

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED
Court of Appeal - First App. Dist.

MAR 30 2001

By RON D. BARROW, CLERK
DEPUTY

KHANM KIM LUC,
Plaintiff and Respondent,
v.
DONALD CHIU,
Defendant and Appellant.

A091936

(San Francisco County
Super. Ct. No. 999090)

43755

Appellant Donald Chiu (Chiu) appeals from a judgment awarding damages to respondent Khanm Kim Luc (Luc) for an eviction in violation of the San Francisco Rent Stabilization and Arbitration Ordinance of 1979, as amended (Ordinance). (1996 S.F. Admin. Code, § 37.9.)¹ He also appeals from rulings on certain post-trial motions. Chiu contends: (1) Luc's lawsuit was barred by a release previously executed by the parties in connection with the settlement of an unlawful detainer action; (2) the Ordinance deprived him of his constitutional right to sell real property; (3) the damages were excessive; and (4) the trial court erred in denying a motion in limine, refusing to give certain jury instructions, refusing to use Chiu's special verdict form, and denying his motion for judgment notwithstanding the verdict. We affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

In May 1997, Chiu purchased real property located at 578 41st Avenue in San Francisco. At the time, a two-story, one-bedroom house was located on the rear of the property, the upstairs portion of which Luc had been renting from the previous owner

¹ The Ordinance has since been amended.

EXHIBIT F

since September 1996 (the Premises). Luc proceeded to pay rent to Chiu and continued to live in the Premises with her three school-aged children.

In November 1997, Chiu served Luc with a "30 DAY NOTICE OF TERMINATION OF TENANCY" (Notice). The Notice read: "Possession of the aforesaid premises is sought pursuant to San Francisco Administrative Code Section 37.9(a)(8). The landlord of the aforesaid premises, Donald Chiu, seeks to recover possession in good faith, without ulterior reasons and with honest intent for the principal use and occupancy of his brother, Ronald Chiu, as his brother's principal residence for a period of at least 12 continuous months."²

Luc did not vacate the Premises by the deadline stated in the Notice. One week after that deadline, Chiu filed an unlawful detainer complaint against Luc (Unlawful Detainer Action). In her answer to the complaint, Luc alleged that Chiu's demand for possession violated the Ordinance because Chiu was acting without good faith and with an ulterior motive.

In January 1998, the parties settled the Unlawful Detainer Action with a "Stipulation" (Stipulation) signed by Luc and Chiu. In the Stipulation, Luc agreed to transfer possession of the Premises to Chiu, and Chiu agreed to waive accrued rent and pay Luc \$1,000. The Stipulation also contained the following Release:

10. Defendant [Luc] hereby releases plaintiff [Chiu] from all claims, demands and causes of action, known or unknown.

11. Defendant is familiar with the provisions of Section 1542 of the California Civil Code which provides as follows: A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE

² Luc also received from Chiu a 3-day notice to quit or pay rent. The record is unclear whether Chiu had refused the tender of the rent, or Luc paid it. In either event, the 3-day notice is not at issue in this appeal.

MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

12. Defendant hereby expressly waives the provision of Section 1542 of the Civil Code and any right they may have to invoke said provisions or any similar provision or common law rule now or in the future. Defendant acknowledges that defendant voluntarily executed this stipulation with full knowledge of its significance and with the express intent of affecting the legal consequences provided by CC § 1452 [*sic*], i.e., the extinguishment of all obligations, except those expressly reserved.

Pursuant to the Stipulation, Luc and her three children vacated the Premises in February 1998. During March 1998, they lived in a friend's living room on Polk Street. They then moved to a one-bedroom apartment in the same building, paying rent of less than \$700 per month. In August 1999, they moved to subsidized housing in a three-bedroom residence at 2278 47th Avenue, paying \$181 per month while the government contributed the balance.

Meanwhile, in March 1998, less than a month after he evicted Luc, Chiu sold the Premises to a friend, Kevin Chien.³ Chien commenced to remodel the Premises and, in addition, built a new three-story residence in front of the Premises.

In November 1998, after seeing the construction in progress and no indication that Chiu's brother had ever moved into the Premises, Luc filed a new lawsuit against Chiu alleging violation of the Ordinance, intentional infliction of emotional distress, breach of covenant of quiet enjoyment, and other causes of action (Wrongful Eviction Action). Chiu filed a general denial of the allegations of the complaint and 25 affirmative defenses. Although one of those defenses stated that Luc "expressly and implicitly waived" her claims, none of the affirmative defenses mentioned the Release.

³ In his brief, Chiu contends he bought the property for \$230,000 and sold it for \$225,000. However, he provides no citation to the record, and we therefore disregard his assertion. (*Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1260, fn. 1 (*Goodstein*)). We also conclude it would not have affected the outcome of the appeal.

In limine, however, Chiu moved for a ruling that the Release effectively barred Luc's lawsuit. The motion is not included in the record, but it purportedly sought to exclude any testimony contrary to the Stipulation, including the Release. The trial court denied the motion, concluding the Release would not be enforceable if it was induced by fraud.

Luc testified at trial that, a week after she moved out, she went to the property and observed the door to the second-floor Premises to be padlocked from the outside. Looking through the window, she saw the house was empty. She later noticed the exterior stairs had been removed from the second floor. Luc passed by the house five times a week for several months, but never detected anyone living there. She did, however, observe construction of a new residence in the front portion of the lot. Luc introduced photographs she had taken of the Premises, which depicted the construction.

Mrs. Applegate, who lived next door to the Premises, testified "[t]here was no one living there" after Luc moved out. She explained, "We never saw anyone over there. There was no lights at night. There was no car coming in and out. And there was never people there." Mrs. Applegate also confirmed the stairway to the front door on the second floor was removed throughout much of the remodeling and the front door was padlocked from the outside.

Chiu did not testify at trial. According to his deposition testimony, which was read into the record, Chiu approached his brother Ronald after he bought the property and suggested that Ronald move into the Premises. After evicting Luc, he decided to sell the property, purportedly because he could not afford the costs of remodeling the Premises. However, Chiu had inspected the Premises *before* he purchased it, and by the time of purchase he had noticed there was a problem with the foundation. The sale of the property was consummated approximately two weeks after Luc had vacated the Premises.

Chiu's brother, Ronald Chiu, insisted he lived at the Premises from April 1998 to January 2000 and considered it to be his principal residence. He claimed he decided to live there because he wanted to move with his wife-to-be out of his mother's residence on 25th Avenue, where they were living. When he purportedly moved into the Premises,

however, he left his wife behind. Confronted at trial with this anomaly, Ronald claimed he wanted to see how the neighborhood was and “guard[]” the padlocked house, even though he would often not arrive from work until as late as 5:00 a.m., and would leave for work again as early as 7:00 a.m. In fact, Ronald did not stay at the Premises at all for a substantial percentage of the time. Two or three nights a week he would return to his wife—at his *mother’s* residence. But he also had a girlfriend, with whom he stayed once or twice a week, at *her* residence in San Rafael. He asserted that no one detected him living at the Premises because he only used a room in the rear of the Premises, and climbed up to the Premises on temporary interior stairs after the exterior stairway was removed. Ronald did not pay rent for the Premises; nor did he cook or eat there. A water bill indicated that he used no water at the Premises from December 1998 to February 1999, even though he claimed to live there at the time. Meanwhile, the PG&E bill remained in Chiu’s name, and Ronald did not change the address on his driver’s license to reflect a residence at the Premises. His driver’s license, vehicle registration, and telephone bill bore his 25th Avenue address. Ronald claimed he was concerned the bills would be lost if sent to the Premises due to the ongoing construction. Also, Ronald acknowledged that his brother never told him he should live at the Premises for 12 continuous months, in accordance with the Ordinance.

According to documentary evidence, Chiu’s conveyance of the property to Chien took place on March 10, 1998, approximately two weeks after Luc vacated. Because the deed indicated that no transfer tax was paid, Luc argued it was conveyed to Chien for *no consideration*. On February 3, 2000, Chien conveyed the Premises to third parties. This time the deed indicated a transfer tax of \$7,575, and Luc argued that the third parties purchased the Premises for over \$1 million.

Luc also produced evidence of additional real property transactions which, she claimed, demonstrated that the eviction was in bad faith and part of Chiu’s broader scheme to evict Luc, improve and sell the property, and at least share in the profits. In April 1997, shortly before purchasing the Premises, Chiu sold his condominium to Chien. In March 2000, after Chien’s profitable sale of the Premises, Chien conveyed the

condominium back to Chiu's mother for *no consideration*.⁴ Luc argued this was the quid pro quo for Chiu providing the uninhabited Premises to Chien for development and resale. In addition, the permit application for the remodeling and new construction: listed *Chiu* as the owner of the Premises, months after Chiu had supposedly sold the property to Chien; and indicated the permit fee was paid by a Puiking Tam Chiu at the address of the condominium that Chiu supposedly sold to Chien in 1997.

Evidence was also presented surrounding the execution of the Stipulation. Luc testified she did not read, understand, or know about paragraphs 10, 11, and 12 (the Release) when she executed the Stipulation's signature page, and she did not agree to a waiver of claims. Chiu had not mentioned he was going to sell the Premises, and Luc would not have signed the Stipulation if Chiu had disclosed his brother was not going to move in. Luc testified: "Q. When you signed that agreement, did you agree to a waiver of claims? [¶] A. No. [¶] Q. Was that ever mentioned? [¶] A. They didn't mention. I don't know. [¶] Q. When you signed that Agreement, when you signed to say you were going to move out -- [¶] A. Yeah, I just move out. [¶] Q. -- had Donald Chiu -- [¶] A. Chiu [¶] Q. -- Always said -- [¶] A. Said [¶] Q. -- That Ronald's going to move in? [¶] A. Move in to live, yes. [¶] Q. Would you have signed that Agreement if Donald Chiu said Ronald wasn't going to move in? [¶] A. No, I'm not sign. [¶] Q. Would you have stayed at the Premises at the 578 - 41st Avenue? [¶] A. Yes." Luc also insisted that the judge in the Unlawful Detainer Action told her she could sue Chiu if his brother did not live in the house for a year.

The jury returned a general verdict against Chiu, assessing economic damages of \$185,000 and non-economic damages of \$30,000. Under the Ordinance, the court trebled the economic damages and entered judgment in the amount of \$585,000.

⁴ According to Chiu, Chien deeded the condominium back to Chiu's mother in April 1997, three days after he purchased it, rather than in March 2000, based on the fact that the notary block on the last page of the grant deed is dated April 28, 1997. The deed itself, however, bears a date in March 2000, and the deed was recorded in March 2000,

Chiu brought motions for judgment notwithstanding the verdict (JNOV) and for a new trial. The court denied both motions. In regard to the JNOV motion, the trial court stated: “in all candor, it appeared to the court to be patent nonsense that the defendant’s brother, Ronald was ever a legitimate occupant of the unit or that there was ever a legitimate intention for him to be an occupant of the unit [¶] . . . there was indicia of landlord subterfuge in the court’s reading of the facts such as to justify the verdict.” The court also stated: “this is a singular case in that the jury, I believe, obviously found that there was a scheme by the owner to regain possession. Even though he sold it, it appeared with the -- on the fact or the facts were susceptible of the finding that the sale was part of the scheme. [¶] It was not for value. It was with a friend. There seemed to be some evidence that there was another property turned over which could have been a quid pro quo. It all smacked of a scheme that a jury could find fraud or to be more charitable, a scheme to circumvent the [Ordinance]. . . .”

The court also entered orders awarding Luc \$36,000 in attorney fees, plus costs. Chiu appealed.

II. DISCUSSION

In light of the glaring shortcomings of the parties’ submissions in this appeal, we take the unusual step of beginning our discussion with a review of certain rules fundamental to practicing before this court. Every factual assertion in a brief must be supported by citation to the record. (Cal. Rules of Court, rule 15(a); *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29.) This means that the cited portion of the record must *itself* support the assertion in substance. Thus, when a party claims a factual assertion is supported by a particular document, the *document* must be included in the record and cited; it is entirely insufficient for appellant merely to cite to the minutes of the trial indicating the document was marked as an exhibit or admitted into evidence. Similarly, when asserting that someone testified to a fact in a deposition, the transcript of which was

suggesting that an old notarization page may have been attached before the deed was submitted to the recorder’s office. We will not speculate on how this was accomplished.

read at trial, the relevant deposition excerpt should be included in the record and cited; it is improper for respondent to cite to a piece of paper that merely lists the deposition passages read at trial. We have discretion to *ignore* assertions lacking proper record support. (*Goodstein, supra*, 66 Cal.App.4th at p. 1260, fn. 1.) (We elect not to disregard the deposition evidence cited by Luc, however, since Chiu proceeded to append the relevant portions of the transcript to his reply brief.)

Furthermore, the appellant has the burden of overcoming the presumption that a judgment is correct, by affirmatively showing error on an adequate record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 (*Maria P.*)) As we discuss *post*, appellant's failure to include in the record the jury instructions and motions underlying his claims of error would have undermined his appeal, if it had any merit to begin with. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 (*Hernandez*); *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1320-1321.)

We turn now to the substance of the appeal. By way of background, the Ordinance in effect at the time of Luc's eviction permitted a landlord to evict a tenant if he sought to recover possession, in good faith without ulterior reasons and with honest intent, for his brother's (or certain other relatives') occupancy as his principal residence for at least 12 continuous months. (1996 S.F. Admin. Code, § 37.9, subd. (a)(8).)⁵ However, if after the eviction the relative did not move into the rental unit and occupy it as his principal residence for the 12-month period, it is rebuttably presumed that the landlord had not acted in good faith. (1996 S.F. Admin. Code, § 37.9, subd. (f).) Although the Ordinance does not forbid the landlord from selling his property after evicting a tenant for a relative's occupancy, such a sale may nevertheless be considered in determining whether the landlord acted in good faith or not. (See *Zimmerman v. Stotter* (1984) 160 Cal.App.3d 1067, 1079 & fn. 12 (*Zimmerman*).)

⁵ The Ordinance has since been amended so that it refers to an occupancy of at least 36 rather than at least 12 continuous months. (1999 S.F. Admin. Code, § 37.9, subd. (a)(8)(ii).)

As mentioned previously, Chiu now argues: (1) the Release precluded Luc's Wrongful Eviction Action; (2) Chiu had a constitutional right to sell his property; and (3) the damages awarded to Luc were excessive. He also argues the court erred with respect to motions in limine, jury instructions, special verdict forms, and his JNOV motion. We examine these arguments in turn.

A. THE RELEASE

As a general proposition, a written release extinguishes every obligation covered by the release. (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366 (*Skrbina*)). As with any contract, however, a release of claims may be unenforceable if it was induced by fraud. (Civ. Code, § 1689, subd. (b)(1); *Skrbina, supra*, at p. 1366.)

Chiu contends the trial court erred in denying his motion in limine, which sought to exclude evidence contrary to the Stipulation and, in particular, the Release. Chiu also appears to claim there was insufficient evidence to support the jury's implicit finding that the Release was induced by this fraud and was thus no bar to Luc's recovery on her wrongful eviction claims. Indeed, Chiu boldly argues there was no evidence of fraud at all.

In reviewing in limine evidentiary rulings, we usually apply an abuse of discretion standard. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) However, where, as here, the in limine motion sought to preclude *all* of the plaintiff's evidence on the ground she had no cause of action as a matter of law, it may be appropriate to apply a de novo standard as if we were reviewing a ruling on a demurrer. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26-28.) As to Chiu's contention regarding the sufficiency of the evidence to support the jury's findings, we apply the substantial evidence standard. Regardless of which of these standards we apply, we conclude Chiu has failed to establish error.

Luc's offer of proof at the in limine hearing, and the evidence introduced at trial, amply supported the conclusion that the Stipulation was induced by Chiu's fraud. As of the time Luc signed the Stipulation, Chiu had continuously represented her eviction was necessary so his brother could move in. A jury could have reasonably concluded these

representations were false: although there was no direct evidence of fraud, there was convincing circumstantial evidence that Chiu intended to evict Luc so he could improve and sell the property himself, or sell the property to Chien, who would then improve the property, sell it, and in some manner share the profit with Chiu.

First, overwhelming evidence supported the conclusion that Chiu's brother never became a bona fide resident of the Premises. The Premises was padlocked from the outside, with the exterior access stairs removed, and neither Luc nor the next door neighbor ever saw any sign that Ronald was living there. Chiu's brother paid no rent, did not change his address, used no water for months and did not eat or cook at the Premises. Despite claiming he wanted to move into the Premises so he and his wife could live together, he left her. Despite Ronald's claim it was his primary residence, at least twice a week he stayed in the residence on 25th Avenue where he had left his wife—if he was not staying with his girlfriend in San Rafael.

Furthermore, this evidence, together with additional proof introduced by Luc, conclusively established that Chiu never *intended* for his brother to assume a bona fide residency. Chiu approached Ronald to move in, but he never explained the provision that he reside there for 12 continuous months. Evicting Luc enabled Chiu to transfer the property to Chien uninhabited, so it could be improved and resold. And, of course, Chiu conveyed the property to Chien less than two weeks after Luc had vacated the Premises. Luc also presented evidence that Chiu (through his mother) received compensation as a quid pro quo from Chien for the considerable profit Chien reaped from the sale of the 41st Avenue property. And, Chiu continued to be involved in the development of the property even after his transfer to Chien, as he was listed as the permit applicant on applications dated months after he supposedly sold the property.

Although Chiu argues that he only decided to sell the property after he learned of the true expense of remodeling, the jury could reasonably have concluded this was untrue, particularly since Chiu had inspected the Premises and knew of the deficient foundation *before* the eviction. At any rate, our role on appeal is not to reweigh the evidence, but to determine merely if there was *any* evidence from which a reasonable

jury *could* find that the Stipulation was fraudulently induced. We conclude Luc alleged and introduced such evidence.⁶

Citing *San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048 (*San Diego Hospice*), Chiu contends a release is a complete bar to the assertion of a tort claim. However, *San Diego Hospice* actually demonstrates an additional basis for voiding the Release: fraudulent *nondisclosure*. Under this theory, a release will not be enforced if the plaintiff has shown that the defendant knew a material fact and did not disclose it despite a duty to do so. Such a duty arises when the material fact was accessible only to the defendant, and the defendant knew the plaintiff was unaware of the fact and could not reasonably discover it. (*Id.* at pp. 1054-1055.) Here, only Chiu knew his true intent with respect to his use of the property, and Luc could not reasonably have discovered it. Given the relationships of the parties, Chiu arguably had an obligation to disclose his intent not to have his brother take up residence in the Premises.

Chiu also makes a number of other meritless arguments we need only discuss briefly. First, citing *Larsen v. Johannes* (1970) 7 Cal.App.3d 491 (*Larsen*), he argues that Luc cannot rescind her waiver of the wrongful eviction claim because she was aware of the claim when she executed the Release. Although there is a distinction between releasing known and unknown claims, the distinction is immaterial here because the Release itself was induced by fraud. In fact, *Larsen* confirms the general rule that a person who signs an instrument is bound by its contents “in the absence of fraud.” (*Id.* at p. 501.)

Second, Chiu addresses the law when a releasor seeks to avoid the effect of a release by claiming she failed to read or understand it. Although there was evidence that Luc was unaware of the Release when she executed the Stipulation, she has not pursued

⁶ Chiu does not appear to challenge the sufficiency of the evidence that the eviction was perpetrated in violation of the Ordinance. The evidence we cite would support the jury’s finding of such a violation as well.

that theory. Nor was it the basis of the trial court's denial of Chiu's in limine motion or essential to the jury's verdict.

Third, Chiu asserts he was prejudiced by Luc's delay in filing the lawsuit, since he had sold the property in the interim. Chiu had alleged laches as one of his affirmative defenses. However, Chiu did not produce evidence of prejudicial delay as required for a laches defense, especially since the sale occurred a very short time after the eviction.

Fourth, Chiu contends that communications he had with Luc as to his purpose for the eviction, if made during settlement of the Unlawful Detainer Action, would have been privileged communications and could not constitute a ground for fraud. Chiu did not raise this issue in the trial court. To the contrary, he conceded during argument on the in limine motion pertaining to the enforceability of the Release: "I agree in principle that fraud in the inducement of anything would void the contract that you enter into." Chiu cannot be heard now to complain on this ground.⁷

Finally, Chiu contends that a footnote in *Zimmerman. supra*, 160 Cal.App.3d 1067, indicates bad faith will not be imputed to a landlord if an intervening cause prevented his relative from moving in. (*Id.* at p. 1079, fn. 12.) Chiu is incorrect. Footnote 12 merely specifies that the landlord's attempted sale of rental property is not "evidence *in and of itself* of bad faith." (*Ibid.*, italics added.) Of course, the sale of property is just one of many circumstances which, when considered together, may give rise to an inference of bad faith. In *Zimmerman* the court concluded, not that the landlord would escape the imputation of bad faith, but that the issue of his good faith was a question for the trier of fact. (*Id.* at p. 1080.)

⁷ Chiu initially relied on *Nafsu v. Hurd* (2000) 84 Cal.App.4th 1103, but as Chiu recently noted the Supreme Court granted review in that case. (S094002). The appeal has since been dismissed, but the decision remains unpublished. In *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 30, the court ruled that the litigation privilege in Civil Code section 47, subdivision (b), bars a claim for recession of a settlement agreement based on allegedly fraudulent statements made during the course of litigation. Nevertheless, Chiu has waived this issue.

Chiu has not established the Release barred the Wrongful Eviction Action.⁸

B. CONSTITUTIONALITY OF RENT ORDINANCE MOVE -IN PROVISION

Chiu argues the Ordinance violates a landlord's constitutional right to sell his real property, because it requires him to rent to his relative for 12 consecutive months after evicting a tenant on that ground.

Chiu is again incorrect. The Ordinance does *not* forbid a landlord from selling his property. Nor does it *require* the landlord to maintain the residency of his relative for 12 months. Evidence of a sale may simply be used, along with other evidence, to show that the landlord's stated intent in requiring possession was false. Evidence of the relative's departure from the rental unit merely establishes a rebuttable presumption of bad faith.

Chiu claims that he was free to sell his property without restriction because the 12-month restriction was not recorded and thus not valid, citing Government Code section 27281.5 and *1119 Delaware v. Continental Land Title Co.* (1993) 16 Cal.App.4th 992, 999-1000. Government Code section 27281.5, subdivisions (a) and (b), require that restrictions imposed by a municipal or governmental entity on the ability of the owner of real property to sell his property must be recorded, and until recordation such restrictions are not enforceable. The Ordinance, however, does not place any restriction on Chiu's ability to sell the Premises; nor would it affect the interest of the new owner. Chiu was fully able to convey the property, and in fact he did convey the property to Chien.

Chiu also argues that the 12-month period is not constitutionally reasonable because there is no provision that allows the period to be shortened if, for example, the relative-tenant dies. The issue, however, is not before us, as Ronald did not die during the 12-month period and Chiu does not offer any reason the period should be shortened.

⁸ Chiu does not contend the disposition of the Unlawful Detainer Action could bar the Wrongful Eviction Action on the basis of res judicata or collateral estoppel. Nor could it. Res judicata would not apply, because Luc did not assert, and could not have asserted, a cause of action for wrongful eviction in the Unlawful Detainer Action. (See, e.g., *Barela v. Superior Court* (1981) 30 Cal.3d 244, 249.) Nor would collateral estoppel apply, since the issue of wrongful eviction was never actually litigated or decided in that action. (See *Zimmerman, supra*, 160 Cal.App.3d at pp. 1074-1075.)

C. EXCESSIVE DAMAGES

The Ordinance creates a private cause of action for violation of its provisions, entitling the tenant to recover economic damages, emotional distress damages, attorney fees, and other relief. In pertinent part, the Ordinance reads: “Whenever a landlord wrongfully endeavors to recover possession or recovers possession of a rental unit in violation of [the Ordinance], the tenant . . . may institute a civil proceeding for injunctive relief, money damages of not less than three times actual damages (including damages for mental or emotional distress), and whatever other relief the court deems appropriate. In the case of an award of damages for mental or emotional distress, said award shall only be trebled if the trier of fact finds that the landlord acted in knowing violation of or in reckless disregard of [the Ordinance]. The prevailing party shall be entitled to reasonable attorney’s fees and costs pursuant to order of the court. The remedy available under this subsection shall be in addition to any other existing remedies which may be available to the tenant” (1996 S.F. Admin. Code, § 37.9, subd. (f).)

Chiu argues Luc was not entitled to economic damages or emotional distress damages, and the court erred in calculating the award of attorney fees. As we have mentioned, none of his arguments has merit.

1. Economic Damages

The Ordinance does not set out a precise means of measuring the amount of “actual damages” to be awarded a tenant for wrongful eviction. (See *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1601 [“actual damages” as used in Ordinance includes both general and special damages].)⁹ “The damages recoverable for wrongful eviction, actual or constructive, include whatever amounts are necessary to compensate the tenant for the detriment proximately caused by the eviction or likely to result therefrom

⁹ The Ordinance requires that “actual damages” be trebled. At least for this purpose, the term “actual damages” is limited to economic losses, and not damages for emotional distress. (*Balmoral Hotel Tenants Assn. v. Lee* (1990) 226 Cal.App.3d 686, 690-697; *Kelly v. Yee* (1989) 213 Cal.App.3d 336, 340-342 (*Kelly*).) In the matter before

[citation].” (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 926.) ““In tort actions damages are normally awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e., restoring him as nearly as possible to his former position or giving him some pecuniary equivalent.’ [Citation.]” (*Castillo v. Friedman* (1987) 197 Cal.App.3d Supp. 6, 20, italics in original (*Castillo*).)

In a case brought by a tenant seeking damages for wrongful eviction under the Los Angeles Rent Stabilization Ordinance (Los Angeles Mun. Code, § 151.00 et seq.), the Appellate Department of the Los Angeles Superior Court upheld a measure of actual damages which was based on the difference between the rent-controlled monthly rate the tenant was paying for her apartment prior to eviction, and the actual fair rental value of the subject premises on the open market over the two-year period it was ““reasonably certain”” the plaintiff would have continued renting the premises absent the eviction. As evidence of such fair market rental value, the court cited the actual amount at which the apartment was rented to another tenant after the plaintiff had vacated the premises. (*Castillo, supra*, 197 Cal.App.3d Supp. at pp. 10, 19-21.)

Here, the trial court instructed the jury in accordance with the *Castillo* standard: “The measure of damages as a general rule is the value of the term less the rent reserved. If you find defendant liable to plaintiff, you must decide how long plaintiff would have remained at 578 41st Avenue but for defendant’s wrongful conduct. You must then decide the amount of damages based on the following method: [¶] You must decide the fair market rental value of the premises over the course of the plaintiff’s likely length of tenancy had it not been interrupted and then subtract what plaintiff would have paid in rent for the period to defendant.”

Luc’s expert opined that the fair market rental value of the Premises was approximately \$1,600. Luc testified that she paid Chiu a monthly rent of \$700, leaving a difference of \$900 per month. She also testified she would continue to live at the

us, the court properly trebled the economic damages, but not the emotional distress damages.

Premises because it is situated in a good neighborhood and conveniently located to her children's school. On this point she testified: "Q. Would you be living there ten years from now? [¶] A. Yes, maybe for -- just when my kids grow up, all grow up, forever. I don't know."

The jury awarded Luc \$185,000 in economic damages. Chiu's only arguments in connection with economic damages are the following. First, he claims the economic damages were excessive because Luc spent \$700 per month for the Premises, but she paid less than that for her housing after the eviction. Essentially, he disagrees with the measure of damages announced in *Castillo*, which calculated the tenant's loss of a below-market rental.

Under the circumstances of this case, we see no error in applying the *Castillo* formula. Looking at it from a slightly different perspective, Luc's damages could be measured by the difference between what she was paying before the eviction and what she would have had to pay for a substantially similar residence after the eviction. What she would have paid for a substantially similar residence may be determined—as the *Castillo* formula does—by calculating the fair rental value of the Premises.¹⁰

Second, Chiu argues that, even under the *Castillo* standard, Luc would not be entitled to any damages because she produced no evidence that Chiu charged anyone rent after he evicted her. To the extent Chiu is contending that, procedurally, a fair rental value cannot be determined by expert testimony, he is incorrect. To the extent he contends that, substantively, the measure of damages should be the difference between what Luc was paying and what Chiu charged after the eviction, he is also incorrect. That

¹⁰ Over time, the difference between the fair market value and the actual rental will not be constant. Thus, as rental costs escalate over the years at a faster rate than the actual rental increases under the rules, the difference between the property's fair market value and the actual rental will increase in subsequent years. The *Castillo* formula, therefore, will tend to underestimate the tenant's loss. Chiu cannot complain, however, because an underestimation of damages is to his benefit; Luc cannot complain, because she proposed that the trial court apply the formula.

amount would reflect Chiu's ill-gotten gain, recoverable under a type of disgorgement-of-profits theory, which Luc did not pursue.

Third, Chiu argues the fair market value of the Premises was "essentially \$0" because of the ongoing construction, and in fact his brother paid no rent at all. Thus, he seems to claim, under the *Castillo* formula Luc would not be entitled to any damages. His argument is frivolous. Whether or not the *post*-eviction construction rendered the property uninhabitable and Chiu's brother paid no rent is immaterial; the question is the fair market value *if Luc had not been wrongfully evicted*. Luc's expert provided substantial evidence of that value.

Chiu has failed to establish any error in the assessment of economic damages.

2. Emotional Distress Damages

Chiu next contends the evidence did not support emotional distress damages, essentially because Luc did not testify to extreme distress, medical expenses, or medications.

Substantial evidence supports the emotional distress award. Luc testified to anxiety during the eviction, anger and resentment at being evicted, and emotional distress from the eviction. She was forced to move herself and her three children from a one-bedroom apartment in a safe, convenient neighborhood to a single room in an already-occupied apartment in a different neighborhood. Chiu offers no authority for his proposition that she needed to present evidence of medical bills or medications, and we are unaware of any such requirement.

3. Attorney Fees

The prevailing party in an action under the rent ordinance is entitled to "reasonable attorney[] fees." (1996 S.F. Admin Code, § 37.9, subd. (f); *Kelly, supra*, 213 Cal.App.3d at pp. 343-344.) The trial court has wide discretion to determine what fee is reasonable. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1088, 1095 (*PLCM Group*) [discussing reasonable attorney fees under Civ. Code, § 1717].) "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed

unless the appellate court is convinced that it is clearly wrong.” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) In determining a reasonable fee award, the trial court should consider time spent and reasonable hourly rate and various relevant factors which might increase or decrease the fee. (*Id.* at pp. 48-49; *PLCM Group, supra*, at pp. 1094-1098.)

The trial court found the \$200 hourly rate claimed by Luc’s attorneys to be reasonable, describing it as on the “very conservative side” and “well within the market range” for the careful and partially successful work of Luc’s attorneys.¹¹ The court appeared to consider the relevant criteria, stating that it looked at market rates, quality of service, and other factors. We discern no abuse of discretion from the record provided to us.

Chiu complains the court awarded the fees based not on Luc’s counsel’s own rates, but on a rate of a more experienced attorney. The attorneys’ fee motion is not included in the record, however. We are left with nothing with which to evaluate Chiu’s assertions other than the reporter’s transcript, which sufficiently supports the award. Chiu has failed to establish any error. (See *Hernandez, supra*, 78 Cal.App.4th at p. 502.)

D. OTHER TRIAL COURT RULINGS

1. Denial of Motions in Limine

Chiu asserts the trial court erred in refusing to grant his motions in limine to “limit evidence regarding the time frame for any alleged damages and effectively dismiss the case on the grounds that LUC signed a mutual release” The written motions in limine are not included in the record. We gather from the transcript of the arguments on the in limine motions that Chiu is referring to the motion in limine we have already discussed, concerning the Release. (The parties stipulated to in limine motions 1, 2, and 3, and agreed to reserve for trial motions 4, 8, 9, 10, 11, and 12. Motion 6 pertained to evidence of the sale of the Premises to Chien, but Chiu’s attorney ultimately agreed the

¹¹ The court stated: “\$200 an hour for the work that I saw was not excessive at all, and I don’t really find that to be an issue. The work was careful and partly, at least, successful, so, and well within the market range, on the very conservative side I’d say. So I don’t have a problem with the \$200 an hour figure.”

evidence would have to be admitted. Motion 7, pertaining to testimony relating to the availability of Ronald Chiu's childhood room [perhaps as an alternative to evicting Luc] was also denied. The only remaining motion was motion 5, pertaining to the Release.) Chiu has not established error.

2. Refusal to Give Proffered Instructions

Chiu argues the court erred in refusing to give his "proffered jury instructions supported by the pleadings and the evidence." He does not, however, identify which instructions were wrongly refused. He asserts the instructions were not entered into the trial record, and he asks us to delay oral argument and allow supplemental briefing after the jury instructions are included in the record on appeal. It is *Chiu's* responsibility, however, to provide the record in a timely manner and to establish error based on the record. He has not shown any effort on his part to locate and include the jury instructions in the record in a timely manner and, to the extent his request could be interpreted as a motion to continue the hearing, it is denied. Chiu's failure to provide an accurate record, adequately address the instructions in his opening brief, and demonstrate error based on the record justify our rejection of his arguments. (*Maria P.*, *supra*, 43 Cal.3d at p. 1295; *Hernandez*, *supra*, 78 Cal.App.4th at p. 502.)

Further, our review of the reporter's transcript discloses no abuse of discretion or error of law. One of Chiu's proffered instructions addressed Civil Code section 1542, pertaining to the waiver of unknown claims. Although the court agreed to instruct the jury (and did instruct the jury) that "[t]he parties to a written contract waive both known and unknown rights as part of a settlement by waiving the provisions of Civil Code section 1542," the court refused to add the following language proposed by Chiu: "To wit, this waiver allows the parties to have finality to a dispute and supports the public policy that there be an end to litigation. This waiver of known and unknown rights is contained in the stipulation in the unlawful detainer case." We agree with the court's conclusion that Chiu's proposed language was inappropriate.

The court also properly rejected proffered instructions 10 and 11, relating to evictions based on the nonpayment of rent, because Luc's eviction was based on the Ordinance's provisions for relative move-ins, not nonpayment of rent.

Finally, Chiu has failed to demonstrate any error in the court's conclusion that instructions 13 through 16 did not entirely conform to the law and, to the extent they were accurate at all, duplicated other instructions. We understand from the reporter's transcript that these proffered instructions referred to "reasonable time," "sale of property in the rent ordinance," "new owner not subject to rent ordinance," and "new owner can rent to anyone." Chiu does not adequately discuss the substance of these instructions, but he was apparently contending that the purported new owner of the Premises, Chien, was not required to rent to Ronald or Luc. Chiu does not explain how these instructions were relevant to Chiu's eviction of Luc; nor does he offer any basis for concluding they were consistent with the Ordinance and applicable law.

3. Rejection of Proffered Special Verdict Forms

The special verdict form proposed by Chiu would have required the jury to make findings as to Chiu's bad faith during numerous time frames and to separately determine rental damages, other property damage, and emotional distress. The court did not accept the proposed special verdict form, finding that many of the 11 proposed findings were unnecessary, duplicative, and surplusage. The court therefore used a general verdict form by default. Chiu fails to establish that the court erred in this regard.¹²

E. JNOV

Chiu argues his JNOV motion should have been granted because his motion for directed verdict (or nonsuit) should have been granted. He does not include his JNOV

¹² For example, Chiu does not explain why it was necessary for the jury to determine whether he was acting in bad faith in each of November 1997, December 1997, February 1998, and March 1998. Although he had contended that the causes of action and damages available to Luc were limited to those arising from acts occurring after the unlawful detainer settlement and judgment, not even that contention demonstrates a need for the requested findings.

motion or Luc's opposition papers in the record, and on that basis we reject his arguments regarding the JNOV motion. (*Hernandez, supra*, 78 Cal.App.4th at p. 502.)

Even if we were to consider his arguments, they are plainly meritless. He argues there was no evidence of fraud in the inducement, he did not owe Luc a fiduciary duty, and Luc did not suffer damage or emotional distress. As we have already explained, there was substantial evidence of fraud and of Luc's economic and emotional distress damages, and substantial evidence thus supported the verdict. Accordingly, Chiu has not established any error in the denial of his JNOV motion. (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 730.)¹³

III. DISPOSITION

The judgment is affirmed.

¹³ In his opening brief, Chiu requests us to take judicial notice of a lawsuit Luc filed in San Francisco Superior Court, which purportedly claims the conveyances between Chiu and Chien were fraudulent. We deny the request, because Chiu failed to seek judicial notice by separate motion (Cal. Rules of Court, rule 14.5(a)), provide a proposed order (Cal. Rules of Court, rule 14.5(b)), provide a copy of the matter to be noticed (Cal. Rules of Court, rule 14.5 (c)), or establish that the matter is of substantial consequence to the appeal (Evid. Code, § 459).

STEVENS, J.

We concur.

JONES, P.J.

SIMONS, J.

(A091936)