

**Hardage** Hotels I, LLC v. Criimi Mae Services Ltd.  
 Partnership  
 Cal.App. 4 Dist., 2007.  
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Court of Appeal, Fourth District, Division 1,  
 California.

**HARDAGE HOTELS I, LLC**, Plaintiff and  
 Appellant,

v.

**CRIIMI MAE SERVICES LIMITED**  
 PARTNERSHIP, Defendant and Respondent.

**No. D047870.**

**(Super.Ct.No. GIC829102).**

March 20, 2007.

APPEAL from a judgment of the Superior Court of  
 San Diego County, [Kevin A. Enright](#), Judge.  
 Affirmed.

[Jeff G. Harmeyer](#), McAtee Harmeyer LLP, San  
 Diego, CA, for Plaintiff and Appellant.

[Gregory Cross](#), Venable, LLP, Baltimore, MD,  
[Gabriel Liao](#), Perkins Coie LLP, Santa Monica, CA,  
 for Defendant and Respondent.

[IRION, J.](#)

\*1 **Hardage** Hotels I, LLC (**Hardage**) sued Criimi  
 Mae Services Limited Partnership (Criimi Mae), a  
 special servicer under a \$91 million loan agreement  
 with Nomura Asset Capital Corporation (Nomura),  
 for breach of contract, breach of fiduciary duty and  
 conversion, alleging Criimi Mae wrongfully  
 withdrew \$73,000 of **Hardage's** funds from a  
 third-party-controlled account established under the  
 agreement for reimbursement of loan fees and  
 expenses. The funds received by Criimi Mae were  
 reimbursement for the cost of loan collateral  
 appraisal, necessitated by a subsequent modification  
 of the loan agreement. **Hardage** asserted it was not  
 responsible for the appraisal costs under the terms of  
 the loan modification agreement. On cross-motions  
 for summary judgment, the trial court granted  
 judgment in favor of Criimi Mae. It ruled that  
**Hardage's** claims failed as a matter of law because  
**Hardage** was contractually obligated to pay for the  
 appraisals.

**Hardage** appeals, contending that the trial court  
 misinterpreted the applicable contractual language  
 and that, in any event, extrinsic evidence submitted to  
 the trial court created a triable issue of material fact,  
 precluding summary judgment. We disagree and, for  
 the reasons stated hereafter, affirm the judgment.

## I

### FACTS

**Hardage** owns and operates hotel properties  
 throughout the United States. In 1995, **Hardage**  
 obtained a loan of approximately \$91 million from  
 Nomura, pledging certain of its hotel properties as  
 loan collateral. The terms of the loan were  
 memorialized in an Amended and Restated Loan  
 Agreement dated October 30, 1995 (the Loan  
 Agreement).

The Loan Agreement required **Hardage** to pay a  
 number of costs, fees and expenses related to the  
 loan, including “all of the fees, costs and expenses  
 incurred in connection with or otherwise relating to  
 the issuance, sale and delivery of the Note,” and “all  
 fees, costs and expenses ... on an initial and ongoing  
 basis [of] any special servicer [and for] (vii) ...  
 appraisals.” (Loan Agreement, § 8.01, subd.  
 (a)(vi).)

Nomura securitized and sold **Hardage's** loan to an  
 issuer of mortgage pass-through certificates, which  
 then assigned the loan to LaSalle Bank, N.A.  
 (LaSalle Bank) as trustee for the holders of the  
 subsequently issued pass-through certificates.

In the fall of 2002, **Hardage** informed LaSalle Bank  
 that it would not be able to meet its obligations under  
 the Loan Agreement, and requested renegotiation of  
 the loan terms. On March 11, 2003, LaSalle Bank,  
 through the loan's “special servicer” Criimi Mae,  
 entered into a modification agreement with **Hardage**  
 (the Modification Agreement).

The Modification Agreement contains three major  
 articles: the first lists “Conditions Precedent” to the  
 agreed-upon modifications; the second contains a  
 “Reaffirmation and Modification” of the prior loan  
 terms; and the third, entitled “Certain Specific

Modifications to the Loan Documents,” specifically amends certain terms of the Loan Agreement.

\*2 Article 1, paragraph (ii) (article 1(ii)) of the Modification Agreement states:

“*Conditions Precedent*. ... [¶ ] (ii) On or before 2:00 p.m. (Eastern time) on the Effective Date, Borrower shall pay to Lender in immediately available funds, and Lender shall have confirmed its receipt of, an amount equal to all costs, fees and expenses (including attorneys' fees and expenses) of Lender incurred or to be incurred in connection with this Agreement and the transactions contemplated by this Agreement, not to exceed \$15,000 inclusive of legal fees related to opinions of counsel related to REMIC issues.”

Both the Loan Agreement and the Modification Agreement contain language stating that the written terms of the agreements constitute the entirety of the parties' agreement, and that “THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.”

After the Modification Agreement was signed, Criimi Mae obtained appraisals of the hotel properties that served as loan collateral. It then requested that the company that controlled **Hardage's** “cash collateral account”—an account established by the loan agreements to process **Hardage's** payment of various fees and expenses relating to the loan—disburse the costs of the appraisals to Criimi Mae. Approximately \$73,000 was disbursed to Criimi Mae.

In April 2004, **Hardage** filed a complaint in the San Diego County Superior Court for breach of contract, conversion and breach of fiduciary duty, alleging Criimi Mae unlawfully withdrew \$73,000 from the cash collateral account. The parties subsequently filed cross-motions for summary judgment, each contending that the Loan Agreement and Modification Agreement should be construed, as a matter of law, in their favor. The trial court granted Criimi Mae's motion.

The trial court ruled that section 8.01 of the Loan Agreement obligated **Hardage** to pay the ongoing fees and costs incurred by the special servicer of the loan, and that this provision was not altered by article 1(ii) of the Modification Agreement. Ergo, the court reasoned, **Hardage** was contractually obligated to pay for the appraisals obtained by Criimi Mae, and **Hardage's** claims for improper withdrawal of the funds failed. **Hardage** appeals.

## II

### DISCUSSION

**Hardage** contends that the trial court's interpretation of the relevant contractual language was erroneous on two separate grounds. First, it contends section 8.01 of the Loan Agreement is inapplicable because it covers only costs and expenses relating to the original (i.e., 1995) loan transaction (including securitization), as opposed to ongoing costs and expenses incurred by the loan servicer. Second, **Hardage** asserts even if section 8.01 could be interpreted to cover the appraisal costs, the section was implicitly changed by article 1(ii) of the Modification Agreement. According to **Hardage**, article 1(ii) caps at \$15,000 any and all costs associated with modification of the loan.

We evaluate these contentions after setting forth the standard of review and applicable legal principles.

#### A. Standard of Review and Applicable Legal Principles

\*3 “[I]t is fundamental that a contract must be so interpreted as to give effect to the intent of the parties at the time the contract was entered into, and that whenever possible, that intention is to be ascertained from the writing alone.” (*Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd.* (1988) 197 Cal.App.3d 1049, 1057 (*Oakland-Alameda County Coliseum* ).) In ascertaining the parties' intent, the language of a contractual provision should not be interpreted in isolation, but rather must be viewed in light of related contractual provisions in the same agreement; an interpretation of contractual language that renders other language in the same agreement meaningless or superfluous is to be avoided. (*Civ.Code, § 1641* [“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other”]; *1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § § 745, 750, pp. 833, 840* [“ ‘an interpretation [of a contract] which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect’ “]; *Muzak Corp. v. Hotel Taft Corp.* (1956) 1 N.Y.2d 42, 46 [133 N.E.2d 688, 690] [“The rules of construction

of contracts require us to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect”].) <sup>FN1</sup>

FN1. The parties also raise an issue as to whether New York or California law should apply. We need not, and do not, resolve this question as the parties rely on California and New York case law interchangeably in making their arguments, reference no dispositive distinction between California and New York law, and agree that the result would be the same regardless of which state's law is applied.

The proper interpretation of a written contract “is essentially a judicial function,” and thus is readily susceptible to resolution on a motion for summary judgment. (Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 865.) “Where the interpretation of contractual language turns on a question of the credibility of *conflicting* extrinsic evidence,” however, it becomes “the jury's responsibility to resolve any conflict in the extrinsic evidence properly admitted to interpret the language of a contract,” precluding summary judgment. (Morey v. Vannucci (1998) 64 Cal.App.4th 904, 912-913; 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 741, pp. 827-829.)

Our review of the trial court's interpretation of a contract, as well as its grant of summary judgment, is de novo. (Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co. (1986) 180 Cal.App.3d 639, 643, fn. 3 (Chevron).)

*B. Section 8.01 of the Loan Agreement Is Most Reasonably Interpreted to Include the Appraisals as Ongoing Costs of the Special Servicer*

The trial court ruled “as a matter of law” that **Hardage** was obligated under section 8.01, subdivision (a)(vi) and (vii) of the Loan Agreement to pay for the appraisals obtained by Criimi Mae. **Hardage** disputes the trial court's interpretation of section 8.01, arguing that the section does not cover ongoing cost of appraisals, but “is most reasonably read to relate” only “to costs and expenses [of] the issuance, sale and delivery of the Note and the initial securitization.” We disagree.

\*4 Section 8.01 states that **Hardage** must pay “all of

the fees, costs and expenses incurred in connection with or otherwise relating to the issuance, sale and delivery of the Note, ... and the initial Securitization ..., and all fees, costs and expenses of[,] on an *initial and ongoing basis*, ... any special servicer.” (Loan Agreement, § 8.01, subd. (a)(vi), italics added.) As the italicized language shows, section 8.01, subdivision (a)(vi) is not limited to the initial loan transactions, but explicitly obligates **Hardage** to pay the “fees, costs and expenses” of the special servicer “on an initial and *ongoing* basis.” (Loan Agreement, § 8.01, subd. (a)(vi), italics added.) As it is not disputed that Criimi Mae is the “special servicer” for **Hardage's** loan, and that the disputed appraisals were a fee, cost or expense that Criimi Mae incurred in connection with that role, <sup>FN2</sup> this clear and unambiguous provision obligates **Hardage** to pay for those appraisals. (Pardee Construction Co. v. Insurance Co. of the West (2000) 77 Cal.App.4th 1340, 1352 [where “the language of the ... contract is clear and explicit, it governs”].)

FN2. **Hardage** concedes that Criimi Mae is the loan's special servicer and that the modification of the loan triggered an obligation to perform the appraisals. The fact that the appraisals were not ordered *immediately* upon modification, does not alter the fact that the appraisals were nonetheless a contractually required duty of Criimi Mae as special servicer.

*C. Article 1(ii) of the Modification Agreement Does Not Modify Section 8.01 of the Loan Agreement*

**Hardage** next contends that even if section 8.01 of the Loan Agreement would have obligated it to pay for the appraisals ordered by Criimi Mae, that section was implicitly modified by article 1(ii) of the Modification Agreement. **Hardage** argues that article 1(ii) was intended to “limit and liquidate **Hardage's** costs arising out of forbearance and modification of the loan,” and because the Modification Agreement “takes precedence” over the Loan Agreement, article 1(ii) relieves **Hardage** of any obligation it might otherwise have had to pay for the appraisals under section 8.01.

In rejecting **Hardage's** argument, the trial court ruled that article 1(ii) of the Modification Agreement “is a condition precedent which only governed whether the Modification Agreement would take effect. It does not alter the terms of the Loan Agreement. That is the function of articles 2 and 3 of the Modification

Agreement, neither of which mentions [section] 8 of the Loan Agreement.” We agree with the trial court’s interpretation of the documents.

Article 1(ii) of the Modification Agreement does not signal any intent to modify section 8.01 of the Loan Agreement and there is likewise no other provision in the Modification Agreement that indicates any such intent. In fact, section 8.01 is not mentioned anywhere in the Modification Agreement. This omission is particularly significant because article 3 of the Modification Agreement, which is titled “*Certain Specific Modifications to the Loan Documents*,” specifically enumerates numerous sections of the Loan Agreement that the parties intended to modify and specifies the precise modifications intended. (See, e.g., Modification Agreement, art. 3, par. (b)(iii) [“Section 3.9(a)(6) of the Loan Agreement is hereby deleted and replaced with the following”].)

\*5 In addition, if, as **Hardage** contends, the parties intended to modify the terms of section 8.01, it would be anomalous for the provision evidencing that intent to appear, as paragraph (ii) does, in *article 1* of the Modification Agreement. As the trial court emphasized, article 1 is not the portion of the Modification Agreement that contains modifications to the Loan Agreement, but is instead the location of *conditions precedent* to loan modification. Article 1 is explicitly titled “*Conditions Precedent*” and states in unambiguous terms that the provisions, such as article 1(ii), that are included there “shall be Conditions Precedent to the ... effectiveness of this Agreement.” The Modification Agreement further specifies the function of the “Conditions Precedent,” stating that “[e]ach Condition Precedent must be fully, timely and properly satisfied ... for this Agreement to become effective....” (Modification Agreement, art. 6, par. (b); see generally [Civ.Code, § 1439](#) [“Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself”].)

**Hardage** argues that despite the unambiguous language of the Modification Agreement supporting the trial court’s interpretation, that interpretation is erroneous because it renders portions of article 1(ii) “meaningless and unenforceable.” <sup>FN3</sup> **Hardage** contends that the sole “reasonable interpretation of [article] 1(ii)” is that “the only portion that is truly a condition precedent is the payment of the \$15,000,” and that upon payment of the \$15,000, the remainder of article 1(ii) “is activated,” resulting in a \$15,000

cost cap on **Hardage’s** contractual cost obligations.

<sup>FN3</sup>. Specifically, **Hardage** contends that the portion stating “ ‘all costs, fees and expenses ... incurred or to be incurred in connection with this Agreement and the transactions contemplated by this Agreement’ “ would be rendered meaningless and unenforceable.

**Hardage’s** argument is without merit. Article 1(ii) does not state that **Hardage** is to pay \$15,000 as a condition precedent, but rather that **Hardage’s** condition precedent payment is “*not to exceed \$15,000*.” (Italics added.) The article then sets out a formula for determining the exact amount of the payment. The formula (an amount equal to “all costs, fees and expenses ... of Lender incurred or to be incurred in connection with this Agreement”) includes the statement that the identified amount is “not to exceed \$15,000,” but, as the trial court determined, it is the condition precedent payment, not the reimbursable costs themselves, that is “not to exceed \$15,000.” <sup>FN4</sup> Contrary to **Hardage’s** argument, the trial court’s interpretation of article 1(ii) gives effect to all of the language of the article and, in light of the surrounding contractual language and the article’s placement, is the more reasonable interpretation of the parties’ intent.

<sup>FN4</sup>. The reference in article 1(ii) to “all costs ... incurred *or to be incurred*”-is not inconsistent with an interpretation of article 1(ii) as a condition precedent. (Italics added.) The reference to costs “to be incurred” is most reasonably interpreted as a benefit for the Lender-allowing Lender to include contemplated costs not yet incurred in the *upfront* reimbursement of costs by **Hardage**, while not necessarily precluding the reimbursement of additional costs at a later date.

Finally, any lingering doubt about the intended meaning of article 1(ii) is removed by article 6, paragraph (b) of the Modification Agreement. That paragraph specifies that each of the contractual provisions labeled as “ ‘conditions precedent’ “ may be waived by the Lender (i.e., LaSalle Bank/Criimi Mae) “in its sole and absolute discretion” at any time. <sup>FN5</sup> This unambiguous provision permitting LaSalle Bank/Criimi Mae unlimited discretion to waive article 1(ii) makes no sense if that article is, as

**Hardage** contends, a cost cap inserted into the Modification Agreement for **Hardage's** benefit.

[FN5](#). Article 6, paragraph (b) of the Modification Agreement states: “Each and every item referred to herein as a ‘condition precedent’ or as ‘conditions precedent’ or words of similar import or meaning shall collectively be defined or as otherwise as used herein, as ‘*Conditions Precedent.*’ Each Condition Precedent must be fully, timely and properly satisfied by Borrower for this Agreement to become effective in any respect, however, Lender shall have the right to waive, in its sole and absolute discretion, any Condition Precedent at any time and from time to time.”

\*6 In sum, by interpreting article 1(ii) as solely a condition precedent, and not as a substantive cost cap, the trial court: (i) gave meaning to all of the terms used in the article; (ii) harmonized the article's language with the surrounding contractual provisions, including the waiver provision in article 6, paragraph (b); (iii) reconciled its conspicuous labeling as a “Condition Precedent” and placement in article 1 (as opposed to articles 2 and 3); and (iv) explained the otherwise incongruous failure to make explicit any purported modification of section 8.01 of the Loan Agreement. By contrast, **Hardage's** interpretation of the provision as a substantive modification of the Loan Agreement that imposed a \$15,000 cost cap creates irreconcilable conflicts and internal inconsistencies on each of these points. Given these circumstances, we are required by the basic tenets of contract construction to adopt the trial court's interpretation of article 1(ii) over the alternative interpretation urged by **Hardage**.<sup>[FN6](#)</sup>

[FN6](#). Although unnecessary to our decision, we note that article 3, paragraph (b)(vi) of the Modification Agreement—which explicitly obligates **Hardage** to pay “[a]ny special servicing fee” of Criimi Mae—provides additional support for the trial court's interpretation.

*D. The Extrinsic Evidence Highlighted by Hardage Does Not Create an Issue of Material Fact Precluding Summary Judgment*

Although **Hardage** states that the intent of “the Modification Agreement is clear,” and “extrinsic

evidence is unnecessary” to its interpretation, **Hardage** also attempts to support its interpretation of the agreement with extrinsic evidence. **Hardage** highlights three declarations “provid[ing] factual information concerning the circumstances of the Modification Agreement” that it believes support its interpretation of the agreement, and at the “very least” raise “triable issues of material fact” concerning the “meaning” of article 1(ii).

The declarations highlighted by **Hardage** contain statements by **Hardage** executives that “[a]n important part of the negotiations” that resulted in the Modification Agreement was the “costs and expense to **Hardage** of modifying the loan”; and that **Hardage** “wanted to make certain that its costs were liquidated so that it could determine precisely the costs of forbearance and modification”; and the parties “agreed that the costs would not exceed \$15,000.”

**Hardage's** contention that these declarations precluded summary judgment is without merit. Where a summary judgment ruling depends on the interpretation of a contract, the mere presence of extrinsic evidence does not create a triable issue of fact for the jury. It is only when extrinsic evidence creates a *factual conflict* that jury resolution of that conflict is required prior to judicial interpretation of the agreement. (*Chevron, supra*, 180 Cal.App.3d at p. 643, fn. 3 [“conflicting evidence as to the parties' intent” does not create an issue of fact where “[t]he evidentiary facts themselves are not in conflict” and “[t]he parties only disagree about the inferences to be drawn”].)

Here, the “evidentiary facts” are not in conflict and thus the extrinsic evidence highlighted by **Hardage** does not create a material issue of fact precluding summary judgment. (*Chevron, supra*, 180 Cal.App.3d at p. 643, fn. 3.) Instead, to the extent the evidence is admissible at all, it serves only to inform our judicial determination of the meaning of the contract. (*Ibid.*; *Okun v. Morton* (1988) 203 Cal.App.3d 805, 816 [where “parol evidence was admitted to explain the context [of the] agreement [that] cast light on the [ ] original intent and the meaning of Paragraph 9,” and the parties “dispute the inferences to be drawn from this evidence, the evidentiary facts themselves are not in substantial conflict,” and the court would “therefore review the pertinent provisions of the contract in the context of the extrinsic evidence and make an independent determination of the meaning of the agreement”]; *Medical Operations Management, Inc. v. National*

[Health Laboratories, Inc. \(1986\) 176 Cal.App.3d 886, 892](#) [same].)

\*7 As we have stated, our interpretation of the pertinent contractual language is that the parties' mutual intent as expressed by their integrated writing was that **Hardage** would be obligated to pay for ongoing costs of a special loan servicer, including the appraisals at issue here. The declarations of **Hardage** executives attesting that they *intended* something different from what was expressed in the written agreement cannot alter that conclusion. ([Casa Herrera, Inc. v. Beydoun \(2004\) 32 Cal.4th 336, 343, 345](#) [extrinsic evidence may be introduced “ ‘to explain the meaning of a written contract ... [if] the meaning urged is one to which the written contract terms are reasonably susceptible,’ “ but cannot be used to “ ‘add to, detract from, or vary the terms of” “ an integrated agreement]; cf. [Oakland-Alameda County Coliseum, supra, 197 Cal.App.3d at p. 1057](#) [“it is fundamental that a contract must be so interpreted as to give effect to the intent of the parties at the time the contract was entered into, and that whenever possible, that intention is to be ascertained from the writing alone”].) <sup>FN7</sup>

[FN7](#). As we affirm the trial court's ruling on the ground that it properly interpreted the contract in Criimi Mae's favor, we need not address the alternate ground of affirmance urged by Criimi Mae—that Criimi Mae was an agent of a disclosed principal, not a contracting party, and therefore could not be liable for breach of contract.

#### DISPOSITION

Affirmed.

WE CONCUR: [McCONNELL](#), P.J., and [HALLER](#), J.

Cal.App. 4 Dist., 2007.

Hardage Hotels I, LLC v. Criimi Mae Services Ltd. Partnership

Not Reported in Cal.Rptr.3d, 2007 WL 831677 (Cal.App. 4 Dist.)

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