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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SCHEHEREZADE SHARABIANLOU et al., **Plaintiffs and Appellants,** **v.** **RONALD M. KARP et al.,** **Defendants and Respondents.**	**A120940, A122167, A122548** **(San Mateo County Super. Ct. No. CIV 440755)**

These appeals have their origin in a failed real estate transaction. Appellants Farrokh and Scheherezade Sharabianlou offered to purchase a commercial building owned by respondent Berenstein Associates.[1] The Sharabianlous engaged real estate agent Ronald Karp and his company California Realty Investment Company (hereafter the Karps) to represent them in the transaction. Soon after the offer was made, however, the parties learned of environmental contamination on the property. Faced with uncertainty about the scope of the contamination and the cost of its cleanup, and unable to agree on who should pay for the remediation, the parties failed to close escrow on the agreed-upon date.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I and III.

[1] Respondent Berenstein Associates is a general partnership in which respondents Sid and Burton Berenstein are general partners. Unless the context requires otherwise, we will refer to the Berensteins and the partnership collectively as "the Berensteins."

After further efforts to resuscitate the transaction were unsuccessful, the Sharabianlous sued the Berensteins and the Karps, seeking, among other remedies, rescission of their agreement with the former and tort damages from the latter. The trial court ordered the contract rescinded on equitable grounds and, citing its statutory authority to adjust the equities under Civil Code section 1692, awarded substantial damages to the Berensteins. It later awarded attorney fees to the Berensteins as prevailing parties. It rejected the Sharabianlous claims against the Karps in their entirety.

The Sharabianlous now challenge the resulting judgment. They first claim it is void because of the trial judge's bias. They also argue that the damages awarded to the Berensteins exceed those legally available in an action seeking relief based upon rescission, and they raise a number of other claims of error concerning the damage award. As to the Karps, the Sharabianlous contend the trial court erred in rejecting their breach of fiduciary duty and professional negligence claims. In the unpublished portions of our opinion we reject the claim of bias and affirm the judgment in favor of the Karps. In the published portion of our opinion, we address the damage award to the Berensteins and conclude it must be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

In the summer of 2002, the Sharabianlous were looking for a new location for their printing business, and they asked Ronald Karp to assist them in finding a suitable building to purchase. In October 2002, they signed a purchase agreement (the Agreement) to buy a building the Berensteins owned on Howard Avenue in Burlingame.[2] The purchase price was $2 million, and upon signing the Agreement, the Sharabianlous deposited $65,000 into escrow at Old Republic Title Company (Old Republic). They later deposited an additional $50,000 into escrow, bringing the total deposit to $115,000.

Initially, the Agreement provided that close of escrow was to occur on February 6, 2003. Over the course of the following months, however, the parties executed a number

[2] The Agreement is a standard form commercial property purchase agreement issued by the California Association of Realtors. It bears the form number CPA-11 and a revision date of April 2001.

of addenda extending the date on which escrow was to close. The final addendum set a closing date of June 4, 2003.

The Agreement also contained both environmental and financing contingencies and set deadlines by which these contingencies were to be removed. To finance the transaction, the Sharabianlous applied for a $1.7 million loan through US Bank, and on December 9, 2002, the bank conditionally approved their application subject to certain conditions, one of which was the submission of an acceptable Phase I environmental report. On US Bank 's recommendation, the Sharabianlous retained Piers Environmental Services (Piers) to conduct a Phase I site assessment to determine the possible presence of environmental contamination at the Howard Avenue property. In its October 2002 Phase I report, Piers recommended that a Phase II investigation be performed, because research revealed that an underground storage tank had been installed on the property in 1946, and the ground floor of the building had been occupied by a dry cleaning business for several decades.

The Sharabianlous and the Berensteins then agreed to extend the deadline for the Sharabianlous' approval of the environmental inspection to December 13, 2002. On December 17, 2002, the parties executed Addendum 3 to the Agreement,[3] extending the deadline for removal of the financing contingency to January 10, 2003. This addendum also addressed the removal of the environmental contingency, stating: "Environmental Contingency shall be removed by the [earlier] of the following events: [¶] i) Seller providing to Purchaser a Notice of Clearance from the San Mateo County Environmental Services, or ii) Seller to deposit in escrow, One Hundred and Fifty Percent (150%) of the remedial costs provided in the summary to be prepared by Piers Environmental Services. [¶] Funds deposited in escrow shall be held until Seller provides a notice of clearance from the San Mateo County Environmental Services Department, at which time escrow holder shall release the remaining funds to Seller without further instructions from the Buyer. At Seller's option, the funds held in escrow may be used to pay the approved

[3] Ronald Karp initially drafted this addendum, and it was modified by Sid Berenstein.

invoices of Piers Environmental Services, and the balance of the funds shall be released to Seller when Seller provides notice of clearance from the San Mateo County Environmental Services Department without further instructions from the Buyer."[4]

In late December 2002, Piers issued its Phase II report, which noted the presence of tetrachloroethene (a dry cleaning solvent), trichloroethene, and other compounds in the subsurface soil at the Howard Avenue property. The report concluded that the subsurface soil had been affected by the property's previous use as a dry cleaning facility, and it recommended further investigation to determine the extent of the contamination.

On January 13, 2003, the parties to the Agreement executed Addendum 4, which released the Sharabianlous' financing contingency but gave them the right to cancel the Agreement if the Howard Avenue property appraised for less than $1.7 million. US Bank retained an appraiser, who inspected the property on January 15, 2003. Ronald Karp accompanied the appraiser to the property and provided information on the value of comparable properties. Karp did not tell the appraiser that environmental reports had been prepared for the property, and the two had no discussion of contamination issues. The appraiser valued the property at $2,050,000. The appraisal report noted, however, that "in light of the [property's] previous use as a cleaners, we make no warranties regarding the presence or absence of toxic substances. If a formal certification of these matters is required, we recommend that a properly licensed professional engineer, familiar with the detailed investigative and reporting requirements of Phase I toxic certifications, be consulted." At trial, the appraiser testified that if he had been provided with copies of the environmental reports, he would not have prepared the appraisal until he had received clarification and estimates for the cost of cleanup. Although he stated that contamination would have affected the appraised value, he offered no opinion on the value of the property in light of the contamination.

[4] On the day before Addendum 3 was signed, Piers had advised that remediation would likely cost $20,000 or more but explained that a more precise cost estimate would only be possible after a caseworker review.

On January 31, 2003, the Sharabianlous removed their financing contingencies and signed an addendum to the agreement stating: "There are no remaining contingencies, the . . . Agreement . . . is contingent free."

In March 2003, Piers sent Ronald Karp a cost estimate for the required remediation work. On May 2, 2003, the San Mateo County Health Services Agency approved the scope of work presented in the Piers plan. On May 27, Piers sent Karp a proposal for monitoring and remediating the contamination at the Howard Avenue property at an estimated cost of $187,180.

Meanwhile, in late April 2003, the parties executed the final addendum to the Agreement, extending close of escrow until June 4, 2003. On that date, the Sharabianlous advised Ronald Karp that the matters discovered in the second phase of the environmental investigation were material, but they indicated they were still negotiating to purchase the building. The Sharabianlous informed Karp that their lender would not fund the loan unless it received an indemnity agreement from the sellers and "approval from the geologist."

Escrow did not close on June 4, and on June 10, Karp advised the Sharabianlous that the Berensteins considered them in default of their obligations under the Agreement. On July 11, 2003, US Bank notified the Sharabianlous that it would not approve their request for financing because of the environmental contamination at the property. Nevertheless, the parties conducted further negotiations, and the Berensteins offered to extend seller financing. Because of the Sharabianlous continued concern about the contamination, the negotiations were unsuccessful.

In August 2003, the Berensteins reached an agreement to sell the Howard Avenue property for $1,550,000 to a corporation owned by Stanley Lo. That sale closed on March 8, 2004. The Berensteins had planned to use the Howard Avenue property as part of a like-kind exchange under Internal Revenue Code section 1031 (IRC section 1031).[5]

[5] Under IRC section 1031, no taxable gain or loss is recognized on the exchange of properties of like kind if both the property surrendered and the property received are held either "for productive use in a trade or business or for investment." (26 U.S.C.

They had contracted to purchase a building in Yuba City, California, as a replacement property, but lost the opportunity to buy it because of the failed sale to the Sharabianlous. Instead, the Berensteins bought a building in McKinney, Texas, which generated less rental income than they would have earned from the Yuba City property.

On July 23, 2004, the Sharabianlous filed their original complaint against the Karps and the Berensteins. The Berensteins cross-complained against the Sharabianlous, alleging breach of contract and seeking declaratory relief. On July 27, 2005, the Sharabianlous filed a second amended complaint.

The Sharabianlous sought declaratory relief against the Berensteins and a return of their $115,000 deposit at Old Republic. They included a claim for rescission of the Agreement on the basis of fraud, failure of consideration, mutual mistake of fact, and commercial frustration. In the alternative, the Sharabianlous sought damages for breach of contract. The second amended complaint also included claims against the Karps for breach of fiduciary duty, professional negligence, fraud, and negligent misrepresentation. One of the bases for the breach of fiduciary duty claim was Ronald Karp's failure to disclose the existence of the Piers environmental reports to US Bank 's appraiser. The Sharabianlous also claimed that Karp should have referred them to a lawyer during the sale negotiations, but he failed to do so. The Sharabianlous' cause of action for professional negligence was based in part on their claim that Ronald Karp's drafting of Addendum 3 had left that document ambiguous.

The matter was tried to the court, and at the close of the proceedings, the court issued separate statements of decision as to the Karps and the Berensteins. As relevant here, the trial court found no breach of the Agreement by either the Berensteins or the Sharabianlous, because neither party knew the full extent of the environmental hazard at the Howard Avenue property. It therefore concluded that equitable rescission was the

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§ 1031(a)(1).) This section "allows taxpayers with profitable real estate investments to swap them for other real estate without paying tax." (2 Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2009) ¶ 13:305.1, p. 13-58.)

appropriate remedy. The court found "that the purpose of rescission is to restore the parties to the former position as far as possible to bring about substantial justice by adjusting the equities." It noted that in adjusting the equities, it could award compensation to a party. The trial court chose to adjust the equities in favor of the Berensteins because it found they had acted far more reasonably than the Sharabianlous when the parties were attempting to negotiate the sale and because, unlike the Sharabianlous, they had acted to mitigate their losses.

The trial court awarded the Berensteins $332,000 as the "net difference in sales price (i.e. the difference in sales price between the sale price to the Sharabianlous and the lower price paid by Stanley Lo) . . . ." It also awarded the Berensteins $96,660 as "present value loss" due to the difference in rental income expected from the McKinney, Texas property and the Yuba City property the Berensteins had lost the opportunity to buy. The total of these damages was $428,660, to which the trial court added prejudgment interest at 10% from June 3, 2003, the day prior to the scheduled close of escrow. The trial court offset these damages by $42,000, an amount representing the difference between the $78,500 in expenses the Sharabianlous incurred, on the one hand, and the $36,000 in lost rent the Berensteins claimed, on the other, together with 10% prejudgment interest on this difference. The trial court also found that both parties had incurred "out-of-pocket expenses, such as environmental reports, appraisals, and financing fees . . . in the range of $27,000 each," and concluded that, since the expenses were roughly equal, they required no adjustment. The trial court found the Berensteins were the prevailing party and were entitled to recover attorney fees pursuant to the Agreement. (See Civ. Code, § 1717, subd. (a).) The court ordered Old Republic to return the $115,000 deposit to the Sharabianlous, together with interest on that amount.

The trial court found that the Karps had not breached any fiduciary duty to the Sharabianlous. It found that Ronald Karp's failure to disclose the existence of the Piers environmental reports to US Bank 's appraiser did not breach any fiduciary duty, because the Sharabianlous and their lender already knew that the extent of the contamination and the potential costs of remediation were uncertain. The court noted that the Agreement

specifically advised the parties to seek expert advice regarding the possible presence of hazardous substances, and it disclaimed any duty by the Karps to provide any advice or information exceeding that needed to obtain a real estate license. The trial court also rejected the professional negligence claim, finding that the Agreement and its addenda were "both objectively straightforward and in fact were subjectively understood by plaintiffs." As a consequence, the court found there was no basis to conclude the Karps breached any duty to draft an unambiguous contract. It further found that the Sharabianlous were well educated, sophisticated individuals with significant experience in commercial real estate transactions who were capable of determining for themselves whether they should seek legal advice. It therefore ordered judgment to be entered in favor of the Karps.

On January 24, 2008, the trial court entered a judgment that specified its damage awards and granted the Berensteins attorney fees in an amount to be determined. The trial court later issued an order awarding the Berensteins fees of $291,269.25. On July 16, 2008, the trial court filed a an amended judgment nunc pro tunc, in which it awarded a total of $890,361.96 to the Berensteins.

The Sharabianlous filed timely appeals from both the original judgment and the order awarding attorney fees.

DISCUSSION

In the unpublished part I of this opinion, we address the Sharabianlous' contention that the trial judge's bias renders the entire judgment void. In the published part II, we turn to their claims of error regarding the damages and attorney fees awarded to the Berensteins. In the unpublished part III of our opinion, we analyze the Sharabianlous' breach of fiduciary duty and professional negligence claims against the Karps.

I. *Judicial Bias.*

The Sharabianlous contend the judgment must be reversed because the trial judge should have been disqualified for bias. We agree with respondents that the Sharabianlous have forfeited this claim by failing to raise it "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (Code Civ. Proc.,

§ 170.3, subd. (c)(1).) Moreover, even if the claim were properly before us, it would fail on the merits.

A. *Background*

The principal basis of the Sharabianlous' claim of judicial bias is an incident that occurred during the latter part of the trial. We therefore set out the relevant facts in some detail.

On December 8, 2005, the Berensteins' trial counsel reported that upon returning to the courtroom after a chambers conference the previous day, he had discovered one of his files missing. According to counsel, the file contained his work product. Counsel told the court the bailiff had informed him the file had been retrieved from Mrs. Sharabianlou. Counsel requested that Mrs. Sharabianlou be admonished on the record and that "she be excluded from the well and [made to] sit behind the wall in the gallery." Counsel noted that defendants had been seated in the gallery during the trial.

Plaintiffs' counsel explained that she had asked Mrs. Sharabianlou to pack her things the previous evening but said, "I was not instructing my client to put a work product of [Berensteins' counsel] in my materials. I had no idea it was there until the bailiff caught up with us in the garage. . . . I am assured that it was inadvertent . . . ." Plaintiffs' counsel asked permission to have her client speak on her own behalf, and the court granted that request. But before Mrs. Sharabianlou addressed the matter, the court stated on the record, "[A]fter you all left yesterday I was working in chambers on something else and [the bailiff] came to me at the very end of his day after retrieving these documents and told me what he had observed and what had transpired and that is right now just hearsay and is not evidence."

Mrs. Sharabianlou apologized for the incident and admitted having taken the documents. She told the court she had done so accidentally and had no use for the file. After listening to Mrs. Sharabianlou's explanation and hearing further from the Berensteins' counsel, the trial judge explained, "I am not going to do anything of a final nature here because if I do take a look at doing something of a final nature – I am actually going to conduct a hearing on this and take evidence and maybe we will need to do

that . . . . I am not making this as a finding, Mrs. Sharabianlou, but I am going to tell you that . . . it's my belief that—this was not intentional and I am just going to leave it at that." The trial judge nevertheless required Mrs. Sharabianlou to sit behind the bar for the remainder of the trial. He explained that if the incident were to recur, he would take testimony and handle the matter as a civil contempt. He warned that if he were to find that Mrs. Sharabianlou's actions were not unintentional, he would consider striking plaintiffs' cause of action for fraud. The trial judge concluded, "I am going to try not to let it influence how I look at your testimony and your credibility on the witness stand. I am going to do the best I can to do that, but it's not going to be easy so we will just leave it at that for now."

After the court's noon recess, the Sharabianlous' counsel raised the incident again and said she was "extremely concerned about comments made by the court." She asked the court to consider declaring a mistrial "on the basis that it will be impossible for my client to have a fair hearing because credibility is an important issue." Plaintiffs' counsel explained that she had had very little time to research the matter, but offered to brief the issue and present it the following morning. Counsel for both the Berensteins and the Karps stated they would oppose any motion for mistrial.

The trial judge stated that he did not "see this as a mistrial situation." But he told plaintiffs' counsel, "You have the right to make a motion for mistrial and have it heard, but it would take a lot to persuade me that it ought to be granted. . . . I suppose if you need overnight to research it further and you want to make an actual motion for a mistrial in the morning, then I suppose that is your clients' right and I will hear it and defense will have a chance to respond." The judge also addressed the question of Mrs. Sharabianlou's credibility, stating "if [she] did do this deliberately and it affects her credibility, it seems to me that's a fact of life that she should have contemplated before she did this . . . ." He noted that the incident did not change his view of the merits of the case, a view he had previously articulated to all counsel, which was that "this is probably a case that's more appropriate for a rescission of the contract and some equitable adjustment of what the

amounts are suffered by each side and . . . this incident to do with the documents doesn't change my view on that. So I still intend to decide the case based on the evidence . . . ."

When the court convened the next morning, the court asked plaintiffs' counsel whether she wanted to make a motion for a mistrial. Counsel informed the court that because her clients had put so much time and money into the case, she had decided to "press on." She reiterated her concern about the incident but said, "I am just hoping to go on from here and have everything go on an equal footing." The trial judge explained that he had held no evidentiary hearing into the incident because he considered it sufficient to have addressed the matter the previous day and to have required Mrs. Sharabianlou to sit behind the bar. He concluded by saying, "I think that will take care of it and that will be behind us and it really doesn't change my view of the case as I have heard the evidence . . . ."

Neither Mrs. Sharabianlou nor her counsel mentioned this incident for the remainder of the trial. The issue of the trial judge's alleged bias did not resurface until the Sharabianlous filed their objections to the proposed statement of decision proffered by the Berensteins. In their objections to the Berensteins' proposed statement of decision, the Sharabianlous claimed the trial judge showed "extreme bias" in finding that "the sellers and buyers were on equal footing" with regard to knowledge of contamination on the property when the contract was signed. They did not explain how this factual finding demonstrated bias. The Sharabianlous also objected to a passage in the Berensteins' proposed statement of decision that said, "Mrs. Sharabianlou's lack of credibility is consistent with her dishonesty displayed during the trial itself when she wrongfully took Defense Counsel's work papers off the Defendant counsel's table."[6]

During arguments on the proposed statements of decision, the Sharabianlous' counsel accused the trial judge in open court of showing favoritism to the defendants. She claimed that "whenever my opponents are talking you nod in agreement all the way through and I thought I am just fighting an absolute losing uphill battle through this trial."

[6] The Karps' proposed statement of decision contained an almost identical passage, but the Sharabianlous did not address it in their objections.

The trial judge disagreed and expressed his view that counsel's comment did not accurately reflect the attitude and demeanor of the court throughout the trial. The trial judge noted that he did not want to leave unanswered a "statement that calls into question [his] impartiality . . . and [his] fairness in the case." The judge nevertheless acknowledged that he had displayed some "real negative attitude" toward Mrs. Sharabianlou on the day he learned she had taken defense counsel's file.

At no time after the document incident did the Sharabianlous move to disqualify the trial judge for bias under Code of Civil Procedure section 170.3, subdivision (c)(1).

B. *Appellants Were Aware of All the Facts Giving Rise to Their Claim of Disqualification Before Entry of Judgment.*

On appeal, the Sharabianlous assert that the appearance of bias on the part of the trial judge renders the judgment void. To support their claim of judicial bias, they refer to the court's handling of Mrs. Sharabianlou's removal of defense counsel's file, the trial court's alleged prejudgment of the case, the portions of the statements of decision in which the trial court commented unfavorably on Mrs. Sharabianlou's credibility, the trial court's ruling that the Berensteins were prevailing parties, and the amount of damages awarded to the Berensteins. Before we may reach the merits of the bias claim, we must confront respondents' argument that the Sharabianlous have forfeited it by failing to raise it at the earliest practicable opportunity.

The governing statute requires a party seeking disqualification on grounds of bias to present its statement of objection "at *the earliest practicable opportunity* after discovery of the facts constituting the ground for disqualification." (§ 170.3, subd. (c)(1), italics added.) Because the bias of a judge may make its first appearance only after the commencement of a legal proceeding, a litigant may request disqualification at that time. (*In re Marriage of Lemen* (1980) 113 Cal.App.3d 769, 788.) A litigant may do so even in the middle of trial if that is when the facts demonstrating bias first become known. (*Schorr v. Superior Court* (1980) 105 Cal.App.3d 568, 571 [disqualification request made after beginning of hearing held timely].) Indeed, "case law recognizes situations in which a party is entitled to relief even though the grounds for disqualification are not

discovered until after judgment is entered." (*Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 425; see also *Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 703-704.)

Although these cases make clear that a party may seek disqualification of a trial judge for bias after trial commences, "[t]he matter of disqualification should be raised when the facts constituting the grounds for disqualification are first discovered and, in any event, before the matter involved is submitted for decision."[7] (*Urias v. Harris Farms, Inc., supra,* 234 Cal.App.3d at p. 424.) If a party does not request disqualification promptly upon discovery of the facts upon which its claim of bias is based, this "constitutes forfeiture or an implied waiver of the disqualification." (*Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337 (*Tri Counties Bank*).) Applying these standards to the facts before us, it is apparent the Sharabianlous have forfeited any claim of judicial bias. Appellants and their counsel were fully aware prior to judgment of all of the facts that they now cite in support of their claim, but they never sought to disqualify the trial judge below.

The Sharabianlous' claim of bias is based principally on the comments the trial judge made after the Berensteins' counsel reported that Mrs. Sharabianlou had removed one of his files. Shortly after the trial judge made those comments, counsel for the Sharabianlous stated that she was "extremely concerned about comments made by the court" and expressed her view that her clients might not get a fair hearing as a result, but she did not seek the trial judge's disqualification at that point. The failure to do so forfeited any claim of bias based on those comments. In a factually similar case,

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[7] In *Caminetti v. Pac. Mutual L. Ins. Co.* (1943) 22 Cal.2d 386, the California Supreme Court explained the policy underlying this requirement: " 'It would seem . . . intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.'" (*Id.* at p. 392, quoting *Lindsay-Strathmore Irr. Dist. v. Superior Court* (1920) 182 Cal. 315, 338 (conc. opn. of Olney, J.); accord, *Urias v. Harris Farms, Inc., supra,* 234 Cal.App.3d at p. 425 ["The rule rests on the principle that a party may not gamble on a favorable decision"].)

Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal.App.3d 143, the plaintiff contended the trial judge should be disqualified for bias based on comments the judge had made while verbalizing his intended decision after the parties' closing arguments. (*Id*. at pp. 149-150.) Rather than seeking disqualification when the comments were made, however, the plaintiff waited until after it received an unfavorable judgment and first raised the issue of bias in its motion for new trial. (*Id*. at p. 150.) The Court of Appeal held the plaintiff had "waived any claimed grounds of disqualification since he could not gamble on a favorable judgment and then move for disqualification upon receiving an adverse judgment." (*Ibid*.; accord, *Lagies v. Copley* (1980) 110 Cal.App.3d 958, 966 [plaintiff waived disqualification based on comments made by judge prior to demurrer hearing by waiting until after adverse ruling on demurrer to seek disqualification], disapproved on another point in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 738, fn. 23.)

As further evidence of bias, the Sharabianlous point to: (1) the trial judge's claimed reliance on an ex parte conversation with the bailiff regarding the taking of defense counsel's file, (2) unfavorable remarks on Mrs. Sharabianlou's credibility in the proposed statements of decision, and (3) the allegedly excessive damages awarded to the Berensteins. Once again, the record demonstrates the Sharabianlous' were aware of all of these facts well prior to the entry of judgment against them on January 24, 2008. First, the Sharabianlous learned of the trial judge's conversation with the bailiff on December 8, 2005 (more than two years before entry of judgment), when the trial judge informed the parties in open court of the substance of that conversation. Second, on October 1, 2007, the respondents filed the proposed statements of decision containing the challenged remarks on Mrs. Sharabianlou's credibility. In their October 16, 2007 objections to the Berensteins' proposed statement of decision, the Sharabianlous specifically objected to these remarks. They asserted that the remarks showed the trial court had allowed its view of Mrs. Sharabianlou's role in the removal of defense counsel's file "to affect the entire judgment," thus making clear that they viewed the

remarks as evidence of bias.[8] Finally, the Sharabianlous objected to the damage calculations in the Berensteins' proposed statement of decision, but they did not do so on grounds of bias.

It is therefore indisputable that when they filed their objections to the proposed statements of decision on October 16, 2007, the Sharabianlous were aware of all facts upon which they now base their claim of bias. Indeed, almost two months later, at the hearing on the proposed statements of decision, counsel for the Sharabianlous again raised the issue of judicial bias. The trial court did not adopt the proposed statements of decision and enter judgment until January 24, 2008. Yet even though the Sharabianlous possessed all of the facts underlying their claim of bias and had ample time to request the trial judge's disqualification before the judgment was filed, they did not do so. They have therefore forfeited this claim and may not raise it on appeal.

Tri Counties Bank, supra, 167 Cal.App.4th 1332, provides strong support for our conclusion. In that case, the trial judge's tentative ruling on a motion for class certification revealed that the judge had relied on the defendant bank's "10-K report" in determining whether the class was reasonably ascertainable, although neither party had mentioned the report in their moving papers. (*Id.* at p. 1335.) The defendant bank later objected to the tentative ruling on the ground that the trial judge had relied on extraneous material gained by independent investigation into matters on which the plaintiffs had failed to offer evidence. (*Ibid*.) After the motion for class certification was granted, the bank sought appellate review of the order by filing a petition for writ of mandate. (*Id*. at p. 1336.) The bank's petition claimed that the trial judge's independent investigation was improper, but it did not argue that the judge was disqualified. (*Ibid*.) After denial of its petition for writ of mandate, the bank returned to the trial court and filed a statement of objection pursuant to Code of Civil Procedure section 170.3, subdivision (c), seeking disqualification of the trial judge because he had conducted an independent investigation

[8] Appellants essentially concede this in their reply brief. They argue, "It did not become apparent that [the trial judge] harbored bias until he issued two tentative statements of decision. Those statements . . . indicated [the trial judge's] apparent bias."

of the facts. (*Tri Counties Bank*, at p. 1336.) The trial court struck the statement of objection as untimely. (*Id*. at pp. 1336-1337.) When the bank sought writ review of the order striking its statement of objection, the Court of Appeal held that the bank had forfeited its objection by waiting until after an adverse ruling on the motion for class certification. (*Id.* at p. 1338.)

That is precisely the case here. The Sharabianlous were aware of all of the facts allegedly constituting evidence of bias prior to judgment, but they waited until their appeal from the adverse decision to argue that the trial judge should have been disqualified for bias. As the California Supreme Court has explained, "the complaining party must seek disqualification at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. . . . By failing to do so when the relevant events occurred, [the Sharabianlous have] forfeited the right to complain about them on appeal." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 994.)

C. *The Cases Appellants Cite Are Inapposite.*

The Sharabianlous rely heavily on *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237 (*Catchpole*), for their argument that a claim of judicial bias may be raised for the first time on appeal. Their reliance is misplaced. In *Catchpole,* Division Two of this District reversed a defense judgment in a sexual harassment suit because the trial judge's comments "reflect[ed] a predetermined disposition to rule against appellant based on her status as a woman." (*Id*. at p. 249.) Here, however, the Sharabianlous do not claim that the trial judge was biased against Mrs. Sharabianlou because of her gender or any other protected characteristic. Thus, "[t]he case before us does not involve a claim of judicial gender bias or any other kind of invidious bias by the trial court. *Catchpole* is, therefore, inapposite and does not excuse [appellants'] failure to object to the trial court's allegedly improper remarks."[9] (*People v. Geier* (2007) 41 Cal.4th 555, 613.)

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[9] We note further that *Catchpole*, unlike this case, did "not present the question of disqualification," although the court did look to the disqualification statutes and case law for guidance. (*Catchpole, supra*, 36 Cal.App.4th at p. 246.)

Although the appellant in *Catchpole* had not objected to the judge's gender bias in the trial court, the Court of Appeal chose to address the issue because "[f]ew more daunting responsibilities could be imposed on counsel than the duty to confront a judge with his or her alleged gender bias in presiding at trial. The risk of offending the court and the doubt whether the problem could be cured by objection might discourage the assertion of even meritorious claims." (*Catchpole, supra,* 36 Cal.App.4th at p. 244.) The record before us demonstrates that these concerns are not present in this case. The Sharabianlous' counsel showed no hesitation about confronting the trial judge with claims of bias. Counsel sought to disqualify the trial judge before trial commenced, and after the judge made the comments at issue here, counsel specifically expressed the concern that those comments indicated her client would not receive a fair trial. Counsel later told the trial judge quite directly that she believed he had exhibited favoritism toward the defendants and that she had been "fighting an absolute losing uphill battle through this trial." Clearly, the Sharabianlous' counsel did not fear "offending the court" (*ibid.*), and she did not shrink from confronting the trial judge with her claim of bias. What she did not do, however, was avail herself of the remedy provided by the statutory disqualification procedure.

The other authorities appellants cite are also distinguishable. Both *Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994 and *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, involved pervasive, egregious judicial misconduct that affected the entire proceedings. In the former case, the trial judge engaged in ex parte contact, created a "circus atmosphere" by failing completely to observe courtroom decorum, belittled the plaintiffs and their counsel, and repeatedly disparaged a plaintiff's testimony in front of the jury. (*Haluck v. Ricoh Electronics, Inc.*, at pp. 1002-1007.) In the latter case, the trial court was guilty of reciting "a veritable litany condemning and impugning the character of undocumented immigrants, including plaintiff," whom the judge claimed "place a burden upon the taxpayers" by obtaining "services . . . to which they are not entitled, and then add insult to injury by suing the providers, such as" the defendant in the case "in order to make 'a pot of [underserved] money.'" (*Hernandez v. Paicius, supra,* at pp. 462-

463, fn. omitted.) As a leading treatise points out, the misconduct in such cases is so " 'extreme'" that the ordinary forfeiture rules do not apply. (2 Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2009) ¶ 12:115, pp. 12-26.1 to 12.26.2.) Nothing in the record before us even approaches such extreme misconduct.

We also reject appellants' argument that it would have been futile to seek the trial judge's disqualification because "he had already rejected any assertion that he harbored bias." Had appellants filed a timely statement of objection, the statute would have required that their claims of bias be heard by a *different* judge. (Code Civ. Proc., § 170.3, subd. (c)(5) ["the question of disqualification shall be heard and determined by another judge agreed upon by all the parties . . . or . . . by a judge selected by the chairperson of the Judicial Council . . . ."].) This procedure ensures that the judge whose disqualification is sought takes no part in the decision on whether a reasonable person might reasonably entertain a doubt about his or her ability to be impartial.

D. *Even if Appellants' Bias Claim Had Been Properly Preserved, It Would Fail on the Merits.*

Although we hold that the Sharabianlous have forfeited any claim of judicial bias by failing to seek disqualification below, their claims would be unavailing even if they had been timely raised. Fundamentally, what the Sharabianlous object to is the trial judge's negative assessment of Mrs. Sharabianlou's credibility, but the trial judge's finding that Mrs. Sharabianlous was not a credible witness does not constitute evidence of bias.

At the outset, we note that under our state's constitution, "[t]he court may make any comment on the . . . credibility of any witness as in its opinion is necessary for the proper determination of the cause." (Cal. Const., art. VI, § 10.) In this case, the judge's credibility assessment, which was "based upon actual observance of the witness[] and the evidence given during the trial," is not proof of either bias or misconduct. (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312.) In making a ruling, a trial judge *must* weigh the credibility of witnesses, and he or she "necessarily makes and expresses determinations in favor of and against parties." (*Moulton Niguel Water Dist. v. Colombo,*

(2003) 111 Cal.App.4th 1210, 1219.) Far from being improper, such assessments of credibility are "the *duty* of a judge when acting as the trier of facts . . . , and if [the judge] believes that a party has testified falsely, and chooses to say so rather than remain silent, [the judge] is not disqualified from proceeding to render judgment." (*Keating v. Superior Court* (1955) 45 Cal.2d 440, 444, italics added; see also *Fishbaugh v. Fishbaugh* (1940) 15 Cal.2d 445, 456-457 [judge acting as finder of facts not disqualified by comments that appellant " 'misrepresented his financial condition'" and " 'took the law into his own hands'"]; *People v. Williams* (2007) 156 Cal.App.4th 949, 956 [judge's comment that defendant had perjured himself at hearing furnished no ground for setting aside ruling for bias because the "trial court lawfully reached this conclusion . . . based on the evidence presented at the hearing"].) In this case, after observing Mrs. Sharabianlou at trial and hearing all of the evidence, the trial judge explained that one of his reasons for ruling against appellants was his view that Mrs. Sharabianlou lacked credibility. That explanation does not constitute evidence of judicial bias. (*Moulton Niguel Water Dist. v. Colombo*, at p. 1219.)

The same is true of appellants' complaints that the trial judge (1) improperly considered the bailiff's hearsay account of Mrs. Sharabianlou's taking of defense counsel's file, (2) prejudged the case before hearing all of the evidence, and (3) made legal rulings that favored the Berensteins. The judge fully disclosed his conversation with the bailiff, and what he reported of the bailiff's account was entirely consistent with the descriptions of the incident given by Mrs. Sharabianlou and her counsel. In any event, "[d]uring a trial any number of things come to a judge's attention beyond the strict confines of the written record." (*People v. Chatman* (2006) 38 Cal.4th 344, 365.) A trial judge's consideration of inadmissible evidence may constitute legal error, but it is not evidence of bias. (See *Fishbaugh v. Fishbaugh*, *supra*, 15 Cal.2d at p. 457; 1 Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2009) ¶ 3:130, p. 3-36 ["Nor is bias proved by the fact the judge based his or her rulings on matters outside

the record"].) This is especially true here, because the essential facts surrounding the removal of defense counsel's file are not disputed.[10]

Nor does the record support any claim that the trial judge prejudged the case. Appellants point to the court's comment indicating its view that the case was one that was "more appropriate for a rescission of the contract and some equitable adjustment" as evidence that the judge had made up his mind prior to hearing all of the evidence. The judge immediately added, however, that he still intended to decide the case based on the evidence. Thus, contrary to appellants' contentions, the judge's comments were only "tentative views and expressly subject to modification in the event that later evidence should require it."[11] (*Weil v. Weil* (1951) 37 Cal.2d 770, 777.)

Finally, that the court rejected the Sharabianlous' legal claims, and found persuasive those of the Berensteins, does not support a claim of judicial bias. "[A] trial court's numerous rulings against a party – even when erroneous – do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.)

II. *The Berensteins*

The Sharabianlous make a number of challenges to the damages the trial court awarded to the Berensteins. We will address these in the order in which they are

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[10] Although the Sharabianlous argue otherwise, there was no need for any further evidentiary hearing into this incident. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 364 [hearing into conversation between trial judge and father of victim unnecessary where the accounts of the conversation were "not inconsistent"].)

[11] *Webber v. Webber* (1948) 33 Cal.2d 153, cited by appellants, is not on point. In that case, the trial court announced its intention to deny a wife's claim for alimony before hearing any testimony on the wife's need, condition of health, or lack of means of support. (*Id*. at p. 156.) On the day following the court's announcement, when the wife's counsel sought to recall her to the witness stand to testify regarding the issue of support, the court stated, " 'I have told you that I am not going to award any support. I have told you that several times . . . I wish you would please stop wasting the Court's time.'" (*Id*. at p. 157.) The trial judge's expression of his tentative views in the case before us does not amount to the sort of "predetermined disposition of [the] issue regardless of what [the] proof thereon might be" that the California Supreme Court condemned in *Webber v. Webber*. (*Id*. at p. 158.)

presented in appellants' opening brief. Appellants' principal claim is that certain items of recovery awarded as rescission damages are not legally permissible under Civil Code section 1692.[12] Specifically, appellants object to (1) the $332,000 awarded as the net difference between the Agreement's sales price and the price paid by Lo and (2) the $96,660 awarded as the difference between the Berensteins' income from the McKinney, Texas property and the higher income the Berensteins would have received from the Yuba City, California property they lost the opportunity to buy. Appellants argue that these items of recovery essentially amount to an award of damages for breach of the Agreement, rather than for its rescission. That is, the damages compensated the Berensteins based on what they would have gained had the Agreement been fully performed. According to the Sharabianlous, these damages do more than restore the Berensteins to the status quo ante, and thus are not proper restitutionary or "consequential damages" under Civil Code section 1692. We agree with appellants.

A. *Relief Available Under Civil Code section 1692*

Civil Code section 1692 provides in relevant part: "A claim for damages is not inconsistent with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any consequential damages to which he is entitled; but such relief shall not include duplicate or inconsistent items of recovery. [¶] If in an action or

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[12] The Berensteins claim the Sharabianlous forfeited these arguments by failing to raise them in their objections to the proposed statement of decision. To the contrary, the record reflects that appellants challenged the contested items of recovery on the basis that the damages would do more than restore the Berensteins to the economic position they occupied prior to the signing of the Agreement. While the phrasing of the arguments on appeal may be slightly different, their substance is the same. The Berensteins also assert that the Sharabianlous may not raise these arguments in this court because they invited the error by seeking similar damages in the trial court. The Sharabianlous acknowledge in their reply brief that at least one item of damages they sought – "$78,000 in increased rent paid" – might be characterized as compensation for loss based on full performance of the contract. Nevertheless, in light of the Sharabianlous' clear objections to inclusion of these damages in the trial court's proposed statement of decision, we find the invited error doctrine inapplicable, because the Sharabianlous "simply did not mislead the superior court in any way." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties." The Sharabianlous contend the challenged items of recovery are not the type of damages authorized by this section. Analysis of this argument requires us to examine the nature of the relief available under this provision.

The statute essentially "restates the equity jurisprudence applicable in the rescission context." (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1422.) The fundamental principle underlying that jurisprudence "is that 'in such actions the court should do complete equity between the parties' and to that end 'may grant any monetary relief necessary' to do so. [Citation.]" (*Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 316 (*Runyan*).) Rescission is intended to restore the parties as nearly as possible to their former positions and " 'to bring about substantial justice by adjusting the equities between the parties' despite the fact that 'the status quo cannot be exactly reproduced.'" (*Ibid*., quoting *Lobdell v. Miller* (1952) 114 Cal.App.2d 328, 344.) To achieve this objective, Civil Code section 1692 provides that "[a] claim for damages is not inconsistent with a claim for relief based upon rescission." It further provides that the aggrieved party shall be awarded "complete relief," including restitution and "consequential damages." (Civ. Code, § 1692.)

The claim authorized by Civil Code section 1692 is one "'based upon . . . rescission' or the disaffirmance of the contract. The statute does not authorize a claim based upon the affirmance of the contract." (*Akin v. Certain Underwriters at Lloyd's London* (2006) 140 Cal.App.4th 291, 297 (*Akin*).) The distinction between disaffirmance and affirmance of the contract has important consequences when it comes to damages. A party who sues for breach of contract thereby affirms the contract's existence, and the damages awarded "compensate[] the party not in default for the loss of his 'expectational interest' – the benefit of his bargain which full performance would have brought." (*Runyan, supra,* 2 Cal.3d at p. 316, fn. 15.) In contrast, rescission is a remedy that *disaffirms* the contract. (*Akin,* at p. 296; see also *Lobdell v. Miller, supra,* 114

Cal.App.2d at p. 343 ["The remedy of rescission necessarily involves a repudiation of the contract"].) Rescission extinguishes the contract (Civ. Code, § 1688), terminates further liability, and restores the parties to their former positions by requiring them to return whatever consideration they have received. (*Nmsbpcsldhb v. County of Fresno* (2007) 152 Cal.App.4th 954, 959-960.) Thus, the "[r]elief given in rescission cases – restitution and in some cases consequential damages – puts the rescinding party in the *status quo ante*, returning him to his economic position before he entered the contract." (*Runyan, supra,* at p. 316, fn. 15.)

The damages available in cases of rescission depend in part on the reasons for which the contract was rescinded. (See *Runyan, supra*, 2 Cal.3d at p. 317 & fn. 16.) In this case, the trial court rescinded the Agreement based on mutual mistake of fact, because "neither party knew the full extent of the environmental hazard at the property . . . ." (See Civ. Code, § 1689, subd. (b)(1) [contract may be rescinded "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake . . . ."].) Rescission is an appropriate remedy where, as here, the contracting parties are mutually mistaken as to the condition of real property. (E.g., *Williams v. Puccinelli* (1965) 236 Cal.App.2d 512, 515-516 [lease of premises for operation of restaurant and bar properly rescinded after discovery that structure lacked sufficient load-bearing capacity].) As our Supreme Court pointed out in *Runyan*, however, the damages available in actions for rescission based upon the fault of the nonrescinding party (such as cases of fraud or misrepresentation) and those not involving fault (such as cases of illegality or mistake) are different. (*Runyan, supra,* 2 Cal.3d at p. 317.) *Runyan* observed that courts have not awarded consequential damages when rescission is sought based upon mistake. (*Ibid*.) " 'Rescission for mistake . . . is a remedy by means of which a party may be relieved of the burdens and may procure restitutionary redress respecting a contract which was defective at its inception because consent was not freely or knowingly given.'" (*Id*. at pp. 317-318, fn. 16, quoting Recommendation and Study relating to Rescission of Contracts (1960) 3 Cal. Law Revision Com. Rep. (1961) p. D-15, fn. 1.) *Runyan* therefore indicates that the damages available to parties in cases in

which rescission is based upon mistake are more limited than those available in cases in which rescission is based upon fault.

In cases involving the rescission of agreements to purchase real property, California courts have held that the seller must refund all payments received in connection with the sale. (See *Kent v. Clark* (1942) 20 Cal.2d 779, 784.) If the buyer has taken possession of the property, the buyer must restore possession to the seller. (*Ibid*.) Such recovery of the consideration exchanged is part of restitution. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 937, p. 1031; *Millar v. James* (1967) 254 Cal.App.2d 530, 531, 532.) As consequential damages, rescinding buyers or sellers may recover such items as real estate commissions paid in connection with the sale (*Tampico v. Wood* (1963) 222 Cal.App.2d 211, 214-215), escrow expenses (*Curran v. Heslop* (1953) 115 Cal.App.2d 476, 483), interest on specific sums of money paid to the other party (*Smith v. Rickards* (1957) 149 Cal.App.2d 648, 654), and attorney fees in appropriate cases. (*Hastings v. Matlock* (1985) 171 Cal.App.3d 826, 841.)

B. *The Trial Court's Award Gave the Berensteins the "Benefit of the Bargain."*

The trial court's award of $428,660 goes well beyond the types of damages permitted in the aforementioned cases. The court's award was calculated based upon the difference between the rescinded contract's sale price and the amount received from the later sale to Stanley Lo. To this the trial court added the difference between the income the Berensteins would have earned from the Yuba City property and the amount they earned from the Texas property. The damages thus effectively gave the Berensteins the benefits they would have gained if the rescinded contract had been fully performed. As such, the trial court compensated the Berensteins "for the loss of [their] 'expectational interest' – the benefit of [the] bargain which full performance would have brought." (*Runyan, supra,* 2 Cal.3d at p. 316, fn. 15; see also *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 564 ["The 'benefit of the bargain' measure of damages is the difference between the actual value of what the plaintiff has received and that which he expected to receive"].) Such damages are not available in an action under Civil Code

section 1692.[13] (*Akin, supra,* 140 Cal.App.4th at pp. 297-298.) The statute precludes "duplicate or inconsistent items of recovery," and damages for breach of contract are inconsistent with rescission. (*Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 915.)

The Berensteins have not cited any case, from California or elsewhere, in which a court rescinding a contract based on mistake has approved the measure of recovery used here. They do not specifically claim that these items constitute either restitution or consequential damages under the statute. Instead, they argue that the trial court was authorized to award them as part of its statutory authority to adjust the equities after granting the remedy of rescission. It is true that case law recognizes the trial court's broad power to fashion an appropriate remedy in cases of rescission. (See, e.g., *Snelson v. Ondulando Highlands Corp.* (1970) 5 Cal.App.3d 243, 254 & fn. 3, 258 [affirming judgment ordering sellers to assume payments on note and to hold defrauded buyers harmless for any demands or claims by lender based on note and trust deed].) But the trial court's authority to adjust the equities is one that must be exercised in accordance with established principles of law and equity. (*Utemark v. Samuel* (1953) 118 Cal.App.2d 313, 316.) As we explain, the damage award before us does not adhere to those principles.[14]

The very definition of rescission is "to 'restore the parties to their former position.' [Citation.]" (*Nmsbpcsldhb v. County of Fresno, supra,* 152 Cal.App.4th at p. 959;

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[13] Our conclusion is strengthened when one observes that the trial court's method of calculating the Berenstein's damages resembles somewhat the measure of recovery available in actions for breach of an agreement to purchase real estate. (See Civ. Code, § 3307.) In such cases, "[i]f the purchaser defaults, the vendor may recover for the loss of his or her bargain and consequential damages." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 901, p. 994.)

[14] The trial court's finding that the Berensteins had acted more reasonably than the Sharabianlous also cannot serve to justify the award. The court found that neither party was in breach, and therefore this cannot be construed as a case of "rescission based upon a ground involving some fault on the part of the nonrescinding party . . . ." (*Runyan, supra,* 2 Cal.3d at p. 317.)

accord, *McCoy v. West* (1977) 70 Cal.App.3d 295, 302.) Had the Sharabianlous taken possession of the premises, restoring the Berensteins to their former position would have meant returning their property to them. (See *Goodrich v. Lathrop* (1892) 94 Cal. 56, 58 [the words "same position" in former Civ. Code, § 3407 (enacted by Stats. 1872 and repealed by Stats. 1961, ch. 589, § 5) refer to the subject matter of the contract, i.e., the property; vendor restored to status quo ante by return of property].) Since the Berensteins never parted with the property, there was nothing physically to restore. Moreover, restoring the Berensteins to their former position does *not* mean compensating them for the depreciation in value that occurred between the signing of the Agreement and the sale to Lo. (See *Goodrich v. Lathrop*, at p. 58.) "If the property can be returned by the vendee in substantially the same condition as when he received it, then the requirements of . . . the code are fully satisfied." (*Ibid.*) In any event, the decline in value appears to have been due to the discovery of the contamination beneath the property and is not attributable to the Sharabianlous. (*Shirreffs v. Alta Canyada Corp.* (1935) 8 Cal.App.2d 742, 754-755.) Nor can the money awarded be characterized as the kind of expenses necessarily incurred in connection with the sale that have traditionally qualified as "consequential damages," such as real estate commissions, escrow fees, or interest. In short, these items of recovery do not fall within the types of damages California courts have found to be proper elements of relief based upon rescission.

The trial court's award of damages to the Berensteins did not merely restore them to the status quo ante. It placed them in a better position by giving them the benefits they would have obtained had the rescinded contract been performed. For this reason, the award of $428,660 was not legally permissible under Civil Code section 1692 and must be reversed.[15] It follows that we also reverse the award of prejudgment interest on this amount.

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[15] Because we reverse the trial court's award of these damages, we need not resolve any contentions regarding the liquidated damages provision of the Agreement. On this point, the Sharabianlous state in their opening brief that their entitlement to return of their entire $115,000 deposit is undisputed, and the Berensteins do not argue

C. *The Setoff for "Out of Pocket Expenses"*

In its statement of decision, the trial court noted that "[b]oth Plaintiffs Sharabianlou and Defendants Berensteins have out-of-pocket expenses, such as environmental reports, appraisals, and financing fees, etc.; each side having so spent in the range of $27,000 each[.]" The court found that these expenses were roughly equal and required no adjustment. The Sharabianlous contend the award is legally unavailable because the costs of the environmental report benefitted the Berensteins, and, as they did below, they further assert that there is no evidence to justify the amount awarded. We agree in part with appellants.

We reject the Sharabianlous' argument that a setoff for the cost of the environmental reports is legally unavailable to the Berensteins. We cannot accept the contention that the reports benefitted the Berensteins alone. Both parties to the transaction could be said to have benefitted from the discovery and investigation of the contamination on the property. Indeed, but for the environmental investigation, the Sharabianlous might have purchased a piece of contaminated property. We are therefore unwilling to hold as a matter of law that the trial court did not act "reasonably and equitably" in crediting this expense to the Berensteins. (See *Runyan, supra,* 2 Cal.3d at p. 318.)

We agree with the Sharabianlous, however, that the evidence is insufficient to support a setoff of $27,000 to the Berensteins. In response to appellants' challenge to the

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otherwise. The Berensteins make no claim that they should be permitted to retain the $65,000 initial deposit as liquidated damages in the event that the trial court's award to them is reversed. To the contrary, the Berensteins argue that the liquidated damages provision is inapplicable here because such provisions apply only in cases of breach of contract, and the trial court found no breach. (See Civ. Code, § 1671, subd. (b).)

Similarly, we do not reach the question of whether the award of $96,660 in lost rental income is supported by IRC section 1031. (See 26 U.S.C. § 1031.) The Berensteins point out that the trial court did not justify the award on this basis, and they make no attempt to do so, either. We have already concluded that the trial court erred in awarding this sum on the grounds it articulated in its statement of decision, and in the absence of any argument by the Berensteins that the award is justified on any other ground, we need not consider the matter further.

sufficiency of the evidence to support the amount, the Berensteins point us only to testimony by Sid Berenstein in which he stated the Berensteins had paid $4,300 as their share of the cost of the Piers phase II report. They offer no other evidentiary support for the $27,000 figure used by the trial court. The Berensteins' factual assertions on appeal cannot rest solely on the figure appearing in the trial court's decision. (See *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379.) "It is the evidence supporting or opposing the trial court's decision that is important." (*Ibid*.) Counsel is obligated to refer us to the portions of the record supporting his or her contentions on appeal. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738; see also Cal. Rules of Court, rule 8.204(a)(1)(C) ["Each brief must: . . .[¶] Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"].) We may disregard a respondent's statements of fact when those statements are unsupported by citations to the record. (E.g., *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1.) And we will not scour the record on our own in search of supporting evidence. (See *Grant-Burton v. Covenant Care, Inc.*, at p. 1379.) Where, as here, respondents have failed to cite that evidence, they cannot complain when we find their arguments unpersuasive. (See *Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 684.)

D. *Appellants' Claim for Expenses Incurred in Reliance on the Agreement*

The Sharabianlous next contend the trial court erred in failing to award them certain costs they allegedly incurred in reliance on the Howard sale. They identify certain of these expenses in their opening brief, including a $23,448.36 prepayment penalty they suffered in the sale of the Broadway Avenue property, as well as "other expenses incurred in connection with the Broadway sale, such as commissions." The precise nature and amount of the "other expenses" are not explained.

We are unable to evaluate appellants' contentions because they are not supported by either sufficient argument or adequate citations to the record. (See Cal. Rules of Court, rule 8.204(a)(1)(B), (C).) The trial court denied the Sharabianlous the $23,448.36 prepayment penalty because it found they could have used other properties to complete a

timely IRC section 1031 exchange but failed to do so. The Sharabianlous' opening brief does not dispute this finding. Indeed, it does not even mention it. Absent some argument that the trial court's conclusion was erroneous, we will not reverse its decision on this point. (See, e.g., *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631-632 [trial court's ruling is presumed correct and burden is on appellant to demonstrate error].)

As for the "other expenses incurred in connection with the Broadway sale, such as commissions," appellants do not tell us the amount they believe they should have been awarded. Their brief contains only a cryptic reference to a trial exhibit. The exhibit is a seller's final settlement statement for the property at 1220-1226 Broadway, and it lists commission charges of $159,488.10. In their briefs on damages in the court below, appellants claimed almost exactly half this amount, or $79,744, as the "[r]eal estate commission on sale of Broadway . . . ." But in their objections to the proposed statement of decision regarding the Berensteins, the Sharabianlous claimed they should be awarded the sum of $149,408.11, which allegedly represented "refinancing costs, prepayment penalties, real estate commission on the sale of Broadway, and closing costs spent in reliance upon their contract to purchase Howard Avenue." Their briefs to this court do not reconcile these various figures, and it is not this court's responsibility to do so on its own. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 ["One cannot simply say the court erred, and leave it up to the appellate court to figure out why"].) We therefore conclude the Sharabianlous have failed to demonstrate error.

E. *Appellate Remedy*

Now that we have determined the merits of the parties' contentions on appeal, the question of the proper appellate remedy remains. The Sharabianlous suggest that we should "modify the judgment so as to strike the monetary award to Berenstein along with the prejudgment interest award to Berenstein and remand the matter to the trial court for a determination of the additional recovery to . . . the Sharabianlous based on their expenses incurred in reliance on the Agreement." Although we agree that the awards to the Berensteins must be reversed, we have determined that the Sharabianlous failed to

demonstrate that they were entitled to additional recovery of expenses based on the Agreement. The Sharabianlous had a full and fair opportunity to litigate this issue, and we therefore conclude that it need not be retried. (See *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 681.)

For their part, the Berensteins have argued only that the trial court's award was correct and that they are entitled to unqualified affirmance of the judgment. They have not proposed any alternative measure of their damages and have not identified any items of damage that might be owed to them if the trial court's award is reversed. Nor have the Berensteins challenged any aspect of the trial court's award of damages to the Sharabianlous. Thus, we conclude that there is no need for a retrial of the damages issues and will therefore affirm the portion of the judgment awarding the Sharabianlous $61,423.82 in damages from the Berensteins, as well as the portion ordering the return of their $115,000 deposit at Old Republic together with interest thereon.

Because we reverse the award of damages to the Berensteins, we must also reverse the portion of the judgment awarding them attorney fees. That award was based on the determination that the Berensteins were the prevailing parties in an action on the Agreement (Civ. Code, § 1717, subd. (a)), and having set aside the damage award, we must set aside the fee award as well. (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053.) The Sharabianlous argue that if the judgment in favor of the Berensteins is reversed, they are necessarily the prevailing parties and are entitled to an award of attorney fees. "The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) We therefore decline to make that determination ourselves and instead leave it to the trial court on remand.

III. *The Karps*

The Sharabianlous argue the trial court erred in rejecting their claims of breach of fiduciary duty and professional negligence against the Karps. We conclude that we must uphold the trial court's judgment in favor of the Karps on these claims. We will therefore

affirm the judgment, although not for the reasons upon which the trial court relied. (E.g., *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16 [trial court's order will be affirmed if correct on any theory].)

A. *Appellants' Breach of Fiduciary Duty Claim Fails.*

The Sharabianlous contend that Ronald Karp breached his fiduciary duty to them by failing to disclose to their lender's appraiser that environmental contamination had been discovered on the property. Appellants assert Karp knew they "were relying on the appraisal to determine whether to exercise a contractual right to walk away from the contract." They claim that had the contamination been disclosed to the appraiser, the property could have appraised for less than $1.7 million, and they would have exercised their right under Addendum 4 to cancel the Agreement.[16]

A claim for breach of fiduciary duty by a real estate agent has three elements; a plaintiff must demonstrate the existence of a fiduciary relationship, its breach, and damages proximately caused by that breach. (*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1562.) The trial court found no breach of fiduciary duty because the evidence showed the Sharabianlous and US Bank "already knew that the toxic hazard and potential remediation cost was undefined and unknown." In addition, the court found that: (1) Karp placed appellants on notice of the contamination issues, (2) Karp advised the Sharabianlous to retain an environmental consultant, (3) the Sharabianlous retained such a consultant, and (4) the Sharabianlous and US Bank were in direct contact with the consultant concerning how the contamination might affect their contemplated purchase.

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[16] The Sharabianlous do not claim that Karp failed to make an adequate disclosure of the contamination to *them*. And under California law, they cannot claim that Karp had a fiduciary duty to offer his opinion as to how the contamination would affect the property's value. (*Pagano v. Krohn* (1997) 60 Cal.App.4th 1, 12 ["Conclusions as to how the legal or practical ramifications of disclosed facts adversely impact value are not 'facts' subject to an agent's duty of disclosure"].) Here, the alleged breach of fiduciary duty was Karp's failure to inform a third party – the appraiser – of the existence of environmental contamination at the site. The Sharabianlous cite no case law or other authority holding that a real estate agent's duty to appellants extends to disclosing this information to a third party, such as a lender's appraiser. Nevertheless, we will assume solely for purposes of our discussion that such a duty exists.

On appeal, the Sharabianlous do not contest any of these findings. Instead, they claim that as a matter of law, "Karp owed a duty to disclose the existence of environmental contamination on the property when he must have known that his failure to do so would affect his principals' substantive rights." We conclude that appellants cannot show any prejudicial error because they failed to present evidence of damages proximately caused by Karp's failure to disclose.

Initially, we observe that the Sharabianlous cite no record evidence supporting either their claim that they were relying on the appraisal to cancel the Agreement or that Karp knew of this alleged reliance. Appellants are required to support all factual assertions in their brief with appropriate citations to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C).) Arguments lacking citation to record evidence are deemed forfeited. (E.g., *Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1560 [ignoring plaintiff's claim regarding defendant's alleged knowledge where no record reference supported claim]; *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301 [argument concerning partners' alleged understanding of partnership agreement waived by failure to provide record support].) Thus, to the extent the Sharabianlous' breach of fiduciary duty claim hinges on these factual allegations, the claim is forfeited.

Moreover, as the Karps point out, implicit in the Sharabianlous' argument is the claim that the property would have appraised for less than $1.7 million had the appraiser been informed of the contamination. The Sharabianlous cite to nothing in the record supporting this claim.[17] In fact, when the appraiser testified at trial, the Sharabianlous' counsel informed the court that "[t]here will be no value given in this case about this property . . . ." And on cross-examination, the appraiser admitted that although he thought the value of the property would decrease as a result of contamination, he had no

[17] Indeed, the Karps argue that the record supports the opposite conclusion. They note that even if the final estimate of cleanup costs in the Piers Phase III proposal ($187,180) is subtracted from the appraiser's $2,050,000 estimated value, the resulting valuation is $1,862,820, an amount well in excess of $1.7 million.

idea how much the value would decrease. In short, there simply is no evidence that the property would have appraised for less than $1.7 million, and thus any claim that the Sharabianlous would have been entitled to cancel the Agreement on that basis is entirely speculative. Without such evidence, the Sharabianlous cannot show that they were damaged by the alleged breach of fiduciary duty. (See *Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 644-645.)

B. *Professional Negligence*

The Sharabianlous next argue the trial court erred in rejecting their professional negligence claim against Ronald Karp. In the trial court, they asserted that Karp was negligent in drafting Addendum 3 to the Agreement because the addendum left unclear whether Berenstein had assumed the responsibility to perform the remediation and obtain a certificate of clearance from San Mateo County. The trial court found Addendum 3 unambiguous, a finding the Sharabianlous now challenge. Appellants argue that because the trial court incorrectly found Addendum 3 unambiguous, it did not address their claims that Karp was negligent because he (1) failed to draft Addendum 3 in an unambiguous fashion and (2) neglected to advise them to consult a lawyer under the circumstances. With respect to the first claim, we hold that even if one assumes Addendum 3 is ambiguous, the Sharabianlous have not demonstrated they were harmed by the alleged negligence. The second claim is barred by the terms of the Karps' agency agreement with the Sharabianlous.

Turning to their first claim of negligence, the Sharabianlous assert that Addendum 3 is ambiguous as a matter of law. They base this argument on what they contend are the different constructions given to the addendum by different witnesses and on the addendum's failure to address particular issues The Karps disagree that Addendum 3 is ambiguous, and they also argue that even if one assumes Karp had a duty to draft an unambiguous addendum and that he breached that duty, the Sharabianlous have not explained what harm resulted from the alleged breach. Indeed, they contend no

harm could have resulted. We agree with the Karps on this second point and therefore do not reach the issue of ambiguity.[18]

The elements of a cause of action for professional negligence by a real estate broker are: " '(1) a legal duty to use due care; (2) a breach of that duty; (3) a reasonably close causal connection between that breach and the resulting injury; and (4) actual loss or damage.' [Citation.]" (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754 (*Carleton*).) Thus, to succeed on their claim of professional negligence, appellants must show that they suffered some actual loss or damage as a result of Karp's allegedly negligent drafting of Addendum 3. (See *Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 715.) "Uncertainty as to the fact of damage negatives the existence of a cause of action." (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1510.)

Appellants' opening brief does not identify any harm resulting from the alleged ambiguity. Addressing the Karps' contentions in their reply brief, the Sharabianlous say only that if the trial court had reached the issue of Karp's negligence, it "could have found that the uncertainty of Addendum 3 with respect to the parties' obligations exposed the Sharabianlous to Berenstein's contentions that they, and not Berenstein, were in breach of contract." The problem with this argument is that the trial court did not find any breach of the Agreement. Thus, even if Karp's alleged negligence "exposed" the Sharabianlous to contentions that they had committed a breach of contract, they suffered no injury because the trial court exonerated them of any claim for breach. Consequently, the only possible harm the Sharabianlous cite in their briefs did not, in fact, come to pass. It follows that they have failed to demonstrate the existence of the fourth element of their claim for professional negligence – actual loss or damage. (*Carleton, supra,* 14 Cal.App.4th at p. 754.) As the California Supreme Court has explained, " '[i]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. [Citation.] The mere breach of a professional duty, causing only nominal damages,

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[18] "[W]e may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court." (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1.)

speculative harm, or the threat of future harm – not yet realized – does not suffice to create a cause of action for negligence.'" (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749-750, quoting *Budd v. Nixen* (1971) 6 Cal.3d 195, 200.) We therefore conclude that even if Karp had a duty to draft an unambiguous Addendum 3 and breached that duty, appellants have failed to show any actual damages.

The Sharabianlous' second argument is that Karp breached a duty to refer them to a lawyer for assistance in drafting Addendum 3. Real estate agents are subject to two sets of duties: those imposed by statute or regulation and those arising from the general law of agency. (*Carleton, supra,* 14 Cal.App.4th at p. 755.) The Sharabianlous do not claim Karp violated any statutory or regulatory duty by not referring them to counsel. "Thus, [they] must derive defendant's duty from the general law of agency, i.e., from the agreement between the principal and agent. 'The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect.'" (*Ibid.*, quoting Rest.2d Agency, § 376.) The Sharabianlous' agreement with Karp is contained in the Agreement and the standard "Disclosure Regarding Real Estate Agency Relationships" (California Association of Realtors Form AD-11, revised October 2001). (See *Carleton,* at p. 755.)

Appellants' opening brief mentions neither of these documents. However, both contain language limiting the Karps' duties with regard to providing legal or other specialized advice, and both specifically admonish the parties to the transaction to seek the advice of an attorney on legal questions. Paragraph 17 of the Agreement is entitled "ENVIRONMENTAL HAZARD CONSULTATION." It states that "Broker(s) has/have made no representation concerning the existence, testing, discovery, location and evaluation of/for, and risks posed by, environmentally hazardous substances, if any, located on or potentially affecting the Property; and . . . Buyer and Seller are each advised to consult with technical and legal experts concerning the existence, testing, discovery, location, and evaluation of/for, and risks posed by, environmentally hazardous

substances, if any, located on or potentially affecting the Property." Under Paragraph 39 of the Agreement, both the buyers and sellers acknowledge and agree "(iii) they will seek legal, tax, insurance, title and other desired assistance from appropriate professionals. Buyer and Seller further acknowledge and agree that Brokers: . . . (iv) cannot verify inspection reports, square footage or representations of others; (v) cannot provide legal or tax advice; and (vi) will not provide other advice or information that exceeds the knowledge, education and experience required to obtain a real estate license."

The standard disclosure form states: "The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect his or her own interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional." The form goes on to state: "A REAL ESTATE BROKER IS THE PERSON QUALIFIED TO ADVISE ON REAL ESTATE TRANSACTIONS. IF YOU DESIRE LEGAL OR TAX ADVICE, CONSULT AN APPROPRIATE PROFESSIONAL."

Here, as in *Carleton,* these documents negate appellants' claim of duty. (*Carleton, supra,* 14 Cal.App.4th at p. 756.) In *Carleton,* the plaintiff incurred additional tax liability because a series of real estate transactions were not structured to qualify as tax-deferred exchanges under IRC section 1031. (*Carleton,* at pp. 749-750, 752.) The plaintiff sued his broker for professional negligence, claiming the broker should have informed him of her lack of expertise in IRC section 1031 exchanges and advised him to seek other professional advice. (*Carleton,* at p. 756.) The Court of Appeal disagreed. Relying on language virtually identical to that contained in the Sharabianlous' agreement with the Karps, the court rejected the plaintiff's argument: "Plaintiff's claim that defendant had a duty to inform him of her lack of expertise with section 1031 exchanges and to advise him to seek other professional help in that regard is negated by the documents' provisions stating a broker is qualified to advise on real estate but legal or tax advice should be obtained from a 'competent professional' . . . . These documents also

provide the very advisement which plaintiff claims defendant should have given . . . ." (*Ibid.*)

The same is true here. Paragraph 17 of the Agreement advises the parties to consult with technical and legal experts regarding the existence and evaluation of any possible environmental contamination. In paragraph 39 of the Agreement, the Sharabianlous acknowledged both that they would seek legal and other desired assistance from appropriate professionals and that they understood Karp could not provide "legal or tax advice." These advisements were reinforced by the disclosure form, which counseled appellants to read all agreements carefully to ensure that they expressed their understanding of the transaction and to consult a competent professional if they desired legal advice. Thus, the Agreement and the disclosure form negate any claim that Karp negligently failed to advise appellants to consult an attorney.

We therefore reject both of the Sharabianlous' claims of professional negligence. In light of our conclusion, we need not reach appellants' argument that the trial court erred in excluding expert testimony regarding a real estate professional's standard of care. (See *Carleton, supra,* 14 Cal.App.4th at p. 755 ["expert testimony is incompetent on the predicate question whether the duty [of care] exists because this is a question of law for the court alone"].)

DISPOSITION

The portion of the judgment awarding damages, prejudgment interest, and attorney fees to the Berensteins is reversed. The portion of the judgment awarding damages to the Sharabianlous is affirmed. The judgment in favor of the Karps is affirmed. The matter is remanded to the trial court for both a redetermination of who is the prevailing party in light of our decision and of the amount of attorney fees. The Karps shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (a)(2).) The Sharabianlous and the Berensteins shall each bear their own costs. (Cal. Rules of Court, rule 8.278(a)(3).)

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.

Sharabianlou v. Karp (A120940)

Trial court: San Mateo County Superior Court

Trial judge: Hon. Gerald J. Buchwald

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