Affirmed and Memorandum Opinion filed June 28, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00854-CV

COMMUNITY MANAGEMENT, LLC, Appellant

V.

CUTTEN DEVELOPMENT, L.P. AND DAVIS DEVELOPMENT, INC., Appellees

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On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 2011-47964

MEMORANDUM OPINION

Community Management, LLC purchased a $33 million apartment complex from Cutten Development, L.P. and Davis Development, Inc. (Appellees) and subsequently sued because of misrepresentations concerning the condition of the property. The trial court granted Appellees' motion for summary judgment and signed a final judgment in their favor. In this appeal, we must determine whether a "disclaimer of reliance" provision in the purchase agreement precludes

Community's fraud claims as a matter of law. We hold that the disclaimer of reliance provision is clear and unequivocal, and the circumstances surrounding the contract's formation do not suggest the provision is unenforceable.

We affirm.

I. BACKGROUND

In April 2007, Community's representative Virgil Benton and Appellees' representative Lance Chernow began negotiating the sale of an apartment complex. In May, Community and Appellees signed a purchase and sale contract for Community to purchase the property.[1] The contract provided for a "feasibility period" that ended in June. According to the contract, during the feasibility period Appellees were to provide Community with specified documents, and Community was to inspect the property, ascertain the suitability of the property, and review the specified documents.[2] Community could terminate the contract during the feasibility period if it found the property unsatisfactory.

According to Benton's affidavit testimony, he sent a "commercial seller's property disclosure statement" to Chernow for completion during the negotiations or the feasibility period.[3] Benton testified that during the negotiations, Chernow "made a point of wanting to limit the knowledge of the Seller when completing any type of property disclosure form to be provided to the purchaser." Chernow

[1] A different company signed the contract as purchaser and then assigned its interest in the transaction to Community before closing. The distinction is immaterial, and we therefore refer to both companies as Community in this opinion.

[2] Community does not contend that a property disclosure statement was listed as one of the specified documents Appellees were required to produce.

[3] The summary judgment record includes two affidavits from Benton. In the first affidavit, Benton testified that he sent the disclosure statement to Chernow "during the negotiations." In the second affidavit, Benton testified that he sent the disclosure statement "during the feasibility period." The parties do not contend that any distinction is important to the disposition of this appeal.

also "made a point of wanting to identify who would represent the knowledge of the Seller when completing the property disclosure form." The contract includes Section 8.1.4 as follows:

> Representations and warranties (a) above made to the knowledge of Seller or (b) in any property disclosure delivered by Seller to Purchaser, shall not be deemed to imply any duty of inquiry. Further any representations, warranties or disclosures contained in any property disclosure prepared by Seller and delivered to Purchaser shall be limited to the "knowledge of Seller" and shall be governed by the limitations of this Contract, including this Section 8.1.4. For purposes of this Purchase Contract, the term Seller's "knowledge" shall mean and refer to the actual knowledge of the Designated Representative (as hereinafter defined) of the Seller and shall not be construed to refer to the knowledge of any other partner, officer, director, agent, employee or representative of the Seller, or any affiliate of the Seller, or to impose upon such Designated Representative any duty to investigate the matter to which such actual knowledge or the absence thereof pertains, or to impose upon such Designated Representative any individual personal liability. As used herein, the term Designated Representative shall refer to Lee Little, Regional Manager, of TX-Davis Development, Inc. and Fred S. Hazel, Vice President of TX-Davis Development.

The contract also includes an "as is" and "disclaimer of reliance" provision, Section 8.1.2, as follows:

> Except for the representations and warranties expressly set forth above in Section 8.1.1, the Property is expressly purchased and sold "AS IS," "WHERE IS," and "WITH ALL FAULTS." The Purchase Price and the terms and conditions set forth herein are the result of arm's-length bargaining between entities familiar with transactions of this kind, and said price, terms and conditions reflect the fact that Purchaser shall have the benefit of, and is not relying upon any information provided by Seller or Broker or statements, representations, or warranties, express or implied, made by or enforceable directly against Seller or Broker, including, without limitations, any relating to the value of the Property, the physical or environmental condition of the Property, any state, federal, county or

> local law, ordinance, order or permit; or the suitability, compliance or lack of compliance of the Property with any regulation, or any other attribute or matter of or relating to the Property (other than any covenants of title contained in the deeds conveying the Property and the representations set forth above). Purchaser represents and warrants that as of the date hereof and as of the Closing Date, it has and shall have reviewed and conducted such independent analysis, studies, reports, investigations and inspections as it deems appropriate in connection with the Property. . . .[4]

There were nine specific representations and warranties in Section 8.1.1 that were made "[f]or the purpose of inducing" Community to enter into the contract, such as (1) possession of marketable title; (2) full disclosure of existing leases; and (3) the absence of outstanding or threatened claims, litigation, or condemnation. But Section 8.1.1 did not require Appellees to disclose known defects about the property.

During the feasibility period, Chernow returned a completed property disclosure statement to Benton. The four-page document asked whether Appellees were "aware of," among other things, "Water-caused damage" or "Any past or present roof leaks or other roof problems." Appellees checked a box "no" next to each of these questions. Benton testified by affidavit that he "relied heavily" upon the representations contained in the disclosure statement when deciding to complete the terms of the contract and close on the property. The parties closed in August 2007.

By the summer of 2010, tenants had reported water leaks in fourteen of the twenty-six buildings on the property. Benton testified that Community discovered the roofs had not been constructed in accordance with the construction plans, which Appellees had provided to Community during the feasibility period.

[4] Section 8.1.2 also disclaims Community's reliance on any documents from third parties that Appellees provided to Community, and it includes other provisions not material to this case.

Community then searched through the property management computer system for records of service request orders. Community discovered that Appellees had received about 58 service requests for water leaks during 2006 and 2007. The records revealed that Appellees performed repairs in response to these complaints, and all of the repairs were done prior to Appellees entering into the contract with Community.

Community sued Appellees and identified the following claims: breach of contract, negligence, breach of implied warranty, fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and rescission and cancellation of the contract. Appellees filed a traditional motion for summary judgment on each of these claims. The trial court granted the motion and ordered that Community take nothing from Appellees. The court held a bench trial on the issue of attorney's fees and then signed a final judgment awarding Cutten trial and appellate attorney's fees. Community appealed.

II. ISSUES PRESENTED

In its brief, Community identifies thirteen "issues presented," but Community does not present independent argument on these issues or refer to these issues specifically in the argument section of its brief. We discern four primary contentions on appeal. First, Community contends the trial court erred by granting summary judgment based on the "as is" and "waiver of reliance" provisions. Second, and related to the first, Community contends that Appellees fraudulently induced Community to enter into the contract. Third, Community contends the trial court erred by granting a summary judgment while Community's motions to compel were pending. Fourth and finally, Community contends the trial court erred to the extent it granted summary judgment based on the statutes of limitations.

Appellees contend that the summary judgment must be affirmed because Community has failed to challenge on appeal all of the grounds for summary judgment. Appellees contend further that the trial court correctly granted summary judgment on all of Community's claims because the contract contained valid "as is" and "disclaimer of reliance" provisions. Appellees contend that Community failed to preserve its issue concerning the motions to compel. Finally, Appellees contend that the trial court correctly granted summary judgment based on the statutes of limitations.

III. STANDARD OF REVIEW

We review summary judgments de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Movants for a traditional summary judgment, such as Appellees, must show that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. *See id.* Appellees are entitled to summary judgment if the evidence conclusively negates at least one essential element of each of Community's causes of action. *See Little v. Tex. Dep't of Crim. Justice*, 148 S.W.3d 374, 381 (Tex. 2004). We review the evidence in the light most favorable to the nonmovant, Community, crediting evidence favorable to Community if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *See Mann Frankfort*, 289 S.W.3d at 848.

IV. NON-FRAUD CLAIMS

Appellees contend that the summary judgment must be affirmed because Community has failed to challenge and negate all independent grounds for summary judgment. We agree with Appellees regarding Community's non-fraud claims only.

When, as here, the trial court does not specify the basis for its summary judgment, the appealing party must show that the trial court erred to base the summary judgment on every ground asserted in the motion. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995). If an appellant fails to challenge all grounds on which the summary judgment may have been granted, the appellate court must uphold the summary judgment. *Heritage Gulf Coast Props., Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 653 (Tex. App.—Houston [14th Dist.] 2013, no pet.). This rule applies to particular claims disposed by summary judgment. *See DeWolf v. Kohler*, 452 S.W.3d 373, 389 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (affirming summary judgment on one of several claims because the appellant did "not challenge all of the independent grounds on which summary judgment on this claim may have been granted"); *Adams v. First Nat'l Bank of Bells/Savoy*, 154 S.W.3d 859, 875 (Tex. App.—Dallas 2005, no pet.) ("[A] reviewing court will affirm the summary judgment as to a particular claim if an appellant does not present argument challenging all grounds on which the summary judgment could have been granted."); *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 898 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (affirming summary judgment on the appellant's DTPA claim because the appellant challenged on appeal only one of two possible grounds for granting the motion for summary judgment).

In the motion for summary judgment, Appellees requested summary judgment on (1) the breach of contract claim because there was no contractual duty for Appellees to make disclosures regarding the physical condition of the property; (2) the negligence claim because the economic loss rule precluded recovery; (3) the breach of implied warranty claim because each of the implied warranties

alleged in Community's petition[5] did not apply to this transaction for reasons other than the "as is" clause; (4) the negligent misrepresentation claim because any reliance by Community was not justifiable due to the adversarial context of the transaction and Community's independent investigation; and (5) the rescission and cancellation claim because rescission and cancellation are merely remedies for fraud and not an independent cause of action.

On appeal, Appellees contend that Community has failed to address these independent grounds for summary judgment in its brief. We agree. The summary judgment may have been rendered on these claims "properly or improperly" based on the unchallenged grounds. *See Ellis*, 68 S.W.3d at 898. Thus, we must affirm the summary judgment on these claims. *See DeWolf*, 452 S.W.3d at 389.

Regarding Community's fraudulent misrepresentation and concealment claims, Appellees contend that Community "failed to brief alternative basis for summary judgment that there was no justifiable reliance because of adversarial context and independent investigation." The argument about justifiable reliance contained in Appellee's motion for summary judgment, however, appears only in the section attacking the negligent misrepresentation claim. Appellees did not expressly contend that summary judgment should have been granted on Community's fraud claims based on the adversarial context and independent investigation. The summary judgment on Community's fraud claims cannot be affirmed on this basis. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993) ("[A] summary judgment cannot be affirmed on grounds not expressly set out in the motion or response."); *see also* Tex. R. Civ. P. 166a(c).

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[5] These warranties included merchantability, fitness for a particular purpose, suitability, good and workmanlike construction services, and good and workmanlike repair and modification services.

We now address Community's fraud claims.

V. FRAUD CLAIMS

In the motion for summary judgment, Appellees argued that Community's fraud claims, including fraudulent inducement,[6] were negated as a matter of law because the agreement included an "as is" and "disclaimer of reliance" clause. Community challenges this basis for summary judgment.[7]

A. Legal Principles for Fraud and Waiver of Reliance

A valid "as is" provision can negate causation for a variety of claims, including fraud. *See Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995). But a "buyer is not bound by an agreement to purchase something 'as is' that he is induced to make because of a fraudulent representation or concealment of information by the seller." *Id.* at 162. Parties to a contract, however, may disclaim reliance on representations, and such a disclaimer can negate a fraud claim if the parties' intent is clear and specific. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 332 (Tex. 2011). "[A] disclaimer of reliance may conclusively negate the element of reliance, which is essential to a fraudulent inducement claim." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997). "In other words,

[6] Under its fraudulent misrepresentation claim, Community alleged in its second amended petition that Appellees misrepresented there was no water damage or roof leaks "with the intent to induce [Community] to enter into the Agreement to purchase the Property."

[7] Initially, Appellees contend the summary judgment can be upheld because the alleged misrepresentation occurred after Community signed the purchase agreement; therefore, Community could not have relied on the representation and been induced to sign the contract. We do not reach this issue because we hold that the disclaimer of reliance provision is enforceable. *See* Tex. R. App. P. 47.1. We also note that Appellees did not challenge the other elements of fraud in the summary judgment motion, so we must assume that Appellees misrepresented the condition of the property and that the misrepresentation was actionable as fraudulent inducement. *See Schlumberger*, 959 S.W.2d at 178.

fraudulent inducement is almost always grounds to set aside a contract despite a merger clause, but in certain circumstances, it may be possible for a contract's terms to preclude a claim for fraudulent inducement by a clear and specific disclaimer-of-reliance clause." *Italian Cowboy*, 341 S.W.3d at 332

The question of whether an adequate disclaimer of reliance exists is a matter of law, which we review de novo. *See id.* at 333; *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 55 (Tex. 2008). We apply typical rules of contract construction. *Italian Cowboy*, 341 S.W.3d at 333.

The first inquiry is whether the parties have used "clear and unequivocal language" to disclaim reliance on representations. *See id.* at 336. If the contract contains a clear and unequivocal disclaimer of reliance clause, we then look to the circumstances surrounding the contract's formation to determine whether the provision is binding on the parties. *Id.* at 337 n.8 (citing *Schlumberger*, 959 S.W.2d at 179). The analysis includes whether (1) the terms of the contract were negotiated, rather than boilerplate; (2) during negotiations, the parties specifically discussed the issue that became the topic of the subsequent dispute; (3) the complaining party was represented by counsel; (4) the parties dealt with each other in an arm's length transaction; and (5) the parties were knowledgeable in business matters. *Id.* (citing *Forest Oil*, 268 S.W.3d at 60). This analysis is necessary because a mere disclaimer, standing alone, will not forgive intentional lies regardless of context. *Forest Oil*, 268 S.W.3d at 61 (refusing to adopt a per se rule that a disclaimer automatically precludes a fraudulent inducement claim).

B. Clear and Unequivocal Disclaimer of Reliance

Community argues that the disclaimer of reliance provision, Section 8.1.2, is not clear and unequivocal because (1) there is no statement that Community was relying "solely on its own judgment" or independent inspection and investigation;

(2) there is no affirmative statement by Community confirming that it "expressly warrants and represents" the disclaimer of reliance; (3) Section 8.1.2 is "lengthy and disjointed" and lacks a heading; and (4) Section 8.1.2 conflicts with Section 8.1.4.

We begin by comparing Section 8.1.2 to the language evaluated by the controlling Texas Supreme Court authority *Schlumberger*, and more recently *Forest Oil* and *Italian Cowboy*:

Schlumberger	***Forest Oil***
Held: Clear and unequivocal.	**Held**: Clear and unequivocal.
"[E]ach of us . . . expressly warrants and represents . . . that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that none of us is *relying* upon any statement or representation of any agent of the parties being released hereby. Each of us is *relying* on his or her own judgment . . . ."	"[We] expressly represent and warrant . . . that no promise or agreement which is not herein expressed has been made to them in executing the releases contained in this Agreement, and that they are not *relying* upon any statement or representation of any of the parties being released hereby. [We] are *relying* upon [our] own judgment . . . ."

Italian Cowboy	***Section 8.1.2***
Held: Not clear and unequivocal "Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises . . . except as expressly set forth herein."	"Purchaser shall have the benefit of, and is not relying upon any information provided by Seller or Broker or statements, representations, or warranties . . . made by or enforceable directly against Seller or Broker, including, without limitations, any relating to the value of the Property, the physical or environmental condition of the Property, . . . or any other attribute or matter of or relating to the Property . . . . Purchaser represents and warrants that as of the date hereof and as of the Closing Date, it has and shall have reviewed and conducted such independent analysis, studies, reports, investigations and inspections as it deems appropriate in connection with the Property . . . ."

See Italian Cowboy, 341 S.W.3d at 336.[8]

Italian Cowboy explained that the clause at issue there was not a clear and unequivocal disclaimer of reliance because it did not use the word "rely" or any variation thereof. *See id.* The clauses in *Schlumberger* and *Forest Oil* were sufficient because those clauses specifically referred to the parties not "relying" on representations, rather than merely acknowledging that no representations had been made. *See id.* Section 8.1.2, here, is more similar to the contractual terms in *Schlumberger* and *Forest Oil* than *Italian Cowboy* because Section 8.1.2 specifically states that Community "is not ***relying*** upon any information provided by" Appellees. This type of language was a key distinction for the Texas Supreme Court. *See id.*

[8] The *Italian Cowboy* court added the emphasis reflected above in the text of the contracts from *Schlumberger* and *Forest Oil*.

Accordingly, the language appears to clearly and unequivocally disclaim reliance. We now address Community's specific concerns.

1. "Sole" judgment or independent investigation clause

Community observes that Section 8.1.2 does not state, as did the contracts in *Schlumberger* and *Forest Oil*, that Community is relying "solely on its own judgment." Although Section 8.1.2 states Community will conduct its own investigation and inspection of the property "as it deems appropriate," there is no statement to the effect that Community would be ***relying*** only on its own judgment or independent investigation and inspection. *See id.* (noting that the terms in *Schlumberger* and *Forest Oil* included language "disclaiming reliance on representations, ***and*** representing reliance on one's own judgment" (emphasis added)).

Community suggests that for a disclaimer to be clear and unequivocal, there must be language showing that the party relied only, exclusively, or solely on its own investigation or judgment, citing *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 379 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated w.r.m.), *Matlock Place Apartments, L.P. v. Druce*, 369 S.W.3d 355, 371 (Tex. App.—Fort Worth 2012, pet. denied), and *RAS Group, Inc. v. Rent-A-Center West, Inc.*, 335 S.W.3d 630, 638–40 (Tex. App.—Dallas 2010, no pet.). Not one of these cases suggests that Section 8.1.2 is unclear or equivocal.

In *Allen*, for example, the First Court of Appeals held that an "independent investigation" clause was not a clear and unequivocal waiver of reliance when the clause stated that the stockholder based his decision to sell on "(1) his own independent due diligence investigation, (2) his own expertise and judgment, and (3) the advice and counsel of his own advisors and consultants." *Allen*, 367 S.W.3d at 377. The court of appeals reasoned that "[t]o make it clear that Allen

did not rely on any facts other than his own investigation, the disclaimer needed limiting language making it clear that Allen relied 'only,' 'exclusively,' or 'solely,' on his own investigation." *Id.* at 379. The court explained that language such as "only, exclusively, or solely" was not the exclusive way to create a disclaimer of reliance: "Or, the clause could include a broad and absolute abjuration of reliance on any oral representations by any other party, as was the case in *Forest Oil* and *Schlumberger*." *Id.* at 380. Accordingly, the court reasoned that there ***would*** have been a clear and unequivocal disclaimer of reliance if the contract included a disclaimer of reliance "on any oral representation," regardless of any "only, exclusively, or solely" language related to the independent investigation. *See id.* at 379–80. That type of broad and absolute clause is contained in Section 8.1.2: "Purchaser . . . is not relying upon any information provided by Seller or Broker or statements, representations, or warranties . . . including, without limitations, any relating to the value of the Property, the physical or environmental condition of the Property, . . . or any other attribute or matter of or relating to the Property . . . ." Thus, *Allen* supports our holding that Section 8.1.2 is a clear and unequivocal disclaimer of reliance.

Matlock and *RAS*, similar to *Schlumberger* and *Forest Oil*, both included contract language that the buyers were relying "solely" on their own investigations of the assets they were purchasing. *See Matlock*, 369 S.W.3d at 370; *RAS*, 335 S.W.3d at 639. The contracts also included, however, other language that specifically disclaimed reliance on any representations by the sellers. *See Matlock*, 369 S.W.3d at 370; *RAS*, 335 S.W.3d at 639. Neither court of appeals based its holding exclusively on the "independent investigation" provisions. *See Matlock*, 369 S.W.3d at 371 (referring to both the disclaimer of representations clause and the independent investigation clause when holding that the language was clear and

unequivocal); *RAS*, 335 S.W.3d at 640 (referring only to the "as is" and "disclaimer of reliance" clauses and not the "independent investigation" clause when holding that the contract conclusively negated the element of reliance for fraud-based claims).

The lack of an "independent investigation" provision with "solely" language in Section 8.1.2 does not negate the clear and unequivocal language that Community was "not relying upon any information provided by" Appellees.

2. "Expressly represent and warrant" language

Community observes that in *Forest Oil* and *Schlumberger* the disclaimer of reliance clauses stated that the parties "expressly represent and warrant" that they are not relying upon any statements or representations. *See Italian Cowboy*, 341 S.W.3d at 336. But in neither case was the "represent and warrant" language critical to the holding. *See Forest Oil*, 268 S.W.3d 51; *Schlumberger*, 959 S.W.2d 171.

Matlock and *RAS* demonstrate that such language is not required; neither included the "represent and warrant" language. The contract in *Matlock* stated, "Buyer acknowledges that it will inspect the property and Buyer will rely solely on its own investigation of the property and not on any information provided or to be provided by Seller," and "Seller hereby specifically disclaims any warranty, guaranty or representation, oral or written, past, present or future, of, as to, or concerning (I) the nature and condition of the property . . . ." *Matlock*, 369 S.W.3d at 370. The contract in *RAS* stated, "Buyer . . . has not relied upon any oral or written information provided by Seller," and, "Seller specifically disclaims any warranty, guaranty or representation, oral or written, past or present, express or implied, concerning the assets . . . ." *RAS*, 335 S.W.3d at 639.

The lack of "represent and warrant" language in Section 8.1.2 does not make it any less clear and unequivocal. Like the buyers in *Matlock* and *RAS*, Community agreed to the clear contract term that it was "not relying upon any information provided by" Appellees.

3. Length, disjointed, headings

Community observes that some contracts include headings that might help the reader understand that the contract contains a disclaimer of reliance clause. *See, e.g.*, *Matlock*, 369 S.W.3d at 370 (quoting the contract's heading "Limitations of Seller's Representations and Warranties"). But Community cites no case holding that the lack of a heading will render nugatory otherwise clear and unequivocal language.

We disagree with Community's argument that Section 8.1.2's length indicates it is not clear and unequivocal. *Matlock*, for example, involved a lengthy disclaimer. *See id.* at 370–71. Section 8.1.2 is no more "disjointed" than the typical contract, and it is in no way ambiguous. We construe an unambiguous contract as a matter of law. *See Italian Cowboy*, 341 S.W.3d at 333 (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)).

4. No Conflict with Section 8.1.4

Finally, Community contends that Section 8.1.2 is not clear and unequivocal because it conflicts with Section 8.1.4 regarding the scope of the "knowledge of the seller." Our analysis of whether Section 8.1.2 is clear and unequivocal does not turn, as Community argues, on whether Section 8.1.4 requires Appellees to provide a property disclosure statement.[9] Instead, we must determine whether, in context, Section 8.1.4 renders Section 8.1.2 unclear or equivocal. It does not.

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[9] The plain language of the provision belies the characterization that Appellees were

We must read a contract in such a way that any potential conflicts are harmonized. *Northborough Corp. Ltd. P'ship v. Cushman & Wakefield of Tex., Inc.*, 162 S.W.3d 816, 820 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (citing *Ogden v. Dickinson State Bank*, 662 S.W.2d 330, 332 (Tex. 1983)). We must give effect to every clause in a contract unless there is an irreconcilable conflict. *Ogden*, 662 S.W.2d at 332. Two contractual provisions directly conflict "when the plain meaning of one provision unambiguously requires that we not enforce another." *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 531–32 (Tex. 2015).

Section 8.1.1 of the contract sets forth the "Representations and Warranties of Seller" made "[f]or the purpose of inducing Purchaser to enter into this Purchase Contract." Five of the nine representations made in Section 8.1.1 are upon "Seller's knowledge." Section 8.1.2 of the contract disclaims reliance upon representations and warranties "except for the representations and warranties set forth above," i.e., the Section 8.1.1 representations and warranties. Section 8.1.4 then speaks to the scope of the "seller's knowledge" and clarifies that neither the Section 8.1.1 representations "above made" on the knowledge of the Appellees, nor information supplied in "any property disclosure" the Appellees might make, suggests a "duty of inquiry." As such, Section 8.1.4 conveys the parties' intent to limit the scope of all representations that are based on Appellees' knowledge. But the section also recognizes the distinction between the 8.1.1 representations "above made" and other representations made upon "seller's knowledge." Thus Section 8.1.4 makes clear that representations contained in "any property disclosure" statement as contemplated by Section 8.1.4 are not representations "set forth above" or "above made" on which Community as purchaser could rely.

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required to provide a completed property disclosure statement because it twice refers to "any" such statement.

So even if the parties intended to require a property disclosure statement based on the reference in Section 8.1.4, reliance on any representations made in such a statement was nonetheless disclaimed in Section 8.1.2. This construction harmonizes both provisions. *See Ogden*, 662 S.W.2d at 332. There is no conflict among the provisions because both are enforceable. *See G.T. Leach Builders*, 458 S.W.3d at 531–32; *cf. Henry v. Gonzalez*, 18 S.W.3d 684, 688 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (holding that there was an irreconcilable conflict when one provision of the contract stated that all disputes would be arbitrated "pursuant to the Federal Arbitration Act" while another provision stated the contract was "subject to arbitration under the Texas General Arbitration Statute").

In its reply, Community counters this construction with a rhetorical question: Why did the parties include a Section 8.1.4 reference to the property disclosure at all if Community's reliance upon the disclosure was to be foreclosed by Section 8.1.2? In other words, why would the parties contemplate a property disclosure statement that Community could not rely upon? But the question misses the point of an analysis of "clear and unequivocal" language under *Italian Cowboy*. We are examining the language of Section 8.1.4 to determine whether anything in the text suggests that Section 8.1.2 does not clearly and unequivocally disclaim reliance upon any and all representations or warranties that are not "set forth above." Section 8.1.4 delineates the scope of "Seller's knowledge" wherever that term might be used in the contract. Nothing in that text suggests that all representations made on "Seller's knowledge" may, notwithstanding Section 8.1.2, be relied upon. The mere fact that Appellees' will or may supply information within their "knowledge" does not contradict an agreement that Community will not rely upon that information. Stated differently, Community could bargain for information

without bargaining for the right to rely upon that information. Having concluded that Section 8.1.2 includes a clear and unequivocal disclaimer of reliance, we turn to the circumstances surrounding the contract's formation to determine whether the provision is binding. *See Italian Cowboy*, 341 S.W.3d at 337 n.8.

C. Circumstances Surrounding Contract Formation

We now review the evidence concerning the factors from *Italian Cowboy* in the light most favorable to Community.

1. The terms of the contract were negotiated rather than boilerplate.

Community contends that there is evidence the contract was not negotiated and that Section 8.1.2 was boilerplate because, according to Benton's affidavit, Appellees were in the business of developing apartment communities and selling them. Community contends, "Based on the business model of Cutten and a close review of the Agreement, a reasonable conclusion can be reached that the Agreement was prepared by Cutten and is a standard form of contract routinely used by Cutten." Even if Appellees prepared the contract and it was standard or routine for Appellees, we disagree that this fact amounts to some evidence the contract was not negotiated.

Benton testified that he was "authorized on behalf of [Community] to negotiate the terms and provisions of the Purchase and Sale Agreement." He referred to the "course of negotiations, both prior to execution of the [contract] and up to the closing of escrow." He testified that he "entered into negotiations for purchase of the property in April 2007," before signing the contract. He testified that he "negotiated for the purchase of the subject property." He testified that he gave the property disclosure statement to Chernow "[d]uring the negotiations." Thereafter Chernow "made a point of wanting to identify who would represent the

knowledge of the Seller," and Appellees' "actual knowledge was limited to the individuals identified in section 8.1.4." Benton's affidavit indicates this contract was negotiated and not boilerplate. *See McLernon v. Dynegy, Inc.*, 347 S.W.3d 315, 330–31 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (reasoning that the contract was negotiated because the employee seeking to avoid the disclaimer of reliance provision testified by affidavit that the employer's "chairman 'negotiated' the terms"; this evidence "demonstrates [the employee] was involved in deciding the terms because the word 'negotiated' entails participation of both parties").

Even if a fact finder could indulge a reasonable inference that Appellees drafted the contract (despite the lack of express testimony to that effect), such evidence would not preclude a conclusion that the terms of this contract were negotiated rather than boilerplate. *See id.* at 330 ("The fact that one party actually drafted the agreement does not control whether its terms were negotiated, as opposed to boilerplate."). Moreover, the contract itself states that both parties "fully participated in the negotiation of this instrument." The contract itself can supply evidence of the *Italian Cowboy* factors. *See Leibovitz v. Sequoia Real Estate Holdings, L.P.*, 465 S.W.3d 331, 343 (Tex. App.—Dallas 2015, no pet.) ("[T]he Agreement states that it was 'jointly drafted' by the parties, which indicates its terms were negotiated."); *McLernon*, 347 S.W.3d at 331 (looking to the terms of the contract to determine that it resulted from an arm's length transaction).

Further, Appellees attached to their motion for summary judgment an affidavit from Fred Hazel, one of Appellees' executives (and one of the people named as a "designated representative" in Section 8.1.4 of the contract). Hazel testified that "the Agreement was the product of significant negotiations between

Purchaser and Seller, having undergone multiple different drafts before the parties agreed to its final form."[10]

The summary judgment evidence shows that the terms of this contract were negotiated rather than boilerplate.

2. During negotiations, the parties specifically discussed the issue that became the topic of the subsequent dispute.

Benton testified by affidavit that during the contract negotiations, he gave Chernow a property disclosure form, and Chernow "made a point of wanting to identify who would represent the knowledge of the Seller" when filling out the form. Benton testified that initially Appellees "refused to complete the disclosure statement." Then Benton "advised [Appellees] through Mr. Chernow that I would not complete the transaction without the defendants completing and returning the disclosure statement to me." During the feasibility period, Chernow returned the disclosure statement to Benton.

This court has held that the inquiry under this factor is not "whether [the parties] discussed the fraudulent-inducement claim or whether [the plaintiff] was aware of the misrepresentations at issue." *McLernon*, 347 S.W.3d at 331. Instead, the "significant point with respect to the *Forest Oil* factors is that [the plaintiff] was aware of [the defendant's] specific representations concerning the topic of the present dispute yet elected to disclaim reliance on those representation." *Id.*

[10] Community argues that we should not consider Hazel's affidavit because Hazel lacked personal knowledge. Community raised this issue before the trial court but did not obtain a ruling on its request to strike the affidavit. Community contends that whether an affiant lacks personal knowledge is a defect of substance, and Community was not required to preserve error. We disagree. Community has failed to preserve error. *See Washington DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 736 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (en banc) ("[A] litigant must object and obtain a ruling from the trial court to preserve a complaint that an affidavit fails to reveal the basis for the affiant's personal knowledge of the facts stated therein.").

In *Schlumberger*, the parties specifically disagreed about the feasibility and value of a sea-diamond mining project, *see* 959 S.W.2d at 180, before the defendant purchased the plaintiffs' interest in the project for what plaintiffs later alleged was an undervalued price, *see id.* at 174. The plaintiffs claimed that the defendant had misrepresented the project's viability and value before the sale. *Id.* The sales contract included a release of claims against the defendant and disclaimer of reliance provision. *See id.* at 180. The *Schlumberger* court enforced the disclaimer of reliance and release of claims because, in part, the commercial feasibility and value of the project was "the very dispute that the release was supposed to resolve." *Id.*

Although there is no evidence that Community and Appellees specifically discussed roof or water leaks, Benton's affidavit testimony shows that before signing the contract, the parties specifically discussed the property disclosure issue. Appellees initially refused to complete the disclosure statement, but Benton insisted despite having already agreed that Community would not rely on any representations not specifically included in Section 8.1.1 of the contract. And before closing, Community was aware of the specific representations made in the property disclosure statement and the limited scope of knowledge on which they were based, yet Community elected to disclaim reliance on those representations by completing the transaction. *See McLernon*, 347 S.W.3d at 331.

Under these circumstances, the summary judgment evidence shows that the parties discussed the issue that became the topic of subsequent dispute.

3. Community was represented by counsel; the transaction was at arm's length; and Community was knowledgeable in business matters.

We evaluate the final three factors together. The evidence is straightforward. The contract states that both parties were "represented by counsel," and Section

8.1.2 states that the "Purchase Price and the terms and conditions set forth herein are the result of arm's-length bargaining between entities familiar with transactions of this kind." The contract states further that Community "represents and warrants, in particular, that . . . [Community] is sophisticated and experienced in the acquisition, ownership, and operation of multi-family housing projects similar to the Property." Thus, the contract itself is some evidence of these three factors. *See Leibovitz*. 465 S.W.3d 343; *McLernon*, 347 S.W.3d at 331.[11] Nothing in the record contradicts the recitals in the contract. Benton's affidavit was silent on these topics. Further, Hazel testified that the "sale of the Property was an arm's-length transaction."

Accordingly, the summary judgment evidence shows that Community was represented by counsel, the transaction was at arm's length, and Community was knowledgeable in business matters.

D. No Error to Grant Summary Judgment on Fraud

In conclusion, the language in the disclaimer of reliance provision, Section 8.1.2, is clear and unequivocal. The circumstances surrounding the contract's formation indicate that the disclaimer is enforceable. Thus, the trial court did not err by granting summary judgment on Community's fraud claims because Community disclaimed reliance on extra-contractual representations. Appellees were entitled to judgment as a matter of law.

Community's first issue and third through twelfth issues are overruled.[12]

[11] The contract also required notices to be sent to "David Wilkinson, Esq." Wilkinson testified by affidavit that he had been licensed to practice law since 1997 and represented Community in this lawsuit.

[12] For the first time on appeal, Community argues that it was fraudulently induced to enter into the contract because Appellees provided Community with an inaccurate "Statement of Operations" during the feasibility period, as required by the contract. This argument was not

VI. MOTION TO COMPEL

Community contends that the trial court erred by granting the motion for summary judgment while motions to compel were pending.

Within its brief, Community cites to only one case for the proposition that we must view summary judgment evidence in the light most favorable to the nonmovant. Community does not cite to any other authority; in particular, Community does not cite to any authority about a trial court's ability to grant a motion for summary judgment after a motion to compel has been filed. Community has failed to adequately brief this argument. *See Canton-Carter v. Baylor Coll. of Med.*, 271 S.W.3d 928, 931–32 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding that a party waived the issue on appeal by inadequate briefing because the brief did not provide the appropriate standard of review, cite any appropriate legal authority, or analyze the facts of the case under the appropriate legal authority in such a manner to demonstrate that the trial court committed reversible error); *see also* Tex. R. App. P. 38.1(i) (brief must contain "appropriate citations to authorities"). This issue has been waived. *See Canton-Carter*, 271 S.W.3d at 932.

Community's second issue is overruled.

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made below, and we cannot reverse on this basis. *See Tello v. Bank One, N.A.*, 218 S.W.3d 109, 116 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("[W]e may not consider grounds for reversal of a summary judgment that were not expressly presented to the trial court by written response to the motion."); *see also* Tex. R. Civ. P. 166a(c).

VII. CONCLUSION

Having overruled Community's dispositive issues, we affirm the trial court's judgment.[13]

/s/ Sharon McCally
Justice

Panel consists of Justices Christopher, McCally, and Busby.

[13] We do not address Community's thirteenth issue concerning the statutes of limitations because the issue is not necessary to the disposition of this appeal. *See* Tex. R. App. 47.1.