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SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



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| **MARTIN A. STEINER,** | ) | **Supreme Court No.** |
| | ) | |
| Plaintiff and Appellant | ) | |
| | ) | |
| **v.** | ) | |
| | ) | |
| | ) | |
| **PAUL THEXTON, as Trustee etc.,** | ) | **From Third District** |
| | ) | **Court Of Appeal** |
| Defendant and Respondent; | ) | **No. C054605** |
| | ) | |
| **SIDDIQUI FAMILY PARTNERSHIP,** | ) | |
| | ) | |
| Intervenor and Appellant | ) | |

# PETITION FOR REVIEW OF APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP

Appeal From Sacramento County Superior Court,
Honorable Lloyd A. Phillips, Jr., Judge

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## PETITION FOR REVIEW

Appellants Siddiqui Family Partnership ("SFP"), intervenor, and Martin A. Steiner ("Steiner"), plaintiff, respectfully petition for review following the decision of the Court of Appeal, Third Appellate District (per Sims, Acting P.J.), certified for publication and filed on May 28, 2008 (Appendix A). The Court of Appeal denied appellants' petition for rehearing on June 19, 2008.

## ISSUES PRESENTED

(1) A purchaser of real property promises in writing to "move expeditiously" to seek a parcel split and development approvals at buyer's expense, and subsequently performs that promise. Does a cancellation contingency provision in the contract convert the purchaser's promise and actual performance into illusory consideration that invalidates the contract when the seller subsequently attempts to reneg?

(2) Does California law preclude application of promissory estoppel as a substitute for consideration to support an option contract?

## WHY REVIEW SHOULD BE GRANTED

### 1. The Court Of Appeal's Opinion Is Inconsistent With Decisions Of Other Appellate Districts In That It Ignores A Parties' Actual Performance And The Implied Duty Of Good Faith To Hold That Promises Actually Performed Were Illusory And The Contract Was Invalid.

Appellants' respectfully request this Court to grant review of the Court of Appeal's Opinion because that Opinion is inconsistent with prior decisions of this Court and other Appellate Districts, and because the Court's Opinion creates a technical legal loophole that would allow parties to evade their obligations under a contract, even after they have received the consideration promised them by the other party.

As set forth in greater detail below, the facts relevant to this appeal are undisputed. Plaintiff Steiner entered into a "Real Estate Purchase Contract" with Thexton that required Steiner to pursue a parcel split and development approvals at Steiner's expense, and to indemnify and hold Thexton harmless from all costs, acts, errors or omissions incurred during the development process. In exchange, Thexton agreed to sell the newly created parcel to Steiner at an agreed upon price if Steiner were successful. Steiner and Thexton expressly acknowledged that "Buyer could have substantial investment during this development period." At Thexton's request, Steiner promised to "move expeditiously with the parcel split," and to provide Thexton with "quarterly reports ... as to the progress of the parcel

split." It is undisputed that appellants began performing on these promises almost immediately, and that they had completed a survey and preliminary lot configuration by the time Thexton signed an Addendum to the Contract which affirmed the Contract and provided Thexton with additional consideration. It is undisputed that appellants had completed between 75% and 90% of the work required to obtain the necessary approvals and were on the verge of obtaining the approvals from the County of Sacramento, when Thexton attempted to reneg.

The Court of Appeal held that appellants' promise to perform and actual performance were not valid consideration for the Contract because Steiner included the following provision (para. 7, p. 2) in the Contract:

> It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project. It is expressly understood that the Buyer may, at its absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void.

In *Bleecher v. Conte* (1981) 29 Cal.3d 345, 351, this Court held that a real estate contract which made the buyers' obligation to pay contingent on their approval of various documents and reports was not illusory because the buyers had agreed to "proceed with diligence" and to "do everything in their power to expedite the recordation of the final map ...." This Court pointed to "two other well-established rules" that the Court considered

pertinent to deciding whether a party's promises were illusory:

> First, "[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. [Citations.]" ... Second, if a contract is capable of two constructions, the court must choose that interpretation which will make the contract legally binding if it can be so construed without violating the intention of the parties.

*Bleecher v. Conte, supra*, 29 Cal.3d at 350.

Several Courts of Appeal have subsequently interpreted this Court's instructions in *Bleecher, supra*, and *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372, as establishing the rule that:

> [W]hen a party is given absolute discretion by express contract language, the courts will imply a covenant of good faith and fair dealing to limit that discretion in order to create a binding contract and avoid a finding that the promise is illusory.

*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (1st Dist. 2002) 100 Cal.App.4th 44, 57, citing *Third Story Music, Inc. v. Waits* (2nd Dist. 1995) 41 Cal.App.4th 798, 808. The leading commentators on contract law appear to agree. Thus in *Third Story Music, supra,* 41 Cal.App.4th at 805-806, the court observed:

> As was said in the most recent edition of Corbin's treatise on contracts: "The complaint that a promise is illusory often comes in rather poor grace from the addressee of the allegedly illusory promise, particularly where the addressor is ready and willing to carry out the expression of intention.

> For this reason, courts are quite properly prone to examine the context to conclude that the escape hatch was intended to be taken only 'in good faith' or in the 'exercise of a reasonable discretion' or upon some other condition not wholly within the control of the promisor. In which case, the conclusion is that the promise is not illusory." (1 Corbin, Contracts, [(rev. ed. 1995)] §1.17 at p. 49.) "The tendency of the law is to avoid the finding that no contract arose due to an illusory promise when it appears that the parties intended a contract. . . . An implied obligation to use good faith is enough to avoid the finding of an illusory promise." (2 Corbin, Contracts, *supra*, §5.28 at pp. 149-150.)

The Ninth Circuit apparently reached the same understanding of California law in *Fosson v. Palace (Waterland), Ltd.* (1996) 78 F.3d 1448, 1454. In *Fosson, supra*, the Ninth Circuit cited *Bleecher* to uphold the validity of a contract that required defendants to pay plaintiff a fixed amount if, and only if, they chose to use a musical composition in a movie they were producing. As the Ninth Circuit explained *(id.* at 1454):

> [A]lthough use of the Composition was within the Producer's discretion and control, we hold that a valid contract arose by virtue of the obligations the Producers agreed to assume in the event the Composition was used. Further, the Producers were under an implied obligation to act fairly to protect Fosson's rights and benefits under the contract.

The Court of Appeal's Opinion in this case ignores the implied duty of good faith and fair dealing as applied in *Bleecher, supra*; *Storek & Storek, Inc. v. Citicorp Real Estate, Inc., supra*; *Third Story Music, Inc. v. Waits, supra;* and *Fosson v. Palace (Waterland), Ltd., supra.* The Court of

Appeal's Opinion also ignores appellants' undisputed partial performance of the Contract by the time Thexton attempted to reneg. See, e.g., *The Money Store Investment Corporation v. Southern California Bank* (4th District 2002) 98 Cal.App.4th 722, 728: "An agreement that is otherwise illusory may be enforced where the promisor has rendered at least part performance. [Citations omitted.]"

Because the facts of this case are undisputed and straightforward, the Court of Appeal's Opinion in this case presents an opportunity for the Court to secure uniformity of decision among the Courts of Appeal, and to settle the law on whether courts should attempt "to give effect to the mutual intention of the parties as it existed at the time of contracting" (Civil Code §1636), or whether courts should strictly construe language that arguable makes one party's promises illusory, even after the promise at issue has been largely performed. More fundamentally, the undisputed facts of this case present the Court with an opportunity to address the effect of widely used cancellation or termination provisions that, on their face, represent a mutual agreement by the parties about whether and under what circumstances a party should be allowed to abandon performance of an agreement if that party determines performance has become too onerous.

## 2. The Court Of Appeal's Opinion Creates A New Limitation On The Application Of The Doctrine Of Promissory Estoppel That Is Contrary To Established California Law.

The Court of Appeal's Opinion presents an important question of law, and a conflict with existing California precedent. The limitation on the doctrine of promissory estoppel announced by the Court of Appeal creates an unnecessary and unwise restriction on the application of the doctrine of promissory estoppel, and undercuts the doctrine's original purpose. Under prior law, a party who made a promise with the expectation that others rely on it, could expect to be bound by that promise if others actually did rely. Under the Court of Appeal's new test, a party who makes a promise with the intent and effect of causing detrimental reliance will have an incentive to attempt to evade the promise, in the hope that a court applying hindsight might determine that "plaintiffs fail to show any injustice in denying enforcement of the agreement." The Court of Appeal's approach therefore encourages uncertainty as to a party's obligation to honor its promises, and it encourages increased litigation.

The doctrine of promissory estoppel has been recognized under California law for decades, at least since this Court's decision in *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 413. Over the past 50 years, California courts have applied the doctrine as a form of "substitute consideration" to enforce a wide variety of promises. *C & K Engineering*

*Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6; see, e.g., cases listed in 1 Witkin *Summary of California Law* (10th ed. 2005) "Contracts," §244, p. 275-76.

The elements of promissory estoppel are typically quoted from section 90 of the Restatement of Contracts,[1] as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

*C & K Engineering Contractors v. Amber Steel Co., supra,* 23 Cal.3d at 6.

The Court of Appeal's Opinion appears to accept that all of the requirements for promissory estoppel were met in this case, except that the Court concluded that:

> However, plaintiffs fail to show any injustice in denying enforcement of the agreement. As the trial court observed in denying promissory estoppel, *Steiner retained the ability to walk away from the agreement at any time.* Steiner gave himself this power in the agreement, which he drafted. *There is no injustice in a resolution of this case that effectively accords the reciprocal right to Thexton.*

Opinion at 24 (italics added).

The Court of Appeal's Opinion creates a new limitation on the application of the doctrine of promissory estoppel that is inconsistent with

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[1] As the Court of Appeal noted, "[t]he provision remains substantially the same in the Restatement 2d of Contracts, though the phrase 'of a definite and substantial character' has been deleted." Opinion at 24, fn. 7.

prior California case law, including this Court's decision in *Drennan v. Star Paving Co., supra*. The Court of Appeal's holding bars application of the doctrine of promissory estoppel to enforce an attempted option contract or any other promise made to a party who reserves a right to terminate or walk away from further performance, regardless of how much detrimental reliance that party incurs and regardless of the benefit conferred on the party who made the promise. Thus the Court of Appeal accepted the fact that appellants spent $60,000 over the course of a year in detrimental reliance on defendant's promise (Opinion at 7, fn.3), and the Court of Appeal assumed that appellants' efforts had increased the value of defendant's Property (Opinion at 26).

No other published California case so limits application of the doctrine of promissory estoppel, and neither the Court of Appeal nor defendant cited any authority in support of such a limitation. To the contrary, California case law suggests that promissory estoppel can supply consideration for an option contract. Thus in *Drennan v. Star Paving Co., supra,* this Court enforced a promise made without consideration to perform paving work for a set price, because the subcontractor who made the bid "had reason not only to expect plaintiff to rely on its bid but to want him to." *Drennan v. Star Paving Co., supra*, 51 Cal.2d at 415. The fact that the general contractor obviously could not be expected to accept every bid it

received was no reason to deny enforcement of the promise on which the general contractor did detrimentally rely.

In *Drennan, supra*, 51 Cal.2d at 414, this Court explained the rationale for applying the doctrine of promissory estoppel:

> Whether implied in fact or law, the subsidiary promise serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon. Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract.

The Court of Appeal's decision in this case adds a new factor to the test for applying promissory estoppel. Instead of determining whether a party should reasonably expect its promise to result in detrimental reliance, and whether reasonable detrimental reliance actually occurred, the Court of Appeal's decision encourages courts to engage in a standard-less evaluation of the relative equities affecting the parties, even after it has been determined (or conceded) that a promise was intended to, and did, result in substantial detrimental reliance. Instead of enforcing a promise because the promisor intended the other party to rely, and the other party actually did detrimentally rely, the Court of Appeal has converted the doctrine of promissory estoppel into a broad mandate that would allow courts to evaluate whether the promise was in the promisor's best interest in the first place.

The Court of Appeal's approach is fundamentally inconsistent with the most basic principle of contract law, as codified in Civil Code §1636:

> A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

The Court of Appeal's test announced below permits an appellate court to ignore the mutual intention of the parties as it existed at the time of contracting, and to instead substitute the appellate court's after-the-fact determination of what parties should have agreed to. The inevitable result will be more litigation, increased uncertainty about a promisor's obligations, and increased costs of attempting to do business in California. Moreover, the Court of Appeal's test will lead to more inequity, rather than less. As this Court recognized in *Drennan, supra*, injustice will result if a party is allowed to escape responsibility for a promise when the promisor "had reason not only to expect plaintiff to rely on its bid but to want him to." *Drennan v. Star Paving Co., supra*, 51 Cal.2d at 414, 415.

## BACKGROUND FACTS AND PROCEDURAL HISTORY

The facts relevant to this appeal and petition for review are undisputed. The Court of Appeal's decision was based on a *de novo* standard of review. Opinion at 12, 24-27.

Plaintiff Steiner entered into a written "Real Estate Purchase Contract" (the "Contract") with defendant Paul Thexton, as Trustee of the

FAS Family Trust ("Thexton" or "Seller"), on September 4, 2003.[2] The Contract calls for Thexton to sell ten acres of a 12.29 acre parcel of real property located at 8585 Chris Lane in Orangevale, Sacramento County, California (the "Property"), for a price of $500,000, contingent on Steiner being able to obtain a parcel split of the ten acres from the 12.29 acres. All parties understood that without a parcel split approved by the county, the 10-acre parcel contemplated by the project was not a legal lot, and could not be purchased or sold by anyone. R.T. 49:4-14; 132:28-134:26.

The parties entered into the Contract after approximately one year of on again, off again discussion and negotiation of the terms. Steiner prepared the written contract, but modified it to include terms specifically requested by Thexton. C.T. 2-15; 257-289; R.T. 15:13-29:2; 110:16-115:28. [3] Steiner made clear throughout the negotiations with Thexton that Steiner intended to build his personal residence on one of the lots, and that Steiner would attempt to develop and sell any other lots that were ultimately approved as part of the parcel split. R.T. 45:13-46:25; 134:27-136:9.

The fact that the Contract was contingent on Steiner's ability to obtain the approvals necessary for a parcel split and development was one

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2 A copy of the Contract is attached to the Court of Appeal's Opinion.

3 "C.T." refers to Clerk's Transcript; "R.T." refers to Reporter's Transcript; relevant pages and lines are designated as "page:line."

of the key terms specifically discussed and negotiated by the parties during the course of the year leading up to execution of the Contract. R.T. 113:14-115:28; 125:8-22. For example, Steiner testified, without contradiction, that Thexton told him he had rejected another offer for $750,000 for the ten acre parcel, because that other offer required Thexton to first obtain the approvals and permits necessary to split off the ten acres and obtain permission to develop it. R.T. 23:19-25:11; 122:1-9.

The Contract expressly records the fact that Steiner and Thexton both recognized that there would be significant costs and risks associated with attempting to obtain approval for a parcel split and development rights for the ten acre portion of Thexton's Property. R.T. 20:25-28:1; 31:27-33:2. Under the heading "CONTINGENCIES," the Contract (page 2) provides:

> 1. Seller is aware that Buyer plans to subdivide, apply for planning entitlements and develop 10 acres from the existing parcel and agrees to cooperate, as needed, with Buyer as Buyer attempts to obtain the necessary permits and authorizations from the various local jurisdictions.
>
> 2. **Buyer, at his sole option and expense, will conduct all necessary investigations, engineering, architectural and economic feasibility studies as outlined earlier in this Contract**.
>
> 3. Both Buyer and Seller understand that Buyer could have substantial investment during this development period.
>
> * * *

6. Buyer shall indemnify and hold Seller harmless for any costs associated with Buyer's investigations. **In the event this contract is terminated prior to close of escrow, Buyer shall deliver to Seller the originals or copies of all information, reports, tests, studies and other documentation obtained by Buyer from independent experts and consultants concerning the Property.**

7. **It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project.** It is expressly understood that the Buyer may, at its absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void.

The Contract also expressly provided that: "Time is of the essence of this Contract," (page 2, para. 15) and went on to emphasize Buyer's obligation to immediately proceed with the "substantial investment" required by the Contract. Thus, under the heading "CLOSE OF ESCROW" (at page 3), the Contract required that:

> **Buyer will move expeditiously with the parcel split.** It is anticipated it will take one to three years, due to existing governmental requirements.
>
> Buyer will give quarterly reports to Seller as to progress of the parcel split.
>
> If parcel split is not completed by September 1, 2006, this real estate purchase contract will be cancelled.

Steiner testified without contradiction that the requirement to "move expeditiously" was specifically requested by Thexton and was important to Thexton. R.T. 113:14-115:28.

Pursuant to and in reliance upon the terms of the Contract, Steiner began the development process almost immediately after execution of the Contract. R.T. 33:26-37:4; 116:2-117:6. By December 2003, Steiner had enlisted the assistance of intervenor Siddiqui Family Partnership ("SFP"), represented by Javed T. Siddiqui, and SFP had provided the assistance of JTS Engineering to prepare a tentative subdivision plan, survey the property and begin the work to obtain the necessary approvals for a parcel split and development. R.T. 52:4-55:24; 61:15-65:22; 198:2-202:18. The Contract specifically contemplated that Steiner could assign all or a portion of his interest in the Contract (see introductory paragraph of Contract). Steiner subsequently assigned a portion of his interest to SFP in exchange for SFP's agreement to provide and pay for the engineering and planning work, and to provide the financing for the acquisition price set by the Contract. R.T. 61:15-65:22; 205:3-219:5, Exhibit 12.

As a result of the initial development work by Steiner and SFP, on or about January 8, 2004, Steiner and Thexton entered into the:

> **FIRST ADDENDUM TO THE REAL ESTATE PURCHASE AGREEMENT DATED SEPTEMBER 3, 2003 BETWEEN MARTIN A. STEINER AND/OR ASSIGNEE HERINAFTER [sic] CALLED "BUYER" AND FAS FAMILY TRUST, PAUL THEXTON, HEREINAFTER CALLED "SELLER."**

Plaintiffs' Exhibit 2; R.T. 34:1-37:10. The "First Addendum" was based on the fact that JTS Engineering had completed the survey of the Property, and

Steiner had obtained further express directions from Thexton about where Thexton wanted the boundary between his remainder parcel and the ten plus acres he wanted to sell. Based on this additional information, JTS Engineering had been able to develop a preliminary lot configuration, a sketch of which is attached to the Addendum. R.T. 37:17-38:1. The more clearly defined lot configuration meant that the portion of Thexton's Property that Thexton was willing to sell was slightly increased from 10 acres to 10.17 acres, and the sale price was increased accordingly. R.T. 34:18-36:2; 37:17-26. In addition, Thexton negotiated additional consideration, in the form of a promise by Steiner to demolish and remove an old barn and abandoned old residence on Thexton's remaining portion of the Property at no cost to Thexton, and to provide Thexton with a water connection at no charge. R.T. 34:5-37:2; 38:20-39:7; 136:10-138:8; 148:17-149:2.

Following execution of the First Addendum, Steiner and SFP continued their work in attempting to obtain approval of a parcel split and development permits. Since the ten-plus acre parcel contemplated by the Contract was land-locked and did not already have access to a public street or utilities (R.T. 25:12-26:8), a considerable amount of work, meetings and planning were required to obtain a parcel split and development approval. R.T. 43:25-44:15; 52:4-55:21; 118:13-119:9; 133:8-23; 207:1-6; 213:18-

214:24. Steiner provided Thexton with frequent updates on the status of development efforts. R.T. 34:5-37:2; 40:26-41:24; 116:1-117:6.

Steiner and SFP testified without contradiction that they spent in excess of $60,000, including their "sweat equity" in pursuing the parcel split and development approval over the course of the next year. R.T. 43:25-44:15; 52:4-55:21.[4] In addition, SFP and its individual partners were actively marketing certain real property located at 812 K Street in Sacramento so that SFP could raise the cash required to pay the purchase price for the Property as soon as Sacramento County approved the parcel split and development plans. R.T. 68:24-69:14; 219:3-225:10. The Contract expressly required Thexton to cooperate in an "IRS-1031 exchange for benefit of Buyer and Seller" (Exhibit 1 at page 3), and SFP intended to use its share of the proceeds from the sale of the 812 K Street property to fund the purchase price of the Property, making use of a 1031 exchange. R.T. 193:14-195:5.

On or about May 15, 2004, Thexton signed – in two separate places – a "County of Sacramento Planning Department Application Information Form" that had been prepared by JTS Engineering, and which requested the

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[4] In fact, Steiner and Siddiqui testified that the market value of the services they provided, including permit and application fees, would have been between $80,000 and $100,000. R.T. 118:22-119:3; see also 43:25-44:15; 53:24-55:28; 207:1-6.

County of Sacramento to approve a parcel map that divided the Thexton property into four parcels plus one remainder parcel. Plaintiff's Exhibit 3; R.T. 39:8-40:28.

Three months later, on or about August 19, 2004, Thexton signed a letter addressed to the County of Sacramento concerning the lack of historical significance of the abandoned residence on the Property, and confirmed his intent to have the old residence razed. Plaintiff's Exhibit 4; R.T. 41:25-43:23. Thexton supplied the photo attached to his letter.

More than one year after Steiner and SFP began performance of their obligations under the Contract, and less than six weeks after Thexton submitted his most recent letter in support of Steiner's development application – and just as it appeared likely that plaintiffs' development plans would be approved – Thexton suddenly reversed position. R.T. 50:18-52:3; 59:20-61:14; 65:23-67:1. On October 4, 2004, Thexton signed a hand-written note requesting the title company to cancel escrow. Plaintiffs' Exhibit 5; R.T. 47:18-49:19. It is undisputed that up to this time, Thexton had not provided plaintiffs with any notice of any objections or concerns about the Contract or the work that Steiner or SFP were performing in reliance on the Contract. Steiner subsequently called Thexton to try to find out what was going on, at which time Thexton informed him that he no longer wanted to sell the Property. R.T. 48:5-

49:25. By the time Thexton attempted to cancel, Steiner and SFP had already performed somewhere between 75% and 90% of the work required to obtain the approvals necessary to close escrow on the Contract; Steiner and SFP completed the remaining work shortly after Thexton submitted his note attempting to cancel escrow. R.T. 50:18-52:3; 59:20-61:14; 240:26-241:3; 248:25-250:26. Siddiqui and Steiner both testified that the reports, investigations, and preliminary approvals obtained by plaintiffs had substantial value to Thexton, because Thexton would be able to use those documents to continue with a parcel split and development of the Property. R.T. 118:13-119:9; 122:15-134:26; 146:14-147:23.

After unsuccessfully attempting to persuade Thexton to perform the Contract, on October 20, 2004, Steiner filed this action for specific performance to prevent Thexton from selling the Property to a third party. R.T. 48:5-49:14; C.T. 2-15. Thexton responded with an answer raising twenty-three affirmative defenses. C.T. 19-25; 291-296. After further efforts by Steiner and SFP to persuade Thexton to perform at least part of the Contract so that SFP could preserve its 1031 exchange opportunities, SFP sought and obtained leave to intervene, and filed its complaint-in-intervention on March 21, 2007, seeking specific performance, and damages for the additional taxes SFP was required to pay when the 1031 exchange fell through. C.T. 257-289. SFP subsequently amended its

complaint and dropped its claim for damages, substituting a request for reformation of the Contract so that a portion of the Contract price for Thexton's Property would be deferred to give SFP additional time to raise the money that it was forced to take out of escrow to pay taxes resulting from the failed 1031 exchange. R.T. 291:24-293:8; 294:6-19; R.T. 461:21-462:26.

A court trial on Steiner's and SFP's complaints began on August 7, 2006. R.T. 1, C.T. 320.1. Thexton presented evidence on a number of his affirmative defenses, focusing primarily on his claim that he was a chronic alcoholic who allegedly lacked the mental capacity to enter into the Contract or to recognize appellants' efforts to perform until Thexton suddenly quit drinking the week he signed his note attempting to cancel escrow. See, e.g., C.T. 308:20-27; R.T. 4:6-11:6. Steiner and SFP presented substantial evidence that Thexton's defenses, including his alleged lack of mental capacity, were made up after-the-fact, and that Thexton's allegations in support of these defenses were inconsistent with his prior actions and prior deposition testimony. R.T. 371:27-376:20. Notably, Thexton never denied any of Steiner's testimony about the Contract negotiations. R.T. 446:10-447:20; see also R.T. 409:6-412:6.

The trial court ultimately accepted defendant's invitation to ignore all of the credibility issues, and accepted defendant's first affirmative

defense – that the Contract was a disguised option and void for lack of consideration – and therefore ruled that it need not reach any of the other affirmative defenses defendant offered at trial. Steiner and SFP timely appealed, leading to the Court of Appeal's decision and this petition for review.

## ARGUMENT

### 1. California Contract Law Should Enforce The Expressed Mutual Intention Of The Parties, Rather Than Facilitate Or Excuse Breaches Of That Expressed Mutual Intention.

California has well-established rules governing contract interpretation:

> A contract must be interpreted to give effect to the mutual, expressed intention of the parties. Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone.

*Beard v. Goodrich* (2003) 110 Cal.App.4th 1031, 1038 [citations omitted]. In addition,

> [T]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

Civ. Code §1644; *Witkin, supra*, §745. As further summarized in *Witkin, supra*, §746, p. 834:

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause

> helping to interpret the other." (C.C. 1641.) "[W]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (C.C.P. 1858.) [Citations omitted.]

The parties' "mutual expressed intention" in this case is perfectly clear from the plain language of the Contract – to put the burden on Steiner to attempt to obtain a parcel split without any cost or risk to defendant, in exchange for a fixed purchase price if appellants were successful, and with an escape clause for appellants if the task became too expensive or they were otherwise unable to proceed. The obvious interpretation of the parties' mutual intent is also confirmed by the parties' conduct *after* they entered into the Contract. As *Witkin, supra*, §749, p. 838, summarizes:

> Acts of the parties, subsequent to the execution of the contract and before any controversy has arisen as to its effect, may be looked to in determining the meaning. The conduct of the parties may be, in effect, a *practical construction* thereof, for they are probably least likely to be mistaken as to the intent. "This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetary Assn. v. Dieden* (1960) 54 C.2d 744, 754, ... [Italics in original.]

The rule expressed in *Storek & Storek, Inc., supra*, and *Third Story Music, Inc. v. Waits, supra,* is perfectly consistent with California's other long-established rules of contract interpretation, in that it applies the implied covenant of good faith and fair dealing to define or limit apparent

discretion "in order to create a binding contract and avoid a finding that the promise is illusory." *Storek v. Storek, Inc., supra*, 100 Cal.App.4th at 57.

The Contract entered into between Steiner and Thexton was an objectively reasonable attempt by both parties to allocate the cost and risk of pursuing the steps necessary to accomplish their mutual intent – there is nothing inherently immoral, illegal, or evil about the way the parties allocated the cost and risk. Nothing about the parties' expressed mutual intent is inconsistent with applying the implied covenant of good faith and fair dealing to define the apparent discretion reserved by Steiner, particularly since that discretion was reserved in a Contract provision that expressly recognizes that it might take three years of effort to determine whether a parcel split could be achieved.

Nor is there any apparent public policy reason why parties should not be allowed to include a cancellation contingency provision in their Contract. Neither the Court of Appeal nor defendant has provided any reason to prohibit parties from agreeing that the seller will hold a property available for sale at an agreed upon price so long as the buyer is actively spending time and money pursuing development approvals – particularly when the buyer agrees to provide all the results of its efforts in the event the buyer determines it cannot proceed.

The Court of Appeal's Opinion concludes that all of appellants'

obligations are illusory because appellants had no obligation to even commence performance. Opinion at 20. However, appellants' obligations to "move expeditiously with the parcel split" and to indemnify Thexton from any cost or loss were, by their terms, effective immediately. Thexton and the Court of Appeal argue that appellants could have exercised their right to terminate performance immediately upon signing the Contract. However, this argument requires the Court to assume that appellants would try to defeat Thexton's right to receive benefits under the Contract instantly upon execution of the Contract. The undisputed evidence is to the contrary (see, e.g., R.T. R.T. 118:13-132:11; 258:22-260:20), and the holdings in *Bleecher v. Conte, supra; Storek & Storek, Inc., supra*, and *Third Story Music, Inc. v. Waits, supra,* instruct that courts should not assume such unlikely and bad faith actions by parties to a contract. Instead of applying the implied duty of good faith to save the mutual intention of the parties as required by existing California law, the Court of Appeal assumed bad faith by appellants, despite the fact that their actual conduct proved the opposite.

Finally, the holdings of *Bleecher v. Conte, supra; Storek & Storek, Inc., supra*, and *Third Story Music, Inc. v. Waits, supra,* are also consistent with the well-established rule that partial performance should be used to enforce a contract if a promise might otherwise be considered illusory. As explained in *Burgermeister Brewing Corp. v. Bowman* (1964) 227

Cal.App.2d 274, 280:

> "In every case of this kind, however, the agreement should be scrutinized carefully to see whether the promisor *did not give some consideration that was not affected by his power to cancel*, and also whether there has not been a part performance that makes up for the defects of the consideration."

*Id.*, quoting 1A Corbin on Contracts, §163, p. 76 [italics added by *Burgermeister* court]; accord *The Money Store Investment Corporation v. Southern California Bank, supra*, 98 Cal.App.4th at 728. Once again, established California precedent supports a rule that attempts to salvage the parties' mutual intent as of the time of contracting, rather than a rule that allows a court to determine after-the-fact whether it would be more equitable to allow a party to avoid its promise than to honor it.

As of the time Thexton executed the First Addendum to the Contract, appellants had already completed a survey of the property and provided a preliminary lot configuration. Pursuant to the Contract (p. 2, para. 6), appellants were under a binding legal obligation to provide the results of the survey and all work that went into the preliminary lot configuration to Thexton, *even if Plaintiffs hypothetically decided to withdraw immediately after Thexton executed the First Addendum.* As the Court's Opinion notes (at 16-17), " 'An option based on consideration, whether it be the proverbial peppercorn or some other detriment, is itself a binding contract and is mutually enforceable. [Citations.] ...' (*Torlai v. Lee* (1969) 270 Cal.App.2d

854, 858-859.)." The survey performed by Plaintiffs and the preliminary lot configuration are indisputably worth more than the proverbial peppercorn, and "[a]ny consideration, however small, has been held sufficient for an option contract." *Kowal v. Day* (1971) 20 Cal.App.3d 720, 726.

**2. The Doctrine Of Promissory Estoppel Should Remain Available Under California Law To Supply Consideration For An Option Contract Or To Enforce A Promise, Even If One Party Reserves The Right To Suspend Further Performance.**

In *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal. 3d. 665, 672, this Court explained:

> [T]he doctrine of promissory estoppel is used to provide a substitute for the consideration which ordinarily is required to create an enforceable promise. This court has recently pointed out that "The purpose of this doctrine is to make a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange."

Nothing in the rationale for applying promissory estoppel suggests that a promise should *not* be enforceable just because that promise recognizes, or is based on, the other party's right to terminate further performance under agreed-upon conditions. Nothing in prior California case law suggests that only reciprocal promises are subject to the doctrine of promissory estoppel. Instead, California law has so far held that whether the doctrine of promissory estoppel is available depends primarily on whether the promisor should reasonably expect to induce detrimental

reliance, and on whether the promise actually did induce detrimental reliance. *C & K Engineering Contractors v. Amber Steel Co., supra*; *Drennan v. Star Paving Co., supra*, 51 Cal.2d at 415, 416.

The Court of Appeal's Opinion (at 26-27) attempts to distinguish this case from *Drennan* by noting that "the agreement between the general contractor and the paving company was silent as to revocation," whereas Steiner reserved the right to revoke. However, this Court's decision in *Drennan* was not based on any finding that the *general contractor* did *not* have the right to revoke. Rather, this Court pointed out that the paving subcontractor – *the promisor in that case* – did not reserve the right to revoke, just as Thexton did not reserve the right to revoke in this case. *Drennan, supra*, 51 Cal.2d at 416. As in *Drennan*, in this case it was in the promisor's – Thexton's – "own interest" to encourage the other party to rely on the promise. *Drennan, supra*, 51 Cal.2d at 415. The Contract expressly records the parties' understanding that: "Both Buyer and Seller understand that Buyer could have substantial investment during this development period," so it is indisputable that Thexton "should reasonably expect" his promise to induce detrimental reliance by appellants. *C & K Engineering Contractors v. Amber Steel Co., supra*, 23 Cal.3d at 6.

The Court of Appeal's Opinion relies on the requirement that promissory estoppel should only be applied "if injustice can be avoided only

by enforcement of the promise," and concludes that "the equities do not support compelling Thexton to sell the property." Opinion at 26. However, comment b to the original Restatement §90 provides:

> Satisfaction of the latter may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

Quoted in 1 Witkin *Summary of California Law, supra*, §244, p. 275. The comment to the Restatement therefore supports this Court's explanation in *Drennan, supra*, that the equities relevant to applying the doctrine of promissory estoppel should focus on the nature of the promise made and the detrimental reliance induced by that promise.

Neither the Restatement nor existing California case law supports the Court of Appeal's approach of conducting a far-ranging re-examination of the equities of the original promise. An after-the-fact inquiry into the equities of the underlying promise that is *not* based on attempting to give effect to the expressed intentions of the parties is likely to lead to inequitable results, and will inevitably lead to increased litigation. For example, while the Court of Appeal suggests that something about the original agreement between the parties was unfair to defendant, Thexton's

Opening Brief (at 9) refers to the purchase price of $500,000 and represents:

> Respondent has never asserted that these, along with other provisions contained within the written document, constituted inadequate consideration ***for the sale of the Property*** (assuming that the option were exercised and the sale consummated). [Emphasis in original.]

More importantly, there is no basis for the Court of Appeal to equate appellants' bargained-for right to cancel with defendant's alleged right to breach his promise. The fact that parties promises are not strictly reciprocal is no reason to deny enforcement of the promises. See, e.g., Civil Code §3386, providing that specific performance is an appropriate remedy even if the right to it is not reciprocal.

It is undisputed that the Contract required appellants to provide "substantial investment during this development period," and it is undisputed that they did so. Thexton, on the other hand, presented absolutely *no evidence* that he expended any sums in reliance on the Contract, or that he suffered any loss during the period of appellants' performance. The trial court made no finding that Thexton did *not* voluntarily enter into the Contract. Moreover, it is undisputed that nothing would prevent Thexton from using the approvals and development progress achieved by appellants for his own benefit if the Court allows defendant to avoid his obligations under the Contract. In short, the facts of this case

demonstrate that when courts attempt to evaluate the overall equities of a contractual relationship without basing that evaluation on the expressed mutual intentions of the parties, there is no standard by which to measure the result, and there is no reason to assume that the result will do equity as to the parties. On the other hand, it is virtually certain that attempting to apply such a test without any standard for measuring what is "equitable" will lead to increased uncertainty and increased litigation by parties about what they thought they had promised one another.

## CONCLUSION

For the reasons set forth above, appellants respectfully request this Court to grant this petition for review to address the new law created by the Court of Appeal's Opinion. The Court of Appeal's holding that appellants' substantially performed promises were illusory is inconsistent with previous decisions by this Court and other Appellate Districts. The Court of Appeal's holding that the doctrine of promissory estoppel is not available to support an option is inconsistent with prior decisions by this Court and with the purpose of the doctrine of promissory estoppel. Both holdings will cause unnecessary confusion and litigation, and both holdings are contrary

to the fundamental principle that courts should interpret contracts so as "to give effect to the mutual intention of the parties as it existed at the time of contracting."

Respectfully submitted July 7, 2008,

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SIDDIQUI FAMILY PARTNERSHIP

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MARTIN A. STEINER

## CERTIFICATE OF WORD COUNT

The text of PETITION FOR REVIEW OF APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP, consists of 7,123 words, as counted by the Corel WordPerfect version 12 word-processing software I used to generate this Brief.

Dated: July 7, 2008.

Klaus J. Kolb
Attorney for Appellant
SIDDIQUI FAMILY PARTNERSHIP

Appendix A

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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MARTIN A. STEINER,

Plaintiff and Appellant,

v.

PAUL THEXTON, as Trustee etc.,

Defendant and Respondent;

SIDDIQUI FAMILY PARTNERSHIP,

Intervener and Appellant.

C054605

(Super. Ct. No. 04AS04230)



APPEAL from a judgment of the Superior Court of Sacramento County, Lloyd Phillips, J. Affirmed.

Law Office of Robert Vaughan and Robert Vaughan for Plaintiff and Appellant.

Law Office of Klaus J. Kolb and Klaus J. Kolb, for Intervener and Appellant.

Law Office of David L. Price and David L. Price for Defendant and Respondent.

In this action seeking specific performance of a real

estate sales agreement, the hopeful buyer, plaintiff Martin A. Steiner, and his partial assignee, intervener Siddiqui Family Partnership, (collectively, plaintiffs) appeal from a judgment, following a bench trial, entered in favor of the property owner, defendant Paul Thexton, as Trustee for the FAS Family Trust (Thexton). Plaintiffs contend the trial court erred in construing the contract as an unenforceable option to buy the property, void for lack of consideration, and in awarding attorney's fees to defendant. We shall affirm the judgment and the attorney's fee award.

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 2004, Steiner filed a complaint seeking specific performance of a "REAL ESTATE PURCHASE CONTRACT."

Thexton filed an answer, asserting a variety of defenses, including a defense that the "contract" was a disguised option, void for lack of consideration.[1]

On March 21, 2006, Siddiqui, with leave of court, filed a complaint in intervention, based on Steiner's partial assignment of his rights under the "contract" to Siddiqui, pursuant to an agreement for Steiner and Siddiqui to participate in the expenses of the effort to subdivide the property. Siddiqui

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[1] Plaintiffs engage in a lengthy discussion about evidence concerning other defenses, particularly Thexton's assertion that his alcoholism rendered him unable to enter a meeting of minds, and Steiner took advantage of him. Although plaintiffs claim this evidence is relevant to provide context for the "disguised option" defense upon which the trial court reached its decision. Thexton also wants to talk about alcoholism on appeal. However, it is not relevant to our resolution of this appeal, and we therefore do not discuss this evidence.

sought specific performance. Siddiqui's complaint also sought damages--for capital gains taxes it owed on the sale of other property, which it planned to defer by using the money to buy Thexton's property in a "1031 exchange" under the Internal Revenue Code. However, Siddiqui later withdrew the claim for monetary damages, asking instead for reformation of the Steiner/Thexton agreement to allow additional time to pay Thexton.

As adduced in the bench trial, Steiner, a real estate developer, was interested in buying and developing several residences on a 10-acre portion of Thexton's 12.29-acre parcel. In order for this to happen, county approvals for a parcel split and development permits were required. Steiner approached Thexton, who had not been interested in selling the property on which he resided, but considered selling a portion of the property. Thexton had previously turned down an offer from a different party for $750,000, because that party wanted Thexton to obtain the required approval and permits. The agreement between Thexton and Steiner, which was prepared by Steiner, was for Thexton to sell the 10-acre portion to Steiner for $500,000 by September 2006, if Steiner decided to purchase the property after pursuing, expeditiously and at Steiner's own expense, the county approvals and permits. However, the "contract" also provided that Steiner was not obliged to do anything and could abandon the effort with notice to Thexton and delivery to Thexton of any work performed up to the time of such notice.

Thus, the document executed by Steiner and Thexton on September 4, 2003, was labeled, "REAL ESTATE PURCHASE CONTRACT." (A copy is attached as an appendix.) It stated in part:

"Martin A. Steiner and/or Assignee, hereinafter called 'Buyer,' offers to pay to FAS Family Trust, Paul Thexton, hereinafter called 'Seller', the purchase price of Five Hundred Thousand Dollars ($500,000.00) for 10 acres of a 12.29 acre property situated in the County of Sacramento . . . hereinafter called 'Property' . . . .

"TERMS OF SALE:

"1. Upon Seller's acceptance escrow shall be opened and $1,000.00 . . . shall be deposited by Buyer, applicable toward purchase price.[2]

"2. During the escrow term, Seller shall allow Buyer an investigation period to determine the financial feasibility of obtaining a parcel split for development of the Property. Buyer shall have no direct financial obligation to Seller during this investigation period as Buyer will be expending sums on various professional services needed to reach the financial feasibility determination. Buyer hereby warranties that all fees shall be paid for said professional services by Buyer and neither the Seller nor the Property will in any way be obligated or indebted for said services.

"[¶] . . . [¶]

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[2] The trial court found that, since this money was to be applied to the purchase price, it did not constitute consideration for the option.

"5. Buyer will pay for the required civil engineering and surveying for the entire parcel map. Any agency requirements of Seller's remaining 2.29 acre parcel will be paid by Seller. Any agency requirements for planning, development or entitlement of the 10 acre parcel will be paid by Buyer.

"[¶] . . . [¶]

"10. If any condition herein stated has not been eliminated or satisfied within the time limits and pursuant to the provisions herein, or if, prior to close of escrow, Seller is unable or unwilling to remove any exceptions to title objected to, and Buyer is unwilling to take title subject thereto, then this Contract shall at the end of the applicable time period, become null and void.

"[¶] . . . [¶]

"17. Buyer hereby agrees to purchase the above-described Property for the price and upon the terms and conditions herein expressed. . . .

"[¶] . . . [¶]

"CONTINGENCIES:

"The Buyer shall have from date of acceptance until the closing of escrow to satisfy or waive the items listed herein below:

"1. Seller is aware that Buyer plans to subdivide, apply for planning entitlements and develop 10 acres from the existing parcel and agrees to cooperate, as needed, with Buyer as Buyer attempts to obtain the necessary permits and authorizations from the various local jurisdictions.

"2. Buyer, at his sole option and expense, will conduct all necessary investigations, engineering, architectural and economic feasibility studies as outlined earlier in this Contract.

"3. Both Buyer and Seller understand that Buyer could have substantial investment during this development period.

"4. Buyer shall hereby indemnify and hold Seller harmless for any acts, errors, or omissions of Buyer or Buyer's agents; and Buyer and Buyer's agents hereby agree that, upon the performance of any test, they will leave the Property in the condition it was in prior to those tests.

"5. By acceptance of this offer, the Seller has granted Buyer and/or Buyer's agents, the right to enter upon subject Property for the purpose of conducting said tests and investigations.

"6. Buyer shall indemnify and hold Seller harmless for any costs associated with Buyer's investigations. In the event that this contract is terminated prior to the close of escrow, Buyer shall deliver to Seller the originals or copies of all information, reports, tests, [etc.]

"7. It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project. *It is expressly understood that the Buyer may, at its absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void.* [Italics added.]

"CLOSE OF ESCROW:

"*Upon successful completion of subdividing the 10 acres from the existing parcel*, Buyer will pay Seller the balance of the purchase price to escrow and close immediately. [Italics added.]

"Buyer will move expeditiously with the parcel split. It is anticipated it will take one to three years, due to existing governmental requirements.

"Buyer will give quarterly reports to Seller as to progress of the parcel split.

"If parcel split is not completed by September 1, 2006, this real estate purchase contract will be cancelled."

Steiner began pursuing the necessary county approvals and (with his partial assignee, Siddiqui) ultimately expended thousands of dollars in this endeavor.[3]

Steiner and Thexton signed an addendum to the "contract" in January 2004. The addendum allowed Steiner to purchase up to 10.17 acres (as opposed to the 10 acres in the original agreement), with a concomitant increase in price. The addendum also deleted original requirements that Steiner grant an easement to Thexton and not build within 100 feet of Thexton's home, and called for Steiner to demolish some old buildings and provide a standard water hookup at no cost to Thexton.[4]

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[3] Plaintiffs say they spent $60,000. The trial court at one point said it was less. We will assume for purposes of this appeal that plaintiffs spent $60,000.

[4] There is no indication that the addendum required Steiner to do anything as consideration for the option to buy.

In May and August 2004, Thexton cooperated with Steiner's efforts by signing, as property owner, (1) Siddiqui's application to the county planning department for a tentative parcel map, and (2) a letter stating an existing structure on the property had no historical significance and would be razed.

In October 2004, Thexton asked the title company to cancel escrow.[5] When Steiner inquired, Thexton said he no longer wanted to sell the property. Steiner nevertheless proceeded with the final hearing of the parcel review committee and apparently obtained approval for a tentative map (evidence which the trial court admitted as going to Steiner's state of mind). Steiner opposed the cancellation of escrow and filed this lawsuit seeking specific performance. The escrow agent continued to hold the money pending trial of this lawsuit.

Following the bench trial, the trial court issued a statement of decision, stating in part:

"Th[e] contract is unenforceable against Defendant Paul Thexton because it is, in effect, an option that is not supported by any consideration.

"[¶] . . . [¶]

"[T]he contract must be construed as an option contract because defendant bound himself to sell the subject property to plaintiff at a stated price for an undefined period of up to three years (described in the contract as the 'investigation

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[5] Plaintiffs suggest Thexton was influenced by a meddling companion, Michelle James. Since we conclude the agreement was in effect a revocable offer, Thexton's reasons for withdrawing are immaterial.

period'), while plaintiff retained the 'absolute and sole discretion' to elect not to continue in the transaction at any time during that period, in which case the purchase contract would become 'null and void.' The unilateral nature of this agreement is the classic feature of an option. . . . .

"Based on the evidence and the language of the contract itself, the Court finds that the option was not supported by consideration. There was no evidence that any money was paid directly to defendant for his grant of the option to purchase the property, or that defendant received any other benefit or thing of value in exchange for the option. As provided in the contract, plaintiff did deposit $1,000 into an escrow account (and subsequently, plaintiff-in-intervention placed another $1000 into the same escrow account), but the contract provided (Terms of Sale, par. 1) that such payment was to be applicable to the purchase price, and was not for the grant of an option. That this payment was not for the option is confirmed by the fact that plaintiff was under no contractual obligation to remit the $1000 (or $2000) to defendant upon termination of the escrow.

"Plaintiff contends that the work that was done, and expenses incurred, in preparing for the parcel split, conferred a benefit upon defendant, or at least constituted a prejudice assumed by plaintiff, such that such work and expenses amount to consideration sufficient to support the contract. This contention must be rejected. The evidence did not support the contention that any work plaintiff did in furtherance of the parcel split conferred any actual benefit on defendant. To the

extent that such work imposed a burden or prejudice upon plaintiff, the contractual language refutes the concept that it was intended to be or should be seen as consideration for the option, because notwithstanding any such work or expense he might undertake, plaintiff still retained the absolute discretion to elect not to continue in the transaction at any time. Consideration must be measured as of the time the contract is entered into. [Citation.] At the time the subject contract was entered into, as at all relevant times, plaintiff could have elected not to continue with the purchase without undertaking any work or expense at all. In fact, plaintiff had not bound himself to do anything, and thus had provided no consideration for the option. Plaintiff has also described as consideration certain additional provisions contained in the purchase agreement itself (i.e. the obligations to 'move expeditiously with the parcel split,' to 'give quarterly reports to Seller as to the progress of the parcel split,' to 'indemnify . . . Seller . . . for any costs associated with Buyer's investigations,' and to 'deliver to Seller the originals or copies of all information' gathered in his investigations if the contract were terminated). These matters still do not constitute consideration for the option. First, plaintiff had the contractual right to terminate the contract *at any time*, which may well have been *before* any of these items were undertaken. We cannot look with hindsight to find consideration in some obligation which plaintiff may have undertaken, even though not compelled to undertake. [Citation.] Second, the very items which plaintiff describes as obligations were subject

to his own language that he could cancel the contract at any time, for any reason, at which time the contract would be null and void.

"The Court likewise rejects plaintiff's claim that in the absence of consideration for the option, his actions constituted a consideration substitute and thus the Court should apply the doctrine of promissory estoppel to avoid injustice. Neither plaintiff nor plaintiff-in-intervention pleaded or otherwise sought promissory estoppel in his or its complaint, and neither sought to amend at any time thereafter. A prerequisite for maintaining a claim for promissory estoppel is that 'the party claiming estoppel must specifically plead all facts relied on to establish its elements.' [Citation.] Even if the Court were to consider the equities involved over and above the pleading and proof requirements, plaintiff cannot establish a claim for promissory estoppel for the reasons set forth above: even if his actions following the execution of the contract could give rise to a claim for promissory estoppel, these actions are not tied to the consideration necessary for the option itself. Plaintiff retained his ability to walk away from the contract at any time and therefore the elements of the doctrine are not satisfied."

The trial court entered judgment in favor of defendant.

Thexton then filed a motion for contractual attorney's fees (Civ. Code, § 1717), as we describe *post*. The trial court granted the motion and awarded attorney's fees in favor of Thexton, as against both Steiner and Siddiqui.

Steiner and Siddiqui appeal from the judgment and attorney's fee award. Siddiqui filed the appellate brief, in which Steiner joined.

DISCUSSION

I. Standard of Review

Plaintiffs contend all issues on appeal present issues of law subject to de novo review. Thexton says the appeal involves a mix of questions of fact and law.

The interpretation of the contract, which does not involve conflicting extrinsic evidence, is a question of law subject to de novo review. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.)

As to the question of adequacy of consideration, Thexton cites *Chalmers v. Raras* (1962) 200 Cal.App.2d 682, which said that adequacy of consideration "is always peculiarly a question of fact for the trial court to determine, in the light of all the facts and circumstances of each particular case." (*Id.* at p. 689.) Plaintiffs reply that where, as here, the facts are not in dispute, the appellate court faces a question of law and is not bound by the trial court's findings. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) As will appear, even under a de novo standard, there was no adequate consideration in this case.

The attorney's fee award is subject to review under an abuse of discretion standard. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096.) Plaintiffs again assert their challenge presents a question of law on undisputed facts, and again plaintiffs' challenge fails under either standard.

II. The Contract is a Disguised, Unenforceable Option

Plaintiffs argue the trial court erred in concluding the "REAL ESTATE PURCHASE CONTRACT" was really a disguised option, unenforceable due to lack of consideration. We shall conclude (a) the agreement, despite its label as a real estate purchase contract, was really an attempt to create an option agreement; and (b) the attempt to create an option failed due to lack of consideration, such that the "contract" was nothing more than a continuing offer to sell which could be revoked by Thexton at any time.

A. Disguised (Attempted) Option

That the document called itself a "REAL ESTATE PURCHASE CONTRACT" is not dispositive; the law looks through the form to the substance. (*Welk v. Fainbarg* (1968) 255 Cal.App.2d 269, 272-273.)

"When by the terms of an agreement the owner of property binds himself to sell on specified terms, and leaves it discretionary with the other party to the contract whether he will or will not buy, it constitutes simply an optional contract." (*Johnson v. Clark* (1917) 174 Cal. 582, 586.) *Johnson* held the agreement was an option rather than a sales contract, despite the facts that (1) the would-be buyer paid $100, which he would lose if he refused to buy the mining property, and (2) he took possession of the property with his employee in order to examine it and prospect it for the purpose of determining whether he would buy it. (*Id.* at p. 586.)

An option to purchase property is "a unilateral agreement. The optioner offers to sell the subject property at a specified

price or upon specified terms and agrees, in view of the payment received,[6] that he will hold the offer open for the fixed time. Upon the lapse of that time the matter is completely ended and the offer is withdrawn. If the offer be accepted upon the terms and in the time specified, then a bilateral contract arises which may become the subject of a suit to compel specific performance, if performance by either party thereafter be refused." (*Auslen v. Johnson* (1953) 118 Cal.App.2d 319, 321-322.)

There is a difference between an option and the exercise of the option which results in a contract of purchase and sale. Thus, "[a]n option may be viewed as a continuing, irrevocable offer to sell property to an optionee within the time constraints of the option contract and at the price set forth therein. It is, in other words, a unilateral contract under which the optionee, for consideration he has given, receives from the optioner the right and the power to create a contract of purchase during the life of the option. 'An irrevocable option is a *contract,* made for consideration, to keep an offer open for a prescribed period.' [Citation.] An option is transformed into a contract of purchase and sale when there is an unconditional, unqualified acceptance by the optionee of the offer in harmony with the terms of the option and within the time span of the option contract. [Citation.]" (*Erich v. Granoff* (1980) 109 Cal.App.3d 920, 927-928.)

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[6] As we explain *post*, here there was no payment received for the option.

Here, the agreement was an (attempted) option in which defendant bound himself to sell on specified terms and left it discretionary with Steiner whether he would or would not buy the property.

Plaintiffs argue the agreement was not an option, because nothing in the agreement required Thexton to keep the property off the market for the three-year term of the contract. However, plaintiffs continue on to defeat their own argument, by saying the agreement did not require Thexton to keep the property off the market "if Buyer decides to cancel the Contract at any time before September 1, 2006." Of course, if plaintiffs cancelled the option, Thexton would no longer be bound by it. But while it was still in effect (if it was a valid option supported by consideration), Thexton could not sell the property to anyone else.

Plaintiffs argue the contract required Thexton to keep the property off the market only as long as plaintiffs moved forward "expeditiously" with the government approvals. However, despite plaintiffs' assertion that Thexton could have sued them if they failed to act expeditiously, the promise to act "expeditiously" was an unenforceable promise, since the agreement did not require plaintiffs to move forward at all. The same applies to Steiner's promise to pay for the investigations and applications for the county approvals. This was an unenforceable promise because he had to pay only if he went forward seeking the county approvals. The agreement did not require him to move forward.

We conclude the agreement was not a contract of purchase and sale, but was rather an unsuccessful attempt to create an

option, which in any event was never exercised by plaintiffs. Plaintiffs are incorrect in saying they exercised the option by pursuing the county approvals. The flaw in their position is evident from their assertion that they "had already accepted the offer" when Thexton tried to revoke. However, under the express terms of the agreement, their "acceptance" remained subject to contingencies which had not been satisfied, such as county approval, and they remained free to walk away.

We now turn to the question whether Thexton was entitled to withdraw from the deal.

B. Option Unenforceable Due to Lack of Consideration

Plaintiffs argue that, even if the contract was a disguised option, the trial court erred in concluding the option was unenforceable due to lack of consideration. We disagree with plaintiffs.

To be enforceable, an option, like any contract, must have consideration. (Civ. Code, § 1550 [elements essential to existence of contract include a sufficient cause or consideration].) Thus, "'[a]n agreement for an option not based upon consideration is simply a continuing offer which may be revoked at any time.' [Citation.]" (*Kelley v. Upshaw* (1952) 39 Cal.2d 179, 191.) "An option based on consideration, whether it be the proverbial peppercorn or some other detriment, is itself a binding contract and is mutually enforceable. [Citations.] In other words, an option based on consideration contemplates two separate cont[]racts, i.e., the option contract itself, which for something of value gives to the optionee the irrevocable right to buy under specified terms and conditions,

and the mutually enforceable agreement to buy and sell into which the option ripens after it is exercised. Manifestly, then, an irrevocable option based on consideration is a contract . . . . [¶] On the other hand, an option without consideration is not binding on either party until actually exercised, and is not a contract in the traditional sense, nor is it a contract under section 1550 of the Civil Code. In short, '[i]t is essential to the existence of a contract that there be sufficient cause or consideration, for a promise unsupported by consideration has no binding force. . . .' [Citations.] In other words, an option given without any consideration contemplates only one contract, the one which comes into existence after it is exercised. Thus, until exercise such an option is merely 'a continuing offer which may be revoked at any time.' [Citations.]" (*Torlai v. Lee* (1969) 270 Cal.App.2d 854, 858-859.)

Additionally, though not cited by the parties, Civil Code section 3391 provides in part: "Specific performance cannot be enforced against a party to a contract in any of the following cases: [¶] 1. If he has not received an adequate consideration for the contract . . . ."

Thus, the "contract" was nothing more than a revocable offer unless there was consideration.

Plaintiff argues there was consideration. We disagree.

"Consideration" is defined in Civil Code section 1605, which states: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or

agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." Civil Code section 1606 states, "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

The trial court found plaintiffs paid nothing other than $1,000 each, but that money was not paid for the grant of an option. The "contract" expressly stated such payment was to be applied to the purchase price. If no purchase took place, the money would go back to plaintiffs upon termination of escrow. Plaintiffs cite no evidence and present no argument that Thexton was entitled to keep that money in the event no purchase took place. Steiner testified it was his understanding that the money (which was still being held in escrow pending trial) would go back to him if he decided not to purchase the property.

Plaintiffs argue there was consideration, in that they conducted the investigations, at their own expense, and the contract called for them to turn over the results to Thexton, such that Thexton benefitted from plaintiffs' efforts. However, the agreement did not require them to conduct the investigations at all. As noted by the trial court, "the adequacy of consideration must be determined as of the date of the agreement, and not at the time of performance. [Citations.]" (*Drullinger v. Erskine* (1945) 71 Cal.App.2d 492, 495.)

As of the date the agreement was executed, the agreement did not require plaintiffs to do anything (other than pay the deposit toward the purchase price). The agreement stated, "It is expressly understood that the Buyer may, at its absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void." Thus, the agreement required Steiner to assume the expense of the parcel split, but *only if he chose to do so.* This does not constitute consideration for the option.

Even assuming Thexton specifically negotiated the provision requiring expeditious action by Steiner (though the transcript cited by plaintiffs shows only that Steiner testified Thexton said the provision was important to him), we reject plaintiffs' argument that Steiner's promise to act "expeditiously" constituted consideration for the option and a legal obligation under the implied covenant of good faith and fair dealing. This argument is defeated by the express clause allowing Steiner to walk away without doing anything.

We similarly reject the argument that legal consideration is found in the provision that "[i]n the event that this contract is terminated prior to the close of escrow, Buyer shall deliver to Seller the original or copies of all information, reports, tests, studies and other documentation obtained by Buyer from independent experts and consultants concerning the Property." In order for these provisions to constitute consideration, they must impose binding legal obligations on Steiner. (*Mattei v. Hopper* (1958) 51 Cal.2d 119, 122 [in a contract where consideration consists of mutual promises, and

the promise of one party is not enforceable, the obligations imposed thereby are not mutual, and consideration is lacking].) Here, the provisions did not impose binding legal obligations on Steiner, because of the clause allowing Steiner to back out of the deal without doing anything at all.

The same applies to the January 2004 addendum to the contract, which added items in the event the sale was consummated but did not alter Steiner's power to withdraw.

Thus, the agreement did not legally bind Steiner to make any expenditures.

We therefore need not address plaintiffs' argument that their expenditures constituted consideration by benefitting the property or Thexton (though we will address this argument in our discussion of promissory estoppel, *post*).

Plaintiffs cite *Bleecher v. Conte* (1981) 29 Cal.3d 345, which found mutuality of obligations in a real estate contract that required the buyers to "proceed with diligence" and "do everything in their power to expedite the recordation of the final map," without which the sale would not go forward. (*Id.* at pp. 350-351.) There, however, "the buyers expressly promised . . . to refrain from withholding their approval unreasonably." (*Id.* at p. 351.) *Bleecher, supra*, 29 Cal.3d at p. 351, distinguished a case (*Sturgis v. Galindo* (1881) 59 Cal. 28) where enforcement was denied because the land sale contract gave one party the right to withdraw at its discretion.

Here, we have a case more like *Sturgis* than *Bleecher*, because here the agreement expressly gave Steiner the right to walk away at his discretion for no reason whatsoever.

Though not mentioned by the parties, we note Civil Code section 3386 states, "Notwithstanding that the agreed counterperformance is not or would not have been specifically enforceable, specific performance may be compelled if: [¶] (a) Specific performance would otherwise be an appropriate remedy; and [¶] (b) The agreed counterperformance has been substantially performed or its concurrent or future performance is assured or, if the court deems necessary, can be secured to the satisfaction of the court." The statute, as amended in 1969, "discarded the rigid requirement of mutuality in favor of a flexible rule that allows courts to ensure equity is done to both parties." (*Converse v. Fong* (1984) 159 Cal.App.3d 86, 92.) We need not consider this matter, because plaintiffs do not invoke Civil Code section 3386 and do not contend Thexton could have compelled specific performance against plaintiffs. To the contrary, plaintiffs merely claim (without supporting authority) that, if they failed to move expeditiously, Thexton could have sued for monetary damages, which they assert would have been de minimus in any case.

Plaintiffs cite a federal case, *Fosson v. Palace (Waterland), Ltd.* (9th Cir. 1996) 78 F.3d 1448, which cited *Bleecher, supra,* 29 Cal.3d 345, for the propositions that (1) an implied covenant of good faith and fair dealing is implied in every contract, and (2) if a contract is capable of two constructions, the court must choose an interpretation that will make the contract binding if it can be done without violating the parties' intentions. (*Fosson, supra,* 78 F.3d at p. 1454.)

The federal *Fosson* case is not binding on us (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 55), and in any event, it is distinguishable. It involved a license agreement pursuant to which the defendants, film producers, agreed to pay a fee of $1,250 to the plaintiff, a musician, if the defendants used his composition in their film (which they did). However, the lawsuit was not an action to enforce the contract, but rather a copyright infringement action brought by the composer, who sought $10,000 in damages based on the defendants' delay in paying the $1,250 license fee. (*Id.* at p. 1450.) The composer argued the license lacked consideration because the producers were not obligated to use the composition, and the composer rescinded the license due to the producers failure to pay. (*Id.* at pp. 1453, 1455.) *Fosson* rejected the arguments, stating that, even though use of the composition was within the producers' discretion and control, a valid contract arose by virtue of the obligations the producers agreed to assume in the event they used the composition. Also, they were under an implied obligation to act fairly. (*Id.* at p. 1454.) There was no rescission because the agreement contained a provision pursuant to which the composer expressly waived his right to rescind the agreement. (*Id.* at p. 1455.) Therefore, the composer could not recover for copyright infringement. (*Id.* at pp. 1454.)

Later in their brief, under a subheading that the agreement is enforceable even if considered an option agreement, plaintiffs cite *Patty v. Berryman* (1949) 95 Cal.App.2d 159, that ambiguous agreements should be interpreted to be bilateral

rather than unilateral. Here, however, the agreement was not ambiguous. Even if it were ambiguous, the ambiguity would be construed against Steiner, as drafter of the document. (Civ. Code, § 1654; *Zipusch v. LA Workout, Inc.* (2007) 155 Cal.App.4th 1281, 1287.)

We conclude the agreement was an unsuccessful attempt to create an option and was therefore merely a revocable offer.

C. Estoppel

Plaintiffs argue their actual performance in reliance on the contract provided any missing consideration under the doctrine of promissory estoppel. They argue they completed between 75 and 90 percent of the work needed for the county approvals by the time Thexton tried to cancel the escrow. We shall explain there is no basis for reversal.

The trial court first stated plaintiffs' failure to plead estoppel precluded them from raising the issue. However, the case cited by the trial court (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 48) involved a dismissal following a demurrer, not a judgment following trial. A defect in the pleading is not controlling where the issue has been developed at trial. (*Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 16.) We therefore do not rest our opinion on the pleading defect.

The trial court went on to say the court would deny the estoppel argument anyway, because plaintiffs' actions following execution of the contract were not tied to the consideration necessary for the option itself, and they always retained the ability to walk away from the contract at any time.

The elements of promissory estoppel are as follows: "'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" (*C&K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6, adopting Restatement of Contracts, § 90.[7]) "'Promissory estoppel is a peculiarly equitable doctrine designed to deal with situations which, in total impact, necessarily call into play discretionary powers . . . .'" (*C&K Engineering, supra*, 23 Cal.3d at p. 7, italics omitted.)

Here, plaintiffs cite Steiner's testimony that he "relied on [Thexton's] promise to sell [him] the property." However, plaintiffs fail to show any injustice in denying enforcement of the agreement. As the trial court observed in denying promissory estoppel, Steiner retained the ability to walk away from the agreement at any time. Steiner gave himself this power in the agreement, which he drafted. There is no injustice in a resolution of this case that effectively accords the reciprocal right to Thexton.

Looking at the equities, we see that, although Steiner and Siddiqui spent thousands of dollars in pursuing the county approvals, they did so at their own risk and for their own

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[7] The provision remains substantially the same in the Restatement 2d of Contracts, though the phrase "of a definite and substantial character" has been deleted.

benefit. Although plaintiffs assert the only risk they intended was that the county might refuse to approve the parcel split, this intent does not appear in the written document, and any ambiguity would be resolved against Steiner as the drafter of the document. (Civ. Code, § 1654; *Zipusch v. LA Workout, Inc.*, *supra*, 155 Cal.App.4th at p. 1287.)

Despite the clause requiring Steiner to turn over his work product regarding the parcel split in the event the agreement was terminated, and even assuming plaintiffs' efforts increased the value of the property, plaintiffs fail to substantiate their insinuation that Thexton wanted the county approvals as much as plaintiffs did and deliberately waited until plaintiffs did the work before cancelling the agreement.

Thus, according to Steiner's own testimony, it was Steiner who initiated the idea of this agreement, by writing one or two notes to Thexton expressing interest in buying the property. Thexton did not respond at all. Steiner then approached Thexton in person. Thexton said he received a lot of such inquiries but did not respond to them. Thexton said he might consider selling a portion of the property, but he had never split property before and did not know how it was done. Thexton also expressed concern about maintaining his privacy. Steiner said he would handle the parcel split. Over time, they negotiated the number of acres, with Steiner insisting he wanted 10 acres and rejecting Thexton's proposal for eight acres. Steiner, who is a contractor as well as a developer, gave Thexton referrals of persons to help with home improvement. Thexton later expressed his thanks and said he felt badly because he wanted a million

dollars for the property, which he thought was more than Steiner wanted to pay. Steiner said he would pay $500,000 and do the work necessary for the parcel split. Thexton later called and said he had received an offer of $750,000 but would prefer to sell to Steiner because of the help Steiner gave for the home improvement. Steiner said he was not willing to pay more than $500,000. Thexton later called and said the $750,000 deal fell through because the buyer wanted Thexton to handle the parcel split. Thexton asked if Steiner was still interested, and Steiner said yes. They talked about terms. Steiner drafted the document. Thexton said he planned to show it to his lawyer. Thexton later asked for changes, to which Steiner agreed, regarding matters such as an easement and mineral rights.

Thexton testified the property has been in his family since 1944, and he has resided there most of his life and planned to continue living there.

In sum, even assuming plaintiffs' efforts increased the value of the property, the equities do not support compelling Thexton to sell the property.

This case is distinguishable from plaintiffs' cited authority, e.g., *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, which held a paving company could not withdraw its bid to do certain paving work at a certain price, after the general contractor used the bid and was awarded a general contract. There, however, the agreement between the general contractor and the paving company was silent as to revocation. (*Id.* at p. 413.) Here, the agreement spoke of revocation, but gave that

right only to Steiner, not to Thexton. The agreement was drafted by Steiner.

We conclude the equities do not warrant application of promissory estoppel in this case.

We parenthetically observe plaintiffs try to distort a comment of the trial court, by suggesting it supports their estoppel argument. They quote the judge's comment: "He [Thexton] obstructed the thing and he canned the whole program and that's about all you need. [¶] . . . [¶] . . . He did it at the time when it was all finished, virtually. There was nothing more to do but sign his name." However, the context of the cited quote shows the judge was merely indicating he understood plaintiffs' position, and it was unnecessary for them to adduce a lot of evidence about their claim that Thexton failed to cooperate with the county approvals after he gave notice to cancel escrow. The judge said, "rather than get into all this, can't we just assume that he did obstruct the completion of this transaction." Thus, the trial court's comment does not support plaintiffs' position.

We conclude plaintiffs' promissory estoppel argument does not provide a basis for reversal.

We conclude plaintiffs fail to show grounds for reversal of the judgment.

III. Attorney's Fees

Plaintiffs contend Thexton's motion for attorney's fees failed to provide sufficient evidence for the award, because the motion lacked sufficient evidence as to how many hours were

reasonably spent and on what issues. We shall conclude plaintiffs fail to show grounds for reversal.

A. Background

Thexton filed a motion for attorney's fees (Civ. Code, § 1717), based on the contract clause in paragraph 17 under "TERMS OF SALE," that "[i]n the event any litigation or other legal proceedings are instituted to enforce or declare the meaning of any provision of this Contract, the prevailing party shall be entitled to its costs, including reasonable attorneys fees."

In support of the motion, Thexton's attorney submitted a declaration stating in part that "from the inception of this file to date, I have expended a total of 271.0 hours incident to this mat[t]er. Of that time, approximate[ly] 21 hours were spent incident to the proceedings subsequent to receipt of the court's intended decision - i.e., drafting and preparing the statement of decision, opposing the plaintiffs' opposition thereto, and preparing the request for court costs and this motion for attorneys' fees. (The actual time spent following the entry of judgment is actually higher but I have not added that time to these applications. . . .) Excluding that particular post-trial time for the moment, of the total time through entry of the court's intended decision, 79% (or 197.9 out of 250.4 hours) was spen[t] subsequent to the court's mandatory settlement conference. In other words, the vast majority of the total attorney time was spent in the last few weeks before trial, in the depositions of trial experts, in the preparation and completion of the trial itself, and in the post

trial steps including preparation of the statement of decision and judgment. In addition, I tracked 33.2 hours of legal assistant time and 115.8 hours of law clerk time related to this file. (I only tracked such time if the efforts undertaken by my staff involved matters which I otherwise would have to have completed if they were not performed by others.) The legal assistant time was billed at the rate of $60.00 per hour. The law clerks who assisted on this file were primarily responsible for trial preparation, research incident to the trial brief and outlines of anticipated trial testimony, preparation of the memorandum of costs, and preparation of the post trial pleadings. Of the total law clerk time spent on this file, I wrote off 31.9 hours. In other words, no one was billed for that time. The law clerks' time was otherwise billed at $90.00 per hour (even though one of them has since passed the California bar exam). (I also used an outside or 'contract attorney' for one project incident to this file. She billed me a total of 19 hours for which I wrote off 3.2 and billed Mr. Thexton 15.8 at $175.00/hour - even though this attorney has been a member of the bar since 1988.)" (Emphasis omitted.) The declaration stated in a footnote: "This litigation involved a real estate breach of contract with claims for specific performance, damages and restitution. It involved complex income tax issues and the effects of a tax-deferred 1031 exchange.[8] It involved an intervening plaintiff who waited

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[8] Siddiqui intended to sell other property it owned and use the proceeds to pay for Thexton's property, making use of an

until the literal last moment to intervene, causing a delay in the trial proceedings and significant last minute discovery concerning the 1031 exchange, the alleged damages and lack-of-mitigation defenses. The plaintiffs' contentions necessitated expertise (on the part of defense counsel) in land use development, real estate acquisition, and the terms and conditions typically part of commercial property development. The contractual defenses asserted by the defendant involved lack of mutual assent, lack of ability to contract, lack of consideration, and the literal plethora of related evidentiary concerns." The declaration stated in another footnote that the client billing statements contained privileged communications, but counsel would make the billings available to the court for in camera review. The declaration said a summary identifying the total time spent month-by-month was attached as an exhibit (which we do not find in the superior court file).

The motion sought a total of $104,683.70.

Steiner and Siddiqui opposed the motion for attorney's fees. They argued the amount was excessive; the fees were inadequately documented; the referenced exhibit was not submitted; and the amount included fees incurred on issues on which defendant did not prevail. Steiner and Siddiqui also filed a motion to tax costs (challenging expert witness fees as

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Internal Revenue Service "1031 exchange" to defer taxes on the capital gain. Thexton's agreement with Steiner required Thexton to cooperate with IRS-1031 exchanges. Siddiqui sold its property in 2005, after Thexton cancelled his agreement with Steiner in October 2004.

a cost element while acknowledging they may be recoverable with attorney's fees).

In reply, Thexton's attorney submitted a supplemental declaration describing some of the proceedings.

On January 23, 2007, the trial court denied the motion to tax costs and granted defendant's motion for attorney's fees, though not for the requested amount of $104,683. Applying the "lodestar" formula (multiplying number of hours reasonably expended by reasonable hourly rate), the court ruled defendant was entitled to an attorney's fee award in the amount of $85,279.

The court's ruling stated in part:

"2. Based on its familiarity with the issues raised and tried in this matter, which consumed seven full days of trial and involved complex legal and factual matters such as the characterization of the contract as an option unsupported by consideration (the issue which eventually proved to be dispositive), defendant's alleged lack of capacity to enter into the contract, and plaintiff-in-intervention's potential claim for damages based on a Section 1031 exchange, the Court finds that the time claimed for work performed by defendant's counsel, David L. Price, and by others working under his direction . . . were directly connected with the litigation, are reasonable and are not excessive.

"3. The time expended by Mr. Price and those working under his direction are documented adequately for the purposes of this motion in Mr. Price's Declaration and Supplemental Reply Declaration. Given the Court's ruling that the time spent on

this matter was reasonable in the particular context and circumstances of this case, detailed line-item billing sheets are not necessary. (See, *Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1587.)"

The trial court awarded a total of $85,279, calculated as follows: 232 hours at $250 per hour; 44 hours at $275 per hour; legal assistants' time of 33.2 hours at $60 per hour; law clerks' time of 115.8 hours at $90 per hour; and a contract attorney's time of 15.8 hours at $175 per hour.

As to plaintiffs' motion to tax costs in the amount of $5,560 for expert witness fees, the trial court's ruling stated: "In their motion, [plaintiffs] suggest that they may be prepared to concede that defendant may recover the claimed costs as part of his claim for attorney's fees. California law does provide that disbursements of counsel for the fees of expert witnesses and consultants may be recoverable as a component of attorney's fees recovered under a contract pursuant to Civil Code section 1717, notwithstanding the fact that expert witness fees may not be recoverable as ordinary costs under Code of Civil Procedure section 1033.5. [Citation.] [¶] Defendant's claim for expert witness fees as an element of costs therefore may have been technically incorrect, but defendant is nonetheless entitled to recover such disbursements in this case as part of the attorney's fees award. Plaintiff's motion to tax these costs is therefore denied."

B. Analysis

As indicated, the attorney's fee award is subject to review under an abuse of discretion standard (*PLCM Group, Inc. v.*

*Drexler, supra,* 22 Cal.4th 1084, 1095-1096), but plaintiffs contend their challenge presents a question of law subject to de novo review. We conclude that, under either standard, plaintiffs fail to show grounds for reversal.

"'[T]he fee setting inquiry in California [including Civil Code section 1717 fees] ordinarily begins with the "lodestar," i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . The lodestar figure may then be adjusted, based on consideration of factors specific to the case . . . . Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary.'" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134; *PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th at pp. 1096-1097 [lodestar approach applies to Civil Code section 1717 fees in absence of contract provision as to how to calculate fees].) "The '"experienced trial judge is the best judge of the value of professional services rendered in court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong."' [Citation.]" (*Ketchum, supra,* 24 Cal.4th at p. 1132.)

Plaintiffs contend they were entitled to sufficient information about how and when defense counsel incurred all the fees in order to allow plaintiffs to identify items that potentially should not be recoverable.

A similar contention was rejected in *Weber v. Langholz* (1995) 39 Cal.App.4th 1578, which in the course of affirming an attorney's fee award stated: "Plaintiff complains that counsel

did not state the total number of hours nor substantiate the hours or amounts with copies of time records or copies of billing statements. Counsel's declaration and verified cost memorandum were, however, made under penalty of perjury. Mathematical calculation could show the number of hours was between 90 and 103. The work done was described. The trial court could make its own evaluation of the reasonable worth of the work done in light of the nature of the case, and of the credibility of counsel's declaration unsubstantiated by time records and billing statements. Although a fee request ordinarily should be documented in great detail, it cannot be said in this particular case that the absence of time records and billing statements deprived the trial court of substantial evidence to support an award; we do not reweigh the evidence. [Citation.]" (*Id.* at p. 1587.)

Plaintiffs argue *Weber* is distinguishable because it involved less money (an initial request of $18,075), and the work done was described. However, here too, the work done was described in counsel's declaration (even though there is a question whether a referenced exhibit was actually submitted). That this case involves more money does not support reversal. Plaintiffs argue defendant's attorney spent 50 hours more on the case than either of plaintiffs' attorneys, despite plaintiffs having submitted twice as much briefing as defendant. However, the trial court could and did make its own evaluation.

Plaintiffs argue some of the attorney's fees were incurred on issues on which Thexton did not prevail or for issues for which attorney's fees were not recoverable. However, plaintiffs

fail to identify any such issues in their appellate brief, other than one amount which the trial court excluded from the award and which therefore affords plaintiffs no basis for appeal. To the extent plaintiffs want to talk about the expert witness fees, they have forfeited the matter by failing to assign error or present any factual or legal analysis as to the trial court's denial of plaintiffs' motion to tax those costs. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [reviewing court may disregard contentions not adequately briefed].) To the extent plaintiffs might be trying to argue (without development) that Thexton should not be allowed attorney's fees for defenses which ultimately were not dispositive, such as the issue of alcoholism, the argument would fail because plaintiffs did not prevail on those issues either, and they fail to show any abuse of discretion in the trial court making the award without trying to separate out fees for each affirmative defense. (See, e.g., *Downey Cares v. Downey Community Dev. Comm'n.* (1987) 196 Cal.App.3d 983, 997 [trial court has discretion to award all or substantially all of party's attorney's fees, even if court did not adopt each claim raised by the party].)

We conclude appellants fail to show grounds for reversal of the attorney's fee award.

DISPOSITION

The judgment and attorney's fee award are affirmed. Defendant shall recover costs on appeal. (Cal. Rules of Court,

rule 8.278(a)(1)-(2).)

SIMS, Acting P.J.

We concur:

NICHOLSON, J.

CANTIL-SAKAUYE, J.

# REAL ESTATE PURCHASE CONTRACT

In Orangevale, California, on September 3, 2003, Martin A. Steiner and/or Assignee, hereinafter called "Buyer", offers to pay to FAS Family Trust, Paul Thexton, hereinafter called "Seller", the purchase price of Five Hundred Thousand Dollars ($500,000.00) for 10 acres of a 12.29 acre property situated in the County of Sacramento, State of California, hereinafter called "Property" (defined in Exhibit A), and more particularly described as follows:

APN #224-0210-013-0000
8585 Chris Lane
Orangevale, CA 95662

TERMS OF SALE:

1. Upon Seller's acceptance escrow shall be opened and $1,000.00 (One Thousand Dollars) shall be deposited by Buyer, applicable toward purchase price.

2. During the escrow term, Seller shall allow Buyer an investigation period to determine the financial feasibility of obtaining a parcel split for development of the Property. Buyer shall have no direct financial obligation to Seller during this investigation period as Buyer will be expending sums on various professional services needed to reach the financial feasibility determination. Buyer hereby warranties that all fees shall be paid for said professional services by Buyer and neither the Seller nor the Property will in any way be obligated or indebted for said services.

3. Upon mutual execution of this contract, at Buyer's cost, Buyer shall order a Preliminary Title Report on the subject Property and open escrow with Cindy Coon, Stewart Title of Sacramento, 555 Capitol Mall, #280, Sacramento, CA 95814, hereinafter called "escrow holder". The parties shall execute escrow instructions as requested by the escrow holder, which are consistent with the provisions of this Contract. The provisions of this Contract shall constitute joint escrow instructions to the escrow holder. Said instruction shall provide for escrow closing as outlined in this agreement.

4. The Preliminary Title Report on the subject Property, together with full copies of all exceptions set forth therein, including but not limited to covenants, conditions, restrictions, reservations, easements, rights and rights of way of record, liens and other matters of record shall promptly be delivered to Buyer. Buyer, shall have 30 days after receipt of said Preliminary Title Report, together with full copies of said exceptions, within which to notify Seller in writing, of Buyer's disapproval of any exceptions shown in said title report. In the event of such disapproval, Seller shall have until the date for closing of escrow within which to attempt to eliminate any disapproved exception(s) from the Policy of Title Insurance to be issued in favor of Buyer and if not eliminated then the escrow shall be cancelled unless Buyer then elects to waive its prior disapproval. Failure of Buyer to disapprove any exception(s) within the aforementioned time limit shall be deemed an approval of said Preliminary Title Report. The Policy of Title Insurance shall be a California Land Title Association Standard Coverage Policy with a liability not exceeding the total purchase price. Title and escrow fees and shall be paid 50%by Seller and 50% by Buyer.

5. Buyer will pay for the required civil engineering and surveying for the entire parcel map. Any agency requirements of Seller's remaining 2.29 acre parcel will be paid by Seller. Any agency requirements for planning, development or entitlement of the 10 acre parcel will be paid by Buyer.

6. Seller will allow an emergency access road easement across the newly created 2.29 acre parcel to the newly created 10 acre parcel if required by any agencies.

7. Buyer will allow a 25 foot easement (if necessary) along the mutual property line for farming access to Seller.

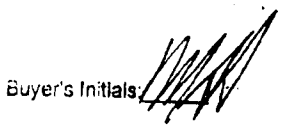
8. Buyer will not construct a home within 100' of Seller's existing home at its present location.

9. Seller will retain mineral and water rights of the newly created 10 acre parcel 150 feet below the surface. Seller will have no surface rights to the newly created 10 acre parcel.

10. If any condition herein stated has not been eliminated or satisfied within the time limits and pursuant to the provisions herein, or if, prior to close of escrow, Seller is unable or unwilling to remove any exceptions to title objected to, and Buyer is unwilling to take title subject thereto, then this Contract shall at the end of the applicable time period, become null and void.

11. Real property taxes, bonds, rentals, premiums on insurance accepted by Buyer, interest on encumbrances and operating expenses, if any, shall be prorated as of the date of close of escrow. Seller shall pay the cost of any transfer tax required by any lawful authority.



Buyer's Initials: 

Seller's Initials: 

12. Possession of the Property shall be delivered to the Buyer on the date of close of escrow, unless otherwise provided herein.

13. This Contract shall constitute the entire Real Estate Purchase Contract between Buyer and Seller and supersedes any and all agreements between the parties hereto, regarding the subject Property, which are prior in time to this Contract.

14. Seller warrants that Seller has not received, nor is aware of any notification from the building department, health department or such other City, County or State authority having jurisdiction, requiring any work to be done on or affecting the Property. Seller further warrants that in the event any such notice or notices are received by Seller prior to the close of escrow and Seller is unable to or does not elect to perform the work required in said notice at Seller's sole cost and expense on or before the close of escrow, said notices shall be submitted to Buyer for his examination and written approval. Should Buyer fail to approve said notice and thereby elect not to acquire the Property subject to the effect of same, within five (5) days from the date Seller submits said notice to Buyer, then this Contract shall be cancelled without further liability to either party.

15. Time is of the essence of this Contract.

16. This contract is the entire agreement of the parties and may not be amended except by a written agreement signed by both parties. Any addendum attached hereto and signed by both the Buyer and Seller shall be deemed a part hereof.

17. Buyer hereby agrees to purchase the above-described Property for the price and upon the terms and conditions herein expressed. All tenders and notices required hereunder shall be made and given to either of the parties hereto at their respective addresses herein set forth. In the event any litigation or other legal proceedings are instituted to enforce or declare the meaning of any provision of this Contract, the prevailing party shall be entitled to its costs, including reasonable attorneys fees. Buyer and Seller hereby acknowledge receipt of a copy of this Contract.

EXPIRATION:

Unless this purchase contract is accepted by Seller, fully executed and returned to Buyer by 5:00 p.m. on September 8, 2003, this Contract shall expire and all terms and conditions shall be null and void.

CONTINGENCIES:

The Buyer shall have from date of acceptance until the closing of escrow to satisfy or waive the items listed herein below:

1. Seller is aware that Buyer plans to subdivide, apply for planning entitlements and develop 10 acres from the existing parcel and agrees to cooperate, as needed, with Buyer as Buyer attempts to obtain the necessary permits and authorizations from the various local jurisdictions.

2. Buyer, at his sole option and expense, will conduct all necessary investigations, engineering, architectural and economic feasibility studies as outlined earlier in this Contract.

3. Both Buyer and Seller understand that Buyer could have substantial investment during this development period.

4. Buyer shall hereby indemnify and hold Seller harmless for any acts, errors or omissions of Buyer or Buyer's agents; and Buyer and Buyer's agent hereby agree that, upon the performance of any test, they will leave the Property in the condition it was in prior to those tests.

5. By acceptance of this offer, the Seller has granted Buyer and/or Buyer's agents, the right to enter upon subject Property for the purpose of conducting said tests and investigations.

6. Buyer shall indemnify and hold Seller harmless for any costs associated with Buyer's investigations. In the event that this contract is terminated prior to the close of escrow, Buyer shall deliver to Seller the originals or copies of all information, reports, tests, studies and other documentation obtained by Buyer from independent experts and consultants concerning the Property.

7. It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project. It is expressly understood that the Buyer may, at its absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void.



Buyer's Initials: _____

Seller's Initials _____

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CLOSE OF ESCROW:

Upon successful completion of subdividing the 10 acres from the existing parcel, Buyer will pay Seller the balance of the purchase price to escrow and close immediately.

Buyer will move expeditiously with the parcel split. It is anticipated it will take one to three years, due to existing governmental requirements.

Buyer will give quarterly reports to Seller as to progress of the parcel split.

If parcel split is not completed by September 1, 2006, this real estate purchase contract will be cancelled.

COOPERATION:

The parties hereto agree to cooperate, and shall execute any and all documents, maps or other matters reasonably necessary to effectuate the purposes of this Agreement (including IRS-1031 exchange for benefit of Buyer and Seller), within a reasonable time frame.

WRITTEN NOTICES:

All notices, authorizations, waivers, etc., required to be given under this contract shall be sent by Seller to Buyer and by Buyer to Seller at the addresses listed below. The parties hereby agree to notify each other of any change in their addresses which may occur during the term of this contract. All required written notice(s) shall be deemed given from one party to the other when said notice(s) is/are placed with the United States Postal Service, proper postage prepaid.

BUYER:

MARTIN A. STEINER
8999 Greenback Lane, 2nd Floor
Orangevale, CA 95662

SELLER:

FAS FAMILY TRUST
8585 Chris Lane
Orangevale, CA 95662

ACCEPTANCE OF CONTRACT:

**BUYER:**

MARTIN A. STEINER,
An Individual

By: _____ Date: 9-4-03
Martin A. Steiner

**SELLER:**

FAS FAMILY TRUST

By: _____ Date: 9-4-03
Paul Thexton



000208

# PROOF OF SERVICE

**Court:** **SUPREME COURT OF THE STATE OF CALIFORNIA**

**Case Name:** ***MARTIN A. STEINER, et al. v. PAUL THEXTON as Trustee of FAS FAMILY TRUST, etc.***

**Case Number:** **Third District Court of Appeal No. C054605**
**Sacramento County Superior Court No. 04AS04230**

I am a citizen of the United States, employed in SACRAMENTO County, California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is: 400 Capitol Mall, 11th Floor, Sacramento, CA 95814. On: July 7, 2008, I served the following documents:

**(1) PETITION FOR REVIEW OF APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP**

## MANNER OF SERVICE

XX U.S. MAIL: By causing a true copy of the above documents to be placed into a sealed envelope, addressed as listed below, and depositing with the U.S. Postal Service on the date indicated above, with postage prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing as stated above.

_____ PERSONAL SERVICE: By causing a true copy of the above documents to be personally delivered by hand to the offices of the addressee(s) listed below:

XX OTHER: By causing a true copy of the above documents to be delivered to the addressee(s) listed below by and/or through:

Express Mail on Supreme Court

## PARTIES SERVED AND ADDRESSES

DAVID L. PRICE, ESQ.
3300 Douglas Blvd., Suite 125
Roseville, CA 95661
Fax: (916) 772-5357

Attorney for Defendant
PAUL THEXTON, Trustee of FAS Family Trust

ROBERT VAUGHAN, ESQ.
11879 Kemper Road, Suite 1
Auburn, CA 95603
Fax: (530) 823-6119

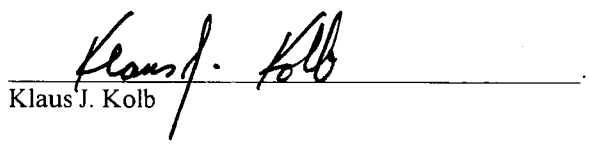
Attorney for Plaintiff
MARTIN A. STEINER

Clerk for Dept. 43 for
HONORABLE LLOYD A, PHILLIPS, JR.
SACRAMENTO COUNTY SUPERIOR COURT
720 Ninth Street
Sacramento, CA 95814

CALIFORNIA COURT OF APPEAL
900 N Street, Room 400
Sacramento, CA 95814

1 Copy

I declare under penalty of perjury that the foregoing is true and correct. Executed this July 7, 2008, in Sacramento, California.



Klaus J. Kolb