APPENDIX
UNPUBLISHED CASES

Not Reported in Cal.Rptr.3d, 2007 WL 1806860 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1806860 (Cal.App. 2 Dist.))

Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Second District, Division 5, California.
Ramon AGUILAR, Plaintiff, Cross-defendant and Respondent,
v.
Gilberto MILLOT, Defendant, Cross-complainant and Appellant.
No. B190026.
(Los Angeles County Super. Ct. No. BC322759).

June 25, 2007.

APPEAL from a judgment of the Superior Court of Los Angeles County. Tricia Bigelow, Judge. Affirmed.
Gilberto Millot, in pro. per., for Defendant, Cross-complainant and Appellant.

O'Rourke, Fong & Manoukian, Roderick D. Fong and Marina Manoukian for Plaintiff, Cross-defendant and Respondent.

KRIEGLER, J.

***1** Plaintiff and respondent Ramon Aguilar was awarded damages of $209,179 following a court trial on his complaint alleging breach of contract and common counts against defendant and appellant Gilberto Millot. Judgment was also entered in favor of Aguilar on Millot's cross-complaint [FN1] against Aguilar, Alvaro L. Banegas, and Bancomer Construction and Development,[FN2] alleging foreclosure of a mechanic's lien, breach of contract, common counts, and declaratory relief.

FN1. Additional cross-complainants were M.I. LLOT GROUP, M.I. LLOT, and M.I. LLOT GROUP, a business entity form unknown. We refer to these entities and appellant collectively as Millot.

FN2. Banegas and Bancomer are not parties to this appeal.

In this timely appeal from the judgment, Millot raises the following issues: (1) the oral contract was entered into between Millot and Banegas, and because Aguilar was not a party to the oral contract, he could not bring this action; (2) if Aguilar was a party to the oral contract, he was in breach due to his failure to pay the amount due, which excused Millot's performance; (3) the statute of limitations on the oral contract expired in March 2004, but Aguilar did not file the instant action until October 2004; (4) the trial court erred in awarding damages in excess of those set forth in the written contract at $100 per day for late performance; (5) Aguilar did not prove that Millot materially breached the contract; (6) Aguilar's payment of $3,700 after the alleged breach constituted a waiver of the breach; (7) the trial court awarded damages based upon loan costs not incurred in Aguilar's name; and (8) the trial court abused its discretion by not allowing oral argument before filing its tentative and final statements of decision.

We find no reversible error and affirm the judgment in its entirety.[FN3]

FN3. Millot's motion to augment the record with documents not presented at trial is denied.

PROCEDURAL HISTORY

Aguilar's October 8, 2004 Complaint

In his breach of contract cause of action, Aguilar alleged that on or about March 5, 2002, he entered into a written contract with Millot, who is a civil engineer. Under the contract, Millot was to draft and design the architectural plans for construction of four single family residences on Thomas Street in Los Angeles. Between January 2003 and September 2004, Millot breached the contract by failing to deliver the designs and drawings in a timely fashion. Millot's untimely delivery of plans and drawings, and the failure to deliver drawings, caused construction to be delayed. Aguilar performed all of his obligations under the contract, except for those Millot prevented or which

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were excused by Millot's nonperformance. Under the terms of the contract, Millot agreed to pay liquidated damages of $100 for each day of delay. Aguilar suffered damages as a result of Millot's breach of contract.

The common count cause of action alleged Millot was indebted to Aguilar for the sum of $21,032.84 within the past two years. Aguilar demanded payment by his complaint, but no payment was received from Millot.

Millot's Cross-complaint

Millot alleged he entered into a contract to perform work in connection with the development of the Thomas Street properties by Aguilar, Banegas, and Bancomer. He also alleged Aguilar, Banegas, and Bancomer were each "a partner, agent, joint venturer, employee or otherwise connected with each of the other [cross]-[d]efendants." Millot performed all acts required except for those excused by breach by the developers. The developers failed to pay Millot under the contract and have demanded that he perform work for which they do not wish to pay. They have demanded that Millot perform additional work at no cost. Millot alleged he had filed a proper mechanic's lien and was entitled to foreclose on the lien. The developers breached their contract with Millot, entitling him to damages. As to the common count cause of action, Millot provided valuable services to the developers who have failed to pay a reasonable value for his services. Declaratory relief was requested to resolve the dispute between the parties.

STATEMENT OF FACTS[FN4]

> FN4. "[I]n summarizing the facts on appeal we 'must consider the evidence in the light *most* favorable to the prevailing party, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment.' [Citation.]" (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 642, fn. 3.)

***2** Banegas and Aguilar purchased four lots on Thomas Street in February 2000, intending to develop four single family residences. Banegas and Aguilar entered into an oral agreement with Millot, calling for Millot to prepare a grading plan, street plan, and design for the Thomas Street homes for $11,600. Payments totaling $6,000 were made on the oral contract by Aguilar and Banegas. [FN5] A change in the lot lines to make all four lots buildable was approved on May 22, 2001. Because of Millot's delays in performing under the oral agreement, Aguilar and Banegas decided to reduce the agreement with Millot to writing, which was done on March 5, 2002.

> FN5. Millot testified he was owed an additional $5,000 on the oral contract.

The written contract set forth the parties' obligations, including payment of an additional $12,596 by Aguilar and Banegas. Aguilar negotiated the contract with Millot, because Banegas was frustrated with Millot's delays. Millot agreed to complete the grading plan and provide a copy of it to the structural engineer within seven days after signing the contract.

The contract contemplated that Millot would complete the job in a reasonable amount of time. The contract provided for damages of $100 per day if Millot's work was not performed in a timely fashion; if Aguilar failed to pay in a timely fashion, he would also be penalized $100 per day. Banegas explained the $100 per day penalty was required because Millot had a habit of not performing while claiming that payments were late. The purpose of the $100 per day penalty, according to Banegas, was to secure "performance."

Aguilar testified that the $100 per day penalty was reciprocal, and the result of contract negotiation with Millot. Millot testified he insisted that each side be subject to the $100 per day penalty because he was not being paid. Millot wanted to put pressure on Aguilar to pay on time by means of the penalty. Millot did not consider the $100 per day penalty for late payment as covering his out of pocket loss, because to complete this project he had to "pay my people to work on these plans" and had "to put jobs aside, bring other people, stay late, making sure that I complied with the contract."

Aguilar and Banegas paid Millot on time, although they were never given invoices as work was completed. A total of $9,000 was paid to Millot on the written contract. An additional $1,810 was paid to Millot for work not included in the written contract.

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Grading plans were submitted to the City of Los Angeles more than seven days after the contract was signed. Millot was to resubmit the grading plans after corrections, but he failed to do so. The street plans were submitted on January 15, 2003, but never completed or approved. The city wanted a plan for Thomas Street as well as Ashland Street, which abutted the property by approximately 50 feet. A plan for Ashland Street was not extra work because Millot knew the property bordered on Ashland Street, and he had been hired to prepare the street plan.

The building plans were to be completed and ready for submittal 17 working days after structural calculations were received from the structural engineer. Mynor Zelada was the structural engineer doing the calculations for the homes to be built on Thomas Street. Millot was to prepare designs or architectural drawings, send them to Zelada, who would do the structural calculations. The plans were not completed within the 17-day deadline. After Zelada received the drawings for two of the houses, he completed the structural calculations on April 15, 2002, and May 30, 2002. He completed the structural calculations on the other two houses on November 11, 2002, and June 11, 2003. Normally, it should not take more than 30 days after corrections to plans to obtain approval from the city. No one complained that Zelada took too long. He never received a request for corrections.

***3** The plans for 2810 Thomas Street were submitted to the city on May 16, 2002. Corrections were issued on May 28, 2002, but approval was not obtained until April 29, 2003, due to Millot's tardy nonperformance.

The building plans for 2816 Thomas Street were submitted to the city on January 7, 2003, and corrections issued January 14, 2003. The plans were not approved until August 18, 2003. Again, the delay was due to Millot's nonperformance.

The plans for 2822 Thomas Street were submitted to the city on January 7, 2003, although structural calculations had been completed on May 30, 2002. Corrections were issued January 13, 2003, but approval was not obtained until August 18, 2003, with the delay occasioned by Millot's untimely performance.

As to 2828 Thomas Street, plans were submitted to the city on January 7, 2003, and corrections issued January 21, 2003. Approval was given on September 5, 2003. The delay was attributable to Millot.

As the delays grew, Aguilar complained to Millot that his work was so late he had accumulated $16,000 in penalties. Millot apologized, said he was very busy, and promised to get the work done as quickly as possible.

The property was purchased for $100,000, with a $50,000 down payment, and the owners carrying the balance for one year. Aguilar and Banegas obtained a bridge loan on June 16, 2001, to pay off the $50,000 debt to the owners, while carrying it over for one year at a monthly payment of $625. In June 2002, they did not have blueprints so the bridge loan was extended, resulting in loan fees in the amount of $1,887. Construction loans between $185,000 and $190,000 were obtained on each of the four lots in January 2003, resulting in monthly payments of between $2,004 and $2,058. Because Aguilar and Banegas did not receive their permits due to Millot's delays, they paid on these loans before construction. The delays resulted in an increase of $155,000 in construction costs. The increased costs were approved by the company monitoring disbursal of the construction funds.

George Lightner testified as an expert witness on behalf of Aguilar. He expressed the opinion that Millot should have had a set of plans completed within six months of the oral contract. However, the first grading plans were not submitted until 12 months later, which was an unreasonable amount of time. Lightner's calculation of the cost of the delays, due to Millot, were based upon the increased costs after the initial six-month period. These costs included money spent on the bridge loans. Lightner found fault in Millot's lack of a timely response to the city's March 2002 suggested corrections to the grading plan. In Lightner's experience, it should have taken no more than 30 days to make the corrections.

Lightner also believed that Millot was responsible for unreasonable delays because some plans were submitted May 16, 2002, and within 12 days, corrections were suggested. The permit was not issued for grading until April 2003. Structural calculations were given to Millot on May 30, 2002, but building plans were not submitted until January 7, 2003.

***4** Lightner opined that Millot had an obligation to

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perform in a timely fashion. Millot had an obligation under the contract to determine what street design was required. Millot's first failure was the delay of seven or eight months in producing and submitting grading plans and structural plans, while costs on the bridge loan were accruing at the rate of $625 per month. Plans were submitted on three lots in January 2003. Lightner concluded that delay damages amounted to $54,000.

Lightner also calculated that there were additional damages of $155,000 resulting from increased construction costs. Industry costs increased 30 to 40 percent during the period of delay; Lightner used only a 15 percent increase in calculating damages. Lightner's figures were corroborated by the amount of additional money borrowed to finish the job. He did not use the $100 per day contract penalty in calculating damages.

DISCUSSION

I

AGUILAR WAS A PARTY TO THE ORAL CONTRACT

Millot's first argument is that Aguilar had no standing to file an action for breach of the oral contract because Aguilar was not a party to the contract. The record does not support Millot's position.

"When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465, disapproved on other grounds in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352, fn. 17.) In reviewing the evidence on appeal, all conflicts must be resolved in favor of the judgment, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571;*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

Banegas testified that he and Aguilar were parties to the oral contract with Millot. In addition, Banegas and Aguilar were co-owners of the property and parties to the subsequent written contract. Aguilar testified he made payments on the oral contract. This testimony constitutes substantial evidence that Aguilar was a party to the oral contract. Moreover, the trial court found that any oral contract was incorporated in and superseded by the written contract, and Aguilar was the party to that contract.

Moreover, Millot alleged in his cross-complaint that Aguilar, Banegas, and Balcomer were partners, agents, joint venturers, and employees of each other. Given the testimony at trial, as well as the language of Millot's own pleading, his claim that Aguilar lacked standing is without merit.

II

AGUILAR'S FAILURE TO PERFORM BY PAYMENT IN FULL ON THE ORAL CONTRACT DID NOT CONSTITUTE A BREACH

***5** Millot argues that if Aguilar was a party to the oral contract, Aguilar's failure to pay the full amount on the oral contract bars relief. We disagree.

Aguilar and Banegas testified Millot did not fully perform on the oral contract, and as a result, they paid only $6,000 of the $8,700 due. The trial court expressly found that Millot did not fully perform under the oral contract. Where there is a conflict in the evidence as to which party to a contract is in breach, and the trial court's finding of breach by one of the parties is supported by substantial evidence, the appellate court will not reweigh the evidence and is bound by the trial court's findings. (*Crag Lumber Co. v. Crofoot* (1956) 144 Cal.App.2d 755, 774.)

Aguilar, Banegas, and Lightner each testified to Millot's failure to complete the grading and design plans within a reasonable period of time under the oral contract. It was Millot's delays that caused Banegas and

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Aguilar to obtain a written contract setting forth Millot's obligations. The testimony of these three witnesses constitutes substantial evidence to support the judgment of the trial court that Millot was in breach of the oral contract.

III

THE STATUTE OF LIMITATIONS ON THE ORAL CONTRACT

Millot next argues the two-year statute of limitations on the oral contract under Code of Civil Procedure section 339 expired as of March 2004, but the instant action was not filed until October 2004. As a consequence, Millot contends no damages could be awarded for breach of the oral agreement. We disagree.

The trial court found that the written contract was intended to incorporate and supersede the oral contract, and Millot does not challenge this aspect of the trial court's finding on appeal. Aguilar did not file this action on the oral contract; instead, the complaint was based on the written contract. Because the written contract incorporated the oral contract, and because this action was based solely on the written agreement, the applicable statute of limitations is the four-year statute of limitations found in Code of Civil Procedure section 337. The two-year statute of limitations on an oral contract does not apply in this action.

IV

THE AWARD OF DAMAGES IN EXCESS OF $100 PER DAY

Millot argues the written contract contained a liquidated damages clause fixing damages at $100 per day in the event of a failure of either party to perform in a timely fashion. Millot contends the amount of damages awarded to Aguilar must be reversed because the damages exceeded the liquidated damages provision. We hold the trial court correctly found that the penalty provision was not intended to be a liquidated damages clause.

The written contract included a provision described as "penalties." The contract provided that if Millot did not perform his obligations in the time specified in the contract, his compensation would be reduced by $100 per day. Similarly, if Aguilar did not pay his obligations under the contract in a timely fashion, he would pay the sum of $100 per day. The trial court ruled, based upon the trial testimony, that the parties did not intend the penalty provision to be a liquidated damages clause. In light of the trial testimony, the trial court's finding was correct. (*Wright v. Rodgers* (1926) 198 Cal. 137, 140-141 [the court should first interpret a contract to determine "whether it was the intention of the parties to the agreement that the sum fixed upon as damages for the breach thereof by either should be a penalty," and if so, the provision is void].)

***6** The testimony at trial evidences a clear intent to create a penalty and no intent to create a liquidated damages clause. The parties were angry about what both sides viewed as untimely performance under the oral contract, and it was out of this anger that the penalty provision arose. Aguilar and Banegas wanted the $100 per day penalty to motivate Millot to perform his engineering duties in a timely fashion. The amount of the penalty was not related to potential damages if construction of the four residences did not take place. On the other hand, Millot was concerned about late payment by Aguilar, and in order to compel performance by Aguilar, Millot insisted on a reciprocal penalty. Millot's own testimony establishes that he did not consider the penalty to be an approximation of damages, because it did not take into account extra pay for his employees and other work that he put aside.

Having concluded, as a matter of contract interpretation, that the penalty provision was never intended to be a liquidated damages clause, it follows that it was an unenforceable penalty provision. As our Supreme Court explains, "A liquidated damages clause will generally be considered unreasonable, and hence unenforceable under [Code of Civil Procedure] section 1671[, subdivision] (b), if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. The amount set as liquidated damages 'must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained.' [Citation.] In the absence of such relationship, a contractual clause purporting to predetermine damages 'must be construed as a pen-

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alty.' [Citation.] 'A penalty provision operates to compel performance of an act [citation] and usually becomes effective only in the event of default [citation] upon which a forfeiture is compelled without regard to the damages sustained by the party aggrieved by the breach [citation]. The characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract. [Citations.]' [Citation.] [¶] In short, '[a]n amount disproportionate to the anticipated damages is termed a "penalty." A contractual provision imposing a "penalty" is ineffective, and the wronged party can collect only the actual damages sustained.' (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 931; see also *Ebbert v. Mercantile Trust Co.* (1931) 213 Cal. 496, 499['[A]ny provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty.'].)" (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977-978.)

The $100 penalty in this case "bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach." (*Ridgley v. Topa Thrift & Loan Assn., supra*, 17 Cal.4th at p. 977.) There was no " 'reasonable endeavor by the parties to estimate a fair average compensation for any loss' " that could be anticipated by late performance of either party to the contract. (*Ibid.*) As a result, the provision was an unenforceable penalty, which the trial court correctly did not enforce.

***7** Our Supreme Court long ago recognized that costs are easily ascertained in advance by "practical engineers or contractors engaged in establishing and doing such work." (*Leslie v. Brown Brothers Incorporation* (1929) 208 Cal. 606, 616.) The $100 penalty in this case did not represent an effort at approximating actual costs or damages-as noted above, the figure merely arose from the emotional frustration of the contracting parties. The trial court's conclusion that the contracting parties did not intend to create a liquidated damages clause is amply supported by the record.

"The legal measure of damages for breach of contract is defined in Civil Code section 3300: 'For the breach of an obligation arising from contract, the measure of damages ... is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.' " (*Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 747.) The damages were properly calculated by the trial court.

V

MILLOT'S BREACH OF THE CONTRACT

Millot argues he did not breach the written contract. Our review of the record demonstrates substantial evidence of a material breach by Millot, and the trial court's findings that Millot did not perform within a reasonable period of time within the meaning of Civil Code section 1657 [FN6] are supported by substantial evidence.

> FN6. Under Civil Code section 1657, performance of a contract within a reasonable period of time is an implied term of the agreement. (*Henry v. Sharma* (1984) 154 Cal.App.3d 665, 669.)

The trial court's detailed statement of decision identified material contract breaches by Millot. As to the oral contract, Lightner testified Millot should have completed a full set of design plans within six months, which was not accomplished. The trial court, as it was free to do, gave great weight to Lightner's testimony. Among the material breaches of the written contract found by the trial court were the following: failure to complete the grading plans within a reasonable time-one set being approved in March 2003 and the other three in August 2003; complete failure to obtain approval for the street improvement plans; and failure to promptly deliver design plans to Zelada for structural calculations. The trial court also credited testimony that Millot admitted being late in his work.

This summary of evidence easily satisfies the requirement of substantial evidence of a material breach of contract by Millot.

VI

WAIVER OF THE BREACH BY AGUILAR'S PAYMENT OF $3,700

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Millot contends any breach by Millot was waived when Aguilar paid $3,700 on the contract in April 2003. We conclude there was no waiver.

A right of action for breach of contract is not necessarily waived by payment on the contract with knowledge of the other party's breach. (*Leonard v. Home Builders* (1916) 174 Cal. 65, 68 .) "In order to recover for breach of contract, the nonbreaching party must prove that it has substantially performed the conditions of the breaching party's performance (or that performance was excused). If it fails to do so, it obtains no recovery. If it does establish this predicate, it is entitled to recover all damages forseeably caused by the other party's breach. [Citations.]" (*Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1051.) A breach by one party to a contract does not absolve another party to the contract of the duty of good faith and fair dealing. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 578.) Whether a party has waived a breach by performance "depends upon the factual showing, and there is no proof as a matter of law of any express or implied waiver, which would warrant setting aside the contrary finding of the trial court." (*California Milling Corp. v. White* (1964) 229 Cal.App.2d 469, 479.) "It is elementary that when there are two parties to a contract and one of them does not do all that he is required to do under the agreement, the other party may nevertheless fully perform his part of the bargain and then hold the defaulting party liable for damages." (*Ibid.*)

***8** The record supports the inference that Aguilar did not waive Millot's breach by making a contract payment. As noted above, Aguilar was required to perform his contractual obligations in order to be able to pursue a damage claim against Millot. Partial payment on the contract thus satisfied this requirement. In addition, there is substantial evidence Aguilar and Banegas did not intend to waive any breach by Millot by making a payment. They testified to their ongoing dissatisfaction with Millot's late performance, but still believed they were better off continuing with Millot rather than starting from scratch with a new engineer. This is not evidence of an intent to waive Millot's breach. Because we review the record for substantial evidence and view the evidence in the light most favorable to the judgment, we find no merit to Millot's waiver contention.

VII

LOAN COSTS NOT INCURRED IN AGUILAR'S NAME

Millot contends the trial court erred in awarding construction loan costs not incurred in Aguilar's name, but rather in the name of Bancomer. Because this issue was not presented in the trial court, we deem it forfeited.

" '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]' " (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fns. omitted.) "Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack. [Citation.] Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.)

Aguilar's relationship to Bancomer was not raised as an issue in the trial court by Millot. Millot's answer to Aguilar's complaint, his cross-complaint, and his written arguments to the court at the conclusion of trial did not suggest an argument that Aguilar could not recover because construction loans were in the name of Bancomer. Because both Aguilar and the trial court were denied the opportunity to address this issue at trial, we decline to hear it on appeal. The issue is forfeited.

VIII

THE LACK OF ORAL ARGUMENT

At the end of trial, the trial court and counsel agreed that arguments would be submitted in writing. The

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trial court said it would consider "any oral argument that [it] need[s] after" reading the written arguments. After submission of the written arguments, the trial court issued a tentative statement of decision. Millot filed a response to the tentative statement of decision, in which he objected to the outcome and to the fact the trial court did not consider further oral arguments after reading the written arguments. The trial court ruled that Millot did not make a timely request for further oral argument. Millot now argues the trial court's failure to allow oral argument requires reversal.

***9** We again find that the issue was waived. The parties agreed that arguments would be made in writing. The trial court stated it would consider oral argument if it were needed. Millot did not ask the court for the opportunity to make an oral argument until after issuance of the tentative statement of decision. In the absence of a timely request for oral argument, the issue is waived.

In any event, Millot had no right to oral argument after a bench trial. " 'Oral argument in a civil proceeding tried before the court without a jury [ ] is a privilege, not a right, which is accorded to the parties by the court in its discretion.' [Citations .]" (*Gillette v. Gillette* (1960) 180 Cal.App.2d 777, 781-782.) Here, the trial court allowed thorough written arguments. Millot fails to demonstrate the need for additional oral argument, or that there was a reasonable probability of a more favorable result had he been allowed to present oral argument. (Cal. Const., art. VI, § 13.)

DISPOSITION

The judgment is affirmed. Aguilar is to recover his costs on appeal.

We concur: TURNER, P.J., and MOSK, J.
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United States District Court,
S.D. New York.
HOMEBRIDGE MORTGAGE BANKERS CORP.,
Plaintiff,
v.
VANTAGE CAPITAL CORP., Michael Brauser, and Scott Harris, Defendants.
No. 06 Civ. 9465(LLS).

Dec. 5, 2008.

West KeySummary
Indemnity 208 37

208 Indemnity
208II Contractual Indemnity
208k34 Scope and Extent of Liability
208k37 k. Attorney Fees. Most Cited Cases
Agreement between plaintiff and defendants did not require indemnification of attorney fees under New York law for a suit between the parties to the agreement. The plaintiff attempted to argue that the word 'costs' as used in the agreement included attorney fees for litigation based on alleged violations. The agreement did not contain unmistakably clear language showing that the other parties to the agreement agreed to pay the plaintiff's attorney fees for suing them on the agreement.

Memorandum and Order

LOUIS L. STANTON, District Judge.

***1** Plaintiff Homebridge Mortgage Bankers Corp. moves for summary judgment in its favor on Counts One and Two of its Amended Complaint, which allege that two of the defendants (Vantage Capital Corp. and its owner, Michael Brauser) breached the parties' Settlement and Purchase Agreement by failing to pay over $860,000 supposedly owed to Homebridge under that contract.[FN1]

FN1. Homebridge says it will dismiss its remaining claims if its motion is granted. *See* Pl.'s Mem. 1, 1 n. 2.

Defendants oppose that motion and cross-move for partial summary judgment dismissing Homebridge's claims that under Section 14(b) of the Agreement, Vantage and Brauser must indemnify Homebridge for the attorneys' fees and expenses it has incurred prosecuting this action.

For the reasons which follow, plaintiff's motion is denied and defendants' cross-motion is granted.

A. Plaintiff's Motion

Claiming entitlement to summary judgment, Homebridge contends that "As justification for failing to honor the Settlement Agreement, Defendants allege breaches of the Settlement Agreement by Homebridge that either did not occur or are immaterial" (Pl.'s Mem. 2), and that "there are no material facts in dispute with respect to Counts One and Two" (*id.* 3).

Under New York law, which governs the Agreement, "a party's performance under a contract is excused where the other party has substantially failed to perform its side of the bargain or, synonymously, where that party has committed a material breach." *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 186 (2d Cir.2007), citing *Hadden v. Consol. Edison Co. of N.Y.*, 3A N.Y.2d 88, 96 (1974).

The record shows that several material questions of fact are genuinely in dispute, including those set forth below.

1.

There is a genuine issue of material fact about whether Homebridge, in violation of § 5(a) of the Agreement, owes over $120,000 in bonuses to its former Florida Branch Manager Michael Samuels, whom Vantage employed after he resigned from Homebridge.

Section 5(a) provides that "Homebridge agrees to pay all commissions and other amounts due and owing to the Personnel with respect to mortgage loans closed on or before August 31, 2006." Under the Agree-

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ment, "Personnel" includes Samuels.

Homebridge argues that no bonuses are "due and owing" to Samuels under § 5(a). *See* Pl.'s Mem. 20. Homebridge's Director of Sales, James Clooney, says he "reviewed the performance of Homebridge's Florida branch to determine whether bonuses should be paid" to Samuels and others, and that "the bonuses paid to these individuals were decided upon in Homebridge's sole discretion based on the performance of the Florida office and my assessment of the individual's contribution to that performance." Clooney Apr. 27, 2008 Decl. ¶ 5 (Pl.'s Ex. 8).

Samuels, on the other hand, testified that the bonuses were mandatory, even if their amount was undefined and negotiable:

Q. So I take it the bonuses were not mandatory as far as you were concerned, right?

A. Mandatory for who? Mandatory that I get them, yes.

***2** Q. But they were discretionary in terms of the money that was given in the month, right?

A. The amount was an arbitrary number, yes, decided by the CEO, Jim Clooney, or whatever his title is.

Samuels Dep. Tr, at p. 66:12-66:20 (Pl.'s Ex. 10). The negotiations were arduous: Samuels complained that Homebridge arbitrarily refused to pay him the full amounts of the bonuses owed to him. *See id.* at pp. 57:17-58:1 (Pl.'s Ex. 10) ("Again, it was an arbitrary number. If they owed me 30, they'd say: We'll give you 15, take it or leave it."), p. 62:2-12 (Pl.'s Ex. 10) ("I always based my calculation off of what I was supposed to be paid, and then presented to them, and then they said we will give you a fraction of it * * * my bonus * * * was always an uncertain thing and always had to kind of fight for my money."). Samuels testified that Homebridge still owes him between $120,000 and $150,000 in bonuses for about January through August 2006. *See* Samuels Dep. Tr. at pp. 209:11-17, 215:22-216:7, 218:17-219:17 (Defs.' Ex. B).

It is not obvious whether the bonuses Samuels is claiming were derived from "mortgage loans" as required by § 5(a), (*see* p. 3 above), but there is testimony from former Homebridge Processing Manager Troy Stoloff implying that the Florida branch office's gross revenues (on which Samuels says his bonuses were based, *see id.* at pp. 65:1-66:11, Pl.'s Ex. 10) were substantially derived from fees associated with mortgage loans closed each month, *see* Stoloff Dep. Tr. at p. 48:1-15 (Pl.'s Ex. 11).

Thus, there are substantial issues which would have to be resolved in Homebridge's favor before one could conclude that as a matter of law the bonuses were not required to be paid, and that it had sole discretion whether or not to pay Samuels any bonuses at all.

2.

There is a genuine issue of material fact about whether Homebridge violated § 9(b) of the Agreement in mid-September 2006 by soliciting the reemployment of Joseph Chiofalo and Anthony Wong when they were allegedly employed by Vantage.

Chiofalo, Wong, defendant Scott Harris and several others employed in Homebridge's now-defunct branch office located at 350 Fairway Drive, Deerfield Beach, Florida (the "Office") on about August 31 or September 1, 2006 resigned from Homebridge and were shortly thereafter hired by Vantage. Immediately after Harris announced his resignation, Jeffrey Feinerman, then a law partner of Homebridge's Chief Executive Officer (Nicholas Bratsafolis), went to the Office to oversee its operations and meet with its remaining employees. Feinerman on about September 1, 2006 spoke with about thirty of those employees and advised them that Homebridge would continue to operate and support the Office, which it did under Feinerman's supervision until mid-September 2006.

Vantage and Brauser claim that in mid-September 2006 Feinerman solicited the employment of Chiofalo and Wong and thus violated § 9(b), which requires that for a period of three years after September 1, 2006:

***3** * * * none of Homebridge or its Affiliates shall directly or indirectly, employ or solicit the employment of any employee of Vantage, Brauser, Harris or any of its or their Affiliates who was an

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> employee working in the Office as of August 31, 2006 and resigned such employment.

That claim finds support in several undisputed facts. *First*, Feinerman admits that he "had dinner with Anthony Wong and Joseph Chiafolo [*sic*] in mid-September 2006 after they had resigned from Homebridge and one or both of them had decided to work for Vantage", Feinerman Apr. 22, 2008 Decl. ¶ 10 (Pl.'s Ex. 22), during which they mentioned the possibility of returning to work for Homebridge, *see* Feinerman Dep. Tr. at pp. 253:10-254:24, 271:5-273:20 (Defs.' Ex. M). *Second*, the parties agree that shortly before the dinner, Feinerman stated in an e-mail to Homebridge's Chief Executive Officer, Bratsafolis, that:

> Chiofalo and [Wong] [FN2] want to have dinner tomorrow night. Do not believe they made the right decision. Want to talk about what concerns they had leading up to Scott leaving.
>
> FN2. The text of Feinerman's e-mail says "Chiofalo and Morelli want to have dinner" (Feinerman's Sept. 10, 2005 E-Mail to Clooney and Bratsafolis, Defs.' Ex. U), but Feinerman testified that "It: was Chiofalo and Wong" who asked him to go to dinner (*see* Feinerman Dep. Tr. at p. 271:5-19, Defs.' Ex. M) and that his e-mail's reference to Morelli, instead of Wong, "was a miss type by me" (*see id.*).

Feinerman's Sept. 10, 2006 E-Mail to Clooney and Bratsafolis (Defs .' Ex. U). *Third*, it is undisputed that Homebridge later rehired Chiofalo.

Homebridge, in contrast, denies the claim that it solicited Chiofalo and Wong, contending that Feinerman's dinner with them "was purely social." *See* Pl.'s Mem. 22-23. Feinerman declares under penalty of perjury that the "dinner was at their request", and that during the meal he told them that he "could not and would not speak with them about returning to work for Homebridge ." Feinerman Decl. ¶ 10 (Pl.'s Ex. 22). Furthermore, Homebridge asserts that the rehiring of Chiofalo in no way shows that it solicited him at that mid-September 2006 dinner. In about November 2006 (*see* Feinerman Dep. Tr. at p. 253, Defs.' Ex. M), Homebridge claims, Chiofalo and another then-employee of Vantage showed up unannounced to pay a visit to Bratsafolis at his New York City office and "beg for their jobs back" (*see* Bratsafolis Dep. Tr. at pp. 338-39, Pl.' Ex. 21), at which time Bratsafolis says he told them "that Homebridge would be unable to offer any employment to them at that time" (*see id.*). Homebridge alleges that it was not until March 2007,[FN3] long after the dinner took place, when Homebridge ultimately rehired Chiofalo. *See* Bush May 28, 2008 Decl. ¶ 3 (Ex. A to Pl.'s Reply).

> FN3. Homebridge claims that the rehiring of Chiofalo in March 2007, even if it facially violated the Agreement's terms, cannot excuse Vantage and Brauser's failures to make the required four $200,000 payments due from October 2006 through January 2007 or the $39,000 security deposit payment due in October 2006. *See* Pl.'s Reply 4-5.

Challenging the veracity of those denials, Vantage and Brauser argue that Homebridge's assertion that the dinner

> * * * was "social" and was aimed to address concerns these two Vantage employees had with plaintiff's operations prior to their resignations, belies credibility. What would be the purpose of discussing gripes these employees had with plaintiff if they were no longer employees? By sheer coincidence, Chiofalo was the same employee Bratsafolis claims to have spoken with "unannounced," and was, not surprisingly, rehired by plaintiff * * * following his alleged "social" meetings with Feinerman and Bratsafolis.

***4** Defs.' Mem. 10-11.

Thus, there are triable questions about whether Homebridge's denials are credible, and whether Homebridge directly or indirectly solicited the employment of Chiofalo and Wong in violation of § 9(b).

3.

Homebridge argues that its alleged breaches of the Agreement are immaterial as a matter of law and that they cannot excuse Vantage and Brauser's failure to make the payments required by the contract. Pl.'s

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Mem. 2, 17. According to Homebridge, the parties executed the Agreement after it threatened to sue the defendants for allegedly inducing most of the employees of its now-defunct Deerfield Beach, Florida office to resign and join Vantage. *See id.* 2-5, 5 n. 4. Homebridge argues that "none of the breaches by Homebridge, even if proven, went to the 'root of the agreement' between the parties in this case" (*id.* 17), which it says was first and foremost a means to avoid the threatened litigation (*see id.* 5, 5 n. 4) by providing for the release (*see* Agreement § 3), effective upon payment of several installments totaling $1.2 million and other amounts (*see id.* §§ 2-3), of its claims against the defendants for much greater sums in damages arising from that mass resignation (*see* Bratsafolis Dep. Tr. at pp. 288-89, Pl.'s Ex. 21).

Vantage and its owner, Brauser, however, assert that "As the ink on the Agreement was drying, plaintiff began to commit various acts in violation of its terms, including violations that went to the core of defendants' motivation in entering into the Agreement" (Defs.' Opp. 1), following which "there was simply nothing of value Vantage was paying for" thereunder (*id.* 14). They claim that the Agreement was, in essence, a transaction whereby Vantage purchased an existing business from Homebridge, taking over its Deerfield Beach office and retaining most of its then-employees based there, in exchange for the payments required by the contract. *See* Brauser May 16, 2008 Decl. ¶¶ 4-5 (Defs.' Ex. C); Defs.' Opp. 1. Brauser says that he (through Vantage) made the initial $400,000 payment due to Homebridge under the Agreement (Brauser Decl. ¶ 6, Defs.' Ex. C), but shortly thereafter "learned of actions taken by Homebridge which violated the terms and the spirit of the Agreement" (*id.* ¶ 7), including its alleged failure to compensate its former employees who resigned to join Vantage for business conducted prior to August 31, 2006 and its claimed solicitations of then-employees of Vantage (*id.* ¶ 5, 10-12), and that consequently Vantage did not make any further payments contemplated by the Agreement (*id.* ¶ 14). Brauser alleges that Homebridge's claimed breaches deprived him of what he bargained for under the Agreement: assurance that the business which Vantage purchased would be free of competition and interference from Homebridge and that the former Homebridge employees who were joining Vantage would be content. *See id.* ¶¶ 4-5, 7, 10-12, 14.

***5** As the New York Court of Appeals stated in *Hadden*, 34 N.Y.2d at 96, 356 N.Y.S.2d 249, 312 N.E.2d 445:

> There is no simple test for determining whether substantial performance has been rendered and several factors must be considered, including the ratio of the performance already rendered to that unperformed, the quantitative character of the default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance.

As stated by the Second Circuit: "The issue of whether a party has substantially performed is usually a question of fact and should be decided as a matter of law only where the inferences are certain." *Merrill Lynch*, 500 F.3d at 186-87;*accord Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc.*, 361 F.Supp.2d 283, 295 (S.D.N.Y.2005) ("in most cases, the question of materiality of breach is a mixed question of fact and law-usually more of the former and less of the latter-and thus is not properly disposed of by summary judgment"); *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 243, 129 N.E. 889 (1921) (Cardozo, J.) ("Where the line is to be drawn between the important and the trivial cannot be settled by a formula. * * * The question is one of degree, to be answered, if there is doubt, by the triers of the facts, and, if the inferences are certain, by the judges of the law." (internal citations omitted)); *F. Garofalo Elec. Co., Inc. v. New York University*, 300 A.D.2d 186, 189, 754 N.Y.S.2d 227 (1st Dep't 2002) ("The question of whether there has been substantial performance-or a breach-is to be determined, whenever there is any doubt, by the trier of fact."); *Magi Communications, Inc. v. Jac-Lu Associates*, 65 A.D.2d 727, 729, 410 N.Y.S.2d 297 (1st Dep't 1978) ("At issue also are defendants' factual allegations of breach of contract which Special Term held to be of such minor importance as to be insufficient to justify defendants' refusal to honor their note. Issue determination is not the function of summary judgment. Materiality of a breach is for trial." (internal citations omitted)).

On this record, one cannot determine summarily that Homebridge substantially performed its obligations under the Agreement even if it breached §§ 5(a) and 9(b) by failing to pay over $120,000 in bonuses owed

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to Samuels and by soliciting two then-employees of Vantage in mid-September 2006.

* * *

The forgoing and other contested questions of fact must be tried. Plaintiff's motion for summary judgment is denied.

B. Defendants' Cross-Motion

Defendants cross-move for partial summary judgment dismissing Homebridge's claims that Section 14(b) of the Agreement requires that Vantage and Brauser indemnify Homebridge for the attorneys' fees and expenses it has incurred in this lawsuit against both of them and another.

Under New York law, Section 14(b)'s language is insufficient to support those claims for attorneys' fees. Section 14(b) does not mention attorneys' fees.[FN4] It states that:

> FN4. Under New York law, an indemnity clause need not always include the term "counsel fees" to provide indemnification for such fees. *See* *Di Perna v. American Broadcasting Cos., Inc.*, 200 A.D.2d 267, 270 n. 3, 612 N.Y.S.2d 564 (1st Dep't 1994) (defendant construction site owner was entitled to recover its counsel fees incurred defending injured worker's main suit from third-party defendant construction contractor).

***6** * * * Vantage and Brauser will indemnify Homebridge from and against, any liabilities, losses, costs, claims and damages resulting from, arising out of or relating to (i) the Assumed Liabilities, including any claims for Assumed Liabilities resulting from the failure to obtain any required consent for the assignment of any Assumed Contract, Assumed Lease or Assumed Furniture and Equipment Lease, (ii) any breach of his or its representations and warranties in this Agreement, (iii) failure to perform any covenant contained in this Agreement, (iv) any action or inaction by Harris after the Effective Date, or (v) the amounts of any claims of any loan officers for any commissions with respect to mortgage loans or applications in process as of the Effective Date.

Homebridge argues that the term "costs" as used in that clause includes its attorneys' fees for litigating this suit on the contract. *See* Pl.'s Reply 11-12 (" * * * 'it is difficult, if not impossible, to ascertain for what it was that the parties had agreed to indemnify' if this clause were not intended to cover Homebridge's 'costs,' namely its attorneys fees, resulting from a failure by Vantage and Brauser to make the payments required by the Settlement Agreement * * * "). However, New York courts have construed the term "costs" in various contracts as excluding attorneys' fees. *See* *Mutual Life Ins. Co. v. Kroehle*, 29 Misc. 481, 483, 61 N.Y.S. 944, 945 (Sup.Ct., N.Y. Co. 18 99) ("Throughout the correspondence and in the contract there is no mention of any counsel fee to be paid by defendant. The only word used is 'costs,' which has a well-defined, and, when applied to legal proceedings, universally understood, meaning; and that meaning does not include counsel fees."); *see also* *Royal Discount Corp. v. Luxor Motor Sales Corp.*, 9 Misc.2d 307, 308, 170 N.Y.S.2d 382, 383 (App.T., 1st Dep't 1957) ("The terms 'costs' and 'expenses' as employed in the assignment agreement do not include attorney's fees, and attorney's fees are not recoverable in the absence of express language in the contract or statute." (internal citation omitted)); *cf.* *Utilisave Corp. v. Benjamin Shapiro Realty Co., L.P.*, 282 A.D.2d 403, 404, 723 N.Y.S.2d 669 (1st Dep't 2001) ("However, we find that the provision in the agreement providing that defendant would be liable for 'collection costs' did not include liability for attorney's fees ." (internal citation omitted)).

The New York Court of Appeals in *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 549 N.Y.S.2d 365, 548 N.E.2d 903 (1989) rejected a claim for attorney's fees which rested on the indemnification provision in a contract "whereby defendant agreed to design, install and supply a computer for plaintiff" (*id.* at 489-90, 549 N.Y.S.2d 365, 548 N.E.2d 903), stating:

> Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear

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from the language of the promise.

***7** The clause in this agreement does not contain language clearly permitting plaintiff to recover from defendant the attorney's fees incurred in a suit against defendant. On the contrary, it is typical of those which contemplate reimbursement when the indemnitee is reguired to pay damages on a third-party claim. It obligates defendant to "indemnify and hold harmless [plaintiff] * * * from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees" arising out of breach of warranty claims, the performance of any service to be performed, the installation, operation and maintenance of the computer system, infringement of patents, copyrights or trademarks and the like. All these subjects are susceptible to third-party claims for failures in the installation or operation of the system. None are exclusively or unequivocally referable to claims between the parties themselves or support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract.

Id. at 492, 549 N.Y.S.2d 365, 548 N.E.2d 903 (Court of Appeals' brackets and elipses) (internal citations omitted); *see also Coastal Power Int'l, Ltd. v. Transcontinental Capital Corp.*, 10 F.Supp.2d 345, 371 (S.D.N.Y.1998) (The agreement could be read to require the loser in a suit for its breach to pay the winner's attorneys' fees, "But the clear message of *Hooper Associates* is that this is not enough."), *aff'd*,182 F.3d 163, 165 (2d Cir.1999) ("This Court affirms the district court's rejection of Coastal's indemnity claim.").

Section 14(b) of the Agreement does not contain unmistakably clear language showing that Vantage and Brauser agreed to pay Homebridge's attorneys' fees for suing them on that contract. Defendants' cross-motion is granted.

CONCLUSION

For the reasons set forth above, plaintiff's motion for summary judgment (Docket No. 35) is denied, and defendants' cross-motion for partial summary judgment (Docket No. 42) is granted.

So ordered.

S.D.N.Y.,2008.
Homebridge Mortg. Bankers Corp. v. Vantage Capital Corp.
Not Reported in F.Supp.2d, 2008 WL 5146957 (S.D.N.Y.)

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