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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

HARALD HEGGNES et al., Plaintiffs and Appellants, v. ROBERT L. RISLEY et al., Defendants and Respondents.	B204008 (Los Angeles County Super. Ct. No. LC075116)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Harwin, Judge. Reversed.

Law Offices of Ray B. Bowen, Jr. and Ray B. Bowen, Jr. for Plaintiffs and Appellants.

Garrett & Tully, Robert Garrett, Ryan C. Squire and Scott B. Mahler for Defendants and Respondents Robert L. Risley, Law Offices of Robert L. Risley and Mary Lolonis.

Greenberg & Bass and James R. Felton for Defendant and Respondent Frank H. Whitehead, III.

Harald Heggnes and Maria Heggnes appeal from the judgment entered in their legal malpractice action after the trial court granted summary judgment in favor of the Law Offices of Robert L. Risley and attorneys Robert L. Risley, Frank H. Whitehead, III and Mary Lolonis (collectively Attorney Defendants). We reverse.

FACTS AND PROCEDURAL BACKGROUND

1. *The Heggneses' Unsuccessful Attempt To Purchase the Apartment Building*

On April 30, 1996 the Heggneses entered into an agreement with George Mullin III to manage a 41-unit apartment building on Langdon Avenue in Van Nuys. The agreement also gave the Heggneses an option to purchase the building at any time prior to May 1, 2006, but provided for cancellation of the agreement upon the uncured default of either party.[1]

The Heggneses exercised their purchase option, and on August 23, 2001 escrow was opened. The escrow instructions provided the total consideration for the sale was $1,256,000, including the Heggneses' assumption of an existing $780,000 loan on the building in favor of Quaker City Bank and execution of a new note for $191,000, secured by a second deed of trust, in favor of Mullin's company, Green Street Group Ltd. The escrow instructions specified an October 23, 2001 closing date but did not state time was of the essence.[2]

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[1] The provision governing default by the Heggneses stated, in part, "Should any of the terms, provisions, conditions or responsibilities contained herein not be met, this agreement shall be in default. If this occurs, Mullin shall make written demand upon Heggnes that the default be cured. Heggnes shall have fifteen (15) calendar days to cure said default. Failure to do so shall give Mullin the right to cancel this agreement."

[2] The escrow instructions stated, "Prior to the expiration of the time specified in this paragraph, I will hand you $131,800.00; $25,000.00 of which will be deposited with the signing of these instructions, Buyer will deposit balance into escrow and necessary costs and charges prior to close of escrow, and will deliver to you any instruments executed by me and additional funds which this escrow requires from me, all of which you are instructed to use and/or deliver provided that on or before October 23, 2001 you hold a policy of title insurance with the usual title company's expectations, with a liability of not less than $1,256,000.00 . . . ."

The transaction was not completed by October 23, 2001. Quaker City Bank did not approve Harald Heggnes's application for assumption of the existing loan until December 3, 2001, and Mullin had refused on January 29, 2002 to accept a $191,000 note, secured by a second deed of trust, from the Heggneses notwithstanding the escrow instructions provided he would do so.[3] The Heggneses were unable to secure an alternative source of funds until February 2002 at which time Keith and Norma LaFond deposited $191,000 into escrow.

On January 30, 2002 Mullin sent the Heggneses a notice of default demanding four defaults be cured within 15 days or the management agreement would be canceled. The defaults identified were "Building and Safety issues and violations," "Late payments on loan obligations," "Failure to name Mullin as an additional insured" and "All other defaults as determined by Professional Property Inspection." In a letter dated February 11, 2002 Whitehead, who had been retained by the Heggneses, disputed the Heggneses were in default of the management agreement and stated, "In short, it appears that you are attempting to thwart the Option to Purchase being exercised by my clients. Be sure that any further attempt to do so will be met with decisive action under the law. It is my suggestion that the parties work out the remaining issues in order to close Escrow no later than February 28, 2002."

In an undated letter from Mullin to the escrow officer, Richard Shewfelt, Mullin stated, in part, "Your escrow for the sale of 8154 Langdon Ave., Van Nuys, Ca. has far exceeded its closing time, therefore, please consider this letter a cancellation of the escrow. This cancelation shall take effect immediately after the cancelation of the following described contract takes effect. [¶] In accordance with the '**Management Agreement and Option to Purchase'** contract which was entered into when your buyers (Maria and Har[a]ld Heggnes) purchased the property; please consider this letter an

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[3] The escrow instructions stated, "Second Deed of Trust to record, as part of the total sales price on your usual forms, securing a note in the amount of $191,000.00, executed by buyer herein in favor of Green Street Group, Ltd, dated during escrow, bearing interest at the rate of 10.000% per annum . . . ."

immediate cancellation of that contract as allowed for on the fourth line, item #13, page 9 of said contract. The fifteen day *notifice* [*sic*] *of default* time period has expired. [¶] Should the buyers be able to close quickly, however, I will consider re-opening the escrow at the price and terms specified in said contract."

On March 23, 2002 Mullin, on the one hand, and Luis and Blanca Munoz, on the other hand, signed a purchase contract with an option to buy-back the apartment building. Both the purchase price and buy-back price were $1,420,000.

3. *The Heggneses' Failed Action Against Mullin and the Munozes*

On May 8, 2002 Risley and Whitehead filed an action on behalf of the Heggneses against Mullin, the Munozes and several business entities for, among other causes of action, fraudulent conveyance and breach of contract (the underlying action). After several successful demurrers the Heggneses filed a fourth amended complaint on March 14, 2003 essentially alleging they had fully complied with the escrow instructions but, as escrow was ready to close, Mullin refused to proceed with the transaction and fraudulently conveyed the apartment building to the Munozes.

The trial court sustained a demurrer to the fourth amended complaint without leave to amend in the underlying action, finding the Heggneses had not complied with the escrow instructions prior to the October 23, 2001 closing date and the allegations in their complaint stating they had complied with escrow were both internally contradictory and contradicted the escrow instructions. On appeal this court affirmed the trial court's order, stating, "[T]he fact that the Heggneses did not fully comply with the escrow instructions, as disclosed by the allegations and attachments to the Fourth Amended Complaint, vitiates the foundation of their entire action." (*Heggnes v. Mullin* (April 19, 2005, B169865) [nonpub. opn.], at [p. 5] (*Heggnes I*)).

We also held the trial court did not abuse its discretion in denying leave to amend the complaint yet again. "[T]he Heggneses now appear to be attempting to erase facts stated in their earlier complaints. In the proposed Fifth Amended Complaint, for instance, the inconvenient factual allegation that money was deposited into the escrow account in November and December 2001 is replaced by a new allegation that funds were

delivered in September 2001. . . . [T]he allegations in the proposed Fifth Amended Complaint continue to demonstrate that the conditions precedent to the sale had not been completed within the escrow period and that amended escrow instructions would have been necessary in order to renew the transaction. It was not an abuse of discretion for the trial court to deny leave to amend under these circumstances." (*Heggnes I*, at [pp. 5-6].)

4. *The Malpractice Complaint; the Trial Court's Order Granting Summary Judgment in Favor of the Attorney Defendants*

On June 30, 2006 the Heggneses filed a complaint for professional negligence against the Attorney Defendants, alleging "they neglected to plead all available ultimate facts that were competent and relevant to the issues therein" and, as a result of their negligence, the underlying action was dismissed.

The Attorney Defendants moved for summary judgment, arguing the Heggneses could not establish the causation element of their legal malpractice action because, as this court held in *Heggnes I*, the Heggneses failed to comply with the escrow instructions by October 23, 2001. Accordingly, whether or not the Attorney Defendants were negligent, the Heggneses could not have achieved a better result in the underlying action. In response the Heggneses asserted the evidence submitted with their opposition papers supported an argument escrow had been extended until at least March 1, 2002, which, in turn, created a triable issue of material fact at to causation (that is, whether more skillful pleading by the Attorney Defendants could have avoided dismissal of the underlying action after successive successful demurrers).

The trial court granted the Attorney Defendants' motion for summary judgment, finding, "[P]ursuant to the Court of Appeal opinion, escrow instructions were not complied with and the Court had discretion to deny the 5th amendment. These issues show that the plaintiff herein could not have ha[d] a better result."[4]

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[4] After the trial court granted the Attorney Defendants' motion, a "judgment" was signed and entered by the court on November 7, 2007. The judgment, however, was entered only "in connection with [the Heggneses'] complaint" and failed to address the cross-complaint filed by the Attorney Defendants. The Heggneses purported to appeal

DISCUSSION

1. *Standard of Review*

We review the trial court's grant of summary judgment de novo and decide independently whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; Code Civ. Proc., § 437c, subd. (c).)[5] When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. Alternatively, the defendant may present evidence to "show[ ] that one or more elements of the cause of action . . . cannot be established" by the plaintiff. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)

"[T]he defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.'" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) Once the defendant's initial burden has been met, the burden shifts to the plaintiff to demonstrate, by reference to specific facts not just allegations in the pleadings, there is

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from the November 7, 2007 judgment, which was not an appealable order. (See *Holt v. Booth* (1991) 1 Cal.App.4th 1074, 1081 ["'[j]udgment rendered on a complaint alone, unaccompanied by judgment on a pending cross-complaint, is not a final judgment and appeal from it may be dismissed'"].) Subsequently, the cross-complaint was dismissed; and we exercise our discretion to treat the notice of appeal, filed before the dismissal of the cross-complaint and the termination of the entire action, as a premature but valid appeal from a proper judgment. (See Cal. Rules of Court, rule 8.104(e)(2) ["reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment"].)

[5] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

a triable issue of material fact as to the cause of action. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849.)

On review of an order granting summary judgment, we view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

2. *The Trial Court Improperly Granted Summary Judgment in Favor of the Attorney Defendants*

a. *Law governing legal malpractice*

To state a cause of action for legal malpractice, a plaintiff must plead "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.)

To recover damages in a legal malpractice action, a plaintiff must prove "that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244; Judicial Council of Cal. Civ. Jury Instns. (2006) CACI No. 601 [plaintiff must prove he or she "would have obtained a better result if [defendant] had acted as a reasonably careful attorney"].) This "but for" inquiry is properly reflected in the substantial factor causation test applicable in negligence actions. (*Viner,* at p. 1239 ["'the "substantial factor" test *subsumes* the "but for" test'"]; CACI No. 430 ["[a] substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm"].) The substantial factor test, however, permits more than one cause of harm even if none was sufficient in and of itself to cause the harm. A substantial factor causing harm "does not have to be the only cause of the harm." (CACI No. 430; see *Viner,* at p. 1240 [plaintiffs alleged defendant attorneys' negligence combined with another's exploitation of that

negligence, the underlying economic situation and other factors caused their losses]; see also CACI No. 431.)

b. *There is a triable issue of material fact as to causation*

This court's decision in *Heggnes I* established, based on the allegations in the pleadings filed by the Heggneses in the underlying action, that the Heggneses had not performed all of the duties specified in the escrow instructions by the October 23, 2001 deadline.[6] Even assuming that is true, and not simply an artifact of the Attorney Defendants' allegedly defective pleading practice, the inability of the Heggneses to satisfy all of the escrow requirements by the original deadline was not, standing alone, fatal to their underlying claims against Mullin and the Munozes. "'The general rule in equity is that time is not of the essence unless it has been made so by its express terms or is necessarily so from the nature of the contract. [Citation.] . . . "[I]t is not enough that a time is mentioned during which or before which something shall be done [citations]." [Citation.] This language . . . is in consonance with the modern view that valuable contractual rights should not be surrendered or forfeitures suffered by a slight delay in performance unless such intention clearly appears from the contract or where specific enforcement will work injustice after a delayed tender.'" (*Fowler v. Ross* (1983) 142 Cal.App.3d 472, 479, italics omitted.) However, even when a contract specifies time is of the essence, California courts might not enforce a time deadline in a real estate sales contract if "there has been a waiver or potential forfeiture." (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1342.) If, as the Heggneses contend, escrow was extended by

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[6] In affirming the trial court's ruling that, as pleaded, the fourth amended complaint failed to state a cause of action, we did not address whether escrow had been extended by oral agreement or the parties' conduct because that was not at issue. (See *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 900, fn. 7 ["'[i]t is axiomatic that cases are not authority for propositions not considered'"]; *People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10 [same].) Indeed, when discussing the trial court's denial of relief as to the Heggneses under section 473, subdivision (b) -- which we also affirmed -- we observed "their complaint may have been defective due to attorney error." (*Heggnes I*, at [p. 8].)

either oral agreement or the parties' conduct,[7] their willingness and ability to perform after the October 23, 2001 deadline may have been sufficient to support some or all of their claims in *Heggnes I*. And, that is the gravamen of the Heggneses' malpractice action against the Attorney Defendants: Their failure to plead escrow had been extended -- or to plead it clearly and without first including a number of inconsistent factual allegations in a series of earlier iterations of the complaint -- was what vitiated their claims in *Heggnes I*, not that they failed to meet the October 23, 2001 deadline.

In opposition to the Attorney Defendants' motion for summary judgment, the Heggneses submitted Harald Heggnes's declaration stating, "Mr. Mullin verbally agreed with my wife and me to extend the escrow period," and several documents demonstrating activity in connection with the transaction occurred without objection after October 23, 2001. For example, a letter from Mullin to Shewfelt, apparently prepared in early January 2002,[8] provides the "breakdown on 8154 Langdon closing" should include $15,000 cash payable to Mullin and 30 percent of the seller's total cash payable to Mary B. Mullin. Handwritten on the bottom of the letter is a request to Shewfelt for "an approximate closing statement (verbal or written). As I circled on page 2 item #1, + #5 There are NO prorations, Buyer pays all costs of sale (escrow, title insurance, recording . . . etc.) and amount to me is NET (fixed). No changes on page 4." In response to

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[7] As discussed, the escrow instructions themselves did not state time was of the essence. In addition, the purchase option specified it could be exercised at any time until May 1, 2006. That is, if the management agreement had not been canceled due to their ostensible default, the Heggneses would have been permitted to exercise the option until that date. (See *Erich v. Granoff* (1980) 109 Cal.App.3d 920, 927 ["option may be viewed as a continuing, irrevocable offer to sell property to the optionee within the time constraints of the option contract and at the price set forth therein"]; *C. Robert Nattress & Assocs. v. Cidco* (1986) 184 Cal.App.3d 55, 67 ["unlike a conditional or qualified acceptance in the formation stage of a contract, a purported exercise of an option which is qualified or made conditional, does not in and of itself terminate the option if there yet remains time during the term of the option in which the unauthorized qualification or condition may be removed and the option exercised absolutely"].)

[8] Although the letter is dated "January 10, 2001," use of "2001," rather than "2002," is clearly a mistake since escrow was not opened until August 2001.

Mullin's letter, two amendments to the escrow instructions were prepared dated January 15, 2002.

The Heggneses also submitted a declaration from Douglas Shewfelt, Richard Shewfelt's son and an escrow officer with the escrow company since before 2001, who reviewed the escrow file for the transaction because his father had retired. Douglas Shewfelt stated, "Although the initial escrow instructions provided a projected closing date of October 23, 2001, the escrow instructions were amended on a number of occasions and the projected escrow closing date was extended in order to allow adequate time for the parties to the escrow to perform in accordance with the terms and conditions of the escrow." Douglas Shewfelt identified a number of documents in the file dated after October 23, 2001 including the buyer's and seller's estimated closing statements dated March 1, 2002 and a facsimile cover letter to Mullin dated February 25, 2002 transmitting the seller's tentative closing statement.

This evidence is sufficient to demonstrate a triable issue of fact whether escrow had been extended by oral agreement, the parties' conduct or both and, as a consequence, whether the Attorney Defendants' negligence (either in investigating the factual basis for the Heggneses' claim or in pleading them) caused the underlying action to be dismissed.

The Attorney Defendants challenge this conclusion by insisting the evidence submitted by the Heggneses in opposition to the summary judgment motion is not admissible (because, for example, it is hearsay or lacks adequate foundation). Although the Attorney Defendants filed written objections to the evidence submitted by the Heggneses, the trial court did not rule on them; and the objections are deemed forfeited on appeal. (See, e.g., *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 623, disapproved on other grounds in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973; *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 577.)[9] "'[W]e must view

[9] Although this court and many other Courts of Appeal have held evidentiary objections not expressly ruled on at the time of decision on a summary judgment motion are not preserved on appeal, the Sixth District recently disagreed; and the issue is now

the objectionable evidence as having been admitted in evidence and therefore as part of the record.'" (*City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 783.)

To be sure, as the Attorney Defendants argue, courts have recognized an exception to the forfeiture rule "when counsel specifically requests a ruling on evidentiary objections and the trial court nonetheless declines to rule." (*Swat-Fame, Inc. v. Goldstein*, *supra*, 101 Cal.App.4th at p. 624, fn. 7; see *City of Long Beach v. Farmers & Merchants Bank*, *supra*, 81 Cal.App.4th at p. 784 [evidentiary objections not waived; "there was nothing further defense counsel could be expected to do in terms of seeking rulings on the previously filed evidentiary objections beyond personally raising the issue on two separate occasions in the presence of the trial court"].) But the Attorney Defendants fail to cite to the record in support of their contention they made any such specific request, and we are unable to find one in our review of the transcripts from the two hearings the court held to consider the motion for summary judgment or the third hearing at which the parties requested the setting of a trial date on the Attorney Defendants' cross-complaint -- a review this court is not, in any event, required to perform. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 ["it is counsel's duty to point out portions of the record that support the position taken on appeal"; "[t]he appellate court is not required to search the record on its own seeking error."]; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546 [it is not the proper function of Court of Appeal to search the record on behalf of appellants or to serve as "backup appellate counsel"].)

Finally, the Attorney Defendants contend summary judgment in their favor was nevertheless appropriate because the fourth amended complaint in the underlying action did, in fact, allege that escrow was extended through April 2002. For example, the

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pending before the Supreme Court. (*Reid v. Google, Inc.* (2007) 155 Cal.App.4th 1342, review granted January 30, 2008, S158965.)

Attorney Defendants point to the allegations, "In April 2002, while the Escrow was still pending, the Defendants fraudulently transferred the subject property to [Defendants] . . . .," and "Plaintiffs have duly complied with and performed any and all conditions precedent to the within Causes of Action, or alternatively, performance or occurrence thereof has been duly excused or waived."[10] Even broadly construing the language identified in the complaint, these allegations fail to convey the theory that escrow was extended either by oral agreement or the parties' conduct. Moreover, any attempt to construe the proposed fifth amended complaint or to submit yet another proposed version of the pleading to allege an extension of escrow was doomed by the Attorney Defendants' "attempts in their prior complaints to artfully plead around the facts" previously alleged. (*Heggnes I*, at [p. 5].) That is, not only was the extension of escrow not plainly set forth but also that theory was fatally inconsistent with earlier pleadings. Whether more skillful lawyering could have framed a complaint that avoided these flaws is a triable issue of fact that required denial of the motion for summary judgment.

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[10] The Attorney Defendants also point out that in their opening brief in *Heggnes I* they asserted "escrow remained open until Respondent Mullin signed written instructions canceling it in December, a date far beyond that called for in the original instruction." They also argued, "Although not a pleading issue, a number of steps were taken by both parties until Mullin asked to cancel. . . . [¶] . . . One cannot call out one date in original instructions and then compare it to another date of actual cancellation of escrow and say there is a contraction." Although we take judicial notice of that brief as requested (see Evid. Code, §§ 452, 459), these arguments were directed to the Heggneses' contention there was no contradiction between the allegations in the fourth amended complaint and the escrow instructions attached as an exhibit to the complaint and, like the allegations in the fourth amended complaint itself, were not intended to set forth a theory of liability against Mullins premised on a mutually agreed extension of the escrow closing date. As noted, we did not evaluate an extension theory in *Heggnes I*. (See fn. 6, above.)

DISPOSITION

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. The Heggneses are to recover their costs on appeal.

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PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.