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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

NAPOLITANO HOLDINGS, LLC,

Plaintiff and Appellant,

v.

TOUCHSTONE CLIMBING, INC.,

Defendant and Respondent.

B284354

(Los Angeles County Super. Ct. No. BC587493)

APPEAL from judgment of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Reversed.

Horvitz & Levy, David M. Axelrad, Mark A. Kressel, Eric S. Boorstin; Allen Matkins Leck Gamble Mallory & Natsis and Charles D. Jarrell for Plaintiff and Appellant.

O'Melveny & Myers, Marc F. Feinstein, Daniel J. Tully; Rankin, Sproat, Mires, Reynolds, Shuey & Mintz and Michael R. Reynolds for Defendant and Respondent.

Plaintiff Napolitano Holdings, LLC (Napolitano) appeals from the judgment entered after the trial court granted the summary judgment motion filed by defendant Touchstone Climbing, Inc. (Touchstone). Touchstone subleased a commercial space from Napolitano with the intent to use the space as an indoor rock-climbing gym. The sublease was conditioned on the City of Pasadena (Pasadena) approving a conditional use permit (CUP) for Touchstone's gym. Touchstone's agreement with Napolitano provided, "Should, for whatever reason, a CUP or building permit be unattainable with conditions acceptable to [Touchstone,] Sublease shall be cancelable by [Touchstone] . . . ." During the CUP approval process, Touchstone invoked its right to cancel the sublease. Napolitano sued Touchstone for breach of contract and breach of the covenant of good faith and fair dealing.

In granting summary judgment, the trial court found Touchstone had acted in good faith in canceling the sublease and there were no triable issues of fact to the contrary. Napolitano contends the evidence creates a triable issue of fact as to whether a CUP with conditions acceptable to Touchstone was objectively unattainable within the meaning of the sublease and whether Touchstone acted in good faith. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Sublease and First Addendum*

Touchstone operates numerous indoor rock-climbing gyms in California. Touchstone's facilities require high ceilings for its tall climbing structures. Touchstone worked with broker Creative Space to find a suitable property. Dan Bernier, Tyler

Stonebreaker, and Evan Raabe comprised the Creative Space team.

On February 27, 2014 Touchstone entered into a commercial sublease with Napolitano for an approximately 26,000-square-foot commercial space located at 1015 South Arroyo Parkway in Pasadena. Touchstone intended to open a climbing gym in the space. The sublease required Touchstone to begin paying a base rent of $27,950 on the earlier of the date the gym opened for business or June 1, 2014. Once rent payments commenced, Touchstone would pay full rent for the first month and 50 percent abated rent for the following six months. The sublease provided Touchstone with access to 13 on-site parking spaces and the right to use specified additional spaces for customer parking during business off-hours.

Chief executive officer Mark Melvin signed the sublease on behalf of Touchstone, and managing member Timothy Naple signed for Napolitano. Touchstone paid a $45,000 deposit, of which $20,000 was nonrefundable.

The parties simultaneously executed an addendum attached to the sublease. Paragraph one of the addendum provided, "[Touchstone]'s use of these Premises shall require a Conditional Use Permit and/or Minor Variance (CUP). [Touchstone] shall submit an application for the CUP to the City of Pasadena with assistance from [Napolitano]. [Touchstone] shall provide any required plans, drawings, and studies. [Touchstone] shall pay the fee and process the application. The Sublease is contingent upon receipt of the CUP and building permit. Should, for whatever reason, a CUP or building permit be unattainable with conditions acceptable to [Touchstone,] Sublease shall be cancelable by [Touchstone] and the non-

refundable portion of the deposit shall be kept by [Napolitano]." The addendum further provided, "[Napolitano] shall have the right to build additional parking (at its sole discretion) and provide [Touchstone] their choice of the aforementioned parking spots. [Touchstone] will seek additional parking in neighboring lots."

B. *Touchstone's Application to Pasadena for a CUP and the Parties' Second and Third Addenda to the Sublease*

In December 2013 Touchstone initiated discussions with Pasadena's Planning Department to obtain a CUP. The CUP process entails submission of an application, which a planner reviews for completeness under the zoning code. Once deemed complete, a project is analyzed according to the zoning code and the general plan, then is set for a hearing.

On March 28, 2014 Touchstone filed a CUP application, in which it categorized its proposed use of the property as a "personal improvement service." Pasadena's zoning code did not include a use classification for climbing gyms. On May 1 a zoning administrator evaluated Touchstone's operational plan and agreed Touchstone's use should be categorized as a personal improvement service. Based on this categorization, Pasadena required Touchstone to provide five off-street parking spaces for every 1,000 square feet of the business property, for a total of 130 parking spaces.

To comply with the parking requirement, Touchstone hired consulting firm Linscott, Law & Greenspan (Linscott) to perform traffic and parking studies. In June 2014 Linscott completed its parking study and submitted a proposed memorandum of

understanding to Pasadena, which attempted to address the parking requirements.

Touchstone requested an extension from Napolitano, and on June 6, 2014 the parties executed a second addendum to the sublease, which provided Touchstone would begin paying rent on the earlier of the date Touchstone obtained a CUP or July 1, 2014. By the end of June, Touchstone was awaiting Pasadena's response to Linscott's proposal.

On July 2, 2014 the parties executed a third addendum to the sublease, which provided Touchstone would begin paying rent on July 1, 2014, with a 50 percent abatement for three months. If Pasadena did not approve a CUP before October, the rent for October would also be abated by 50 percent with the rent due at the end of the sublease term. Touchstone then would pay one full month's rent for November, followed by six months of rent abated by 50 percent. The third addendum also provided, "[Touchstone] waives any and all rights to terminate the Sublease, for any reason, on the date [a] CUP [is] approved." Touchstone began paying rent on the property in July 2014.

In August 2014 city planner Jason Killebrew issued a summary of conditions, in which he concluded Linscott's proposed parking ratio of three parking spaces per 1,000 square feet was not consistent with Touchstone's use because Pasadena's zoning code required five off-street parking spaces for every 1,000 square feet of the property. Based on Killebrew's suggestion, Touchstone revised its application to categorize its use as indoor commercial recreation.[1]

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[1] Pasadena does not impose a single standard for parking requirements for facilities classified as indoor commercial recreation.

On November 11, 2014 Linscott submitted a revised memorandum of understanding. Based on Linscott's revised proposal, Killebrew adopted a hybrid approach, requiring three or five parking spaces per 1,000 square feet, depending on the proposed use of those square feet. Using this approach, Killebrew revised the necessary number of off-street parking spaces to 83.[2] Pasadena required these spaces to be within 1,000 feet of the property for use by customers and within 1,500 feet of the property for use by employees.

Because the sublease provided only 13 on-site parking spaces,[3] Touchstone attempted to locate at least 70 off-site spaces to lease. Pasadena's Economic Development Department (Economic Development) evaluated parking within 1,000 feet of the property and found the parking options were very limited. Touchstone requested Killebrew approve a shared parking agreement, which would allow Touchstone to share off-site parking spaces with other businesses if their uses of the spaces did not conflict. Touchstone explored off-site parking options, including 37 spaces at 980 South Arroyo Parkway and 40 spaces at 950 South Arroyo Parkway. Touchstone submitted to Killebrew an unexecuted copy of a one-year lease for parking spaces at 980 South Arroyo Parkway.

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[2] Killebrew calculated Touchstone needed 92 off-street parking spaces, but he reduced the number by 10 percent to 83 spaces given the property's proximity to public transit.

[3] Touchstone had anticipated Napolitano providing up to 12 additional on-site parking spaces, but in November 2014 Pasadena's Public Works Department ruled the proposed additional spaces were not acceptable.

On December 12, 2014 Bernier e-mailed Naple and Napolitano's attorney Craig Stelmach to inform them "the CUP is still moving forward." Bernier represented Melvin "believe[d] that the application [was] complete." By January 2015 Killebrew had tentatively scheduled a hearing on Touchstone's CUP application for March 4, 2015. To prepare for the hearing, on February 9, 2015 Killebrew requested Melvin provide an executed copy of the lease for off-site parking at 980 South Arroyo Parkway. If Touchstone had submitted a lease showing access to at least some off-site parking in the vicinity of the property, Killebrew would have approved Touchstone's application as complete,[4] which would have allowed Touchstone to request a variance.

Killebrew, as a city planner, did not have discretion to waive Touchstone's compliance with code requirements. However, the hearing officer had discretion to approve, deny, or modify the CUP. If Touchstone had requested a minor variance, the hearing officer would have had discretion to deviate from the applicable parking standard by up to 25 percent. With a nonminor variance, the hearing officer could have allowed more than a 25 percent deviation from the standard, within reason. Touchstone could have sought a variance regarding both the number of required parking spaces and the required proximity of those spaces to the property. Killebrew discussed with Touchstone the option of seeking a variance, but Touchstone did not alter its application to seek any type of variance.

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[4] For an application to be deemed complete, the applicant must submit an executed lease identifying the number of parking spaces provided under the lease.

In January 2015 Touchstone learned it could not rely on shared parking to fulfill its parking requirements unless there was no overlap in business hours between Touchstone and the sharing business. On January 22, 2015 Melvin e-mailed Chin Taing, a Linscott transportation planner, to provide Taing with data showing the peak usage hours of Touchstone's gyms were "after office hours." Melvin wrote, "I believe that [Killebrew] would prefer that we don't dwell on [the parking] issue now, and let the approval happen. We're apparently on the early March date. I think he feels that the city will work with us on the [parking] leases."

On January 29 Taing e-mailed Melvin to inform him she had communicated with Killebrew regarding Touchstone's application. Taing relayed that, with regard to shared parking, "even if the off-site spaces may not be utilized during the day when the project is not expected to experience its peak parking demand, the off-site shared parking lease agreement needs to indicate that the spaces are leased all the time (even if those spaces will likely be occupied during the day by other users)."

In response, Melvin forwarded Taing's e-mail to the Creative Space team. Melvin asked the team to "brainstorm as to whether we need to panic here" and expressed concern the "project [was] seriously in trouble." Melvin closed, "Should we give up?"

On January 30, 2015 Bernier responded, "We have enough parking at 950 and 980 S. Arroyo," but he questioned whether the 950 South Arroyo Parkway lot was within 1,000 feet of the property to meet the distance requirement for customer parking. Bernier noted the 950 Arroyo lot could be used to meet the

requirements for employee parking, which comprised 20 percent of the required parking, because it was within 1,500 feet.

Melvin responded by e-mail on January 31. Melvin expressed concern about the provision in the third addendum to the sublease, under which Touchstone waived its right to terminate the sublease once Pasadena approved a CUP. Melvin stated, "Obviously I cannot let this happen if we don't get a parking provision. [¶] . . . In lieu of the fact that we are on a track to pay full rent from now on, and are paying half now, I want this provision retracted by the landlord. . . . I want the right to terminate the lease up to the point of an approved building permit. I do not trust this city, and I trust this landlord less. [¶] . . . There is no logical reason that Napolitano should disagree with this change if we are paying full rent. In fact, if they do, just terminate now, because any landlord that would lock someone in for something that they can't do is a pathetic partner. [¶] . . . Let's save money on Pasadena and let it go if we don't both get city accommodations and landlord accommodations (although it's a pretty lame accommodation I'm asking for from the landlord, and it's one that they won't give I bet)." (Capitalization omitted.)

On February 2 Melvin followed up on this e-mail and reiterated, "I will have to take this off the agenda [for CUP hearing] if we don't have [parking] resolved." Melvin wrote he could not "take [the] chance" that Pasadena would "pass the CUP with conditions for the parking, making the lease language take hold, even if [Pasadena] will never be allowed to issue a permit because [Touchstone] can't deliver on the parking."

C. *Touchstone Purports To Terminate the Sublease and Continues Discussions with Pasadena*

On February 4 or 5 Melvin met with Economic Development. Following that meeting, Melvin e-mailed Creative Space (Bernier, Stonebreaker, and Raabe) and wrote, "The solution we came up with for Pasadena is something I would not have thought of. It's probably only a 50/50 since we're asking that [Pasadena] internally ditch a year's worth of pathetic work on the part of their planner, but that solution would put this project on track again. . . . [¶] . . . But let me also reiterate, that I want the lease cancelled and I want Tim Naple to return our deposit, less the $20K I presume, and I want him to know that we're done. I do not want to pay next month's rent. [¶] The rest of it is strategy on working the 50%. In my mind you tell [Naple] that we're vacating the lease due to the findings and restrictions on the project. I don't think we necessarily need to tell him that we were finally on a calendar, not sure."[5] Melvin continued, "I don't see a reason to come up with any agreement with [Naple] for now. There could be a reason if we get a changed CUP, but even then, it would only be to protect ourselves as we move to final permitting." Melvin requested Creative Space conduct "a hard search" for alternative locations in Pasadena for Touchstone's gym.

Bernier responded on February 5 that he was in "agree[ment] that [Touchstone] should walk from this project if you don't get the cooperation you need from the landlord." Bernier expressed "misgivings about the approach of continuing

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[5] Melvin's e-mail is undated, but its contents make clear it was sent following the meeting with Economic Development.

to process the approvals after lease cancelation and without a new framework of a deal sketched out. . . . [T]hat strategy seems to give all the advantage to the landlord since, if we wind up coming back to him, it will be with an approval that we think is viable."

Melvin responded the same day by e-mail, "I want this lease cancelled. Period. If this were a different landlord I might feel differently." He added, "[T]hey won't have all the leverage. . . . [I]f things turn out well in two months, and [Naple] won't take a similar deal, I'll still walk. In fact, I might want half rent again."

On February 6, 2015 Melvin sent a letter to Naple, in which he stated "it's time for Touchstone to face the conclusion that the city of Pasadena will not pass a Conditional Use Permit, or Minor Conditional Use Permit that will allow us to operate. [¶] Effective[] immediately we would like to terminate the lease." The letter continued, "There is a remote chance that a meeting we had this week with Economic Development will give this project a new life, but it is remote. In that case, we'll let you know and you can decide if it's worth your trouble to consider us as a tenant again." Touchstone never requested Napolitano help with the CUP application process, build a parking garage on-site, or make additional parking at the property available to Touchstone, despite those parking options having been specifically contemplated in the first addendum to the sublease.

Beginning in February 2015 Touchstone stopped paying rent to Napolitano. On February 6 Stelmach sent an e-mail to Bernier and others requesting to discuss the "disturbing news" about Touchstone's intended cancellation of the sublease and noting "the issues being raised are issues that were certainly

known, and contemplated, at the time we negotiated the sublease."

The next day Bernier e-mailed Naple, attaching Touchstone's formal termination letter. The e-mail explained, "The approvals process has been more time consuming, expensive, and unpredictable than we were lead to believe when we undertook this project. The prospects for approval on terms that are achievable are dim. Touchstone needs to stop the bleeding on a project that has such little likelihood of being approved." The e-mail also noted "the possibility of a path to approval," which would require "a new application for a variance or a new traffic/parking study . . . . There is too much uncertainty and Touchstone can't continue with a lease in these circumstances."

On February 12 Melvin e-mailed Killebrew to "withdraw [Touchstone's] application effective immediately," because "[t]his is not a project that is possible for us to continue." The same day Stelmach e-mailed Melvin to acknowledge "receipt of your correspondence to Tim Naple regarding a potential termination of the sublease." Stelmach wrote, "If your concern is that parking is going to delay the CUP longer than expected, my suggestion is we explore a rent deferment, similar to the addendum previously executed, whereby the deferred rent is simply added to the end of either the original or renewal term." Melvin responded, "I'm willing to work on this project a lot more, and I will describe to you what options we have going forward and how the city of Pasadena misrepresented and misled the process, but I will not do so unless you accept that my termination letter is a termination. . . . [¶] Please make that acknowledgment and we

can work together to get the city turned around. Economic Development is on our side on this, and that matters."

On February 14 Stelmach e-mailed Melvin, stating Napolitano "remain[ed] committed to assisting in any way we can to move the CUP to completion." Stelmach requested Melvin update Napolitano about the status of Touchstone's discussions with Economic Development. Stelmach closed his e-mail by noting Napolitano "reserve[d] all rights with respect to this matter."

Melvin responded, "I'm so sorry you have to sign off an otherwise friendly note with 'we reserve all rights with respect to this matter.' It would seem to me that this minimizes the possibility of a pleasant and enduring relationship between Touchstone and Napolitano." Melvin also noted Touchstone's "meeting with Economic Development will happen in the upcoming week. I'm happy to let you know the result, but it is not within reason to expect that they can promise any more than to discuss our application with Planning." Melvin closed, "I want to finally reiterate, that as of February 6, 2015, the lease between Napolitano Holdings and Touchstone Climbing is terminated. We worked diligently for the better part of a year to obtain a CUP with Pasadena for our business, to find out in the 11th hour that the city was not willing to accommodate our use."

On February 18 Napolitano's attorney sent a letter to Melvin, in which Napolitano "unequivocally rejected" Touchstone's "attempt to terminate" the sublease and demanded Touchstone acknowledge the sublease remained in effect, pay all past due rent, and perform its obligation under the sublease, including seeking the necessary approvals from Pasadena.

On February 20 Melvin e-mailed the Creative Space team and wrote, "Pasadena seems to be willing to go to lengths to make a way to get us into [Napolitano's] building. There is a pathway forward which would probably take 3 months and end with 1) a variance approval to increase the allowable travel distance to off-site parking, 2) a full-hours-open deal with a parking lot that [Touchstone's Economic Development contact] would be willing to personally strong-arm and knows about, 3) a CUP to adjust the number of parking spaces needed and maybe deal with some landscaping minimums." Melvin added, "*Don't divulge the details to Napolitano of a possible solution, or imply that there is a solution to the problem of getting a CUP.* I believe our stance is that 'the city of Pasadena agreed in our recent meeting that a CUP and MCUP were not sufficient to allow our use, but they are motivated to discuss variance options.' " (Italics added.) Melvin again instructed the Creative Space team to investigate alternative sites for the gym.

Touchstone and Napolitano continued to discuss possible amendments to the sublease to allow Touchstone to pursue its project. On March 30 and April 22, 2015 Napolitano sent Touchstone letters of intent outlining terms for rent abatement and deferral while Touchstone sought the necessary approvals from Pasadena and proposing to increase Napolitano's involvement in the approval process. On April 9 Melvin e-mailed Naple in response to the March 30 letter of intent, stating, "We cannot agree to this . . . because we'll owe you a bunch of rent."

On April 29 Melvin e-mailed Naple, stating Touchstone would not reach a new agreement without the "negation of [the provision in] Addendum No. 3," under which Touchstone had waived its right to cancel the sublease upon Pasadena's approval

of a CUP. Melvin wrote, "We are wasting our time here. We discovered in February that the building department would not allow our occupancy without a variance. That was news to everyone, and it is documentable. . . . [¶] . . . [¶] . . . On April 11th, I let you know that our Pasadena planner wanted to know if we wanted to start down the path of a variance. I told him I was optimistic that we would with full participation of Napolitano, but that we needed to hear from you. . . . [¶] Let's just let it go. I don't think Napolitano is prepared to partner in this relationship."

D. *Napolitano Sues Touchstone*

On July 8, 2015 Napolitano filed a complaint against Touchstone, alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. Napolitano alleged Touchstone acted unfairly and in bad faith in connection with its obligations to secure necessary approvals from Pasadena. Napolitano alleged Touchstone breached the sublease when it "(1) failed and refused to timely perform its obligations under the Sublease to apply for and process a CUP application and any other approvals necessary for its planned operations at the Premises, (2) failed and refused to perform its obligations under the Sublease to pay rent, (3) caused the City to cancel its planned hearing on or about March 4, 2015, on Touchstone's CUP application, in bad faith, (4) purported to terminate the Sublease in February 2015, including, without limitation, for the purpose of avoiding its obligations to pay further rent under the Sublease, as well as its obligations to continue pursuing the approvals needed for its planned operations at the Premises, and (5) refused to perform its

obligations under the Sublease notwithstanding Napolitano's repeated demands for performance."[6]

E. *Touchstone's Motion for Summary Judgment or, in the Alternative, Summary Adjudication*

On November 23, 2016 Touchstone filed a motion for summary judgment or summary adjudication. Touchstone argued "it properly exercised its right to terminate the lease prior to a [CUP] being issued by the City of Pasadena." Touchstone asserted a CUP was unattainable because Touchstone could not lease sufficient shared parking to meet Pasadena's requirements for 70 off-site parking spaces. Touchstone also argued the claim for breach of the covenant of good faith and fair dealing failed because Touchstone paid the nonrefundable portion of its deposit to Napolitano in consideration for its discretionary right to terminate the sublease, and therefore any duty to act in good faith would be inconsistent with the sublease's express terms. In support of its motion, Touchstone submitted declarations, deposition testimony, and other evidence.

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[6] Touchstone cross-complained against Napolitano with respect to Napolitano's failure to refund the $25,000 refundable portion of Touchstone's security deposit, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, money had and received, and declaratory relief. Touchstone voluntarily dismissed its cross-complaint with prejudice after the court granted its motion for summary judgment.

F. *Napolitano's Opposition*

In its opposition, Napolitano argued there were triable issues of fact, including whether Touchstone failed to process the CUP application and obtain necessary approvals for its climbing gym; purported to terminate the sublease although it had a clear path forward with Pasadena; withdrew its application for a CUP before the CUP could be heard by a city hearing officer on the March 4, 2015 agenda; failed to seek even a minor variance; and sought to extract rent and other concessions by concealing information material to whether Touchstone could move forward with its project.

Napolitano contended Touchstone did not have the right unilaterally to terminate the sublease and withdraw its pending CUP application before processing its application to completion. Only after completing the process did Touchstone have a right under the first addendum to cancel the sublease, if Pasadena denied the application or granted it with conditions unacceptable to Touchstone. Napolitano also asserted Touchstone was motivated to cancel the lease not by the unattainability of a CUP, but by its desire to renegotiate more favorable lease terms and to avoid making rent payments while it worked on the approval process.

Napolitano submitted numerous objections to Touchstone's evidence in support of its motion. In reply, Touchstone also filed evidentiary objections.

G. *The Trial Court's Hearing and Ruling*

At the February 17, 2017 hearing the trial court commented, "I don't have any evidence before me that suggests that a C.U.P. would have been issued for anything other than the

83 parking spaces, which [Touchstone] didn't have and, basically, doesn't look like they could get. [¶] The effect of addendum number three is that, once the C.U.P. is issued, [Touchstone would be] locked in for 20 years, regardless whether the terms are acceptable or even economically practical." The court stated, "[F]rom execution of the original sublease and addendum number one" the parties "realized there were going to be issues . . . with regard to the conditional use permit" and "[i]f the conditions could not be met to [Touchstone's] satisfaction in good faith, [Touchstone] had an out." The court opined, "I am not persuaded that the obligation on Touchstone created by addendum number one was to pursue the C.U.P. to issuance, regardless what the issuance was or what the conditions were." Considering the first and third addenda together, the court reasoned, "I don't think that addendum number three changed the ability of Touchstone to say, you know, no way on top of dirt that we're going to be able to get an acceptable set of conditions for the C.U.P."

Napolitano argued the hearing officer could have altered the parking conditions and that Touchstone stated in its communications that its proposed parking solution had a "50/50" chance of success and "[t]here[] [was] a pathway forward" for a parking variance. The trial court rejected these arguments, opining there was no evidence Touchstone's possible route to approval was "much other than wishful thinking."

The trial court granted Touchstone's motion, concluding there were no triable of issues of fact whether Touchstone had decided in good faith an acceptable CUP was unattainable. The trial court overruled all of Napolitano's evidentiary objections,

but it did not address Touchstone's evidentiary objections.[7] On July 31, 2017 the trial court entered judgment in favor of Touchstone.[8] Napolitano timely appealed.

DISCUSSION

A. *Standard of Review*

Summary judgment is appropriate only if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618 (*Regents*); *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1085.) """"We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained."' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.""""

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[7] Where the trial court fails to rule on evidentiary objections in the context of a summary judgment motion, on appeal the court presumes the objections have been overruled, with the objector having the burden to renew its objections in the Court of Appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) Neither party asserts an argument relating to its evidentiary objections on appeal.

[8] The trial court granted summary judgment as to all of Napolitano's causes of action. In their trial court briefing, the parties did not address Napolitano's claim for declaratory relief, which sought a determination of the parties' responsibilities under the sublease, and the parties do not address the claim on appeal.

(*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; accord, *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1179 (*Husman*).)

A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; *Husman, supra*, 12 Cal.App.5th at pp. 1179-1180.) If the defendant satisfies this initial burden, the burden shifts to the plaintiff to present evidence demonstrating there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, at p. 850; *Husman*, at pp. 1179-1180.) We must liberally construe the opposing party's evidence and resolve any doubts about the evidence in favor of that party. (*Regents, supra*, 4 Cal.5th at p. 618; *Husman*, at p. 1180.) " '[S]ummary judgment cannot be granted when the facts are susceptible to more than one reasonable inference . . . .' " (*Husman*, at p. 1180; accord, *Rosas v. BASF Corp.* (2015) 236 Cal.App.4th 1378, 1392.)

B. *Triable Issues of Fact Exist as to Whether Touchstone Breached the Express Terms of the Sublease*

Napolitano contends triable issues of fact exist whether Touchstone breached the sublease by invoking its right to cancel the sublease under the first addendum although a CUP with acceptable terms was not unattainable. We agree.

1. *Napolitano did not forfeit its contention the sublease required a CUP be unattainable as a condition precedent to Touchstone's right to cancel the sublease*

Touchstone contends Napolitano forfeited its argument the sublease unambiguously required a CUP be unattainable as a condition precedent to Touchstone's right to cancel the sublease because Napolitano argued in the trial court the terms of the sublease were ambiguous. Generally, a party cannot raise new issues or change the theory of a cause of action for the first time on appeal. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603; *Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143 [petitioner forfeited contention he was denied a fair hearing because of a panel member's bias where he did not raise this issue before the agency or the trial court].) "'"This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal . . . ."'" (*American Indian Health & Services Corp. v. Kent* (2018) 24 Cal.App.5th 772, 789; accord, *C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1492 ["opposing party should not be required to defend for the first time on appeal against a new theory"].) Nevertheless, an appellate court has discretion to consider an issue for the first time on appeal "'where the relevant facts are undisputed and could not have been altered by the presentation of additional evidence.'" (*American Indian Health & Services Corp. v. Kent*, at p. 789; accord, *Key v. Tyler* (2019) 34 Cal.App.5th 505, 540 [argument raising a legal issue concerning the interpretation of a written instrument that does not depend upon any disputed facts may be considered for the first time on appeal]; *C9 Ventures v. SVC-West, L.P.*, at p. 1492.)

Napolitano argued in the trial court the sublease did not give Touchstone the right to cancel because approval of an acceptable CUP remained a possibility at the time Touchstone purportedly canceled the sublease.[9] Touchstone responded by asserting, "Touchstone had the unfettered right to cancel the sublease at any time prior to a CUP being approved," the same argument Touchstone now makes on appeal. Further, the trial court addressed Napolitano's contention Touchstone improperly invoked its cancellation rights, concluding there was no triable issue of fact whether Touchstone determined in good faith the CUP was unattainable. In addition, interpretation of the sublease does not turn on disputed facts. Under these circumstances, Napolitano did not forfeit its breach of contract theory on appeal. (See *American Indian Health & Services Corp. v. Kent, supra*, 24 Cal.App.5th at p. 789.)

2. *The sublease did not grant Touchstone unfettered discretion to terminate before the issuance of a CUP*

"'The interpretation of a contract is a judicial function.'" (*Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 432; accord, *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 68.) "'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citations.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citations.] 'If

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[9] Also, after the trial court granted Touchstone's motion, Napolitano filed a "suggestion for sua sponte reconsideration," in which it argued "the contract requires that before Touchstone may cancel the sublease, the unattainability of an acceptable permit must be an objectively true fact."

contractual language is clear and explicit, it governs.' [Citation.] "'The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' ([Civ. Code,] § 1644), controls judicial interpretation.'" (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 195; accord, *Department of Forestry & Fire Protection v. Lawrence Livermore National Security, LLC* (2015) 239 Cal.App.4th 1060, 1066 ["'[C]ourts must give a " 'reasonable and commonsense interpretation'" of a contract consistent with the parties' apparent intent.'"]; *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 752 [""if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning""].) "'[A] contract must be understood with reference to the circumstances under which it was made and the matter to which it relates.'" (*Mountain Air Enterprises, LLC*, at p. 752; accord, *Wind Dancer Production Group*, at p. 69.)

The parties agree the CUP provision in the first addendum is unambiguous, but they disagree on its unambiguous meaning.[10] Napolitano argues the first addendum required an

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[10] Neither party contends extrinsic evidence is relevant to interpret the meaning of the sublease provisions at issue. Napolitano argued in the trial court the words in the first addendum, "[Touchstone] shall . . . process the [CUP] application," were ambiguous as to whether Touchstone had discretion to abandon an application process once begun, or whether Touchstone was contractually obligated to process its application to completion before invoking its right to terminate for unattainability. Napolitano presented no extrinsic evidence to the trial court of the parties' contemporaneous understanding. Napolitano has abandoned this argument on appeal.

acceptable CUP be objectively unattainable before Touchstone could cancel the sublease. Napolitano alternatively contends the language required Touchstone subjectively to have believed the CUP was unattainable before canceling. Touchstone argues the language "for whatever reason," as used in the phrase of the first addendum that "[s]hould, for whatever reason, a CUP . . . be unattainable with conditions acceptable to [Touchstone]," granted Touchstone "unfettered cancellation rights," limited only by the third addendum's waiver provision.

Napolitano's interpretation is the better one. "In the absence of a specific expression in the contract or one implied from the subject matter, the preference of the law is for the less arbitrary reasonable person standard." (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 59; accord, *Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 106 [An objective test "'is especially preferable when factors of commercial value or financial concern are involved, as distinct from matters of personal taste.'"].) The first addendum's use of the passive voice to describe the condition triggering Touchstone's discretion to cancel, that "a CUP . . . be unattainable," also favors interpreting the provision to require an objective test. If the parties intended to vest Touchstone with the discretion to determine whether a CUP was attainable, they could have drafted language to that effect, for example, "Should, for whatever reason, Touchstone determine a CUP with acceptable conditions is unattainable, it shall have the right to cancel." They did not.[11]

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[11] Touchstone also argues the parties' inclusion of "'reasonableness' qualifiers" elsewhere in the sublease and

The context of the CUP provision in the first addendum also supports interpretation of the sublease to require objective unattainability. Paragraph 1 expressly stated "[t]he Sublease is contingent upon receipt of the CUP and building permit" and made it Touchstone's duty to submit and process a CUP application "with assistance from [Napolitano]." Under Touchstone's interpretation, Napolitano would rely on Touchstone to obtain the CUP, while Napolitano would keep the lease space open and defer, then abate the rent, with Touchstone having the sole ability to control whether it obtained the CUP on subjectively acceptable conditions. Under Touchstone's reading, for example, it could cancel the sublease because there was only an 80 percent chance of obtaining a CUP with acceptable conditions, upon subjectively determining before any hearing the CUP was unattainable if there was even a small risk Pasadena would not agree to its parking proposal. Touchstone's reading would render meaningless the express requirement the CUP "be unattainable." (See *Camacho v. Target Corp.* (2018) 24 Cal.App.5th 291, 306 [courts must "giv[e] effect to all provisions, if doing so is reasonably possible"]; *Hemphill v. Wright Family, LLC* (2015) 234 Cal.App.4th 911, 915 ["'Courts must interpret contractual language in a manner which gives force and effect to *every* provision, and not in a way which renders some clauses nugatory, inoperative or meaningless.'"].)

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addenda means they intentionally omitted a similar requirement from Touchstone's cancellation rights. But the parties also included language granting Napolitano "the right to build additional parking (at its sole discretion)," yet did not include similar language to describe Touchstone's discretion to cancel.

Interpreting the contract language as a whole, the prepositional phrase "for whatever reason" clarifies that Touchstone had the discretion to cancel if an acceptable CUP was unattainable, regardless of the reason Touchstone was unable to procure Pasadena's approval or why it found the CUP conditions unacceptable.

3. *Triable issues of fact exist as to whether a CUP with acceptable terms was attainable*

Napolitano has raised a triable issue of fact whether a CUP with terms acceptable to Touchstone was attainable at the time Touchstone asserted its right to cancel the sublease. Around February 4 or 5, 2015 Melvin described Touchstone's parking proposal in an e-mail to Creative Space as having "a 50/50" chance of success, but in his February 6 cancellation letter to Napolitano, Melvin stated there was only a "remote chance" Pasadena would approve Touchstone's parking proposal. Bernier followed up with an e-mail to Naples, in which he described the prospects of an agreement as "dim." It does not matter whether the likelihood of Pasadena agreeing to acceptable parking conditions was "50/50" or "remote" and "dim"—the word "unattainable" does not connote something merely difficult to accomplish or unlikely to be achieved. Rather "unattainable" means "not able to be accomplished or achieved." (Merriam-Webster's Online Dict. (2019) <https://www.merriam-webster.com/dictionary/unattainable> [as of Sept. 10, 2019], archived at <https://perma.cc/X6FF-87RX>; see Lexico Online Dict. (2019) <https://www.lexico.com/en/definition/unattainable> [as of Sept. 10, 2019] [defining "unattainable" as "[n]ot able to be reached or achieved"], archived at <https://perma.cc/5QD3-

WKSD>; American Heritage Dict. Online (2019) <https://ahdictionary.com/word/search.html?q=unattainable> [as of Sept. 10, 2019] [defining "unattainable" as "[i]mpossible to attain"], archived at <https://perma.cc/3XYZ-HWYP>.)

Touchstone knew seeking a minor or nonminor variance was an option, which would have allowed the hearing officer to deviate from the zoning code requirements. Although Touchstone did not revise its application to include a request for any type of variance before it purported to cancel the sublease, Touchstone's internal communications from the time of cancellation show it planned to continue its pursuit of CUP approval. Internal communications in the following weeks show Touchstone met with Economic Development to discuss a variance, and believed "[t]here[] [was] a pathway forward."

Touchstone's communications with Napolitano similarly raise questions as to whether an acceptable CUP was truly unattainable. In its letter purporting to terminate the sublease, Touchstone acknowledged a recent meeting with Economic Development suggested options that could "give this project a new life." On February 12 Melvin wrote to Stelmach, "I'm willing to work on this project a lot more . . . . [¶] . . . Economic Development is on our side on this, and that matters." On April 28 Melvin wrote to Naple, "We may have a way to move forward with the city . . . ." The next day Melvin again wrote to Naple and recounted, "We discovered in February that the building department would not allow our occupancy without a variance." Melvin added that in April, in response to an inquiry from a Pasadena planner, Melvin stated he was "optimistic" Touchstone and Napolitano could work together to obtain a variance.

These communications could support the inference it remained possible Pasadena would grant a variance, as contemplated by the express terms of the sublease ("[Touchstone]'s use of these Premises Shall require a Conditional Use Permit and/or Minor Variance (CUP)"), but Touchstone never sought a variance prior to its purported cancellation. The trial court erred in finding no triable issue of fact on this evidence.

C. *Triable Issues of Fact Exist as to Whether Touchstone Violated the Implied Covenant of Good Faith and Fair Dealing*

Napolitano contends the trial court erred in finding no triable issue of fact whether Touchstone violated the implied covenant of good faith and fair dealing by prematurely abandoning the CUP approval process and invoking its right to terminate the sublease for reasons other than the unattainability of an acceptable CUP. We agree.

1. *The sublease imposes a duty of good faith and fair dealing*

"'"'"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."'" [Citation.] 'The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith.'" (*Bevis v. Terrace View Partners, LP* (2019) 33 Cal.App.5th 230, 252; accord, *Steiner v. Thexton* (2010) 48 Cal.4th 411, 419 [noting all contracts impose duty of good faith and fair dealing, but concluding there was no breach because contract's express language allowed defendant the

"'absolute and sole discretion' to cancel the transaction"].) ""'This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose.'"" (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 76 [where agreement stated loan servicer "should" work with borrower to identify feasible alternatives to foreclosure, loan servicer was bound by implied covenant to exercise its discretion to do so in good faith]; accord, *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 [the covenant "prevent[s] one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*"]; *Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1204 [the covenant "'prevent[s] a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract'"].)

"The precise nature and extent of the duties imposed under the implied covenant thus depend upon the purposes of the contract." (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 806 [where plaintiff's share of common expenses under lease was determined by expenses incurred by defendant, implied covenant entitled plaintiff to verify incurred expenses by requesting accounting from defendant]; accord, *Avidity Partners, LLC v. State of California, supra*, 221 Cal.App.4th at p. 1204.) Because "the implied covenant will only be recognized to further the contract's purpose[,] it will not be read into a contract to prohibit a party from doing that which

is expressly permitted by the agreement itself." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120; accord, *Steiner v. Thexton, supra*, 48 Cal.4th at p. 419 ["the *implied* covenant does not trump an agreement's *express* language"].)

Touchstone contends implying a covenant of good faith and fair dealing into the first addendum would contradict the express terms of the addendum, which Touchstone argues granted it the unfettered discretion to cancel the sublease for any reason before Pasadena approved a CUP. As discussed, we reject this interpretation of the language in the first addendum. The authorities cited by Touchstone, which limit application of the implied covenant where a contract expressly permits the conduct at issue, are therefore inapposite. (See, e.g., *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374 [lessor that terminated lease upon lessee's notice of intent to sublet was not bound by implied covenant to accept reasonable sublet where express terms gave lessor right to terminate and negotiate new lease directly with potential sublessee]; *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1061 [lease providing "'Tenant and Landlord shall each have the right to terminate'" did not bind either party to exercise termination right in good faith]; *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 808 ["[C]ourts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision

literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement."].)[12]

As discussed, the sublease did not give Touchstone discretion to abandon the application process for any reason other than unattainability of approval on acceptable terms. And, as noted, the first addendum's express terms made the sublease "contingent upon receipt of the CUP and building permit," and made it Touchstone's responsibility to submit and process the CUP application. Under these circumstances, Touchstone was bound by the implied covenant of good faith and fair dealing not to do anything that would undermine the process and "'frustrate[] [Napolitano's] rights to the benefits of the contract.'" (*Avidity Partners, LLC v. State of California, supra*, 221 Cal.App.4th at p. 1204; accord, *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 349.)

2. *Triable issues of fact exist as to whether Touchstone canceled the sublease and withdrew its CUP application for reasons other than unattainability*

Napolitano has raised a triable issue of fact whether Touchstone violated the covenant's "duty to do everything that the contract presuppose[d] [it would] do to accomplish its purpose" by prematurely withdrawing its application and

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[12] Touchstone's argument "[t]he duty of good faith need not be imposed here because the Sublease was supported by adequate consideration" is likewise without merit. Napolitano does not contend the covenant of good faith and fair dealing must be implied into the sublease or its addenda to enforce an otherwise unenforceable illusory promise; rather, it argues the covenant must be implied to give it the benefit of its bargain.

abandoning the approval process before the attainability of a CUP was fully determined. (*Lueras v. BAC Home Loans Servicing, LP, supra*, 221 Cal.App.4th at p. 76.) This is not to say the covenant imposed a duty on Touchstone to process its application to completion if circumstances made clear it would be futile. But, as discussed, at the time of Touchstone's purported cancellation, Touchstone's internal communications indicated there still was a path forward to secure Pasadena's approval of an acceptable CUP.

These same communications demonstrate Touchstone's concern about the consequences of the third addendum's waiver provision. On January 31, 2015 Melvin e-mailed Stonebreaker about the provision under which Touchstone would waive its right to terminate the sublease once Pasadena approved a CUP. Melvin wrote, "Obviously I cannot let this happen if we don't get a parking provision. [¶] . . . I want this provision retracted . . . . In other words, if we're paying rent, then I want the right to terminate the lease up to the point of an approved building permit." (Capitalization omitted.) While Touchstone may have had a legitimate cause for concern over the effect of the third addendum's waiver provision, that concern did not obviate Touchstone's duty to pursue approval of a CUP in good faith, especially given that Touchstone agreed to the waiver provision as part of a bargain granting it rent deferments during the CUP process.

Napolitano also introduced evidence Touchstone canceled the sublease to gain a financial advantage unrelated to the terms of the CUP by seeking to escape rent payments during the protracted CUP approval process and to renegotiate the sublease to obtain further rent abatements. Melvin went so far as to say

he wanted to renegotiate the sublease regardless of whether Pasadena approved an acceptable CUP, stating in a January 31, 2015 e-mail, "Let's save money on Pasadena and let it go if we don't both get city accommodations and landlord accommodation . . . ." Melvin similarly wrote in a February 5, 2015 e-mail to Bernier, "[I]f things turn out well [with Pasadena] in two months, and [Naple] won't take a similar deal, I'll still walk. In fact, I might want half rent again."

Melvin also expressed distrust for Napolitano on multiple occasions. Melvin's statement he "might feel differently" about cancelling the lease "[i]f this were a different landlord" suggests the unattainability of an acceptable CUP was not Melvin's sole motivation for canceling. Touchstone also contemplated hiding information about the status of its CUP application from Napolitano. On February 5, 2015 Melvin wrote, "I don't think we necessarily need to tell [Naple] that we were finally on a calendar [for a CUP hearing], not sure." After purporting to cancel the sublease, Touchstone continued furtively to discuss a CUP and variance with Pasadena, while simultaneously attempting renegotiate the sublease. On February 20, in an e-mail to Creative Space, Melvin described "a pathway forward" with Pasadena but instructed the recipients, "Don't divulge the details to Napolitano of a possible solution, or imply that there is a solution to the problem of getting a CUP." In the same e-mail, Melvin expressed an interest in exploring other Pasadena locations for a climbing gym, suggesting Touchstone was looking for a better deal.

A reasonable trier of fact could find Touchstone terminated the sublease to preserve its cancellation rights, avoid paying rent during the protracted CUP approval process, negotiate for more

favorable rent terms with Napolitano, and explore other real estate options for its Pasadena gym, in violation of its duty to act in good faith to secure Pasadena's approval of a CUP with acceptable terms.

DISPOSITION

The judgment is reversed. The matter is remanded with directions for the trial court to vacate its order granting summary judgment and to enter an order denying Touchstone's motion for summary judgment or, in the alternative, for summary adjudication. Napolitano is entitled to recover its costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.