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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

BEN ELLIOTT et al., Plaintiffs, Cross-defendants and Respondents, v. MARK FEDICH, Defendant, Cross-complainant and Appellant.	C044226 (Super. Ct. No. 144729)
BEN ELLIOTT et al., Plaintiffs and Respondents, v. MARK FEDICH, Defendant and Appellant.	(Super. Ct. No. 02UD245)

Defendant Mark Fedich appeals from the judgment entered after the trial court granted the motion of plaintiffs Ben Elliott, Helen Elliott and Larry Elliott (collectively, the

Elliotts) to enforce an oral agreement to settle the litigation between them. Fedich contends the facts do not support the trial court's determination that the oral settlement agreement met the requirements for enforcement under Code of Civil Procedure section 664.6 (hereafter section 664.6). Changing theories in his reply brief, he argues that his appeal involves only questions of law that he may raise for the first time on appeal. Fedich also challenges for the first time on appeal the damage award of $10,000 if he failed to comply with the other terms of the settlement agreement. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Fedich is a resident of space 34 at the El Rio Mobile Estates, a mobile home park owned and operated by the Elliotts in Anderson, California. On October 12, 2001, the Elliotts served Fedich with a five-day "notice to occupant," on grounds he had taken possession of the mobile home in space 34 without executing a rental agreement with them.

In December 2001, Fedich filed a small claims action against the Elliotts in case No. CVCL010001547. He claimed damages in the sum of $5,000 for breach of contract, slander, and depreciation of property.

One month later, the Elliotts filed a complaint against Fedich for declaratory relief, nuisance and slander in case No. 144729. The complaint specifically alleged: (1) Fedich was illegally occupying the mobile home in space 34 because he refused to sign a lease agreement; (2) he was conducting a commercial construction business at that residence; and (3) he

had stated publicly that the Elliotts failed to maintain the mobile home park in the manner required by law. Fedich cross-complained against the Elliotts, alleging premises liability, general negligence, and violation of mobile home laws.

Next, in April 2002, the Elliotts filed a complaint for unlawful detainer against Fedich in case No. 02UD245 on grounds he kept a dog on the premises without authorization.

The Elliotts successfully moved for summary adjudication on their cause of action for declaratory relief in case No. 144729. The trial court declared that Fedich was an illegal occupant of space 34 of El Rio Mobile Estates.

Judge Halpin conducted a mediation conference in the three consolidated cases on January 14, 2003. Fedich and the Elliotts were present, both represented by counsel. The amended order after mediation recited that the parties had agreed to settle the case under the following terms:

"a. Defendant shall pay plaintiff[s] the sum of $1,000.00 upon the sale of his mobile home and agrees to leave the premises and to sell his mobile home within six (6) months.

"b. Plaintiff[s] [and defendant] shall execute appropriate [mutual] general releases and a dismissal with prejudice of this entire action upon compliance with this settlement.

"c. The parties agree to stipulate to a judgment of eviction and damages in the sum of $10,000.00 in favor of plaintiff[s] against defendant in the event defendant does not comply with this settlement. [¶] . . . [¶]

"e. By agreement of the parties the court retains jurisdiction pursuant to Section 664.6 of the Code of Civil Procedure to supervise, interpret and enforce the terms and conditions of this settlement. . . ."

The statement of agreement or nonagreement filed by Judge Halpin indicated that the mediation ended "in full agreement by all parties. . . ."

Two weeks later, on January 28, 2003, counsel for Fedich informed the Elliotts that Fedich had no intention of complying with the settlement agreement. Fedich moved to set it aside and demanded jury trial de novo. He stated in a declaration attached to the jury trial demand, "My agreement to settle this case is withdrawn. I was under a great deal of pressure at the time of the mediation and did not freely agree to the terms of the settlement. I therefore withdraw my agreement to settle the case . . . ."

The Elliotts moved to enforce the settlement agreement under section 664.6 on grounds of anticipatory breach. The Elliotts' counsel stated in a declaration submitted with the motion, "At [the January 14, 2003, mediation conference] defendant MARK FEDICH in my presence, in the presence of his attorney Will Hawes, and in the presence of Judge Halpin orally agreed to the settlement terms as set forth in the Amended Order After Mediation . . . . [¶] . . . At the mediation conference defendant FEDICH was represented by his counsel who explained to him the consequences of the settlement agreement."

The trial court heard both motions the same day. It denied Fedich's motion to set aside the mediation agreement ruling that he "failed to present sufficient evidence to support his attempted recission [*sic*] of the agreement." The court granted the Elliotts' motion to enforce the settlement agreement and entered judgment in their favor. It declined to hold Fedich in anticipatory breach and delayed enforcement in the form of a $10,000.00 judgment, judgment of possession, and removal of Fedich from the premises until the July 14, 2003, deadline for compliance had passed.

DISCUSSION

I

The resolution of this appeal requires the application of two standards of review. We review the trial court's finding on whether the parties entered into a binding settlement agreement in open court under the substantial evidence standard. (*Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 544 (*McElroy*).) Whether duress exists as a defense to a contract is also a question of fact. (*Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 176.) The question whether the statutory requirements of section 664.6 were met is a question of law which we review independently. (*McElroy, supra,* 104 Cal.App.4th at p. 544.)

II

We address the question of law first. Section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court

or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. . . ." (Italics added.)

By denying Fedich's motion to set aside the mediation agreement, granting the Elliotts' section 664.6 motion, and entering judgment in their favor, the trial court impliedly found there was a binding *oral agreement before the court* and expressly found Fedich was not entitled to rescind it. The first question on appeal is whether the record supports the court's implied finding that the parties entered into a binding oral agreement to settle the litigation between them.

"'Past cases have established that, in ruling upon a section 664.6 motion for entry of judgment enforcing a settlement agreement, and in determining whether the parties entered into a binding settlement of all or part of a case, a trial court should consider whether (1) the material terms of the settlement were explicitly defined, (2) the supervising judicial officer questioned the parties regarding their understanding of those terms, and (3) the parties expressly acknowledged their understanding of and agreement to be bound by those terms. In making the foregoing determination, the trial court may consider declarations of the parties and their counsel, any transcript of the stipulation orally presented and recorded by a certified reporter, and any additional oral testimony. . . . [Citations.]' [Citation.]" (*McElroy, supra,* 104 Cal.App.4th at p. 544.)

Here, there is no transcript of the mediation conference. The only evidence of what occurred in that proceeding is Judge Halpin's statement of agreement or nonagreement, his amended order after mediation, and the declaration submitted by the Elliotts' counsel. "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence. [Citations.]" (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992, italics in original.) Because there is no reporter's transcript of the mediation conference, and there is no error on the face of the existing record, we conclusively presume that the evidence supports Judge Halpin's finding that the mediation ended in full agreement of all the parties in accordance with the terms set forth in the amended order after mediation. Indeed, Fedich acknowledges the existence of an agreement in his declaration in support of the request to withdraw it.

III

The next question is whether the record supports the trial court's ruling that Fedich "made [no] showing that would support a finding of duress." Duress falling short of physical compulsion renders a contract voidable. (1 Witkin, Summary of

Cal. Law (9th ed. 1987) Contracts, § 417, p. 374.) The Restatement of Contracts defines duress broadly under the heading of economic compulsion. (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1077, citing Rest.2d Contracts, § 176, pp. 481-482.) "'[T]he doctrine . . . may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure.'" (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian, supra,* 218 Cal.App.3d at p. 1077.)

Fedich sought rescission of the settlement agreement on grounds he "was under a great deal of pressure at the time of the mediation and did not freely agree to the terms of the settlement." He did not describe the nature or source of the "pressure." There is nothing in the record to suggest any wrongful act or that the pressure described by Fedich rose to the level of duress. Accordingly, we conclude the trial court properly denied his motion to set aside the mediation agreement.

Fedich did not offer as grounds for rescinding the oral agreement the claim that the possible $10,000 damage award was unconscionable. Accordingly, he waived that claim of error on appeal.

IV

Having concluded the parties entered into a binding oral settlement agreement before the court, and Fedich was not entitled to rescind it, we reject Fedich's argument the court erred in enforcing the agreement against him. Contrary to his

claim there was "no evidence of any kind that the parties participated in and/or negotiated with the court, the attorneys and/or one another," taken together, the statement of agreement or nonagreement, the amended order after mediation, and the declaration of the Elliotts' counsel show the requirements of section 664.6 were met.

DISPOSITION

The judgment is affirmed. The Elliotts shall recover their costs on appeal. (Cal. Rules of Court, rule 27(a).)

NICHOLSON, J.

We concur:

SIMS, Acting P.J.

HULL, J.