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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JAVIER DE LA O AND ROSA MARIA DE LA O, Plaintiffs and Respondents, v. ROBERTO L. ELENES AND MARIA ELENA ELENES, Defendants and Appellants.	B204638 (Los Angeles County Super. Ct. No. BC356374)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, John Shepard Wiley, Jr., Judge. Affirmed.

Leist Law Group, Jeffrey J. Leist for Defendants and Appellants.

Irvine Law Group, S. Ron Alikani for Plaintiffs and Respondents.

INTRODUCTION

Two married couples purchased one lot containing two houses, and each couple contributed an equal amount for the downpayment. The couples agreed in writing that each couple was an equal owner of the property, although legal title was to be in only one of the couples's names. Each couple equally split the cost of the mortgage payments, taxes and expenses. The couple who had legal title agreed to compensate the other couple with 50 percent of the earnings from the sale of the property.

Ultimately, there was friction between the couples, culminating in a physical fracas. One couple—plaintiffs—moved out. The other couple rented the vacant home to tenants. The couple that moved out—plaintiffs—demanded to be named as an equal title owner of the property and filed an action to obtain their rights as a beneficiary of a resulting trust.

The defendants asserted that there could be no resulting trust because of the express agreement and also invoked defenses of abandonment, the rights were time barred, and breach of the agreement. The trial court found for the plaintiffs under a resulting trust theory and ordered that the plaintiffs' names be added to the record title of the property. We hold that there is substantial evidence to support the trial court's findings against defendants on their defenses. We also hold that there is substantial evidence that plaintiffs, by virtue of an express agreement, are owners of one-half an undivided interest in the property.

BACKGROUND

We state the facts in the light most favorable to the trial court's decision, resolving all conflicts and indulging all reasonable inferences to support the judgment. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, abrogated on another ground as stated in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100.) To the extent the trial court's findings of fact are not challenged on appeal, we accept the facts set forth in the trial court's judgment. (See *City of Merced v. American Motorists Ins. Co.* (2005) 126 Cal.App.4th 1316, 1322-1323.)

In 1991, plaintiffs, a married couple, and defendants, a married couple, agreed to purchase for $207,500, a parcel of real property containing two houses on one lot, located at 10715 S. Truro Avenue, Lennox, California 90304 (the property). Plaintiffs and defendants each paid one-half of the downpayment and closing costs or $14,697.43 each. Defendant Maria Elena Elenes is the aunt of plaintiff Rosa Maria De La O.

Because plaintiffs did not want their names to appear on the title to the property, title was recorded solely in the names of defendants. Defendants obtained a real estate loan secured by a deed of trust in their own names of approximately $178,000 to finance the purchase of the property. Plaintiffs did not apply for, nor appear as parties, on the loan. After the purchase of the property, defendants lived in the front house on the property, and plaintiffs lived in the back house on the property.

After the purchase of the property, plaintiffs on the one hand, and defendants on the other hand, each agreed to pay 50 percent of the costs associated with the property, including mortgage payments, property taxes, insurance, and water. Each couple also agreed to split the cost of construction of a new roof, additional bedroom, and a fence.

On April 9, 1993, the parties signed a notarized written agreement (agreement) to memorialize their arrangement concerning the property. The agreement provided in relevant part that:

"Before a notary public, on April 9, 1993, the following parties appear: Mr. Javier L. De La O and Mrs. Rosa Maria De La O, husband and wife, herein called Party 1, and residents of 10717 So. Truro Ave., Lennox, CA 90304 and Mr. Robert L. Elenes and Mrs. Maria Elena Elenes, husband and wife, herein called Party 2, and residents of 19715 Truro Ave., Lennox, CA 90304 both parties hereby certify under oath that the following has been and is mutually agreed: (1) That both parties Party 1 and Party 2 are equal owners of the property commonly known as: 10715 and 10717 Truro Avenue, Lennox, California 90304 and with legal description . . . (2) That the above mention (sic) property 1/2 interest belongs to Party 1 and the other 1/2 interest belongs to Party 2. (3) That Party 2 fully agrees that the herein mention (sic) property 1/2 interest belongs to Party 1 and the other 1/2 interest in the property belongs to Party 2. (4) That at any time of sale

of the herein mention (sic) property Party 2 agrees to fully compensate Party 1 with fifty percent (50%) of the earnings as a result of the said property sale. (5) That Party 2 has been receiving and will continue to receive fifty percent (50%) of the due mortgage payments and R/E tax in the form of cash from Party 1. (6) That the herein property was bought by both parties, Party 1 providing fifty percent (50%) in cash to Party 2 as owner of 1/2 interest on the said property. And Party 2 providing with (sic) the other fifty percent (50%). (7) That Party 1, for personal and private reasons, does not want to be listed as a register (sic) owner of said property at the present time. (8) That both parties, on their freewill (sic) sign this agreement to make sure that the rights of ownership of said property are respected by both parties."

After living on the property for approximately seven years, plaintiffs vacated the back house in May 1998. Plaintiff Javier De La O testified they decided to move because of a falling out with defendant Roberto Elenes after a night of drinking and playing poker. Mr. Elenes confirmed there was an argument over a card game.

After plaintiffs moved out of the back house, they paid nothing further for their share of the mortgage payment, taxes and other expenses attributed to the property. Defendants never contacted plaintiffs to ask for contributions for the expenses of the property.

Plaintiffs testified, in effect, that upon leaving the property, they told defendants that their one-half share of expenses for the property was to be paid by the amounts defendants received from leasing the back house to tenants. Defendants were to handle the rental of the property, and were to notify plaintiffs if the rental was insufficient and whether plaintiffs needed to pay more money to make up their share. Defendants denied there was any such discussion.

Defendants remained in their house and rented the vacant house to tenants. Defendants converted the garage into a rental unit. They refinanced the property, thereby lowering expenditures. The rental income that went to defendants from the property covered more than half the mortgage, tax and other expenses of the property. There were no further verbal or written communications between plaintiffs, on the one hand, and

defendants, on the other hand, for more than seven years, until approximately June 2005. When plaintiffs heard about the rental payments and refinancing, they contacted defendants and asked that plaintiffs' names be put on the record title or that the property be sold and the proceeds split between plaintiffs and defendants. This action ensued.

PROCEDURAL HISTORY

Plaintiffs filed an action on August 3, 2006, and in their first amended complaint asserted their rights as owners of a one-half undivided interest in the property. They alleged theories of a resulting trust, equitable lien, breach of written contract, and unjust enrichment. They sought, inter alia, to quiet title to their interest and to be compensated for their share of the income from the property. Plaintiffs recorded a notice of lis pendens against the property. The notice of lis pendens was filed in the action.

After a bench trial, the trial court issued a Statement of Decision and Judgment, ruling that although the legal title was in the name of the defendants, they held fifty percent (50%) of the title in a resulting trust in favor of the plaintiffs. The trial court ordered that plaintiffs' names be added to the legal title of the property. Judgment was entered. The trial court did not award plaintiffs any money. The notice of appeal was timely filed.

DISCUSSION

A. Standard of Review

Plaintiffs, by claiming the existence of a resulting trust in property, had the burden to establish their right to assert a resulting trust by clear and convincing evidence. (*Gomez v. Cecena* (1940) 15 Cal.2d 363, 366-367.) The standard on appeal, substantial evidence, remains the same even when the higher clear and convincing evidence standard applied in the proceedings below. (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.) "Whether the evidence to prove the existence of a trust is clear, satisfactory and convincing 'is primarily a question for the trial court to determine, and if there is

substantial evidence to support its conclusion, the determination is not open to review on appeal.'" (*Viner v. Untrecht* (1945) 26 Cal.2d 261, 267.) "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." (*Primm v. Primm* (1956) 46 Cal.2d 690, 693.) "Where statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.) We review questions of law de novo. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1176.) Even if the trial court's theory of the law is not correct, the judgment will be affirmed if the judgment is correct on any theory of law applicable to the case. (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 558; *Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 661.)

B. Relationship

The trial court asserts that the parties created a resulting trust. "Ordinarily a resulting trust arises in favor of the payor of the purchase price of the property where the purchase price, or a part thereof, is paid by one person and the title is taken in the name of another." (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 238.) Normally, the resulting trust arises when there is an oral agreement, which, although unenforceable under the statute of frauds, supports an inference or presumption that the payor did not intend that the transferee should have the beneficial interest. (*Id.* at p. 239; see Civ. Code, § 2224; Prob. Code, § 15002, 15003 [common law of trusts not displaced]; *In re Cecconi* (N.D. Cal. 2007) 366 B.R. 83, 112-113; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trust, § 311, p. 885.)

Defendants argue that there could be no resulting trust because there is an express written agreement. That express agreement specifically provides that plaintiffs, on the

one hand, and defendants, on the other hand, own 50 percent of the property and that record title shall be in defendants' names. As between the parties, this agreement should be binding in itself. There is no need to create an obligation by implication, which is the essence of a resulting trust. There was a resulting trust following the purchase because of the oral agreement. But that was superseded by a written agreement. (Code Civ. Proc., § 1856, subd. (a); *Aero Bolt & Screw Co. v. Iaia* (1960) 180 Cal.App.2d 728, 739-740 ["'An express agreement supersedes an implied *right which would have come into existence if the parties remained* silent'"].) If anything else, the written agreement might be said to have created an express trust by which defendants hold an individual one-half interest in the property for the benefit of plaintiffs. (See *Knapp v. Knapp* (1940) 15 Cal.2d 237, 240-241; Prob. Code, § 15201; *Nicholas v. Nicholas* (1952) 110 Cal.App.2d 349, 352 [Definite or express language or words not necessary to create trust so long as requisite intent]; cf. 6 Scott and Ascher on Trusts (5th ed. 2009) § 43.2.1, p. 2946; Chester & Bogart, The Law of Trusts and Trustees (3d ed. 2005) § 461, pp. 476-477.) "Because both express and resulting trusts are 'intention-enforcing' types . . . confusing the two has no serious effects." (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 846, p. 261.)

Plaintiffs pleaded an action on the contract and in the prayer asked for specific performance or damages. Plaintiffs also argued at the trial court their breach of contract claim. Indeed, defendants argued there was no resulting trust because there was a written agreement. The trial court found that plaintiffs had not breached the written agreement. That the trial court, in effect, found a breach of the written agreement by defendants does not result in its not being enforceable. It was fully enforceable. Finally, even if the "theory of recovery was not advanced by plaintiff in the trial court, it is settled that a change in theory is permitted on appeal when a question of law is presented on the facts appearing in the record. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [336 P.2d 534].)" (*Martin v. Kehl, supra,* 145 Cal.App.3d at p. 239.)

C. Defenses

1. Abandonment

Defendants assert that plaintiffs' failure to pay one-half of the expenses for maintaining the property constitutes an abandonment of plaintiffs' rights.[1] "Abandonment of a right or property is the voluntary relinquishment thereof by its owner with the intention of terminating his ownership, possession and control and without vesting ownership in another person [citation]. Intent to abandon is generally a question of fact [citation], and may be inferred from conduct [citation]. Under the common law any title to or interest in land other than a fee simple may be abandoned. Equitable rights in land may be abandoned." (*Carden v. Carden* (1959) 167 Cal.App.2d 202, 209.) "If interests in real property can be and are abandoned, they do not become, as in the case of personal property, the property of the first appropriator [citation], but instead return to the estate out of which they were carved." (*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 887.) As our Supreme Court has stated, "the trier of fact, before decreeing an abandonment, must find that the owner's conduct clearly and convincingly demonstrates the necessary intent [to abandon]." (*Id.* at p. 890.)

The trial court found that there was no intent on the part of plaintiffs to abandon the property. The trial court relied upon the facts of the discord that compelled plaintiffs to physically leave the property in order to avoid conflict and the absence of any suggestion that plaintiffs were abandoning their rights. As the trial court noted, plaintiffs had a written agreement confirming their rights in the property and what they thought was an arrangement to take care of their contribution obligation.

Unlike in the cases cited by defendants, plaintiffs received no consideration for any purported cancellation of their interest, and there was no evidence supporting such a cancellation. Contrary to defendants' argument, plaintiffs did in effect pay their

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[1] Defendants did not plead abandonment as an affirmative defense, but this was not raised by plaintiffs.

obligations by letting defendants keep all payments for the rental of a portion of the property. There was substantial evidence to support the trial court's finding of no abandonment.

2. Time Bar

Defendants assert that plaintiffs' claims are time barred—either by the statute of limitations (Code Civ. Proc., § 343) or by laches. There could have been no breach of a contract or trust until defendants repudiated any interest plaintiffs claim in the property. The trial court found that defendants did nothing inconsistent with the written agreement until they purported to repudiate it in 2005 (the action was filed in 2006). (*Berniker v. Berniker* (1947) 30 Cal.2d 439, 447-449 [resulting trust]; see *Martin v. Kehl, supra,* 145 Cal.App.3d at p. 240 [resulting trust]; *Di Grazia v. Anderlini* (1994) 22 Cal.App.4th 1337, 1345-1346 ["California courts have followed the generally held view that the limitations periods on actions against trustees of express trusts do not begin to run absent the beneficiary's actual knowledge of some unequivocal act in violation of duties of the trustee or in repudiation of the trust"]' *Parker v. Walker* (1992) 5 Cal.App.4th 1173, 1190 [statute of limitations does not run until repudiation of contract].) Moreover, the statute of limitations does not run against the right of action to enforce a trust unless the beneficiary has knowledge of the repudiation or any breach. (See *Parker v. Walker, supra,* 5 Cal.App.4th at p. 1190, fn. 3.)

Defendants assert that by their exerting complete control over the property when plaintiffs moved out in 1993, the limitations period began at that time. But the trial court found that this was consensual and not a breach. The trial court found that defendants first repudiated the agreement in 2005 when plaintiffs requested to be put on the title, and that plaintiffs had no reason to believe before that time that defendants would not honor the agreement. There was substantial evidence in support of the trial court finding that the statute of limitations did not bar the action. (See *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112 ["resolution of the statute of limitations issue is normally a question of fact"].)

The trial court found that there was no delay or prejudice such as to support defendants' laches defense. The defense of laches is based on an unreasonable delay that causes a disadvantage or prejudice to the other party. (See *Magic Kitchen LLC v. Good Things International, Ltd.* (2007) 153 Cal.App.4th 1144, 1156-1157; *Martin v. Kehl, supra,* 145 Cal.App.3d at p. 241; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 18, pp. 304-306.) Laches is a question of fact. (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.) The trial court found no unreasonable delay and no prejudice to defendants in connection with the timing of the action. The trial court noted that there was no evidence of prejudice, and that the defendants should not have been surprised that plaintiffs would claim their interest in the property. There was substantial evidence to support the trial court's finding of no laches. Accordingly, the action is not time-barred.

3. Breach

Defendants assert that plaintiffs cannot prevail because they breached their agreement by not making the required payments. Defendants argue that there could be no enforceable oral modification of the agreement that would substitute the rental payments for plaintiffs' payment obligations. But no oral modification theory is necessary. The trial court found that plaintiffs "left the [defendants] with the advantage of collecting 100% of the rent on their old house—a benefit that more than compensated for the [defendants'] burden of managing the rental property and paying for all the mortgage, taxes, and upkeep." The trial court expressly found that plaintiffs did not breach the agreement. The agreement provided that defendants were to receive cash from plaintiffs for the mortgage and tax payments—not the upkeep. The agreement does not preclude defendants from receiving the cash from rental payments to which plaintiffs are entitled. If there was a defect in performance, it was waived. (Civ. Code, § 1501; Code Civ. Pro., § 2076.) Defendants never objected to this means of payment. (See *Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1450-1451 [no breach

where acquiescence in method of payment].) There is substantial evidence to support the trial court's finding that plaintiffs did not breach the agreement.

Even if there had been an oral modification, it has been executed by the parties and supported by consideration (allowance of defendants to keep all the rents) and therefore is not barred by the statute of frauds. (Civ. Code, § 1698, subd. (b); *D.L. Godbey & Sons Constr. Co. v. Deane* (1952) 39 Cal.2d 429; see *Raedeke v. Gilbralter Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 673.) Thus, the trial court's conclusion that plaintiffs did not breach the agreement was not legally erroneous.

4. Pro Tanto Interest

Defendants quarrel with the trial court's finding that plaintiffs are entitled to a 50 percent interest in the property because they did not pay all the consideration to purchase the property. Defendants claim plaintiffs did not meet their burden to show that they contributed 50 percent of the purchase price. (See *Keene v. Keene* (1962) 57 Cal.2d 657, 665; *Watson v. Poore* (1941) 18 Cal.2d 302, 317-319.) Thus, defendants claim plaintiffs have not established that they are entitled to any trust—or at best—the matter must be remanded to determine to what share of the property they are entitled. They only focus on the amount of cash paid directly by plaintiffs to defendants and not on the rental payments received.

The trial court found that plaintiffs contributed at least 50 percent of the purchase price and other expenses because they paid that amount by cash and by allowing defendants to retain the rental payments. Defendants have not argued that the trial court was incorrect in this finding but rather that plaintiffs did not delineate the precise amounts involved. But there was evidence concerning the rent and the mortgage, tax and other payments. There was therefore substantial evidence to support the trial court's

finding. Moreover, the express agreement between the parties provides that plaintiffs are to have a 50 percent interest in the property. [2]

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs.

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MOSK, J.

I concur:

KRIEGLER, J.

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[2] On appeal, defendants do not challenge the specific form of the remedy ordered by the trial court, even though they did so at trial.

I concur in the result. I agree with the trial court that a resulting trust was created. A resulting trust is defined in section 7 of the Restatement Third of Trust as follows: "A resulting trust arises when a person (the 'transferor') makes or causes to be made a disposition of property under circumstances (i) in which some or all of the transferor's beneficial interest is not effectively transferred to others (and yet not expressly retained by the transferor) and (ii) which raise an unrebutted presumption that the transferor does not intend the one who receives the property (the 'transferee') to have the remaining beneficial interest." When an express trust fails, then a resulting trust may arise. *(Hansen v. Bear Film Company, Inc.* (1946) 28 Cal.2d 154, 173; *Bainbridge v. Stoner* (1940) 16 Cal.2d 423, 428.) Here, there is substantial evidence the express trust failed when the trustees refused to convey the one-half interest to plaintiffs. I would affirm on this basis.

TURNER, P. J.