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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WASHINGTON 111, LTD., Plaintiff, Cross-defendant, and Appellant, v. AARON KELSEY et al., Defendants, Cross-complainants, and Appellants.	G062343 (Super. Ct. No. 30-2019-01091292) O P I N I O N

Appeal from an order of the Superior Court of Orange County, John C. Gastelum, Judge. Affirmed.

Spierer, Woodward, Corbalis & Goldberg, Stephen B. Goldberg and Michelle R. DeMason for Defendants, Cross-complainants and Appellants.

Horvitz & Levy, Curt Cutting, Cameron Fraser; Stuart Kane and Donald J. Hamman for Plaintiffs, Cross-defendants and Appellants.

* * *

INTRODUCTION

Under California law, a contract may be rescinded if consent was given based on a mutual mistake of fact. To permit rescission, the mistake must be of a fact that was present at or before the time the contract was made. Mistakes as to future facts or errors in judgment do not permit a party to rescind. The difference between a mistake of past or present fact and a mistake of future fact or error in judgment can be subtle and difficult to discern. One test to draw this distinction, and the one we use here, is to ask whether the truth or falsity of the proposition of fact depends upon the occurrence or nonoccurrence of a future event.

This case arises out of a lease between plaintiff Washington 111, Ltd. (Washington), as landlord, and defendant Aaron Kelsey, as tenant, of office space in the Washington Park Shopping Center (the Center) in the City of La Quinta (the City). In response to Washington's lawsuit for breach of the lease, Kelsey[1] sought rescission based on mutual mistake of fact. The jury found there was a mutual mistake of fact, but the trial court granted Washington's motion for a new trial. Kelsey and his wife appealed.

We affirm the order granting a new trial. The proposition of fact to which Kelsey contends the parties were mistaken, and on which the jury was instructed, was his ability to obtain permits for and complete construction of tenant improvements without the City requiring an amount equal to 20 percent of his costs of construction be spent on improving the Center's common areas (over which Washington had exclusive control). As we shall explain that proposition was not a fact; rather, it was a description

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[1] Washington also sued Kelsey's wife because she guaranteed the lease. We use the name Kelsey throughout the opinion for simplicity.

of a situation or event that had not, and could not, have existed or occurred at the time the lease was executed. Whether that proposition was true or false could not be determined at the time the lease was executed but depended upon the occurrence or nonoccurrence of a future event, i.e., whether the City would or would not impose additional conditions on issuing permits. As such, the proposition was a prediction or mistaken belief that the City would not impose further conditions to issuing permits to Kelsey to build his tenant improvements.

As we are affirming the order granting a new trial, we dismiss as moot Washington's cross-appeal from the judgment. (See *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 764.)

FACTS

I. *The Lease Between Washington and Kelsey*

Washington owns the Center in La Quinta, California. Jack Tarr managed Washington. As of early 2018, Kelsey, who is a dentist, leased suite 10 at the Center for use as his dental office. At that time, Kelsey's 10-year lease was due to expire. In April 2018, Kelsey and Washington executed an indenture of lease (the Lease) for suites 4 and 5.

The Lease granted Kelsey exclusive use, possession, and control over the "Premises," defined as the interior of suites 4 and 5 for use of a dental office, and a license to use the Center's common areas, such as parking areas, driveways, and pedestrian walkways. Such common areas remained "subject to the exclusive control and management of the Landlord . . . ."

The Lease required Kelsey, as tenant, to complete at his expense all tenant improvements necessary to place suites 4 and 5 "in finished condition for opening of [a dental office]." Kelsey expected to pay nearly

$700,000 to make those tenant improvements. The Lease also required Kelsey to apply for and obtain all permits required by the City to construct such tenant improvements. Paragraph 17.02 of the Lease stated, "Tenant [Kelsey] shall, at Tenant's sole cost and expense, comply with all of the requirements of all city, county, municipal, state, [and] federal . . . governmental authorities . . . pertaining to the Premises." The Lease provides that if Kelsey failed to obtain permits within 90 days following Washington's approval of construction, then Washington would have the right to terminate the Lease.

II. *Conditions to Issuing Kelsey Building Permits*

As part of his plan to build out suites 4 and 5 for his dental practice, Kelsey submitted construction plans to the City in order to obtain a building permit. The City reviewed Kelsey's plans for, among other things, compliance with the 2016 California Building Code and the La Quinta Municipal Code.

In October 2018, as part of Kelsey's permit process, the City conducted a site inspection at the Center and determined that certain "path of travel" accessibility improvements under the Americans with Disabilities Act of 1990 (ADA; 42 U.S.C. 12101 et seq.) had to be made to the common areas as a condition to issuing a permit to Kelsey. According to the City, the 2016 California State Building Code required the City to impose that condition because the Center did not meet current ADA accessibility standards. The City required at least 20 percent of total cost of tenant improvements be spent to make the path of travel more accessible.

In an e-mail to Tarr dated November 2, 2018, Kelsey wrote: "The issue at hand is the City's requirement that the property outside of the leased

space be brought up to code with regards to ADA guidelines. These areas are under your purview and thus control the decision process." "The [tenant improvement] build is actually [$]300K, which would put the ADA upgrade amount at [$]70K to meet a 19% threshold."

On November 6, 2018, Kelsey's tenant improvement plans were approved by the City. However, a building permit was not approved because the "final path of travel upgrade determination approval" was required.

III. *The City's Policy Was New and Unforeseen*

The City's policy of requiring upgrades to the common area path of travel as a condition to issuing permits to tenants at the Center was new. Kelsey testified that, when he signed the Lease, he was not aware that the City would condition permits and issuance of a final certificate of occupancy on making path of travel improvements to common areas. When Kelsey previously built out suite 10 at the Center, no such issues arose. Tarr likewise testified that when he signed the Lease on behalf of Washington, he did not know that Kelsey's ability to get a permit for tenant improvements would be conditioned on path of travel upgrades to the common areas. In Tarr's experience, the City had never before imposed such a condition.

In his November 2, 2018 e-mail to Tarr, Kelsey gave Washington the choice of two options, either "figure out how to spend [$]70K on these ADA issues and we move forward," or "work out a new lease" for Kelsey's current space (suite 10) and "kill this project." Washington initially would not agree to undertake the travel path upgrades required by the City.

IV. *The Dispute Between Washington and the City Over Conditions to Tenant Permits*

Three other tenants at the Center seeking building permits from the City also had the issuance of permits conditioned on common area travel path upgrades. A dispute arose between Washington and the City over whether the City could require path of travel improvements to common areas, which are under the control of the landlord, as a condition to issuing occupancy permits to the Center's tenants. During the dispute, the City issued tenants building permits and temporary certificates of occupancy. The dispute was mediated, and a settlement was reached in February 2020.

Under the terms of the settlement agreement, the City agreed to issue permanent certificates of occupancy to existing tenants at the Center that had temporary occupancy permits. The City also agreed that, as to future tenants at the Center, it would not impose, as a condition for issuance of a building permit or occupancy permit, any common or parking area ADA improvements so long as Washington retained control and management of those areas. Washington agreed to complete construction of ADA improvements to common and parking areas within five years.

V. *The City Approves Kelsey's Building Permit*

In January 2019, Washington submitted a site diagram with details for common area travel path improvements. On February 4, the City's building division accepted the site design. The City's acceptance resolved any doubts about the City ultimately issuing a permanent certificate of occupancy.

As of February 28, 2019, Kelsey's building permit had been approved by the City subject only to the condition that Kelsey identify his

general contractor. At that point, Kelsey could "pull his permits" from the City and begin the build out plans for suites 4 and 5.

Washington forgave all unpaid rent on suites 4 and 5 due before March 2019. Kelsey never took possession of suites 4 and 5. In May 2019 he made an offer to lease a building three miles away from the Center.

PROCEDURAL HISTORY

I. *Trial and Jury Verdict*

Washington sued Kelsey for breach of lease and breach of guaranty, and Kelsey brought a cross-complaint against Washington which, as relevant here, included a cause of action for rescission of the Lease. In an amended cross-complaint and an amended answer, Kelsey alleged mutual mistake of fact about "[Kelsey]'s ability to timely obtain a tenant improvement permit and, later, a timely final certificate of occupancy without depending on [Washington]'s upgrades to common area[s]."

The matter was tried to a jury. The parties argued whether the jury should be instructed on mistake of fact. The trial court agreed with Kelsey to instruct the jury on mistake of fact and to give CACI No. 331, modified to read as follows: "[The] Kelseys claim that there was no contract because both parties were mistaken about [the] Kelseys' ability to permit, construct, and use their suite without the City requiring that an amount equal to 20% of [the] Kelseys' cost of construction be spent on improving common area[s] at the Washington Park shopping center, which is within Washington's . . . exclusive authority and control. To succeed, [the] Kelseys must prove both of the following: [¶] 1. That both parties were mistaken about [the] Kelseys' ability to do their tenant work and open for business without the City requiring substantial improvements to common area[s],

which only Washington . . . had authority and control over; [and] [¶] 2. That [the] Kelseys' would not have agreed to enter into this contract if they had known about the mistake. [¶] If you decide that [the] Kelseys have proved both of the above, then no contract was created."

The jury returned a verdict in favor of Kelsey. On the verdict form, the jury answered "Yes" to the question, "Were [the] Kelseys mistaken about their ability to permit, construct, and use their suite without the City requiring that an amount equal to 20% of [the] Kelseys' cost of construction be spent on improving to common area, which was within Washington 111's exclusive control?" The jury answered "Yes" to a question asking whether Washington was also mistaken. The jury answered "No" to the question, "Would [the] Kelseys have entered into the contract if they had known about this mistake."

II. *Washington's Motion for a New Trial*

Following entry of judgment on the verdict, Washington moved for a new trial on four grounds: (1) "[t]he mutual-mistake instruction did not properly describe a 'mistake' under California law"; (2) "[t]he alleged mistake was not material as a matter of law;" (3) "[t]he erroneous mutual-mistake [(*sic*)] instruction was prejudicial because the trial evidence supported a verdict for Washington . . . on the material issues; and, alternatively (4) "there was insufficient evidence that the parties made a mistake of fact."

The trial court granted Washington's motion for new trial on the ground that "there was insufficient evidence that the parties made a mistake of fact." The court found "the undisputed evidence offered at trial shows the parties were mistaken as to a possible future event, not a fact that existed before or at the time they entered into the lease agreement." The trial court

explained that the evidence established the parties were unaware when they executed the Lease of the City's policy conditioning the issuance of building permits on ADA compliance and, therefore, "any failure to anticipate this new requirement was not a mistake of fact." The court also found that no evidence was offered at trial to show the "nonoccurrence" of the City's new ADA requirement "was a basic assumption of the lease." Because there was "no evidence the parties were mistaken as to an identifiable and essential element of the lease *at the time they executed it*," the trial court found insufficient evidence to support the verdict and granted the motion for new trial.

Kelsey and his wife appealed from the order granting a new trial. Washington filed a protective cross-appeal from the judgment.

DISCUSSION

I. *Standard of Review*

"[A]s a general matter, orders granting a new trial are examined for abuse of discretion." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859.) The order granting a new trial under Code of Civil Procedure section 657 is presumed to be correct and must be affirmed on appeal "'unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.'" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.)

Although abuse of discretion is the general standard of review, "any determination underlying any order is scrutinized under the test appropriate to such determination." (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 859.) If the order granting a new trial is premised on a

determination of a question of law, appellate review is de novo. (*Lee v. West Kern Water Dist*. (2016) 5 Cal.App.5th 606, 624 [order granting new trial was based on a determination whether jury instructions were correct and therefore was reviewed de novo].) When the evidence extrinsic to a contract is not in conflict, the determination of whether a mutual mistake of fact occurred is a question of law. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527.)

II. *The Mutual Mistake of Fact Instruction as a Matter of Law Did Not Describe a Mistake of Past or Present Fact Permitting Rescission of the Lease*

A. *Scope of Review*

Although the trial court granted a new trial on the ground of insufficiency of the evidence, the issue in the trial court and on appeal, was not so much sufficiency of the evidence, which both sides agree is virtually undisputed. The issue is whether the proposition claimed by Kelsey to have been mistaken was legally sufficient to permit rescission of the Lease. That proposition was specifically laid out in the mutual mistake of fact jury instruction drafted by Kelsey's counsel and was the subject of questions submitted to the jury.

We must affirm an order granting a new trial if it should have been granted upon any ground stated in the motion whether or not that ground was specified in the order. (Code Civ. Proc., § 657.) Accordingly, instead of addressing sufficiency of the evidence, we believe it makes better sense to address Washington's first and third grounds for seeking a new trial, that is, "[t]he mutual mistake instruction did not properly describe a 'mistake' under California law" and "[t]he erroneous mutual-mistake [(*sic*)]

instruction was prejudicial because the trial evidence supported a verdict for Washington . . . on the remaining issues."

B. *The Mutual Mistake of Fact Instruction Describes a Hope, Prediction, or Error in Judgment*

A contract may be rescinded if consent was given by mistake. (Civ. Code, § 1689, subd. (b)(1).) Civil Code section 1577 defines a "mistake of fact" as: "[A] mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: [¶] 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed." To warrant rescission, the mistake must concern facts existing at or before the time the agreement was executed. (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 245 (*Paramount*).)

The fact as to which Kelsey contends the parties were mutually mistaken was described in the mutual mistake of fact jury instruction as follows: "[The] Kelseys' ability to permit, construct, and use their suite without the City requiring that an amount equal to 20% of [the] Kelseys' cost of construction be spent on improving common area[s] at the Washington Park Shopping Center, which is within Washington 111's exclusive authority and control."

Kelsey contends this alleged mistake was one of present fact and therefore the trial court erred by concluding it was of a future occurrence. Washington argues the instruction describes a failure to anticipate future events and therefore erroneously describes a mistake of fact as California contract law defines that term.

Courts have distinguished between a mistake of present or past fact warranting rescission (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1332-1333), and errors in judgment or facts concerning future events, which do not warrant rescission (*Paramount, supra*, 227 Cal.App.4th at pp. 244-249; *Mosher v. Mayacamas Corp.* (1989) 215 Cal.App.3d 1, 5, (*Mosher*)). "Civil Code section 1577 speaks in terms of mistakes as to present or past facts; there is no authority for rescission based on a mistake regarding future events." (*Paramount, supra*, 227 Cal.App.4th at p. 245.)

In this case, the parties were not mistaken as to a present or past fact. Indeed, the proposition of fact which Kelsey contends to have been mistaken was not, when the Lease was executed, a fact at all. A fact is "[s]omething that actually exists; an aspect of reality" (Black's Law Dict. (7th ed. 1999) p. 610, cl. 2), "a thing done," or "an actual occurrence" (Merriam-Webster's Collegiate Dict. (11th ed. 2004) p. 448, cl. 1). Civil Code section 1577 defines a "[m]istake of fact" in terms of "a fact past or present" or "a thing . . . which does not exist . . . ."

When the Lease was executed, Kelsey had not yet obtained permits for and constructed the tenant improvements to suites 4 and 5 at the Center. His being able to do so without the City requiring an amount equal to 20 percent of the construction cost be spent on common area improvements was something that had not yet occurred. Whether Kelsey would be able to obtain permits for and construct the tenant improvements without such requirements could not be shown to be true or false until the occurrence or nonoccurrence of a *future* event. Until one of those events occurred, the proposition identified in the mistake instruction was not a "fact past or present," but a mere hope, prediction, or error in judgment.

The parties in this case simply failed to anticipate a *future* occurrence. *Mosher, supra*, 215 Cal.App.3d 1 is analogous. In *Mosher*, the buyer and the seller jointly owned properties in Lake Tahoe until the buyer agreed to purchase the seller's interest in the properties. (*Ibid.*) After the parties executed the purchase agreement and the buyer had begun paying the purchase price, a change in federal tax law eliminated the tax benefits of owning a secondary residence, which severely reduced the value of the purchased properties. (*Id.* at p. 3.) Due to the change in federal tax law, the buyer stopped making payments for the properties, and the seller sued for breach of contract. (*Ibid.*)

The trial court granted the seller's motion for summary judgment, and the Court of Appeal affirmed. (*Mosher, supra*, 215 Cal.App.3d at p. 4.) The court rejected the buyer's claim that the parties had made a mutual mistake of fact by overvaluing the properties in the purchase agreement. (*Id.* at pp. 5-6.) Instead, the buyer's claim was premised on the argument that the valuation of the properties was rendered mistaken by events that occurred after the purchase agreement was executed—i.e., the adverse federal tax law that was enacted several years after the parties executed the agreement. (*Id.* at p. 5.) The court explained: "Absent evidence that the existence of a future contingency (e.g., continuation of tax benefits) is an assumption of the contract . . . , the defense of mistake of fact must be premised on past or present facts about which the parties are ignorant or mistaken. There was no evidence presented to the trial court that the valuation of the properties proposed by appellant itself in 1982 was erroneous in light of facts then or previously in existence." (*Ibid.*)

In the present case, as in *Mosher*, the parties did not make any mistake about the value of the leased premises at the time the Lease was made. Instead, they failed to anticipate future, adverse governmental action imposing requirements which made the Lease less desirable, at least to Kelsey. Cities can, and do, impose conditions on issuance of building permits. The parties did not accurately predict that the City would not require improvements to the Center's common areas as a condition to issuing permits to Kelsey.

Kelsey relies upon *Williams v. Puccinelli* (1965) 236 Cal.App.2d 512 (*Williams*). In *Williams*, a landlord and tenant entered into a lease for a portion of a two-story building. (*Id.* at p. 513.) Both the landlord and the tenant contemplated the tenant would use the premises for a restaurant, and the lease expressly provided for that purpose. (*Ibid.*) Unbeknownst to the parties, both the leased and unleased portions of the building had significant structural problems and substantial alterations were required by law to allow the second floor to be used as a restaurant. (*Ibid.*) In a lawsuit by the tenant, the trial court found there was a mutual mistake of fact "'in that the parties to said lease believed said demised premises, on the second floor of said building, could be used as a restaurant and bar without any structural changes in the brick building; and that it was not within the contemplation of the parties at the time the lease was executed, [that] the very costly structure changes *to the building itself* would have to be made before said second floor could be used lawfully as a restaurant.'" (*Id.* at p. 515.)

The Court of Appeal, affirming the judgment of rescission, concluded substantial evidence supported the trial court's finding of mutual mistake. (*Williams, supra*, 236 Cal.App.2d at p. 515.) "The testimony is without conflict that both parties entered into the lease under the

assumption that respondent could lawfully install and operate a restaurant and bar on the second floor without the necessity of any substantial structural alterations or repairs to the building itself, and that *both* parties were ignorant of the structural weaknesses of the building which would prevent such use unless such work was done." (*Id*. at p. 516.) Both the trial court and the Court of Appeal were careful to point out that the structural weaknesses were throughout the building, and not just in the portion leased to the tenant, and therefore the lease provision that the tenant take the premises """as is""" did not preclude rescission for mutual mistake. (*Id.* at pp. 514, 517-518, & fn. 3.)

Williams demonstrates by distinction why there was no mutual mistake in the present case. The mutual mistake of fact in *Williams* was that the entire building was structurally sound and a restaurant and bar could be operated on the second floor without the necessity of structural alterations or improvements. The condition of the building was a fact that was in existence and could be determined as true or false when the lease was executed. The same cannot be said of Kelsey's ability to construct the tenant improvement without the City later requiring improvements to the common areas as a condition to issuing permits.

III. *Kelsey Failed to Show a Future Contingency That Was an Assumption of the Lease*

An error in judgment or failure to anticipate a future occurrence permits rescission of a contract if "the existence of a future contingency" was "an assumption of the contract . . . ." (*Mosher, supra*, 215 Cal.App.3d at p. 5.) The trial court here found "no evidence was offered at trial to show that the non-occurrence of the City's new requirement was a basic assumption of the

lease. [Citation.] Kelsey offered no evidence to show any oral agreement concerning the non-occurrence of the City's new requirement. Nothing in the contract itself indicates the parties assumed that the City would not impose this kind of requirement."

Kelsey argues an assumption of the Lease was the future contingency that his improvements would not be linked to Washington's improvements to common area path of travel and the Lease terms show the parties assumed that his improvements were independent from common area improvements. Thus, Kelsey argues, the failure to anticipate the City requiring improvements to the Center's common areas as a condition to issuing Kelsey permits for tenant improvements justified rescinding the Lease.

As Washington points out, the mutual mistake of fact instruction, which was drafted by Kelsey's counsel, did not address the future unanticipated contingency issue. No instruction on the subject of future unanticipated contingency was ever proposed.[2] The lack of any jury instruction on future unanticipated contingency did not render the mutual mistake of fact instruction erroneous, which is what Washington contends, but does mean that Kelsey's mistake of fact defense was and is limited to the theory presented by that instruction.

The trial court nonetheless made findings on and rejected a future unanticipated contingency theory, and so we address Kelsey's future unanticipated contingency argument. We conclude it has no merit. As an

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[2] Washington did not raise the issue of future unanticipated contingency in its motion for new trial, and Kelsey did not argue the matter in his opposition. The future unanticipated contingency issue appears to have first arisen in the trial court's order granting the motion for a new trial.

expression of the parties' assumption, Kelsey points to section 5.01(a) of the Lease, which states in relevant part: "Landlord shall at its cost and expense perform the 'Landlord's Work' as set forth in Exhibit 'B' in accordance with the plans and specifications prepared by Landlord or Landlord's architect. Any work in addition to any of the items specifically enumerated in said Exhibit 'B' shall be performed by Tenant at its own cost and expense." He argues that, outside of the work set forth in exhibit B, the Lease assumed Washington would have no obligation to pay for or perform any work. Kelsey also points out that he had control over only suites 4 and 5 while the Center's common areas were "subject to the exclusive control and management of the Landlord . . . ."

The recitation in the Lease of the scope of the landlord's work does not mean that a basic assumption of the Lease would be that the City or other governmental authority would not require Washington to perform other work as a condition to issuing permits to Kelsey. The City is not bound by the Lease. Both Kelsey and Tarr knew the City could place conditions on issuing permits. Although Kelsey did not have control over common areas, Washington was bound by an implied covenant not to do anything to injure his right to receive the benefits of the Lease. (*Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 105.)

Kelsey also cites and relies upon e-mail messages exchanged between Tarr and Kelsey on November 2, 2018, as evidence of the parties' beliefs and understandings about the assumptions of the Lease. Kelsey wrote he was "disappointed by the recent events provoked by the City" and Tarr responded by claiming Kelsey had "a misunderstanding . . . in regards to our mutual lease obligations on this issue and the purview of scope of work you are responsible for in making necessary determinations." Construed in favor

of the order granting a new trial (*Jones v. Sieve* (1988) 203 Cal.App.3d 359, 365), that evidence shows only that the City's actions were unforeseen and the parties disagreed about who had the obligation to comply with the City's requirements and conditions.

For argument's sake, we shall assume Kelsey is correct and assumptions of the Lease were that the Landlord's work was limited to the work identified in the Lease and that completion of his tenant improvements would not be linked to improvements to the Center's common areas. Kelsey's reason for entering the Lease was to acquire a larger space for his dental practice; Washington's reason was to make money by receiving rent. The City's requirement of improvements to the Center's common areas did not undermine those reasons for entering into the Lease. Lease provisions regarding landlord's work and tenant's responsibilities were not the purposes of the Lease but terms by which the parties agreed to carry out those purposes.

IV. *The Mutual Mistake of Fact Instruction Was Prejudicial*

Instructional error must be prejudicial to warrant reversal or a new trial. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) Instructional error in a civil case is prejudicial "'where it seems probable' that the error 'prejudicially affected the verdict.'" (*Ibid.*) To assess prejudice, we consider: "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Id.* at pp. 580-581.)

The jury verdict itself demonstrates the jury was misled by the erroneous mutual mistake of fact instruction. The jury found in favor of Kelsey based on specific findings the Kelseys and Washington were

"mistaken about [the Kelseys'] ability to permit, construct, and use their suite without the City requiring that an amount equal to 20% of [the] Kelseys' cost of construction be spent on improving common area, which was within Washington 111's exclusive control" and the Kelseys would not have entered into the Lease if they had known about the mistake. Because the jury found mutual mistake of fact, it did not answer a series of questions regarding Washington's breach of lease cause of action. The prejudicial effect of the mutual mistake of fact instruction thus is manifest in the jury verdict itself.

V. *Kelsey Is Estopped from Asserting Mistake of Law*

Kelsey argues the order granting a new trial should be reversed on the ground the parties made a mutual mistake of law rather than a mutual mistake of fact. During arguments over jury instructions, counsel for Washington objected to giving the mutual mistake of fact instruction on the grounds the mistake was not material and any mistake was one of law, not fact. In response, Kelsey argued the mistake had "nothing to do with the law" and "absolutely [was] a factual mistake." The court agreed with Kelsey, gave the mutual mistake of fact instruction drafted by his counsel, and did not instruct on mistake of law.

Under the invited error doctrine, a party who induces the commission of error is estopped from asserting it as a ground for reversal on appeal. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) Kelsey induced the trial court not to give an instruction on mutual mistake of law. He is therefore estopped from asserting mutual mistake of law as a ground for reversal.

DISPOSITION

The order granting Washington's motion for a new trial is affirmed. Washington's cross-appeal is dismissed as moot. Washington is entitled to costs on appeal.

SANCHEZ, J.

WE CONCUR:

GOETHALS, ACTING P. J.

DELANEY, J.