiu* (2017) 10 Cal.App.5th 502, 506.)

At some point, plaintiff Park Lane Associates, LP (Park Lane) became the building's owner. In May 2012, it commenced renovations, planning to convert the building to an owner-occupied living environment in which each owner occupied his or her unit. The renovations included work on the penthouse apartment, which was located directly above the Aliotos' apartment.

Joseph Alioto (Alioto), a 68–year old attorney when the construction commenced, conducted his law business from his apartment.[1] The renovations included demolition work, using drills and jack hammers, which created noise and dust. The Aliotos' water and electricity were shut off periodically, elevators did not always work, and the building shook, making it difficult for Alioto to speak on the telephone, conduct his law business, or sleep. He complained to the building doormen and the property manager, but received no response.

B. The First Unlawful Detainer Case

In February 2013, the Aliotos withheld their monthly rent payment, and Park Lane responded by filing an unlawful detainer action against them (*Park Lane Associates, LP v. Joseph Alioto et al.* (Super. Ct. San Francisco County, 2013, No. CUD–13–644351) [the first unlawful detainer case]). The case was tried to a jury, and a verdict was entered on May 31, 2013. The jury determined that Park Lane "breached the implied warranty of habitability" by substantially interfering with the Aliotos' right to occupy their apartment, and reduced the Aliotos' rent payment for the month of February 2013 by about 20 percent (from $10,316.52 to $8,284.87).

The day before the jury returned its verdict, the general contractor responsible for the renovation work at the building

testified he expected work on the penthouse to be completed by the end of July 2013.

C. The Current Unlawful Detainer Case

Work on some portions of the building continued after the jury verdict and, in November 2013, the Aliotos again withheld their monthly rent payment, prompting Park Lane to file the current unlawful detainer action on December 3, 2013 (*Park Lane Associates, LP v. Joseph Alioto et al.* (Super. Ct. San Francisco County, 2013, No. CUD–13–647251) [the current action]). The Aliotos answered the complaint, alleging, among their affirmative defenses, that Park Lane: (1) failed to provide habitable premises; (2) breached the covenant of quiet enjoyment of the premises; (3) violated the rent ordinance; and (4) was collaterally estopped from re-litigating the issue of whether it had substantially interfered with the Aliotos' right to occupy their apartment.

D. The Parties Settle; Park Lane Files a Dismissal Without Prejudice

***2** Later in December 2013, Park Lane's registered agent, Russell Flynn, and Alioto negotiated and executed a settlement agreement with a stipulation for entry of future judgment, which all parties signed by January 3, 2014 (the settlement). Under the settlement, the Aliotos agreed to: (1) pay the rent they owed for November and December 2013, by January 6, 2014; and (2) ensure their future rent payments were received by the property management company "by no later than the fifth day of each month," provided Alioto received a call from Park Lane's counsel "at least 3 days before the due date." In return, Park Lane agreed to forgive the Aliotos' previous arrearage (originally, $4,253.30 for June 2013), and to reduce the Aliotos' rent by $1,000 per month for 11 months, from November 2013 through September 2014. The Aliotos by then had been served with a notice terminating their tenancy pursuant to the Ellis Act (Gov. Code, § 7060 et seq.).[2] They requested and were granted the right to remain as tenants through October 24, 2014, however, with Park Lane reserving its right to terminate the tenancy earlier pursuant to the Ellis Act, and the Aliotos reserving their right to assert defenses to that act, except for the defense of a "decrease in housing services caused by or related to the construction activity."

The Aliotos also agreed to release and hold Park Lane harmless for inconvenience or distress resulting from any past, current, and future construction activity resulting from the building's extensive renovations (the release). The release provided in pertinent part as follows: "In addition, for the consideration herein, Defendants [the Aliotos] shall release and hold Plaintiff [Park Lane] ... harmless for any inconvenience, decrease in housing services, or distress as a result of or arising out of the building's extensive renovation, improvement, unit rehabilitations, construction, and the like ('construction activity'). *This release extends to all past, current, and future construction activity that occurs in or around the building, the Premises* [i.e., the Aliotos' apartment], *and/or other units in* [*the building*]. It is the express intention of this Agreement that the consideration provided to Plaintiff [Park Lane] [sic] by Defendants [the Aliotos] [sic] shall in every way compensate Defendants [the Aliotos] ... from all problems, inconveniences, aggravations, and adverse issues related to the construction activity, and that Defendants [the Aliotos] shall thereafter not be entitled to any further rent adjustment, abatement, or award of damages as a result thereof except as allowed by this Agreement. *Defendants* [*the Aliotos*] *acknowledge that construction activity will continue throughout the duration of* [*their*] *tenancy at the Premises* [*i.e., the Aliotos' apartment*], *and they hereby agree that the consideration provided by this Agreement shall be sufficient to compensate them for any harm, annoyance, loss or diminution of housing services, or lack of quiet use and enjoyment they suffered or will suffer as a result of the past, present, and future construction activity.*" (Italics added.)

As part of the settlement agreement, Park Lane agreed to file a dismissal without prejudice. The parties' settlement agreement authorized the court to "set aside the dismissal if necessary," however, "upon an application of [Park Lane], for the purpose of enforcing the terms of this stipulation and entering judgment pursuant to its terms .... on ... *ex parte* notice ...." The parties also signed and attached to the settlement stipulated terms for entry of any future judgment in the event of breach of the agreement. Among other things, the stipulated terms included an agreement that, should the court sign "a judgment for restitution" of the premises, the Aliotos *"expressly waive*[*d*] *any right to an appeal or to seek a stay of execution of judgment or eviction for any reason whatsoever, including hardship. Defendants* [*the Aliotos*] *also waive*[*d*] *any right to move for relief from forfeiture of the written rental agreement* entered into by and between Plaintiff's [Park Lane's] predecessor-in-interest and Defendants [the Aliotos]." (Italics added.)

***3** The stipulated terms for entry of any future judgment included two attorneys' fee provisions. The first provision,

in paragraph two, addressed responsibility for attorneys' fees generally, providing in full as follows: “Except as otherwise stated herein, each party is to bear his/its own attorney's fees and costs *unless a motion is filed to enforce the terms of the Agreement or this stipulation for entry of future judgment (the ‘Stipulation’). Should such a motion become necessary, the prevailing party shall recover his/its fees and costs incurred in bringing an enforcement motion.*” (Italics added.) The second provision, in paragraph four, addressed the consequences of a breach of the agreement, providing in pertinent part as follows: “[J]udgment as a result of breach shall include (1) restitution of the Premises [i.e., the Alioto's apartment]; (2) all unpaid rent without offset or credit; and (3) attorney fees and court costs reasonably incurred to obtain judgment pursuant to this Stipulation.” Alioto crossed out and initialed the attorneys' fee provision contained in paragraph four, but did not cross out the attorneys' fee provision contained in paragraph two. Pursuant to the parties' settlement, Park Lane filed a request for dismissal of the action without prejudice on January 6, 2014.

E. The Dismissal is Vacated; Judgment is Entered and Stayed

At some point early in 2014, construction work resumed on the penthouse unit. In March 2014, Alioto complained by e-mail to Park Lane's counsel about the noise, dust, and related water stoppage. The following month, April 2014, the Aliotos withheld their rent payment. When Park Lane's counsel called Alioto on April 16, 2014 to inquire about the payment, Alioto complained about the renewed construction work.

The same day (April 16, 2014), Alioto and three other elderly tenants of the building filed an independent lawsuit against Park Lane (*Greene et al. v. Park Lane Associates, LP* (Super. Ct. San Francisco County, 2014, No. CGC–14–538688) [the *Greene* lawsuit]) alleging the following causes of action based on the continuing construction work: breach of the warranty of habitability; related statutory violations; nuisance; negligence; intentional infliction of emotional distress; unfair business practices; retaliation; violation of the rent ordinance; excessive rent; and breach of the covenant of quiet enjoyment. In addition to being one of the plaintiffs, Alioto and his law firm served as plaintiffs' counsel with two other law firms. They sought damages and injunctive relief.

The following week, on Friday, April 25, 2014, after learning of the *Greene* lawsuit, and still not having received the Aliotos' monthly rent payment, Park Lane applied ex parte for an order vacating dismissal of the current action and enforcing the settlement. The Aliotos had breached the settlement, Park Lane contended, by failing to pay their rent for April 2014, and by filing a lawsuit against Park Lane complaining of its construction activity, even though they had released Park Lane from liability for injuries resulting from “ ‘all past, current, and future construction activity.’ ” The Aliotos opposed the motion, asserting mistake of fact, fraud, and a change in circumstances. They contended that: they signed the settlement reasonably believing construction on the penthouse had been completed; under the lease agreement they were entitled to withhold rent; they had deposited their rent in an escrow account pending resolution of their dispute; and they told Park Lane's counsel they were doing so.

Park Lane replied to the Alioto's factual allegations by filing a supplemental declaration from its agent, Russell Flynn. Flynn declared that, when he met Alioto *in December 2013* to attempt to settle the current action, Alioto offered to buy the penthouse apartment, and Flynn refused, explaining that he had just purchased the penthouse himself. According to Flynn, he told Alioto in that conversation that he planned to move in to the penthouse in “several months,” *after he had work done to reinforce the roof with steel beams and add a small elevator* between the two floors of the apartment.

***4** After holding a hearing on May 6, 2014, the trial court granted Park Lane's ex parte application on June 9, 2014 (the June 2014 order), finding that the Aliotos had “released all claims arising from [the] building's extensive renovation,” including claims related to “future construction activity,” and that they failed to comply with their obligation under the settlement to make timely rent payments. The court ruled that the Aliotos' assumption there would be no further construction on the penthouse did not qualify as a mistake of fact, and that the Aliotos “failed to show any construction was concealed from [them].” Vacating the dismissal, the court issued an order awarding possession of the Aliotos' apartment to Park Lane (the enforcement order), and entered judgment pursuant to the terms of the settlement. “[B]ased on the fact that rent ha[d] been timely paid into an escrow account in good faith,” however, the trial court ordered the judgment stayed, on the conditions that the Aliotos: (1) strictly comply with the remaining stipulation terms; (2) pay all rent due by June 16, 2014; and (3) reimburse Park Lane for all attorneys' fees it incurred in bringing the motion to enforce the settlement agreement—as the prevailing party under the settlement agreement—by personal delivery or certified mail no later than July 3, 2014. The court further instructed that the stay would “be lifted without further Court

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order upon submission of declaration re: non-compliance by Plaintiff/Plaintiff's counsel [i.e., Park Lane or Park Lane's] counsel if Defendants [the Aliotos] breach[ed] term 8(ii) of the stipulation," requiring receipt of all rent payments by the fifth day of each month, or if the Aliotos "fail[ed] to timely comply with this Order."

F. The Aliotos Move to Amend the Judgment to Remove the Fees Provision

On September 3, 2014, the Aliotos filed a motion to amend the enforcement order and judgment. Citing Code of Civil Procedure section 473, subdivision (b), they contended they should be relieved from the order to pay the attorneys' fees that Park Lane incurred in moving for enforcement of the settlement because the order contained a mistake. The attorneys' fee provision contained in paragraph four of the stipulated terms had been crossed out, the Aliotos observed, and the attorneys' fee provision in paragraph two also should have been stricken, because "[a]ttorneys' fees were never intended to be part of the Settlement Agreement." Alioto explained in a supporting declaration that he had crossed out the attorneys' fee provision in paragraph four, but "overlooked" the "duplicative" provision contained in paragraph two, mistakenly failing to cross it out as well. Unconvinced, the trial court denied the motion, on October 16, 2014, ruling that the Aliotos failed to meet their burden under Code of Civil Procedure section 473, subdivision (b) (the October 2014 order).

G. The Stay is Lifted and the Judgment is Enforced

The following month, on November 3, 2014, Park Lane filed a motion to lift the stay and enforce the judgment. It contended the Aliotos remained in breach of the settlement agreement because Alioto continued to prosecute the *Greene* lawsuit for damages arising out of Park Lane's construction activities, in contravention of the waiver of all such claims in the settlement agreement. Additionally, Park Lane contended, the Aliotos failed to make a timely and complete rent payment for the month of September. Regarding the second point, Park Lane explained that, after the Aliotos breached the settlement agreement by withholding their rent in April, they lost the right to pay a reduced monthly rent ($9,316.52 rather than $10,316.52). The Aliotos thereafter were required to, and did, pay their full rent between April and August; but they sent a check for the reduced amount in September, and made no additional payment by the fifth day of that month when full payment was due under the settlement. As the trial court had conditioned its order staying enforcement of the judgment on "strict[ ]" compliance with the settlement agreement, and as the Aliotos had since breached the agreement, Park Lane contended, an order should be issued lifting the stay and enforcing the judgment.

The Aliotos opposed Park Lane's motion, contending that: their lower September rent payment was the result of a clerical error; they submitted the check two weeks early (on August 21, 2014); their October rent payment was in the correct amount; Park Lane gave them no notice of the error in the September payment until October 23, 2014, when it returned their rent checks for September and October, claiming unspecified "ongoing breaches" of the settlement agreement; Park Lane waived any claim that Alioto's involvement in the *Greene* lawsuit constituted a breach of the settlement agreement by opting not to rely on the settlement agreement as a defense in that matter; Alioto did not release claims challenging his Ellis Act eviction, which were part of the *Greene* lawsuit; Alioto could not waive his rights to a habitable dwelling; and Alioto would not have signed the settlement agreement had he been aware Park Lane planned to begin "substantial demolition and destruction" of building units.

***5** Following a hearing on the matter, on December 8, 2014, the trial court granted Park Lane's motion, lifting the stay and authorizing Park Lane to enforce the judgment, finding that the Aliotos' "[m]onthly rent was not received [by] the Plaintiff [Park Lane] by the 5th of September as required by Section 8(ii) of the Settlement Agreement" (the December 2014 order).

H. The Aliotos' Post–Judgment Motions

On December 31, 2014, the Aliotos filed motions for relief from the order lifting the stay of the judgment, for a stay of execution of the judgment, and for relief from forfeiture of the lease, citing Code of Civil Procedure section 1179 and claiming hardship. Park Lane opposed the request for relief from the forfeiture, quoting the language of the settlement agreement, in which the Aliotos " 'expressly waive[d] any right ... to seek a stay of execution of judgment or eviction for any reason whatsoever, including hardship," and "also waive[d] any right to move for relief from forfeiture of the written rental agreement." The Aliotos' hardship argument also was unconvincing, Park Lane asserted, because, among other things, the Aliotos owned and occupied a separate single family home in Diablo, California to which they could relocate following eviction.[3]

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After a hearing, the trial court issued an order on January 23, 2015, denying relief from forfeiture; it found the Aliotos failed to meet their burden of demonstrating extreme hardship under Code of Civil Procedure section 1179, and had waived their right to seek relief from forfeiture (the January 2015 order).

On February 6, 2015, the Aliotos filed a notice of appeal, challenging the December 2014 order lifting the stay of the judgment, and the January 2015 order denying their motion for relief from forfeiture.

II. DISCUSSION

The Aliotos contend the judgment in this action must be reversed because the trial court abused its discretion (1) in issuing the June 2014 order, vacating dismissal but staying enforcement of the settlement, and (2) in issuing the December 2014 order, lifting the stay. The first order was an abuse of discretion, they contend, because it enforced the settlement agreement despite evidence that it was based on a mistake of fact and on fraud, and that the underlying conditions later changed in a manner that could not have been anticipated, and because they did not breach the agreement by depositing rent payments into an escrow account. The second order was an abuse of discretion, they contend, because it ignored that Park Lane breached the settlement agreement by failing to promptly notify them their September rent payment was deficient. Additionally, in their opening appellate brief, the Aliotos contend the trial court erred in its October 2014 order, declining to amend the enforcement order and judgment by relieving them of the obligation to pay Park Lane's attorneys' fees, to the extent the court relied on the timeliness of their motion, because their motion was timely. In their reply brief, the Aliotos further contend the trial court abused its discretion in issuing the October 2014 order because Alioto's mistake in failing to cross out the second attorneys' fee provision was excusable. We address each of these contentions below.[4]

A. Standard of Review

***6** In opposing the June 2014 order, vacating dismissal and enforcing (but staying) the stipulated judgment, the Aliotos contended they signed the settlement, releasing claims related to "past, current, and future construction activity," because they mistakenly believed all construction on the penthouse unit was completed. In the motion that produced the October 2014 order denying amendment of the (stayed) enforcement order and judgment, they contended the stipulated terms attached to the settlement contained a (remaining) attorneys' fee provision because Alioto mistakenly overlooked it and failed to cross it out. In opposing the December 2014 order lifting the stay, the Aliotos acknowledged they mistakenly failed to pay the full amount of their September rent, but contended the error should be excused because Park Lane failed to promptly notify them of the error. The parties agree the trial court's decisions to deny relief based on mistake are reviewed for abuse of discretion. (See, e.g., *Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1135 [a ruling on a motion to be relieved from a stipulation is reviewed for abuse of discretion].) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712, fns. omitted.)

B. The June 2014 Order: Dismissal Vacated; Judgment Entered and Stayed

The Aliotos submit the trial court erred in entering the June 2014 order vacating dismissal of the action and entering (but staying) judgment in Park Lane's favor because (1) the ruling ignored their evidence that the settlement was entered into due to fraud or mistake, (2) the agreement should have been set aside due to "changed circumstances," and (3) they did not breach the agreement by depositing their rent payments into an escrow account.

The Aliotos submitted declarations stating they had reasonably expected there would be no further construction on the penthouse apartment after they signed the settlement in December 2013 and January 2014. The expectation was reasonable, they submit, because: the penthouse by then had been renovated twice in less than two years; Park Lane's general contractor testified in May 2013, in the first unlawful detainer action, that work on the penthouse would be completed within two months; Park Lane represented that construction on the unit was complete; and no construction work on the penthouse was underway at the time the Aliotos executed the settlement agreement. This evidence, the Aliotos contend, established that, in deciding to execute the settlement agreement, they relied on (1) a mistake of fact, (2) Park Lane's fraudulent representations, and (3) underlying conditions

that later changed in a manner that could not have been anticipated.

In their opening appellate brief, the Aliotos cite a single legal authority as support for their contention that the trial court erred in declining to grant them relief from their settlement obligations. That authority, *Los Angeles City School Dist. v. Landier Management Company* (1960) 177 Cal.App.2d 744 (*Los Angeles City School Dist.*), confirms that a trial court, "in the exercise of its sound discretion, *may* set aside a stipulation entered into through ... fraud, [or] mistake of fact ... [or] where ... there has been a change in the underlying conditions that could not have been anticipated ...." (*Id.* at p. 750, italics added.) But, in that case, the Court of Appeal affirmed denial of the defendants' request for relief from a judgment entered pursuant to a stipulated settlement. (*Id.* at p. 752 ["[o]ne who agrees to waive or forego a right is precluded from afterwards asserting that right"].)

The Aliotos cite no appellate case in which a trial court's refusal to set aside a party's obligations under an agreement constituted an abuse of discretion; nor do they point, in their opening brief, to any legal authority providing or discussing the standards that are to govern a trial court's exercise of discretion in this context. (See, e.g., *Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 383 [When an appellant fails to support a point with citations to authority, the appellate court may treat the point as waived].) The Aliotos do acknowledge *Lawrence v. Shutt* (1969) 269 Cal.App.2d 749 (*Lawrence*) in their reply brief, which quoted and discussed the statutory definition of "mistake of fact" (*id.* at p. 765, quoting Civ. Code, § 1577)~,[5] but they do not themselves discuss or apply the statutory definition or case law interpreting it. They also ignore *Lawrence*'s conclusion that a party who has "notice of sufficient facts to put them on inquiry," but "[n]evertheless ... fail[s] to make reasonable inquiry, or any inquiry," cannot claim mistake of fact to obtain relief from their obligations. (*Id.* at pp. 765–766.)

***7** Here, the plain language of the settlement put the Aliotos on notice that inquiry was appropriate, to the extent they harbored any expectation there would be no further construction work on the penthouse apartment. The mutual release included in the settlement contained the following language expressly and repeatedly warning the Aliotos that there would be construction work in the building in the future: "[F]or the consideration herein, Defendants [the Aliotos] shall release and hold Plaintiff [Park Lane] ... harmless for any inconvenience, decrease in housing services, or distress as a result of *or arising out of the building's extensive renovation, improvement, unit rehabilitations, construction, and the like ('construction activity'*. This release extends to all past, current, and *future construction activity* that occurs in or around the building, the Premises [the Aliotos' apartment], *and/or other units in The Park Lane*.... Defendants [the Aliotos] acknowledge that construction activity *will continue* throughout the duration of [their] tenancy ... and they hereby agree that the consideration provided by this Agreement shall be sufficient to compensate them for any harm, annoyance, loss or diminution of housing services, or lack of quiet use and enjoyment they ... will suffer as a result of the past, present, and *future construction activity*." (Italics added.) When the trial court expressly directed Alioto's attention to this language during a hearing on the issue, he replied that he was not aware, and had not been told, this future construction activity would extend to the penthouse unit above his apartment, or that it would include demolition. This explanation is wholly insufficient to support a legally cognizable mistake of fact. As stated in *Lawrence*, "courts will not set aside contractual obligations, particularly where they are embodied in written contracts, merely because one of the parties claims to have been ignorant of or misunderstood the provisions of the contract. [Citations.]" (*Lawrence, supra*, 269 Cal.App.2d at p. 765.) In *Lawrence*, the court applied this reasoning in rejecting the defendants' argument that they misunderstood a term contained in a release they signed. (*Id.* at pp. 765–766.) Noting evidence that the defendants twice had expressed dissatisfaction with the release before signing it, which demonstrated they had "notice of sufficient facts to put them on inquiry as to the meaning" of a word used in the settlement, and that the defendants nonetheless failed to make any inquiry, the court concluded "the mistake which the defendants entertained was not a mistake of fact within the meaning of the law. [Citations.]" (*Ibid.*)

The trial court properly reached the same conclusion here. It is evident from the transcript of the hearing on Park Lane's motion to vacate the dismissal that Alioto read the settlement before signing it; he advised the trial court, for example, that he made a change to the document before signing it. Further, Park Lane's counsel submitted a declaration describing a number of changes Alioto requested in settlement negotiations, and attached as an exhibit a previous draft of the settlement containing Alioto's proposed changes in redline. Notably, although Alioto in the latter document, proposed eliminating the terms for a stipulated entry of judgment, he made no changes at all to the

mutual release language cited above, which referred to “the building's extensive renovation,” or planned “future construction activity ... in or around the building ... and/or other units.”

Although Alioto submitted a declaration asserting “Plaintiff [Park Lane] had previously represented ... construction on that [penthouse] unit was completed,” the reference apparently was to the general contractor's testimony in May 2013 that the work then underway on the penthouse would conclude within two months. There was evidence, however, that Park Lane representative Russell Flynn told Alioto, during settlement negotiations in mid-December 2013, that he had purchased the penthouse but would not be moving in for “several months,” because he wanted work done first to reinforce the roof and add a small elevator. Alioto did not deny the exchange with Flynn, which undoubtedly put him on notice there would be more work on the penthouse apartment. Instead, Alioto appeared to implicitly acknowledge the exchange, as he complained at the hearing no one told him *the planned extent* of future construction work, for example, that it would include “demolition” or that the penthouse would be “gut[ted] ... for the third time.” Given the clear language of the settlement, this did not suffice to show a mistake of fact.

The Aliotos' assertions that they were entitled to relief because changes in the underlying conditions could not have been anticipated, and Park Lane engaged in fraud are similarly unavailing. Relying again solely on *Los Angeles City School Dist. v. Landier Management Company*, *supra*, 177 Cal.App.2d 744, which, as discussed above, does not advance their cause, the Aliotos assert that an unanticipated change in circumstances—from there being “no ongoing construction in the penthouse to [their] knowledge” when they executed the settlement to the later resumption of construction work on the penthouse—required a ruling relieving them of their obligations under the settlement. But, as the one case they cite confirms, the standard is an objective one, i.e., whether there “has been a change in the underlying conditions *that could not have been anticipated.*” (*Id.* at p. 750, italics added.) Here, the language of the release contained in the settlement and the information Flynn provided to Alioto during their December 2013 settlement conversation—in an exchange Alioto never denied or directly contradicted —gave the Aliotos every reason to anticipate there would be a change, i.e., a resumption (or continuation) of the “extensive renovation” work on the building, including work on the penthouse apartment, to construct an elevator, which one might reasonably have anticipated would include some demolition of walls.

***8** The Aliotos' fraud claim fares no better. In their reply brief, they quote Civil Code section 1572 for the proposition that “ ‘the suppression of that which is true, by one having knowledge or belief of the fact’ constitutes fraud.” The quotation is incomplete, however, because the statute begins with a clause requiring a showing that the other party to a contract acted “with intent to deceive another party thereto, or to induce him to enter into the contract ....” (Civ. Code, § 1572.) The Aliotos make no attempt to address the intent requirement and do not acknowledge the evidence showing no such intent—Flynn's uncontradicted statement that he told Alioto in December 2013 he would be doing further work on the penthouse. To the extent the Aliotos rely on the argument Alioto made to the trial court, that Park Lane committed fraud by withholding information about the extent of the planned future construction work, we are unpersuaded. The language of the settlement's release (which expressly warned of “future construction activity,” defined as including “extensive renovation,” “in or around the building ... and ... “other units”), and the information Flynn provided Alioto in their December 2013 settlement conversation, refute the contention. The trial court did not err in finding the Aliotos “failed to show that any construction was concealed from [them].”

Finally, the Aliotos contend they did not breach the settlement by withholding their April rent and instead depositing it into an escrow account. The Aliotos contend their lease allowed them to withhold rent if the landlord breached the agreement, provided they gave written notice and allowed the landlord reasonable time to cure the breach; that they did give Park Lane timely notice of its breach; and that the settlement did not prohibit them from depositing their rent to an escrow account. This argument borders on the frivolous.

In the settlement, the Aliotos expressly relinquished and renounced all claims against Park Lane arising out of this matter, including, specifically, claims for “any inconvenience, decrease in housing services, or distress as a result of or arising out of the building's extensive renovation,” including “future construction activity.” The language was broad—as the trial court observed and as Alioto acknowledged during the hearing—and undoubtedly extended to the construction-related complaints Alioto voiced in the communications he sent to Park Lane, which he later offered as evidence of notice of breach of the lease. Having concluded the trial court

did not err in declining to grant the Aliotos relief from the settlement, we conclude the settlement's release precluded the Aliotos from seeking further compensation for conduct it covered. We note as well that the Aliotos agreed in the settlement to remit their monthly rent payments between January and September 2014 to the property management company, Meridian Management Group, by specified dates. The Aliotos' payments instead were deposited to an account with City National Bank, purportedly pursuant to their rights under the lease, were nevertheless in derogation of their obligations under the settlement. The trial court did not err, therefore, in determining that the Aliotos had breached the settlement.[6]

***9** For the reasons set forth above, we affirm the trial court's June 2014 order, granting Park Lane's motion to vacate the dismissal and entering (but) staying judgment in Park Lane's favor.

C. The December 2014 Order: Stay Lifted

The Aliotos also submit the trial court abused its discretion in entering the December 2014 order lifting the stay, based on their failure to pay the full amount of the rent due for September 2014, because in doing so it ignored evidence Park Lane acted in bad faith by secretly holding onto their September payment for two months without notifying them it was deficient. In their opening brief, the Aliotos offer no legal argument and cite no legal authority supporting the conclusion Park Lane's failure to advise them of the deficiency excused their underpayment. Although, in their reply brief, the Aliotos belatedly contend Park Lane violated the rent ordinance by refusing to accept or cash their September 2014 payment, they waived this argument by failing to raise it in their opening brief. (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1292, fn. 6.)

The following points are undisputed: (1) in the settlement, the Aliotos agreed to pay “[a]ll ... rent ... by no later than the fifth day of each month,” and hold Park Lane harmless “for any inconvenience, decrease in housing services, or distress ... arising out of .... future construction activity that occur[red] in or around ... other units” in the building; (2) four months later, in April 2014, the Aliotos nonetheless withheld their rent payment; (3) the same month, Alioto joined as a plaintiff and plaintiff's counsel in the *Greene* lawsuit, naming Park Lane as defendant and alleging claims for relief based on the continuing construction activity in the building; (4) in June 2014, the trial court ruled the Aliotos had not complied with their obligation to pay rent under the settlement and vacated dismissal of the action, awarding restitution of their apartment to Park Lane, but stayed its order *on the condition that the Aliotos “strictly comply with the remaining terms” of the settlement* (italics added); (5) in September 2014, the Aliotos submitted a rent payment that was $1,000 less than the agreed amount; and (6) in November 2014, Park Lane filed a motion to lift the stay, contending the Aliotos did not strictly comply with the settlement terms as required, because they failed to pay their September rent in full, and Alioto continued to prosecute the *Greene* lawsuit despite having released all construction-related claims against Park Lane in the settlement.

On this record, the trial court granted Park Lane's motion, and lifted the stay, finding the Aliotos did not comply with the settlement's requirement that they pay all rent by the fifth day of the month. As there was no dispute regarding the factual or legal accuracy of this conclusion, and as the Aliotos on appeal provide no reasoned legal argument and cite no legal authority excusing them from the settlement requirement, we reject their contention that the trial court erred or abused its discretion in lifting the stay and we, therefore, affirm both the order and the resulting judgment.

D. The October 2014 Order: Attorneys' Fees

***10** Finally, the Aliotos claim the trial court erred in its October 2014 order, by declining to rescind its June 2014 order requiring them to pay the attorneys' fees that Park Lane incurred in moving to vacate the dismissal and enforce the settlement. The trial court ordered reimbursement of Park Lane's attorneys' fees as part of a compromise, after issuing an order vacating dismissal and enforcing the settlement, but staying the resulting judgment, thus allowing the Aliotos to remain in their apartment several more months if they strictly complied with the settlement. In awarding fees, the trial court relied on paragraph two of the settlement's stipulated terms, which provided that “the prevailing party shall recover” associated “fees and costs” if a motion to enforce the settlement was filed. The trial court concluded that Park Lane was the prevailing party within the meaning of this provision.

The Aliotos moved for relief from the fees award citing Code of Civil Procedure section 473, subdivision (b), and claiming mistake. They attached Alioto's declaration averring that he crossed out the attorneys' fee provision contained in paragraph four of the stipulated terms, and also should have

crossed out the attorneys' fee award provision in paragraph two, but mistakenly failed to do so because he "overlooked" it. The Aliotos cited no statutory or decisional authority supporting their contention that this oversight qualified as a mistake entitling them to relief. After hearing argument from the parties, the trial court denied their motion, explaining simply that they "failed to sustain [their] burden under CCP [section] 473(b)."

In their opening brief on appeal, the Aliotos assume the trial court denied their motion because they waited too long to file it. They contend this was error because, under Code of Civil Procedure section 473, subdivision (b), a party may seek relief from an "order ... taken against him or her through his or her mistake" on an application submitted "within ... six months, after the ... order ...." (Code Civ. Proc., § 473, subd. (b).) As the trial court issued the order directing them to pay Park Lane's attorneys' fees on June 9, 2014, and they filed their motion seeking relief from that order on September 3, 2014, they contend their request was timely. The trial court, however, found the Aliotos had not sustained their burden of proof; the timeliness of the motion is, therefore, beside the point.

In their reply brief, the Aliotos also (belatedly) cite case law supporting the principle that the trial court had *discretion* to grant them relief here, but they fail to offer any cogent argument that the trial court abused its discretion in declining to do so. The Aliotos' own authority support the conclusion there was no abuse here. In *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, the Supreme Court stated that, although " 'the provisions of section 473 of the Code of Civil Procedure are to be liberally construed' " (*id.* at p. 256), " '[a] ruling on a motion for discretionary relief' " under that section " 'shall not be disturbed on appeal *absent a clear showing of abuse*' " (*id.* at p. 257, italics added). As noted in *In re Marriage of Carter* (1971) 19 Cal.App.3d 479, the test under this standard "is whether or not the trial court exceeded ' " 'the bounds of reason, all of the circumstances before it being considered.' ' " [Citations.]" (*Id.* at p. 494.) Applying that test, the court in *Sanserino v. Shamberger* (1966) 245 Cal.App.2d 630, concluded there had been no abuse of discretion, in denying a party relief under section 473 where the party claimed "a misunderstanding as to the nature and effect of the stipulation entered into." (*Id.* at p. 634.) Observing that "[t]he language of the stipulation seem[ed] clear enough," the party's counsel drafted the stipulation after conferences with her, and the party signed it, the Court of Appeal concluded substantial evidence supported the trial court's decision. (*Id.* at p. 633.) We reach the same conclusion here.

***11** Alioto acknowledges he is an experienced attorney with his own law office. At the hearing on Park Lane's motion to vacate dismissal and enforce the settlement, he did not contradict opposing counsel when the latter observed that Alioto was "a famous antitrust lawyer" who had been "practic[ing] law longer than [opposing counsel had] been alive." Alioto also did not contradict the declarations submitted by Park Lane's counsel and agent describing the considerable back and forth involved in negotiating the settlement. According to those uncontradicted accounts, Park Lane drafted the stipulation, forwarding it to Alioto for review, and Alioto returned the draft with many proposed textual additions and deletions. Negotiations continued at the courthouse on the day set for the trial, culminating in Alioto's agreement to sign the settlement with two modifications. Park Lane's counsel averred that, at Alioto's insistence, he (1) removed an integration clause, and (2) added a provision requiring a telephone reminder for Alioto at least three days before each rent payment was due. Alioto agrees he also crossed out a line of text in paragraph four of the attached stipulated terms, providing for attorneys' fees, and the document reflects other handwritten and initialed changes regarding the date on which the Aliotos' payment of arrearages was due and the amount of notice required for any ex parte application to enforce the agreement.

In sum, Alioto was an experienced attorney who carefully negotiated the settlement, only signing it after requiring and making a number of changes. The language of the remaining attorney fee provision contained in paragraph two of the attached stipulated terms was neither complex nor confusing. It appeared near the top of the first page of the stipulated terms, in a separately numbered paragraph, in the same font as the rest of the document. Additionally, after Alioto signed the document on December 30, 2013, he took a copy home for his wife to sign, which she did on January 3, 2014, four days later, giving him further time to review the document with his wife and to catch any objectionable provisions. Given these facts, and considering also that the trial court only awarded fees under the agreement after exercising its discretion to allow the Aliotos a further opportunity to remain in their apartment, we cannot say that it abused its discretion in denying them relief from the fees award. We consequently affirm the trial court's October 2014 order.[7]

III. DISPOSITION

The following orders of the trial court are affirmed and also the resulting judgment: (1) the June 9, 2014 order granting application for vacating the dismissal and enforcing judgment pursuant to settlement agreement and stipulation; (2) the October 15, 2014 order, denying defendants' motion for an order amending order and judgment dated June 9, 2014; and (3) the December 8, 2014 order lifting stay of judgment.

We concur:

Ruvolo, P.J.

Streeter, J.

All Citations

Not Reported in Cal.Rptr., 2018 WL 549166

Footnotes

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 Alioto represented himself and his wife in this litigation.

2 The Ellis Act allows owners of residential property to remove property from the rental market consistent with certain guidelines. (*Danger Panda, LLC v. Launiu*, *supra*, 10 Cal.App.5th at pp. 506–507.)

3 Park Lane also contended that relief from forfeiture was precluded because, in a separate (third) unlawful detainer action that it filed against the Aliotos on October 30, 2014 based on the Ellis Act (*Park Lane Associates, LP v. Joseph Alioto et al.* [Super. Ct. San Francisco County, 2014, No. CUD–14–650445]) the same trial court had granted summary judgment, entering judgment in favor of Park Lane for restitution of possession of the Aliotos' apartment, on December 8, 2014. As the Aliotos' tenancy had been properly terminated under the Ellis Act, Park Lane submitted, their apartment was withdrawn from the rental market for a period of time and no rent could be accepted for its use.

4 Although the Aliotos stated in their notice of appeal that they also intended to challenge the trial court's January 2015 order denying them relief from forfeiture, they provide no argument in their appellate briefs regarding that order and we, therefore, deem it abandoned. (*Mangano v. Verity, Inc.* (2009) 179 Cal.App.4th 217, 222, fn. 6.)

5 Civil Code section 1577 provides as follows: “Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: [¶] 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, [¶] 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.”

6 In their reply brief, the Aliotos assert a public policy argument, not included in their opening brief, challenging the validity of the settlement's release and, by extension, the validity of the trial court's June 2014 order, by contending any purported waiver of the warranty of habitability was invalid. The Aliotos frame their assertion as a response to one of Park Lane's arguments, characterizing the latter as an assertion that, through the settlement, they waived any claim based on the warranty of habitability. The cited portion of Park Lane's respondent's brief did not mention the warranty of habitability, however; rather, Park Lane there contended that the language of the settlement itself put the Aliotos on notice there would be further construction activity in the building. In our original opinion, we declined to consider the Aliotos’ new argument because they waited until their reply brief to raise it in this appeal, offering no excuse for their delay, and did not sufficiently develop it by citing facts or law. The Aliotos subsequently petitioned for a rehearing, citing *Morey v. Paladini* (1922) 187 Cal. 727, 734, for the proposition that, when one party is seeking to enforce a contract, and “the court discovers a fact which indicates that the contract is illegal and ought not to be enforced,” it must “instigate an inquiry,” even if the issue is raised in an appellate reply brief. But that case is easily distinguishable because there a review of “the plain terms of the contract itself” unavoidably led to the conclusion the parties intended an illegal restraint on trade. (*Id.* at p. 736.) In contrast, here, a review of the contract itself does not compel a conclusion that the Aliotos were waiving the warranty of habitability or that the agreement otherwise was illegal. In their rehearing petition, the Aliotos cite to a declaration they filed in the trial court complaining that the construction created certain disruptions, but they have cited no legal authority

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compelling the conclusion the disruptions rendered their apartment uninhabitable. Accordingly, we reject their belated assertion that the trial court erred in enforcing their settlement because it was illegal and, therefore, void.

7 Because we agree with Park Lane on the merits, we need not address its arguments that the Aliotos waived the right to appeal, were collaterally estopped from appealing generally, and waited too long to appeal the October 2014 order. We deny Park Lane's pending request for judicial notice of court records filed in the *Greene* lawsuit because they are unnecessary to our analysis.

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