2d Civ. No. B-194349
LASC No. BC329607

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GABRIEL GUERRERO,

Appellant,

vs.

CORDOVA ASSOCIATES, INC.,

Respondent.

APPEAL FROM
SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE JANE JOHNSON, JUDGE

APPELLANT'S OPENING BRIEF

GLENN WARD CALSADA, SBN 134589
555 WEST FIFTH STREET, 30TH FLOOR
LOS ANGELES, CALIFORNIA 90013
TELEPHONE: (213) 996-8431
FACSIMILE: (213) 996-8326
EMAIL: glenn@calsadalaw.com

Attorney for Appellant

2d Civ. No. B-194349
LASC No. BC329607

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GABRIEL GUERRERO,

Appellant,

vs.

CORDOVA ASSOCIATES, INC.,

Respondent.

APPEAL FROM
SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE JANE JOHNSON, JUDGE

APPELLANT'S OPENING BRIEF

GLENN WARD CALSADA, SBN 134589
555 WEST FIFTH STREET, 30TH FLOOR
LOS ANGELES, CALIFORNIA 90013
TELEPHONE: (213) 996-8431
FACSIMILE: (213) 996-8326
EMAIL: glenn@calsadalaw.com

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER

I

INTRODUCTION

This appeal concerns an action for specific performance filed by Plaintiff and Appellant Gabriel Guerrero against Defendant and Respondent Cordova Associates, Inc.. Plaintiff was granted a judgment for equitable conversion against Respondent upon a proper showing that Respondent had sold the subject property to a third party during the pendency of the lawsuit and Plaintiff was otherwise entitled to specific performance.

Appellant appeals an order vacating his judgment for equitable conversion and entering a new and different judgment in favor of Respondent. As set forth herein, the order vacating the initial judgment must be reversed because (1) the trial court exceeded its jurisdiction by ruling on Respondent's motion to vacate after Respondent had filed a notice of appeal of the initial judgment, (2) the trial court erroneously concluded that Plaintiff was required and failed to tender the full purchase price for the subject property during the escrow period because Respondent/Seller had fully performed its obligations to Plaintiff/Buyer, even though time was not of the essence, the Seller did not notarize the grant deed or deposit it in a proper form or provide a residential transfer disclosure statement, prior to committing an anticipatory breach of contract, and (3) Respondent's protective cross-appeal was untimely filed and, as a result, the Plaintiff's judgment must be automatically reinstated.

II

STATEMENT OF APPEALABILITY

This is an appeal of an August 30, 2006, order vacating the Plaintiff's judgment for specific performance and the substitute judgment in favor of Respondent. (Appellant's Appendix [hereinafter "AA"] 369-379) The order is an appealable post-judgment order. (Code Civ. Proc. §§ 663a, 904.1, subd. (a)(4).) The notice of appeal was timely filed on October 10, 2006. (AA 369.)

III

STATEMENT OF ISSUES ON APPEAL

1. Must the order granting Respondent's §663 motion be reversed where the trial judge issued its ruling during the pendency of Respondent's prior appeal?

2. Must the order granting Respondent's §663 motion be reversed where the trial court erroneously concluded that Plaintiff was required and failed to tender the full purchase price for the subject property during the escrow period because Respondent/Seller had fully performed its obligations to Plaintiff/Buyer, even though time was not of the essence, the Seller did not notarize the grant deed or deposit it in a proper form or provide a residential transfer disclosure statement, prior to committing an anticipatory breach of contract?

(3) Must the initial judgment in favor of Plaintiff be automatically reinstated because

Respondent's protective cross-appeal was untimely filed?

IV

STATEMENT OF THE CASE

1. The Subject Property

This dispute concerns residential real property consisting of three (3) parcels located in El Sereno, California, approximately five (5) acres in total size and improved with a triplex .[1] (AA 268). The Complaint alleged that Cordova Associates, Inc. represented by its president Henry Cordova (hereinafter "Cordova" or "Defendant") committed fraud and breached its agreement to sell the subject property. (AA 1-51.). Plaintiff sought the alternative remedies of specific performance and damages. (AA 8). Defendant answered the complaint on March 28, 2005. (AA 52-57.) After the filing of the Complaint, the trial court expunged Plaintiff's lis pendens based on the state of evidence at the time of the motion to expunge. (AA 62-64). Thereafter, Defendant sold the subject property to a third party who had knowledge of the prior escrow and pending lawsuit. (AA 268). After a court trial, the trial judge issued a statement of decision (AA 267-282) and made the following findings of fact:

2. Development Potential Impacted By Split Zoning Issues

On June 25, 1990, the City of Los Angeles, enacted Ordinance No. 165879

[1]The property is commonly described as 2608 Eastern Avenue, 2520 Eastern Avenue and 2647 Lombardy Road, Los Angeles, California (hereinafter "subject property").

rezoning a portion of the subject property (2520 Eastern Avenue) from R1 (single family home density) to (T)(Q)RD6-1 (town home density). (AA 268.) At all relevant times, the other two parcels were zoned RD6-1 (town home density). (AA 268.) The designation of "(T)" and "(Q)" placed certain conditions and restrictions on the 2520 Eastern Avenue parcel not present on the other two parcels and allowed the City to withdraw the higher zoning classification at a later date and replace it with R1 zoning. (AA 268.)

3. **Defendant's Own Failed Efforts to Develop The Subject Property**

On or about February 21, 1991, Defendant acquired the subject property. (AA 268 [Ex. 11 (AA 549)].) Defendant's president, Henry Cordova, a man in his seventies, had been a real estate broker for several years and was in the development business. (AA 268.) Over the years, Defendant endeavored to develop the subject property with his son. (AA 268). Defendant was unable to get City approval for his project and decided to sell the property. (AA 269.) Acting as an owner-seller, Defendant, for many years, placed a large "for sale" sign at the property and received numerous inquiries from buyers and real estate professionals. (AA 269 [Ex. 57 (AA 685)].)

4. **Gabriel Guerrero Meets His Mentor Henry Cordova**

Sometime in 2002, Plaintiff, a successful commercial real estate agent, noticed the "for sale" sign and contacted the Defendant. (AA 269.) Plaintiff and Defendant quickly

became friends and began to socialize. (AA 269.) Plaintiff viewed Defendant as a mentor on real estate and development matters. (AA 269.)

5. **Failure of Early Proposals Due To Zoning Issues**

On December 5, 2002, Plaintiff, acting as agent, presented Defendant with a proposal from buyer Pacific Crest to purchase the subject property. (AA 269.) This proposal contained a zoning contingency provision for the buyer. (AA 269.) This offer was met with a counter offer by Defendant for $840,000.00. (AA 269 [Ex. 58 (AA 688)].) The deal was never consummated. Defendant was to pay a 4% commission to "Gabriel Guerrero/Carolyn Jacobs Brokers." (AA 269 [Ex. 58 (AA 688)].)

On March 26, 2003 a proposal to purchase for $840,000.00 was made by Plaintiff, as agent, on behalf of buyer SY Development to Defendant. (AA 269.) The proposal required an zone change for the property and contained a zoning contingency provision for the buyer. (AA 269.) The seller was to pay a 4% commission to Plaintiff's company, Southern California Commercial Real Estate, Inc., ("SCCRE"). (AA 269 [Ex. 23 (AA 645-646)].) This deal was never consummated. (AA 269.)

On or about April 4, 2003, Defendant opened escrow with a third party, Coastal Vision, to sell the property for $900,000.00. (AA 269 [Ex. 24 (AA 647-650].) The buyer had a zoning contingency provision. (AA 269.) No brokers were involved in this transactions. (AA 269.) Escrow was cancelled in late 2003. (AA 269.)

On September 29, 2003, a proposal to purchase the property for $950,000.00 was submitted by Richard Stromberg Development through Southern California Commercial Real Estate, Inc. ("SCCRE"), acting as broker for both the buyer and the seller. (AA 269 [Ex. 2 (AA 394-396)].) Plaintiff is a principal with SCCRE. (AA 269.) This proposal contained a zoning contingency. (AA 269.) SCCRE was to get a flat rate $45,000 broker's commission. (AA 269.) No formal action was taken by Cordova Associates, Inc. (AA 270.)

6. **Cordova Broaches Idea Of Plaintiff Developing Subject Property**

Plaintiff testified that Defendant then broached the idea of Plaintiff developing the property himself. (AA 270.) Plaintiff and Defendant discussed a 37 unit town home development, which would be certain if the entire property site was unconditionally zoned RD6-1. (AA 270.) Plaintiff had just completed a developer's program at the University of Southern California and he wanted to take on such a project. (AA 270.)

7. **Plaintiff's Original Proposal**

On October 6, 2003, a proposal is submitted by Richard Stromberg Development and Gabriel D. Guerrero by SCCRE, acting as broker for both buyer and seller. (AA 270 [Ex. 4 (AA 398-400)].)

It is accompanied by a letter from Gabriel D. Guerrero dated October 6, 2003 that states, in part:

> "I am working diligently with my contacts in the City of Los Angeles to get to the heart of the matter about what can actually be built there and at what density.
>
> You have my guarantee that I will work diligently towards the soonest possible date to close escrow. During the process, I will most likely involve you in lunches and meetings with city officials to aid in the process." (AA 397 [Ex. 3].)

8. **Exchange of Counter Offers Retaining Buyer's Zoning Contingency**

The October 6, 2003 proposal from Plaintiff was responded to with a counter offer from Defendant dated October 7, 2003. (AA 401-402 [Ex. 5].) This documents retained the zoning contingency for the buyer. (AA 270.)

Defendant's counter proposal of October 7, 2003 was met with a document from Plaintiff labeled a binding counter-offer dated October 7, 2003. (AA 403-405 [Ex. 6].) This document also retained the zoning contingency for the buyer. (AA 270.)

9. **Cordova's Announces That Zoning Issues Have Been Resolved**

On or about October 31, 2003, Defendant received a letter from a city council aide stating the zoning issues with the subject property "have been resolved." (AA 270 [Ex. 16 (AA 638)].) This letter is immediately shown to Plaintiff by Defendant who repeats that "zoning issues with the city have now been resolved." (AA 270.) Based on this information, Plaintiff proceeds with the sale and proposed development of the 37 town homes. (AA 270.)

On November 21, 2003, Defendant responds to Plaintiff's counter-offer of October 7, 2003 with a "counter-counter-offer." (AA 270 [Ex. 7 (AA 406-407)].) This document also retained the buyer's zoning contingency. (AA 271.)

At defendant's request, Plaintiff makes written changes to Defendant's November 21, 2003 counter document. (AA 271 [Ex 8. (AA 408-411)].) This document retains the zoning contingency but changes the date of closing from 90 days after opening to July 31, 2004 (nearly a five (5) month escrow), plus a 60 day extension thereafter. (AA 271.) Plaintiff gives Defendant a $20,000 check for deposit into escrow. (AA 271.)

Gabriel Guerrero's personal assistant Yomara Ochoa testified that she recalled a meeting during contract negotiations with Henry Cordova and Gabriel Guerrero where Defendant mentioned that the City had made a mistake in the zoning for the 2520 Eastern Avenue parcel but insisted that the zoning issue had been resolved. (AA 271.)

10. **Defendant To Give Residential Property Transfer Disclosure Statement During The Escrow**

Plaintiff intended that the series of proposals between the parties would be followed by a formal purchase and sale agreement. (AA 271; RT 518, 653-654, 814-817.) However, no standard purchase and sale agreement ("CAR form") was entered into as is customary in the real estate industry. (AA 271; RT 518). Plaintiff requested that the parties enter into such an agreement so that he could provide the Defendant with agency

disclosure statements. (AA 271; RT 530-532, 653-654, 814-817). Defendant refused to enter into such a contract and told Plaintiff that he would give the residential property transfer disclosure statement required under state law during the course of escrow. (AA 271; RT 530-532, 653-654, 814-817).

11. **No Agreement On First Escrow Instructions**

On February 2, 2004, escrow instructions were prepared incorporating the negotiating documents/contract as Exhibits 1, 2 and 3, but were not signed. (AA 271 [Ex. 11 (AA 217-219)].)

12. **City Informs Cordova That Zoning Issue Remains.**

City Planner, Jose Carlos Romero-Navarro testified that sometime in February 2004, Defendant came into the City Planning department and complained about a "mistake" in the zoning map with regards to the 2520 Eastern Avenue parcel. (AA 271; RT 861-867). Defendant explained that he was in the process of selling the property. (AA 271; RT 869, 904). Mr. Navarro investigated the matter and told the Defendant that the zoning appeared correct. (AA 271; RT 867). As a result, Defendant needed to submit a subdivision map and possibly a zone change if he wanted to develop the property for high density condos or town homes on the entire site. (AA 271; RT 864). Despite his investigation, Mr. Navarro was unaware of the existence of any formal request submitted by Defendant to Planning Department to resolve the zoning issues Defendant described.

(AA 272; RT 864-865.)

13. **Cordova's Instruction To Deposit $20,000 Without Signed Instructions.**

On or about February 24, 2004, Defendant instructed escrow to deposit the $20,000 check. (AA 272 [Ex. 11 (AA 575)].) On the same day, the escrow officer faxed to Plaintiff, a letter from Defendant dated January 26, 2004, asking Plaintiff to sign and return. (AA 271 [Ex 11 (AA 579)].) This letter granted the Defendant $10,000 in "liquidated damages" if the Plaintiff failed to perform certain tasks within 30 days after opening. (AA 272 [Ex. 9 (AA 412-413)].)

14. **Escrow Instructions Are Re-Drafted Without Any Mention Of Zoning Contingency.**

On or about February 27, 2004, Defendant instructed escrow to scrap the entire February 2, 2004 draft escrow instructions and to prepare an entirely new instruction. (AA 272.) Defendant explained to Plaintiff that he wanted to do any with exhibits and have a single instruction reflecting the written terms of the agreement between the parties. (AA 272 [Ex. 11 (AA 602-615)].)

Nowhere in these revised escrow instructions is there any reference to a zoning contingency for the buyer. (AA 272.) Plaintiff testified he signed the rewritten escrow instructions only because of Defendant's repeated assurance that the zoning issues "have been resolved" and therefore felt that the zoning contingency was no longer necessary.

But for this assurance, Plaintiff would not have signed the revised escrow instructions. (AA 272.)

On February 27, 2004, the parties executed written sale escrow instructions setting forth the written terms for the sale of the subject property consisting of five acres and an old triplex. (AA 272 [Ex. 11 (AA 602-615)].) As a material inducement for signing the document, Defendant, as Seller, represented to Plaintiff, as Buyer, that the entire property was zoned RD6-1 allowing for a development of 37 town homes. (AA 272; RT 797-798). To comfort Plaintiff, Defendant showed him a map, containing his business card, outlining the entire property and written in the center of the property was the words "ZONE RD-6." The map contained no reference to "(T)"and "(Q)" conditions on the 2520 Eastern Avene parcel and was deposited into escrow. (AA 272; RT 797-799; [Ex. 11 (AA 520)].) On that basis, Plaintiff agree to the terms for sale. (AA 273; RT 802-803).

15. **Time Is Not Of The Essence And Defendant To Deposit Recordable Deed**

The instructions provided for a purchase price of $995,000 (net $980,000 to seller). (AA 273; RT 42-43, 346, 512; [Ex. 11 (AA 602)].) Defendant set the "net" purchase price on his own. (AA 273.) Escrow was scheduled to close on July 31, 2004. (AA 273 [Ex. 11 (AA 602)].) However, time was not of the essence. (AA 273; RT 37; [Ex. 11 (AA 602: "Buyer to use his best efforts to close escrow on or before July 31, 2004")].) The Buyer was to deposit $20,000.00 and Seller was to deposit a recordable

grant deed capable of placing valid title in the Buyer. (AA 273 [Ex. 11 (AA 604: "I will hand you necessary documents called for on my part to cause title to be shown as set out herein ...")] .)

16. **Plaintiff Complies With Terms For 60 Day Extension of Escrow To 9/30/04**

Besides funding the escrow, the Buyer was to order and/or contract for an aerial survey, topographical plan, architect, engineer and soils report within 30 days of February 27, 2004. (AA 273.) In the event of failure to perform during this 30 day period, the Seller was given the option to cancel escrow and retain $10,000 as liquidated damages. (AA 273.) After 30 days, the Seller did not cancel escrow and the sale continued. (AA 272.) After 60 days, Buyer was to release $20,000 which Seller could retain if escrow does not close. (AA 273.) "By releasing the full $20,000.00 deposit after 60 days from February 27, 2004[,] Buyer and Seller agree that an extension of up to 60 days shall be given to the Buyer for the close of escrow providing that buyer discloses, reviews all information obtain[ed] as specified under Buyer's Contingencies hereinafter stated." (AA 273.) Plaintiff complied with the terms for the 60 days extension and, as a result, escrow was extended for 60 days from July 31, 2004 to September 30, 2004. (AA 273 [Ex. 11 (AA 602-615)].)

17. **Plaintiff Informs Defendant He Is Principal of SCCRE and Actual Buyer**

Prior to opening escrow and thereafter, Plaintiff informed Defendant that he was

the principal of SCCRE and the actual buyer. (AA 273; RT 338, 342, 512; [Exs. 4 (AA 398), 6 (AA 403), 11 (AA 551-552)].) Plaintiff allowed the escrow instructions to be written with SCCRE as the buyer because it contained an assignee provision. (AA 273) Plaintiff is the assignee of the original Buyer Southern California Commercial Real Estate and formalized his assignment in writing prior to trial. (Ex. 11 (AA 602-615); Ex. 38 (AA 658-659).)

18. **Plaintiff Informs Defendant Of His Development Efforts**

Plaintiff also kept the Defendant informed of his progress in developing the property. (AA 273.) He hired Jim Osterling and Tom Sullivan of Bridge Residential Advisors to consult him, as well as architects, engineers and surveyors. (AA 273-274.) Plaintiff produced checks showing expenses of $20,000 for deposit and $9500 in other expenses. (AA 274 [Ex. 39 (AA 661-667)].) Tom Sullivan developed a pro forma which he had shown to Defendant. (AA 274 [Ex. 59 (AA 690)].)

Jim Osterling testified that he met with City officials and tried to determine whether or not a "mistake" in zoning was in fact the case on the 2520 Eastern Avenue. (AA 274.) Plaintiff and Jim Osterling testified that on or about September 8, 2004, he informed Defendant that they were potential investors and that the development project, based on the pro forma, could realize over $4,000,000 dollars in potential profits. (AA 274.)

19. **Plaintiff's Has Ability To Fund The Purchase At All Times**

Plaintiff testified he had more than a million dollars in his bank and was able to fund the purchase at all times. (AA 274; RT 537). He produced a loan approval letter for 2/3rds the purchase price ($600,000) dated May 15, 2004 which he showed to Defendant. (AA 274; RT 451, 537-539; [Ex. 18 (AA 642-643)].) Plaintiff testified he showed Defendant his financial records (AA 274; RT 559-560; [Ex. 22 (AA 644) and Ex. 39 (AA 660)].) These exhibits (Exs. 22 and 39) were admitted for the limited purpose that Plaintiff showed Defendant his financial records. (AA 274.) Defendant never doubted Plaintiff's ability to fund the escrow. (AA 274; RT 56).

20. **Defendant Conceals Zoning Reversion Letter From Plaintiff Inducing Early Release Of $20,000 Deposit And Triggering Escrow Extension To 9/30/04**

On or about April 14, 2004, Defendant was informed by the City that a portion of the property (2520 Eastern Avenue) reverted to its underlying zoning of R1 thereby significantly reducing the development potential of the property. (AA 274 [Ex. 26 (AA 654)].) Defendant did not provide this letter to Plaintiff until October 1, 2004. (AA 274.) Having not received the April 14, 2004, letter, Plaintiff consented to the release of the full $20,000.00 deposit to Defendant. (AA 274.)

21. **Defendant Buys Adjacent "Palos" Property Ostensibly To "Improve Access" To Subject Property**

In May 2004, Defendant opened escrow on adjacent property owned by David Palos, located at 2635 Lombary Avenue and improved with a single family residence. (AA 274.) Defendant testified he was buying the property to "improve access" to the subject property he was in the process of selling of Plaintiff. (AA 274.) Plaintiff testified that Defendant wanted him to buy the Palos property from him, but rejected the idea when his architects explained it was not needed for the intended development. (AA 274-275.) Defendant eventually purchased the Palos property in September 2004 for $200,000 cash. (AA 275.)

22. **Defendant Unreasonably Demands Additional Payments From Plaintiff To Keep Escrow Open After 7/31/04**

On June 4, 2004, Defendant sent the escrow officer and Plaintiff a letter demanding confirmation that the escrow was to close by July 31, 2004. (AA 275 [Ex. 11 (AA 564)].) Defendant explained in the letter that the 60 day extension given to Plaintiff was inclusive of the July 31, 2004 date and not actually an extension for 60 days thereafter. (AA 275.) The escrow officer testified she did not respond to Defendant's demand for clarification and that the notation "Escrow to close no later than 7/31/04" was only a reminder for herself. (AA 275 [Ex. 11 (AA 564)].)

Prior to July 31, 2004, Defendant demanded from Plaintiff the amount of $75,000 in order to secure an extension of the escrow. (AA 275.)

On August 5, 2004, Defendant sent the escrow officer a letter instructing her to draft cancellation instructions because Plaintiff did not sign an extension and deposit an additional $50,000 into escrow. (AA 275; RT 365-369, 390; [Ex. 11 (AA 556)].)

23. **On 9/21/04, Defendant Unilaterally Cancels Escrow; However, Without Mutually Executed Cancellation Instructions Escrow Remains Active For Additional Six Month Period After "Date Last Set" For Closing**

On September 21, 2004, Defendant called the escrow office and instructed her to cancel escrow. (AA 275 [Ex. 11 (AA 420)].) At this time, Defendant considered the escrow canceled and no longer intended to proceed with the sale. (AA 275)

The escrow instructions further provided for termination of the escrow as follows:

> Para. 24: "Your Escrow Holder agency shall terminate six (6) months following the date **last set** for close of escrow and shall be subject to earlier termination by receipt by you of mutually executed cancellation instructions. If this escrow was not closed or cancelled within the described six (6) month period, you shall have no further obligations as Escrow Holder ...." (AA 275 [Ex. 11 (AA 606)].)

Under the express terms of the escrow instructions, the date **last set** for close of escrow was September 30, 2004, (July 31 plus 60 day extension). (AA 275.) Because of the lack of mutually executed cancellation instructions, the escrow holder's agency lasted

for an additional six months thereafter up to and including March 31, 2005. (AA 275-276.)

24. **During Additional Six Month Period, Defendant Accepts Purchase Offer For Subject Property And Tells New Buyer He Cancelled Plaintiff's Escrow As Of July 31, 2004**

On January 27, 2005, during the pendency of the Plaintiff's escrow, Defendant signed an acceptance of a purchase offer from subsequent purchaser Al Vanegas of Bancomer Constructions and included in his acceptance letter the following language:

> "[B]uyer is aware that part of this property was previously entered in an escrow which expired and canceled July 31, 2004. Seller gave written instructions to escrowholder to cancel escrow." (AA 276, 669.)

25. **During Additional Six Month Period, Plaintiff Files Specific Performance Lawsuit, However, Defendant Sells Subject Property To New Buyer After The Court Expunges Lis Pendens**

On March 1, 2005, Plaintiff commenced this specific performance and damages action. (AA 1) A lis pendens was recorded, but later expunged based on the state of the evidence at the time of the motion. (AA 62-64.) Thereafter, Defendant sold the subject property to subsequent purchaser Bancomer Construction for $1,525,000. (AA 274, 668-

679.) The sale included the Palos property recently purchased for $200,000 cash. (AA 274 [Ex. 44 (AA 668-669)].) Subtracting the Palos property, the sale to Bancomer resulted in net sale proceeds of $330,000 above the $995,000 contract price agreed to by and between Plaintiff and Defendant (not including SCCRE's commission of $15,000). (AA 276.)

In evaluating the credibility of witnesses, the trial judge found the Plaintiff's witnesses credible and rejected Defendant's testimony. (AA 276-277.)

26 **Trial Court's Conclusions of Law**

1. Pursuant to the terms of the Agrement, Plaintiff was entitled to an extension of 60 days from July 31, 2004. (AA 278.)

2. There was no integrated agreement between the parties. Thus all prior representations are part of the contractrual agreement. (AA 278.)

3. Specific Performance (AA 278-280.)

To obtain specific performance for a contract, a party must establish: (1) the existence of a contract which can be specifically enforced; (2) the contract contains sufficiently certain terms, is just and reasonable, and supported by adequate consideration; (3) plaintiff's performance or a tender of performance of all conditions precedent, or a showing of justifiable excuse for its nonperformance; (4) defendant's breach of the contract; and (5) the inadequacy of the legal remedy. (5 Witkin, Cal

Procedure (4th ed. 1997) Pleading, § 741, p. 199; see also Byrne v. Laura (1997) 52 Cal.App.4th 1054, 1073.)

After the filing of the case, Defendant sold the subject property and is, therefore, no longer able to deliver title. However, the sale during the pendency of this lawsuit does not eliminate Plaintiff's remedy for specific performance to recover the sale proceeds as an equitable owner of title. Rogers v. Davis (1994) 28 C.A.4th 1215, 1222, 1223).

Plaintiffs may recover property through specific performance and additional compensation when that compensation is necessary to fully vindicate their contractual rights. (Id. at 221.) A purchaser of property sold prior to the conclusion of a specific performance lawsuit may be found to be an equitable owner at the time of the sale and the equitable relief granted may have substantially the same legal effect as the promised performance under the sales contract. (Id. at 1224.)

A. Inadequacy of Legal Remedy.

California courts have consistently held that contracts to convey properties like the property at issue should be specifically enforced because of the uniqueness of the property. See, Trapaceae v. Superior Court. 73 Cal.App.3d 561, 567 (1977); Stewart Development Co. v. Superior Court. 108 Cal.App.3d 266, 273 (1980) (superseded by statute as to other matters). In this case, far from indicating that the parcels involved were not unique, the facts show that Plaintiff intended to develop the property extensively and

resell or lease portions of it and that the development of the hill side property was in substantial size and could not be located elsewhere in El Sereno. Accordingly, the property is unique.

B. The Agreement is Just. Reasonable and Supported by Adequate Consideration.

To warrant specific performance, a contract must be just, reasonable and supported by adequate consideration. The adequacy of the consideration must also be determined from circumstances as they existed when the agreement was made. Petersen v. Hairtail (1985) 40 Cal.3d 102, 110. Consideration, to be adequate, need not amount to the full value of the property. The test is not whether the seller received the highest price obtainable, but whether the price is fair and reasonable under the circumstances. In this particular case, it was Henry Cordova, an experienced developer, who dictated the purchase price and the court finds that the purchase price was just, reasonable and supported by adequate consideration.

C. Contractual Terms Are Sufficiently Definite.

To warrant specific performance of a contract, all the material terms of the agreement must be sufficiently certain to make the precise acts clearly ascertainable. Usserv v. Jackson. (1947) 78 Cal. App. 2d 355 at 358. The material factors that must be set forth with sufficient certainty in the contract are (1) identity of the seller, (2) the

identity of the buyer, (3) the price to be paid, (4) the time and manner of payment, and (5) a specific description of the property. Reeder v. Longo. (1982) 131 Cal.App.3d 291 at 296. All five factors are plainly set forth in the escrow instructions and therefore this element is satisfied.

D. Plaintiff Has Been Ready. Willing and Able to Perform His Obligations.

A buyer seeking specific performance of a contract to sell real property must prove that he is ready, willing and able to perform; i.e., that he had and has the resources to purchase the property. C. Robert Nattress & Assocs. v. CIDCQ (1986) 184 Cal.App.3d 55, 65. Since the opening of escrow, Plaintiff has been ready, willing and financially able to complete the purchase. Defendant was shown Plaintiff's loan approval letter and financial records and never doubted his ability to fund the escrow. Defendant presented no evidence which would call into question the financial ability of the Plaintiff.

E. Defendant's Breach.

Prior to September 30, 2004, Defendant notified the escrow holder to cancel escrow during the 60 day extension period. Defendant also met with and accepted another offer during the pendency of the escrow up to six months after the last date set for closing. One party's anticipatory breach (unequivocal repudiation) of the contract excuses the other party's duty to perform (or to tender performance of) its contractual obligations and entitles the latter (nonrepudiating party) to immediately pursue breach of contract

remedies. (See, Cal. Civil Code §§ 1440, 1511; Beverage v. Canton Placer Mining Co. (1955) 43 C2d 769, 777; Harris v. Rudin, Richman & Appel (2002) 95 CA4th 1332, 1344.)

[F]. Equitable Conversion - Plaintiff's Right to Net Sale Proceeds from the Bancomer sale.

The Plaintiff's ability and willingness to complete his obligations under the escrow instructions warrants a finding that the Plaintiff was the "equitable owner" of the subject property, with a right to the Defendant's sale proceeds from the Bancomer Construction sale under the doctrine of "equitable conversion." See Rogers v. Davis, supra, 28 CA4th at 1223. Had Defendant not sold the subject property during the pendency of this lawsuit, this court could have and would have granted specific performance to convey title. Under the doctrine of equitable conversion, Plaintiff is awarded the sum of $330,000. In addition, Plaintiff is awarded damages for the purchase price paid of $20,000 and expenses of $9,500. In total, Plaintiff is awarded $359,500.00, plus interest thereon at 10% per annum since the commencement of this lawsuit, March 1, 2005.

[4]. Contract Damages. (AA 281.)

[The court awarded $20,000 paid as title and escrow expenses plus interest.]

[5]. Seller's Fraud (AA 281.)

[Although the court found that Cordova misled Plaintiff about the status of the

zoning, the court also found that Plaintiff did not justifiably rely on the zoning status and awarded no damages for fraud.]

[6]. No Violation of Broker's Duty to Disclose Identity of Purchaser (AA 282.)

If an agent with authority to sell property buys it for himself or herself, the burden is on the agent to show that the transaction was proper in all respects. The principal may avoid it if there is any unfairness, even though price is not inadequate. (Cisco v. Van Lew (1943) 60 Cal.App.2d 575, 584, 141 C.2d 433).

The facts clearly show that Defendant always knew that Plaintiff was the intended buyer in the transactions, that he intended to develop the property, and disclosed all terms of his development during the course of escrow. In fact, it was Cordova who insisted that he be provided with all property studies, including surveys, soils reports, and the like. There is no evidence that Plaintiff had contracted with the Bridge Group to assist in the development of the property at the time the parties entered into their contract (thus no disclosure was required on that date) and there is evidence that Plaintiff introduced Defendant to Osterling/Sullivan/Bridge during the pendency of escrow. There is no evidence that Plaintiff acted unfairly in any matter in this transaction as dual agent or violated his fiduciary duty as a dual agent in this transaction.

Furthermore, the rule against self-purchase by an agent does not apply where, as here, the Seller's agent is authorized to sell the property for a certain net price and keep

any excess as commission. The evidence clearly shows that it was Cordova who dictated what he wanted to receive as net proceeds indicating that the amount of the commission was of no consequence to him. Because no injury to the principal can result from purchase by the agent under those circumstances, it is proper. (Allen v. Dailey (1928) 92 Cal.App. 308, 313, 268 P. 404; Pascal v. Cotton (1962) 205 Cal.App.2d 597, 600.)

Plaintiff is to prepare a judgment in accordance with this decision within ten days of the date of the date set forth below. It is ordered. Dated: May 31, 2006.

27. **Defendant's Motion to Vacate Based On Pothast v. Kind (1933) 192 Cal. 192**

On June 26, 2006, the trial judge entered judgment in favor of Plaintiff for the total sum of $359,950.00. (AA 286-287.) On July 11, 2006, Defendant filed a Motion to Vacate the Judgment. (AA 293-324.) Plaintiff's opposition papers were filed on July 18, 2006. (AA 326-332.) Defendant contended that the statement of decision granting a decree of specific performance without an actual deposit by the buyer of the purchase price in escrow "runs afoul of controlling California Supreme Court authority," (Pothast v. Kind (1933) 192 Cal. 192. (AA 346.) Defendant argued that the Supreme Court faced the identical circumstance in Pothast: "There, as here, a contract was made for a property purchase and an escrow was opened. There, as here, the seller deposited duly executed deeds in escrow. There, as here, the buyers were to deposit the purchase price by a certain date. There, as here, the seller 'undertook to repudiate the escrow agreement' and the buyers contended that 'they were thereby relieved of any further duty to deposit [the

purchase price] and the deposit thereof was waived by such anticipatory breach of the agreement.'" (AA 346-347.)

28. **Court's Tentative Ruling To Deny Motion To Vacate**

On August 3, 2006, the trial judge issued its tentative ruling denying the motion and heard oral arguments. (AA 346-348.) The tentative ruling distinguished Pothast by noting the following:

> 1. "Henry Cordova ... never deposited into escrow a 'recordable' grant deed capable of placing valid title in Plaintiff's name. See, Statement of Decision, ¶ 23 and Escrow Instructions, p. 3 (Attachment No. 2 to Motn). The grant deed that was deposited was not notarized (as required by law Cal.Govt.Code § 27287) and did not contain a proper vesting. See, Grant Deed, Attachment No. 3 and notion 'Buyer Vesting Incorrect Redraw'. ... [B]ecause Cordova never deposited into escrow the necessary papers that would enable a title company to issue a policy of title insurance showing title to be vested in Plaintiff, it was never incumbent upon Plaintiff to tender the purchase price." (AA 347.)
>
> 2. "Unlike the situation in Pothast, time is not of the essence in these escrow instructions. See, Statement of Decision, ¶23. ... In light of the distinguishing characteristics of this case (which are not at all at issue in Pothast), Pothast does

not apply, and Defendant cannot rely on it to argue that this Court's decision has been based on an incorrect or erroneous legal basis." (AA 347.)

3. "Plaintiff was not required to deposit the purchase money in escrow in order to obtain specific performance." Cockrill v. Boas, 213 Cal. 490, 492; Civ. Code §§ 1439, 3392. (AA 347.)

29. **Defendant Files Notice Of Appeal Of Plaintiff's Judgment In Advance of Final Ruling**

On August 8, 2006, Defendant filed a notice of appeal of Plaintiff's judgment in advance of the trial judge's final ruling. (AA 349.) The filing of the notice of appeal immediately vested jurisdiction in the appellate court as of August 8, 2006.

30. **Trial Judge Issues Her Final Decision Vacating Plaintiff's Judgment**

On August 28, 2006, the trial judge entered a minute order vacating the Plaintiff's judgment (AA 352-353) and issued a ruling on submitted matters. (AA 354-356.) In a complete turnabout, the trial judge ruled:

"In this case, Defendant had performed by submitting to escrow an executed deed with vesting in accordance with the terms of the escrow instructions. The escrow agent Betty Kimura testified that (1) she had never been contacted by Guerrero for a change of vesting (so at the time of the alleged anticipatory breach, vesting was in accordance with the contract)

and (2), other than signing a deed, there was nothing that Defendant was required to do in order to close escrow. Defendant was powerless to recover the executed deed from escrow; thus, there could have been no anticipatory breach, which was the basis of the court's decision. Although the deed was not notarized, the escrow instruction do not require the deed to be in recordable form. All Plaintiff had to do to close escrow was deposit the money, which he never did." (AA 355-356.)

After the court vacated the judgment, Defendant filed an abandonment of the appeal of Plaintiff's judgment on September 7, 2006. (AA 357-359.) On September 19, 2006, the court entered a new and different judgment in favor of Defendant. (AA 366.) Also, on September 19, 2006, the court signed an identical written order vacating the Plaintiff's judgment. (AA 374-378.) On October 10, 2006, Plaintiff filed the instant appeal of Defendant's judgment. (AA 369-379.) The clerk of the superior court mailed the Notice to Attorney in Re Notice of Appeal on October 12, 2006. (AA 380.) **More than 20 days later**, Defendant filed a notice of protective cross-appeal of the original judgment on November 27, 2006. (AA 387-390.)

V

STANDARD OF REVIEW

"An order . . . granting [a motion to vacate judgment] may be reviewed on appeal

in the same manner as a special order made after final judgment." C.C.P. 663a; 9 Witkin Cal. Proc. (4th), Appeal, §148.).

VI

LEGAL ARGUMENT

A. **THE TRIAL COURT'S ORDER VACATING THE INITIAL JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT LACKED JURISDICTION TO RULE ON RESPONDENT'S MOTION TO VACATE**.

Subject to certain exceptions, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." (C.C.P. §916, subd. (a).)

The automatic stay prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it. (Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 189; Elsea v. Saberi (1992) 4 Cal.App.4th 625, 629.) The trial court's power to enforce, vacate or modify an appealed judgment or order is suspended while the appeal is pending. (Gold v. Superior Court (1970) 3 Cal.3d 275, 280.) Further trial court proceedings in contravention of the section 916 stay are in excess of the court's jurisdiction, including granting motions to

vacate judgments. (Copley v. Copley (1981) 126 Cal.App.3d 248, 298; Laidlaw Waste Systems v. Bay Cities Services (1996) 43 Cal.App.4th 630, 641 [trial court cannot, after notice of appeal is filed, set aside initial judgment and enter second judgment varying materially from first].) "So complete is this loss of jurisdiction effected by the appeal that even the consent of the parties has been held ineffective to reinvest the trial court with jurisdiction over the subject matter of the appeal and that an order based upon such consent would be a nullity." (See, In re Lukasik (1951) 108 Cal. App. 2d 438, 444.)

In this case, Respondent made a tactical decision to appeal the initial judgment entered June 26, 2006 (AA 286-287) in advance of the trial court's final ruling on its motion to vacate. After the trial court announced its August 3, 2006, tentative ruling to deny the motion (AA 346-348), Respondent believed all was lost and immediately filed a notice of appeal. (AA 349.) However, this action had the legal effect of immediately depriving the trial court of subject matter jurisdiction to rule.

In an clumsy effort to remedy this dilemma, Respondent filed a notice of abandonment of appeal on September 7, 2006 (AA 357-359) and then submitted an identical formal order for the judge to sign on September 19, 2006. (AA 374-378.) However, so complete is the loss of jurisdiction upon taking an appeal that even the abandonment of the appeal is ineffective to reinvest the trial court with subject matter jurisdiction to rule. The trial court had no power to make its August 28, 2006, minute order granting Defendant's motion to vacate (AA 352-353) or to issue a ruling on

submitted matters undermining the appeal (AA 354-356), and any order or judgment based on such ruling or minute order would also be beyond the court's jurisdiction. For these reasons, the initial judgment must be reinstated.

B. THE TRIAL COURT'S ORDER VACATING THE INITIAL JUDGMENT MUST BE REVERSED BECAUSE RESPONDENT HAD NOT FULLY PERFORMED ITS OBLIGATIONS AT THE TIME OF THE ANTICIPATORY BREACH.

C.C.P. §663 sets forth the grounds for granting a motion to vacate a judgment. The statute reads:

> "A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment:
>
> (1) Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected."

A motion under this section is directed only at a final judgment.(Remington v. Davis (1951) 108 C.A.2d 251, 253.) When ruling on the motion, the court has no power to disturb a determination of fact (See, Jones v. Clover (1937) 24 C.A.2d 210, 211) or to make supplemental findings of fact. (See, Knapp v. Newport Beach (1960) 186 C.A.2d 669, 682.)

In granting the motion to vacate, the trial judge ruled:

"The real question is whether Defendant's alleged breach (that is, attempting to cancel the escrow) was of such nature that it is clear that performance or tender by the other party would be useless. Due to the unique nature of an escrow, the answer is no. ... In this case, Defendant had performed by submitting to escrow an executed deed with vesting in accordance with the terms of the escrow instructions. The escrow agent Betty Kimura testified that (1) she had never been contracted by Guerrero for a change of vesting (so at the time of the alleged anticipatory breach, vesting was in accordance with the contract) and (2), other than signing a deed, there was nothing that Defendant was required to do in order to close escrow. Defendant was powerless to recover the executed deed from escrow; thus, there could have been no anticipatory breach, which was the basis of the court's decision. Although the deed was not notarized, the escrow instruction do not require the deed to be in recordable form. All

Plaintiff had to do to close escrow was deposit the money, which he never did." (AA 376-377.)

Respondent expressly concurred, approved and accepted the terms of the escrow as set forth in the instructions and agreed to deposit all necessary papers that would enable a title company to issue a policy of title insurance showing title to be vested in the Buyer.[2] Having failed to deposit into escrow a recordable deed, it was never incumbent upon Appellant to deposit the balance of the purchase price in order to obtain a decree of specific performance. (See, Tatum v. Levi (1931) 117 Cal.App. 83, 89; Lifton v. Harshman (1947) 80 Cal. App. 2d 422, 432-433.) Without notarization, a grant deed

---

[2]The pertinent language of the escrow instructions reads:
"The foregoing terms, provisions, conditions and instructions are hereby approved and accepted in their entirety and concurred with by me. I will hand you necessary documents called for on my part to cause title to be shown as set out herein, which you are authorized to deliver when you hold or have caused to be applied to funds set forth herein within the time as herei provided. You are authorized to pay on my behalf, my recording fees, charges for evidence of title as called whether or not this escrow is consummated, except those the buyer agreed to pay." (AA 604.)

Paragraph 9 of the instructions also states:
"The parties authorize the recordation of any instrument delivered through this escrow if necessary or proper for the issuance of the required policy of title insurance or for the closing of this escrow. Funds, instructions or instruments received in this escrow may be delivered to, or deposited with any title insurance company or title company to comply with the terms and conditions of this escrow." (AA 606.)

cannot be recorded. (See, Cal.Govt.Code § 27287.)

California courts have long held that before a seller can require a buyer to perform his part of the agreement he must have fulfilled all conditions precedent imposed upon him and must have been able to fulfill and must have offered to fulfill all conditions concurrent. See, Lifton v. Harshman (1947) 80 Cal. App. 2d 422, 432-433. In Lifton, the sellers in their portion of the escrow instructions "concurred in, approved and accepted" the terms of the escrow as set forth in the buyer's (appellant's) instructions and agreed to deposit in escrow "all instruments and money necessary" for them to comply with the agreement. They did not deposit a cancellation of the lease, a release of the deed of trust and chattel mortgage or a termite clearance. The court held:

> "Before respondents could require appellant to perform his part of the agreement they must have fulfilled all conditions precedent imposed upon them and must have been able to fulfill and must have offered to fulfill all conditions concurrent imposed upon them. (Civ. Code, § 1439; Boone v. Templeman, 158 Cal. 290, 298 [110 P. 947, 139 Am.St.Rep. 126].) Where a seller is in default for failure to deliver his deed he may not rightly contend that the buyer is in default. (Moresco v. Foppiano, 7 Cal.2d 242, 246 [60 P.2d 430].) A purchaser is not bound to make payment until the seller is prepared to give a good deed. (Cates v. McNeil, 169 Cal. 697, 706 [147 P. 944]; Luchetti v. Frost, 6 Cal.Unrep. 763, 765 [65 P. 969]; Ohanian

v. Kazarian, 123 Cal.App. 196, 200 [11 P.2d 42].) **Since respondents had not deposited in escrow the necessary papers that would enable a title company to issue a policy of title insurance showing title to be vested in appellant free of the liens of the lease and deed of trust, it was not incumbent upon appellant to tender the purchase price**. (Tatum v. Levi, 117 Cal.App. 83, 89 [3 P.2d 963].)" (See, Lifton v. Harshman, supra, 432-433; Cf., Fogarty v. Saathoff (1982) 128 Cal. App. 3d 780, 786: [seller deposited duly executed and acknowledged grant deed].)

Respondent was also required to provide a residential transfer disclosure statement ("TDS"). (AA 271; RT 530-532, 653-654, 814-817; Civ. Code §1102 et. seq..) At the time of the anticipatory breach, he had failed to fulfill this condition as well. In Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 1 Cal. Rptr. 3d 569, a seller of real property sued the buyers for specific performance and breach of contract after they failed to complete their purchase of the property. The trial court granted summary judgment for the buyers, finding that providing them with a transfer disclosure statement was a condition precedent to the buyers' duty to perform. Because it was undisputed that the seller never delivered the statement to the buyers, the trial court concluded that there were no triable issues of fact and that the buyers were entitled to judgment as a matter of law. The court of appeal affirmed. It held that delivery of the disclosure statement is a nonwaivable

condition precedent to the buyers' duty of performance in every sale of real estate covered by Civ. Code § 1102 et seq. The seller's performance of this condition also gives rise to a statutory right of rescission by the buyer. A buyer has no duty to perform the contract unless the seller complies with the statutory disclosure requirements and the buyer chooses not to exercise the right of rescission. (See, Realmuto v. Gagnard, supra, at p. 205.)

To reach its conclusion that Respondent had fully performed, the trial court actually changed earlier findings of fact. For example, when granting the motion to vacate, the trial judge found that the Respondent's performance was complete because the Buyer's vesting was in accordance with the contract at the time of the anticipatory breach. However, during closing arguments, the trial judge found that Plaintiff had until the close of escrow to send in the vesting.

> "MR. EINSTEIN: THE ESCROW OFFICER TESTIFIED THAT MR. CORDOVA HAD DONE -- OR CORDOVA ASSOCIATES HAD DONE EVERYTHING THEY WERE SUPPOSED TO DO OTHER THAN SIGN THE DEED, AND SHE COULD NOT PREPARE THE DEED BECAUSE SHE DIDN'T GET VESTING. ON THE FLIP SIDE, THERE IS IN SHOWING THAT MR. GUERRERO WAS ABLE TO PERFORM. SO EVEN IF THE COURT SAYS THE ESCROW CLOSING DATE WAS

THE 30TH VERSUS THE 15TH OF SEPTEMBER, OKAY, THERE HAS BEEN NO SHOWING THAT MR. GUERRERO WAS ABLE TO PERFORM. THEY NEVER SENT THE VESTING TO ESCROW –

THE COURT: WELL, WAIT. HE HAD UP TILL THE DATE IT CLOSED TO PERFORM." (RT 988-989.)

The trial court's ruling that Respondent had fully performed also conflicts with her earlier finding that Respondent had agreed to give Plaintiff a residential property transfer disclosure statement *during the course of escrow*. The court stated: "Defendant ... told Plaintiff that he would give the residential property transfer disclosure statement required under state law *during the course of escrow*." (AA 271; RT 530-532, 653-654, 814-817). In its conclusions of law, the trial court ruled: "There was no integrated agreement between the parties. Thus all prior representations are part of the contractual agreement." (AA 278.)

In still another example, the trial court's finding that the escrow officer required from the Respondent only a signed deed contradicts other evidence in the record. Betty Kimura actually required Respondent to both sign and notarize the grant deed. In her March 3, 2004, instruction letter regarding the grant deed, Betty Kimura demanded that Respondent:

"[...]**SIGN AND ACKNOWLEDGE BEFORE A NOTARY PUBLIC**

Exactly as your name(s) appear on the enclosed items: YOU MUST HAVE **VALID IDENTIFICATION** WITH YOU TO PRESENT TO THE NOTARY PUBLIC AT THE TIME OF SIGNING. Grant Deed ..."

(Emphasis in original.) (AA 571.)

The trial court also failed to realize that the grant deed was never in a proper form to close escrow. (AA 436.) Besides having an incorrect vesting for the Buyer, the deposited grant deed did not have the correct Seller either. Respondent had assigned all "right, title, interest and obligation" in the escrow to Mario Silva, the tax exchange accommodator. (AA 594-599.) Moreover, there is no evidence in the record that Mario Silva ever executed and deposited a grant deed on behalf of the Seller.

Also contrary to the court's ruling, the escrow instructions do allow one party to stop escrow and, therefore, commit an anticipatory breach of contract at any time.

Paragraph 21 of the instructions reads:

"The parties shall cooperate with you in carrying out the escrow instructions they deposit with you and completing this escrow. The parties shall deposit into escrow, upon request, any additional funds, instruments, documents, instructions, authorizations, or other items that are necessary to enable you

to comply with demands made on you by third parties, to secure policies of title insurance, or to otherwise carry out the terms of their instruments and close this escrow. *If conflicting demands or notices are made or served upon you or any controversy arises between the parties or with any third person arising out of or relating to this escrow, you shall have the absolute right to withhold and stop all further proceedings in, and in performance of, this escrow until you receive written notification satisfactory to you of the settlement of the controversy by written agreement of the parties, or by the final order or judgment of a court of competent jurisdiction*." (AA 607.)

Where a seller repudiates the contract and indicates that he is not bound thereby, tender of performance by the buyer before suit for specific performance is unnecessary. (Beverage v Canton Placer Minning Co. (1955) 43 C2d 769, 278 P2d 694; Am-Cal Inv. Co. v. Sharlyn Estates, Inc., (1967) 255 Cal. App. 2d 526, 538-539.)[3] A party can enforce the

[3]There are, of course, numerous other cases excusing a buyer's default. (See, e.g., Moresco v. Foppiano (1936) 7 Cal.2d 242, 245-246 [seller's failure to deliver deed as promised prevented seller from contending that buyer was in default]; Hutton v. Gliksberg (1982) 128 Cal.App.3d 240, 244 [rejecting seller's argument that buyer was in default for failing to deposit additional cash into escrow, where evidence showed that buyer was ready to do so should seller tender performance]; Groobman v. Kirk (1958) 159 Cal.App.2d 117 [finding that buyer was not in default for failing to deposit the balance of the purchase price into escrow where the evidence showed that seller did not tender a deed and title policy insuring an unencumbered title]; and Rubin v. Fuchs (1969) 1 Cal.3d 50, [seller had to record a tract map before the buyer had to tender the payment].)

contract without a tender when the other party has abandoned the contract, commits an anticipatory breach of the contract, unequivocally repudiates the contract, or otherwise by words or acts waives the necessity of a tender. (See, Towne Development Co. v. Lee (1963) 63 Cal. 2d 147, 152; Beeler v. American Trust Co. (1946) 28 Cal. 2d 435, 438-439; Landis v. Blomquist (1967) 257 Cal. App. 2d 533, 537; See, Civ. Code, §§ 1440, 1511 to 1515.)

Here, the trial court found Respondent had committed an anticipatory breach when Cordova canceled escrow and so instructed the escrow officer. The escrow officer would have no obligation to close escrow in the face of such a controversy between the parties. Requiring the Plaintiff to deposit funds in a stalled escrow in the face of such a breach would have him perform a useless act.

Finally, given the unique facts of this case, it is not true that Respondent did not receive payment of the purchase price from the Plaintiff. The trial court had specifically ruled that had Respondent not sold the subject property, she would have granted Plaintiff specific performance. (AA 280) Time not being the essence of the contract, the trial court would have also allowed Plaintiff a reasonable time to deposit funds and close escrow. However, because Respondent no longer had title by the time of trial, the trial court could only grant substituted equitable relief. Under the doctrine of equitable conversion, the contractual buyer as an equitable owner is entitled to any proceeds derived from a sale of the property to a third party. (See, Rogers v. Davis (1994) 28 Cal. App. 4th 1215.) Accordingly, Respondent's sale of the subject property to a third party

during the pendency of this lawsuit had the practical effect of receiving payment from the Plaintiff.

In short, the trial court's August 3, 2006, tentative ruling was actually correct. Respondent had not fully performed. Time was not of the essence. Plaintiff made payment to Respondent during the lawsuit by means of a credit from Respondent's sale of the subject property to a third party. For the above reasons, the order vacating the initial judgment must be reversed and the initial judgment must be reinstated.

C. THE INITIAL JUDGMENT IN FAVOR OF PLAINTIFF MUST BE REINSTATED BECAUSE RESPONDENT FAILED TO FILE A TIMELY PROTECTIVE CROSS APPEAL.

California Rules of Court 8.108(e)(2) [formerly Rule 3(e)(2)] provides that "[i]f an appellant timely appeals from an order granting ... a motion to vacate the judgment . . . the time for any other party to appeal from the original judgment . . . is extended until 20 days after the clerk mails notification of the first appeal."

On October 10, 2006, Plaintiff filed the instant appeal of Respondent's judgment. (AA 369-379.) The clerk of the superior court mailed the Notice to Attorney in Re Notice of Appeal on October 12, 2006. (AA 380.) **More than 20 days later**, Respondent filed a notice of protective cross-appeal of the original judgment on November 27, 2006. (AA 387-390.) Consequently, the protective cross-appeal is untimely.

Respondent's failure to file a timely protective cross appeal from Respondent's judgment mandates reinstatement of the initial judgment where, as here, an order granting a motion to vacate the initial judgment must be reversed on appeal. (See, Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892.)

V

CONCLUSION

For the foregoing reasons, Plaintiff Gabriel Guerrero respectfully requests this court to reverse the order vacating the initial judgment, and reinstate the initial judgment in favor of the Plaintiff.

Dated 4-28-07

Respectfully submitted,
Law Offices of Glenn Ward Calsada

Glenn Ward Calsada, Esq.
Attorney for Appellant
Gabriel Guerrero

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of Appellant Gabriel Guerrero is produced using 13-point Roman type including footnotes and contains approximately 9700 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated 4-28-07

Respectfully submitted,
Law Offices of Glenn Ward Calsada

Glenn Ward Calsada, Esq.
Attorney for Appellant
Gabriel Guerrero

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Counsel of Record hereby certifies that interested entities or parties are listed below:

1. Gabriel Guerrero, Appellant

2. Cordova Associates, Inc., Respondent

3. Henry Cordova, President - Cordova Associates, Inc., Respondent

Dated 4.28.07

Respectfully submitted,
Law Offices of Glenn Ward Calsada

Glenn Ward Calsada, Esq.
Attorney for Appellant
Gabriel Guerrero

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a resident in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my address is: 555 W. Fifth Street, 30th Floor, Los Angeles, California 90013.

On April 30, 2007, I served the foregoing documents(s) described as: **APPELLANT'S OPENING BRIEF**, on the interested parties in said action,

__X__ by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Robert A. Olson Greines Martin Stein & Richland 5700 Wilshire Blvd., Suite 375 Los Angeles, CA 90036	Hon. Jane Johnson Los Angeles County Superior Court Department 56 111 N. Hill Street Los Angeles, CA 90012
Supreme Court of California (4-Copies) Ronald Reagan Building 300 South Spring Street Los Angeles, CA 90013	

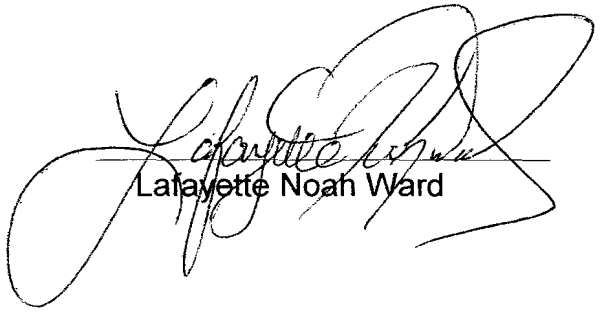
_____ I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

__X___ BY PERSONAL SERVICE

_____ BY OVERNIGHT VIA Express Mail to the parties at the above addresses.
_____ BY MESSENGER
_____ BY FACSIMILE I transmitted via facsimile a complete and correct copy the attached document and received and attached printed transmittal verification that the entire document was received by the designated parties at the facsimile number(s) provided by the respective parties.

__X__ (State) I Declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 30, 2007, at Los Angeles, California



Lafayette Noah Ward