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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

URBAN ECO HOUSING, LLC, Plaintiff and Appellant, v. TU MY TONG, Defendant and Respondent.	B202340 (Los Angeles County Super. Ct. No. BC298372)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Greene, Fidler, Chaplan & Hicks and Scott A. Chaplan for Plaintiff and Appellant.

Law Office of Bruce Adelstein and Bruce Adelstein; Edward J. Horowitz; Hamilton Law Offices and John M. Hamilton for Defendant and Respondent.

INTRODUCTION

Plaintiff Urban Eco Housing, LLC appeals from a judgment entered in favor of defendant Tu My Tong pursuant to Code of Civil Procedure section 631.8. We affirm.

FACTS[1]

Plaintiff was formed to purchase urban properties and revitalize them using sustainable building materials. Its members are Scott Chaplan (Chaplan), Chief Executive Officer and an attorney, Matthew Bradley Mandel (Mandel), Chief Operating Officer and a real estate broker, and Brett Daniels.

Duc Doan (Doan) owned a piece of property at 4131 S. Figueroa St. in Los Angeles. It contained a three-story apartment complex which was in disrepair and had been the subject of notices and citations from the city. It was subject to a task force which could reduce rents, place rents into escrow and prosecute the owner.

The property was subject to a first trust deed from Imperial Capital Bank securing a loan of $312,000 and a lis pendens filed by Los Angeles Housing Renaissance Corp. Payments on the loan were not current.[2]

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[1] The parties' briefs contain factual statements without record references, factual statements unsupported by the record references given, and factual statements supported by argument or other nonevidentiary matter. Rule 8.204(a)(1)(C) of the California Rules of Court requires that a party's briefs support any reference to a matter in the record by a citation to the record. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) To the extent the parties have made reference to factual or procedural matters without record references or unsupported by the references given, we will disregard such matters. (*Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451; *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1.)

Additionally, on appeal from a judgment, the question is whether plaintiff presented any substantial *evidence* which would support a judgment in its favor. (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.) Since we are reviewing evidence, we will ignore factual statements supported by record references to nonevidentiary matters.

Defendant obtained the property from Doan in May 2003. She thereafter encumbered it with deeds of trust in favor of The Figueroa Trust and The Figueroa Trust No. 2 (collectively Figueroa Trust) in the amounts of $312,000 and $80,000.

Mandel learned about the property around May 20, 2003. He brought it to the attention of Chaplan and Daniels.

Mandel spoke to defendant by telephone. They discussed terms for the purchase of the property and agreed on a purchase price of $575,000. Mandel filled out a purchase agreement on plaintiff's behalf. The agreement provided for the close of escrow on June 6. He took it to the office of Michael Henschel (Henschel)[3] on May 29.

At the time, there were two other potential buyers for the property. Henschel advised defendant to accept plaintiff's offer due to plaintiff's ability to complete the sale in a short period of time.

On May 30, Mandel and Daniels met with defendant and Henschel. Mandel brought a revised purchase agreement providing for a purchase price of $587,500 and a close of escrow on June 11. They discussed the encumbrances to which the property would be subject, namely the first trust deed in favor of Imperial Capital Bank in the amount of approximately $292,000 and the Los Angeles Renaissance Housing Corp. lien. They discussed the property's physical condition and regulatory problems.

While the lis pendens was of some concern to Mandel, he believed his attorney could take care of it. The physical condition of the property also was not a problem. Plaintiff had previously purchased properties subject to the task force. The city would then give it time to make the necessary repairs to the property.

The parties agreed to additional terms not found in the standard purchase and sale agreement. The property was sold "as is," with plaintiff required to conduct its own inspection and investigation of the property.

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[2] A notice of default was recorded on June 23, 2003.

[3] Henschel's role in the transaction is unclear. While he provided advice to defendant, he acknowledged that he is not a lawyer.

Additionally, while the purchase agreement contained a standard "time is of the essence" provision, the additional terms required that (1) "[e]scrow shall close on or before June 11, 2003," and (2) "[b]uyer shall deposit all funds necessary to close escrow, with escrow holder, on or before June 10, 2003."

Defendant wanted a very short escrow period for two reasons. First, she wanted to avoid foreclosure by Imperial Capital Bank. Second, she did not want to be responsible for making the required repairs to the property.

Henschel added a provision that plaintiff could waive the requirement of a title insurance policy, so that title insurance was not a condition of completing the transaction. Defendant had not obtained a title insurance policy and she told him that she was not on good terms with Doan. Henschel thought there might be difficulty in acquiring an affidavit of uninsured deed from Doan, which would be required under the circumstances by most title companies. The waiver provision would protect defendant from being obligated to provide a title insurance policy which she could not obtain.

Chaplan and Mandel showed documentation to defendant and Henschel which satisfied them that plaintiff had sufficient cash to complete the purchase of the property.

On May 31, 2003, Mandel and Daniels went to inspect the property. While they were there, Doan came up to Mandel and started yelling at him. He said that he was the owner of the building and he was not selling it. He threatened to file a lis pendens. Mandel obtained a preliminary title report which showed that defendant owned the property. He also spoke to defendant and Henschel, who assured him that ownership of the property would not be an issue.

On June 4, 2003, Fidelity National Title Company issued a preliminary title report, effective May 20. The report identified defendant as the sole owner of the property. The report was faxed to escrow on June 9. Mandel approved it on June 10. However, Mandel also wrote on it: "Subject to removal of lis pendens from Renaissance Housing Corp. Mark Adams, Esquire." Mandel explained: "We were in negotiations with this guy. I thought that his lawsuit was bogus. I didn't want to waive any rights. I'm not an attorney. I don't do this for a living in terms of writing legal documents. And I wanted

to make sure I wasn't waiving any rights to get this guy out of the picture. . . . [A]nd so I said, look, I approve the title report, which isn't even in contention here in my mind because I have the right to buy property without a title report."

Plaintiff made its initial deposit into escrow between June 2 and June 6, 2003. This was accomplished by Daniels, Mandel and Chaplan each depositing $8,500 into escrow.

On or before June 10, 2003, defendant filled out a statement of information for the escrow company. It reflected an amount of $292,300 due to Imperial Capital Bank and the amounts due to the Figueroa Trust, in care of Henschel. Imperial Capital Bank submitted a payoff demand to escrow on the afternoon of June 9. The total amount was $318,522.61, which included a prepayment penalty.

The deeds of trust in favor of the Figueroa Trust were recorded on June 10, 2003. Henschel's office prepared the demand documents for the trusts and he had defendant sign them. Shortly after that, reconveyance documents were signed and notarized. None of these documents were deposited into escrow, however.

Henschel drove defendant to the escrow office on June 10, 2003. A grant deed in favor of plaintiff was signed and notarized.

However, on June 10, 2003, Doan filed a lawsuit against defendant challenging her title to the property, and early in the morning on June 11 he recorded a lis pendens against the property. Chaplan notified Mandel of the lawsuit, and Mandel told plaintiff that she needed to have the lis pendens and the Figueroa Trust liens removed from the property in order for plaintiff to be able to complete the purchase and close escrow. She told him she would take care of it; it would not be a problem.

Plaintiff did not receive the Imperial Capital Bank payoff demand from escrow until June 11, 2003. It requested an extension of time in which to close escrow, since it could not close without knowing how much money to pay.

Additionally, plaintiff could not close escrow while the litigation over title to the property was pending between defendant and Doan. Mandel did not want plaintiff's funds tied up in escrow for the course of their litigation. Chaplan, too, indicated that

plaintiff would not consider closing the transaction as long as the property was subject to the Doan lis pendens as well as the Figueroa Trust liens. He explained that he did not simply deposit money and close escrow "[b]ecause there was somebody else challenging ownership, and I didn't want to pay $587,500 to a woman that didn't own the property as she promised us that she did."

Defendant never sent plaintiff a notice to buyer to perform.

On June 12, 2003, real estate broker Jim Naja (Naja) sent a document to escrow attempting to cancel the escrow, apparently on defendant's behalf. Escrow was not canceled, however.

On June 13, 2003, Chaplan wrote to Henschel memorializing an earlier conversation. Chaplan stated that he was negotiating with Mark Adams to get the Los Angeles Renaissance Housing Corp. lis pendens removed, but defendant would have to get the Doan lis pendens removed expeditiously so that the transaction could go through.

Imperial Capital Bank issued a notice of default on June 23, 2003. Defendant's attorney contacted Michael Rone (Rone), a mortgage banker and president of U.S. Credit Bank Corp. The attorney explained that the property needed to be refinanced because it was in foreclosure. Rone purchased the Imperial Capital Bank note, loaning the money to defendant at 10 percent interest for a period of three months.[4]

In December 2003, Rone told defendant that escrow had not been canceled because she had not signed the document sent on June 12. Defendant signed a copy of the document dated December 15. Rone then asked defendant's attorney to send it to escrow.

Thereafter, defendant spent money repairing the property.

At some point, Doan filed for bankruptcy. Apparently, the litigation over title of the property was transferred to the bankruptcy court. As of the time of trial in the instant matter, the Doan litigation was on appeal.

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[4] Defendant later breached her agreement to repay the loan.

PROCEDURAL BACKGROUND

Plaintiff filed this action against defendant for specific performance on July 2, 2003. It later added 4131 South Figueroa as a doe defendant.

On July 17, plaintiff filed a notice of lis pendens. Defendant's counsel filed a motion to expunge the lis pendens, which was denied on September 4. On September 29, defendant substituted out her attorney and substituted in herself. On October 14, she substituted in a new attorney, who filed an answer to the complaint. Defendant again substituted in herself for her attorney on December 16. She substituted in a third attorney on December 18.

Defendant filed a second motion to expunge the lis pendens. The trial court granted it conditioned on defendant's posting of an undertaking in the amount of $500,000.

On March 17, 2004, defendant filed a cross-complaint against plaintiff, Chaplan, Daniels, Mandel and Henschel for breach of contract, fraud and conspiracy, quiet title, declaratory relief, rescission, cancellation of instrument, violation of statutory duty, slander of title and cancellation of lis pendens.

Defendant filed a motion for reconsideration of the order conditionally expunging the lis pendens, and plaintiff requested sanctions. The trial court denied reconsideration and set a hearing on the request for sanctions.

Defendant filed another substitution of attorney on April 27. Then on July 15, she filed a first amended cross-complaint against plaintiff, Henschel, the Figueroa Trust, and Donald Forman. She alleged causes of action for fraud and misrepresentation, quiet title, rescission of the trust deeds, rescission of the purchase and sale agreement, cancellation of instrument, violation of foreclosure consultant law, breach of fiduciary duty and breach of written contract.

Defendant then moved for summary judgment. The trial court denied the motion.

At a status conference on January 28, 2005, plaintiff's counsel represented that defendant failed to appear for a scheduled deposition and had hired a new attorney. The

trial court ordered defendant to appear at her next scheduled deposition or have sanctions imposed against her.

On October 19, the trial court severed trial of plaintiff's specific performance cause of action against defendant and scheduled it for a court trial.

On March 6, 2006, defendant filed another substitution of attorney. On April 4, she filed a motion in limine to exclude any evidence regarding her personal life and relationships.

On April 12 and 18, 2006, Henschel filed opposition to defendant's discovery motions. On April 25, he filed a motion to dismiss the cross-complaint against him and a separate complaint defendant had filed against him (*Tong v. Henschel* (Super. Ct. Los Angeles County, BC311314)).

Defendant filed another substitution of attorney on April 26. Her new counsel then filed opposition to Henschel's motion to dismiss. Counsel also filed a motion to exclude "improper expert opinion."

On May 17, defendant filed her own handwritten trial brief. On July 7, she filed another substitution of attorney. On August 3, she substituted out her attorney and substituted in herself.

At a September 19 status conference, the trial court set a hearing on Henschel's motion to dismiss and various motions in limine for April 18, 2007 and trial for May 7, 2007. On March 8, 2007, defendant substituted in a new attorney. She filed another substitution of attorney on March 26.

At some point, defendant had again moved for summary judgment. On April 2, the trial court denied her motion. It also denied without prejudice a motion by plaintiff for sanctions.

On April 18, the trial court granted Henschel's motion for evidentiary sanctions based on defendant's failure to produce documents.

On May 7, defendant's counsel resubmitted her trial brief. Plaintiff filed a motion in limine to bar defendant from raising any affirmative defenses not asserted in her

answer to the complaint. Both parties stipulated to the foundation for specified documents to be introduced into evidence.

The trial court ruled on the various motions before it as follows: It granted defendant's motion to preclude evidence regarding the attorneys who had represented her in the action. It granted her motion to preclude evidence regarding her personal life. It granted her motion to preclude evidence as to the price she paid for the property or the circumstances of her acquisition of the property. It granted a motion to preclude evidence relating to plaintiff's legal damages. It also granted a motion barring introduction of documents not produced by defendant during discovery.

The trial court provisionally denied a motion to preclude evidence of defendant's ex parte filings with the court, subject to review of each document sought to be admitted. It also provisionally denied the motion to bar defendant's assertion of affirmative defenses, subject to rulings on amendment of the answer to conform to proof.

Also prior to trial, defendant dismissed her cross-complaint as to plaintiff as well as her causes of action against plaintiff in the separate action she had filed. Additionally, she entered into a conditional settlement with Henschel.[5]

Trial on plaintiff's cause of action for specific performance then proceeded. After plaintiff presented its case, defendant moved for a judgment of nonsuit. The trial court offered plaintiff the opportunity to reply or to reopen its case in chief or present rebuttal evidence, but plaintiff declined to take advantage of these opportunities. The trial court then granted the motion for nonsuit.

The trial court found that plaintiff's contract with defendant "was one in which time was of the essence and that an unusually short escrow was of vital importance to" defendant. Plaintiff was required to deposit funds sufficient to close escrow on June 10, 2003. Prior to the close of escrow, there was "a subsequent intervening act in the form of the filing of a lawsuit by the prior owner (Duc Doan)," notice of which was given to

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[5] The trial court thereafter entered a dismissal of the cross-complaint as to Henschel.

plaintiff on June 10. The following day, a lis pendens was recorded against the property at 8:04 a.m.

The trial court found that plaintiff's failure to deposit the necessary funds into escrow by June 10, 2003 was due to "the pendency of the Duc Doan lawsuit and their desire not [to] have their funds tied up in lengthy litigation. There was nothing in the parties[']contract or in their conduct that would raise an inference that the parties intended to be bound by the contract in the event that the escrow could not close in the very unusually short period of time specified in the contract."

The trial court therefore ruled that the filing of the Doan lawsuit and lis pendens (1) substantially frustrated the parties' purpose in entering into the contract without fault of either party; (2) the parties' performance, particularly defendant's, became impracticable without fault of either party; and (3) the fact escrow could not close in the specified period of time resulted in a material failure of consideration, discharging defendant's obligations under the contract. This material failure of consideration was sufficient to deny specific performance.

The trial court added that plaintiff presented no evidence showing that defendant was complicit with Doan in filing the lawsuit and lis pendens. Rather, plaintiff's evidence showed Doan's animosity toward defendant. Additionally, defendant's conduct following the failure to close escrow was "consistent only with a person attempting to salvage herself from a very bad situation which required her to deal with a variety of issues as a result of the failure of the escrow to close within the very short time specified. This included doing necessary repairs on the building which plaintiff itself estimated would cost $250,000.00."

The trial court therefore ruled that defendant was entitled to a judgment of nonsuit, as well as an order expunging plaintiff's lis pendens. Judgment was entered and the lis pendens expunged on July 27, 2007. The judgment additionally stated: "Defendant Tu My Tong is further entitled to costs of suit incurred herein and possible attorney's fees as will be determined upon defendant's filing of a memorandum of costs and motion for an award of attorneys fees."

On August 14, 2007, defendant substituted herself in for counsel. On August 16, she filed a memorandum of costs. Plaintiff filed its notice of appeal from the July 27 judgment on September 17.

At some point, defendant retained another attorney. On October 1, 2007, he filed a motion for an award of attorney's fees on defendant's behalf.

DISCUSSION

A. *Standard of Review*

On appeal from a judgment under Code of Civil Procedure section 631.8, the question is whether plaintiff presented any substantial evidence which would support a judgment in its favor. (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.*, *supra*, 73 Cal.App.4th at p. 528.) In reviewing the evidence, we give plaintiff's evidence all value to which it is legally entitled, drawing all reasonable inferences in its favor. (Cf. *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580.) We will not draw inferences based on speculation or conjecture, however. (*Kidron*, *supra*, at pp. 1580-1581.)

In addressing the appeal, we begin with the presumption that the judgment of the trial court is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 357.) "It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) Meeting this burden requires citations to the record to direct the court to the pertinent evidence or other matters in the record which demonstrate reversible error. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Guthrey v. State of California*, *supra*, 63 Cal.App.4th at p. 1115; *Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.) It also requires citation to relevant authority and argument. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

Additionally, "[w]e discuss those arguments that are sufficiently developed to be cognizable. To the extent [plaintiff] perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis." (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

As previously stated, rule 8.204(a)(1)(C) of the California Rules of Court requires that a party's briefs support any reference to a matter in the record by a citation to the record. (*Guthrey v. State of California, supra,* 63 Cal.App.4th at p. 1115.) To the extent the parties have made reference to factual or procedural matters without record references, we will disregard such matters. (*Yeboah v. Progeny Ventures, Inc., supra,* 128 Cal.App.4th at p. 451; *Gotschall v. Daley, supra,* 96 Cal.App.4th at p. 481, fn. 1.) Neither will we consider any claim of error based on statements unsupported by record references. (*Weller v. Chavarria* (1965) 233 Cal.App.2d 234, 246.)

B. *Failure of Consideration*

Plaintiff contends the trial court erred in holding that defendant's performance obligations were waived due to a failure of consideration. Plaintiff claims that there was no failure of consideration, the statement of decision misrepresents the record, and the trial court committed reversible error when it prevented plaintiff from offering critical evidence.

In support of its claim that there was no failure of consideration, plaintiff relies on *Katemis v. Westerlind* (1953) 120 Cal.App.2d 537. *Katemis* involved a plaintiffs' appeal from a judgment of nonsuit in an action for specific performance. Plaintiff here relies on the following portion of the opinion: "It is apposite to point out that even were we to consider time of the essence of this agreement, the judgment of nonsuit was nevertheless erroneous. Under the terms of the escrow instructions, plaintiffs agreed to deposit in escrow prior to March 1, 1952, the sum of $19,150. Defendant seller also agreed that prior to March 1, 1952, she would deposit in escrow all instruments necessary for her to comply with the escrow instructions. These respective obligations, viz., plaintiffs'

deposit of the money and defendant's deposit of all requisite instruments, were thus concurrent conditions; that is, they were mutually dependent, each promise given in consideration for the other, and each being due at the same time. (Civ. Code, § 1437.)" (*Katemis, supra,* at p. 545.)

We fail to see how the foregoing statement supports plaintiff's position. *Katemis* did not involve a situation in which time was of the essence and the parties bargained for a short escrow period which was thwarted by an intervening event that prevented escrow from closing at the specified time. Even if defendant had performed all of her obligations under the purchase agreement, she still could not deliver title to plaintiff in the short escrow period due to the Doan lawsuit and lis pendens.

Plaintiff's claim that the statement of decision misrepresents the record is a challenge to the statement: "The trial court offered plaintiff the opportunity to reply or to reopen its case in chief or present rebuttal evidence, but plaintiff declined to take advantage of these opportunities." Plaintiff argues that the trial court erroneously excluded evidence which plaintiff otherwise would have presented in response to defendant's motion for nonsuit.

Even if the statement of decision misrepresents the record, that does not entitle plaintiff to relief. We review the judgment itself, and it is well established that a correct decision by the trial court will be affirmed, even if made on an incorrect ground or for an erroneous reason. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 211.) Additionally, findings in the statement of decision not essential to the judgment may be disregarded as mere surplusage. (*Pas v. Hill* (1978) 87 Cal.App.3d 521, 524, fn. 2, overruled on another ground in *Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309, 310.) The trial court's statement regarding a procedural matter is not essential to the judgment and therefore may be disregarded.

Plaintiff also claims the trial court committed reversible error in preventing it from offering critical evidence. Plaintiff fails, however, to identify specifically what evidence it sought to have admitted and how that evidence would have changed the result. (Evid.

Code, § 354.) Instead, its discussion is a rambling discourse on expert testimony admitted at trial and conversations between counsel and the trial court regarding various issues. This discussion falls far short of plaintiff's burden to demonstrate reversible error by an adequate record (*Ballard v. Uribe*, *supra*, 41 Cal.3d at p. 574; *Robbins v. Los Angeles Unified School Dist.*, *supra*, 3 Cal.App.4th at p. 318) by directing us to the pertinent evidence and rulings in the record which demonstrate reversible error (*Guthrey v. State of California*, *supra*, 63 Cal.App.4th at p. 1115; *Culbertson v. R. D. Werner Co., Inc.*, *supra*, 190 Cal.App.3d at p. 710). Also absent are citations to relevant authority demonstrating evidentiary error. (*Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546.)

Plaintiff further asserts that the trial court committed reversible error by failing to find that plaintiff's obligation to deposit funds in escrow was concurrent with defendant's obligation to convey clear title. Again, plaintiff ignores the effect of the intervening act—Doan's lawsuit and lis pendens. Plaintiff cites no authority and makes no cogent argument in support of its claim that defendant's "obligation to convey title free from the Doan lis pendens was neither excused nor outcome determinative," waiving the claim. (*Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546.)

Plaintiff also asserts that it could have taken title subject to the Doan lis pendens at its discretion. It cites nothing in the record to show that it agreed to do so. It also asserts, without citation to evidence in the record, that the lis pendens was gone at the time of trial, implying that the trial court therefore erred in denying specific performance. It neglects to mention that by the time of trial, defendant had made improvements to the property and paid off the first trust deed, obligations which plaintiff would have taken on had the purchase been consummated.

Additionally, Chaplan testified that plaintiff would not consider closing the transaction as long as the property was subject to the Doan lis pendens "[b]ecause there was somebody else challenging ownership, and I didn't want to pay $587,500 to a woman that didn't own the property as she promised us that she did."

The law provides that "[w]here the parties assume that a certain object or effect will be attained, and this becomes impossible, performance by the injured party is excused. . . . The defense has sometimes been explained on the theory of implied conditions and failure of consideration." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 843, p. 929.) In such a case, "'[p]erformance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason recognized as such by *both* parties, for entering into the contract has been destroyed by a supervening and unforeseen event.'" (*Id*. at pp. 929-930.)

Here, both parties clearly recognized that the basic reason for entering into the purchase agreement was for defendant to sell the property quickly so as not to be responsible for paying off the Imperial Capital Bank loan and making repairs to the property. When a supervening and unforeseen event—Doan's lawsuit and lis pendens—prevented a quick sale, there was a failure of consideration and performance was excused. The trial court was correct.

C. *Waiver of the Time is of the Essence Provision*

Plaintiff contends that defendant waived the time is of the essence provision, in that defendant failed to perform her obligations under the purchase agreement which were concurrent with plaintiff's obligations. Plaintiff cites no authority supporting a finding of waiver where, as here, there is an intervening act which renders performance impossible.

Plaintiff claims that defendant breached the implied covenant of good faith and fair dealing and is therefore estopped from asserting the time is of the essence provision. If the failure to close escrow were based solely on defendant's actions with respect to the Figueroa Trust liens, plaintiff's claim might have some validity. (See *Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1131-1132, 1134-1135.) However, Doan's independent filing of a lawsuit and lis pendens prevented the close of escrow under the terms of the purchase

agreement, since plaintiff did not agree to purchase the property subject to that lis pendens.

Plaintiff suggests that defendant should have spoken to or met with Doan after he filed his lawsuit. Since the lawsuit was against her, we fail to see how such an obligation could be imposed.

Plaintiff also argues that defendant could not use the time is of the essence provision "as a shield and a sword." That is, she could not use her failure to disclose and remove the Figueroa Trust liens as a defense. This was not the basis of the judgment of nonsuit. The basis was the existence of the Doan lawsuit and lis pendens, which prevented the timely consummation of the purchase agreement.

Plaintiff further claims defendant lied about the liens, the amount she spent to repair the property, her acquisition of the property, her relationship with Doan, her discovery abuse, and her motivation to cancel the purchase. Plaintiff fails to explain how any of these purported lies affected the trial court's decision.

Plaintiff hints that defendant wanted to cancel the sale so she could sell the property at a higher price to a different purchaser and somehow arranged for Doan to sue her and place the lis pendens on the property to enable her to do so. Plaintiff points to no evidence which establishes that this was the case. Rather, as the trial court found, plaintiff's evidence showed Doan's animosity toward defendant, and defendant's retention and repair of the property.

D. *Exclusion of Evidence*

Plaintiff claims the trial court erred in excluding evidence as to: the number of attorneys who represented defendant during the course of the proceedings; defendant's past relationship with Doan; the price defendant paid for the property and her sophistication as a real estate investor; Mandel's extensive experience in real estate and his dealings with defendant; defendant's multiple handwritten ex parte communications in the trial court and the bankruptcy proceedings; the amount of money owed on the Imperial Capital Bank trust deed exceeding the purchase price.

A judgment will not be set aside based on the erroneous exclusion of evidence unless the erroneous rulings resulted in a miscarriage of justice (Evid. Code, § 354), i.e., it is reasonably probable that absent the errors the party claiming error would have obtained a more favorable result (*People v. Watson* (1956) 46 Cal.2d 818, 836). Lacking in plaintiff's laundry list of complaints about the trial court's rulings is any showing that different rulings would have resulted in a more favorable judgment. This alone requires rejection of plaintiff's claims.

Plaintiff also fails to cite relevant authority and argue error under that authority as to the individual rulings. Again, this justifies rejection of the claims of error. (*Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546.) On appeal, "the party asserting trial court error may not . . . rest on the bare assertion of error but must present argument and legal authority on each point raised. (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649.)

The same is true of plaintiff's claim that the trial court erred in sustaining defendant's objections based on lack of foundation. Absent legal authority and argument, the claim of error is waived. (*Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546.)

E. *Attorney's Fees*

Plaintiff asserts that the trial court erred in awarding attorney's fees to defendant and that, in fact, plaintiff was entitled to an award of attorney's fees and costs. Inasmuch as plaintiff has failed to demonstrate that the trial court erred in granting defendant a judgment, it has failed to demonstrate that it was entitled to an award of attorney's fees and costs as the prevailing party.

Moreover, a postjudgment order awarding attorney's fees is separately appealable as a postjudgment order. (Code Civ. Proc., § 904.1, subd. (a)(2); *R. P. Richards, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 158; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46.) We have no jurisdiction to consider issues relating to the attorney's fee order unless an appeal has

been taken therefrom. (*R. P. Richards, Inc.*, *supra*, at p. 158; *Norman I. Krug Real Estate Investments, Inc.*, *supra*, at p. 46.) Plaintiff failed to appeal from the postjudgment order awarding attorney's fees to defendant.

In *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, the court observed that when attorney's fees are awarded as a matter of right, the order awarding attorney's fees may be considered incidental to the judgment and therefore not separately appealable. (*Id*. at p. 764.) Where the award is discretionary, however, the order is separately appealable. (*Ibid*.)

Here, the right to attorney's fees was based on a contract provision. While under the contract an award of attorney's fees to the prevailing party was mandatory, in light of the variety of claims and cross-claims and the trial court's discretion under Civil Code section 1717 to determine that neither side was the prevailing party, we conclude that the award of attorney's fees was discretionary. The order awarding attorney's fees therefore was separately appealable. (*Gouskos v. Aptos Village Garage, Inc.*, *supra*, 94 Cal.App.4th at p. 764.) Since plaintiff did not appeal from this order, we have no jurisdiction to consider its claim of error in awarding attorney's fees to defendant.

DISPOSITION

The judgment is affirmed. Defendant is awarded costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J. WOODS, J.