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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

IEFENN ADRIANNE SUMAMPOW et al., Plaintiffs and Appellants, v. MERCATOR PROPERTY CONSULTANTS PTY, LTD., Defendant and Respondent.	B236491 (Los Angeles County Super. Ct. No. SC107790)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald M. Sohigian, Judge. Affirmed.

Greenberg & Bass, James R. Felton and John Yates for Plaintiffs and Appellants.

Russ, August & Kabat, Judith L. Meadow and Nathan D. Meyer for Defendant and Respondent.

Iefenn Adrianne Sumampow (Iefenn) and Ievan Sumampow (Ievan) (collectively siblings) appeal summary judgment in favor of defendant Mercator Property Consultants PTY, Ltd. (Mercator) in a declaratory relief and quiet title action pertaining to properties located in Beverly Hills, California on Rexford Drive (Rexford Property) and Wilshire Boulevard (Wilshire Condo).

We affirm.

FACTS

The siblings' April 29, 2010, complaint in case No. SC107790

The siblings' verified complaint against Mercator alleged: Their father, Robby Sumampow (Sumampow), transferred the Rexford Property to Iefenn and the Wilshire Condo to Ievan. Mercator contends that the transfers were invalid. Moreover, it claims an interest in the Rexford Property and the Wilshire Condo, and it intends to proceed against them to satisfy a claim that it has against Sumampow for over $5.5 million. The siblings are entitled to a declaration and a judgment quieting title to establish that they are the true owners of the properties.

Mercator's June 22, 2010, judgment against Sumampow in case No. BC387373

In a pending action against Sumampow, Mercator obtained a judgment for recognition and enforcement of an Australian judgment against him in the amount of $5,681,796. In addition, pursuant to Civil Code section 3439.04,[1] the judgment provided: (a) on April 30, 2007, Mercator was a creditor of Sumampow when he transferred the Rexford Property and the Wilshire Condo; (b) to the extent Sumampow transferred the properties to his children, Iefenn and Ievan, Sumampow acted with the intent to hinder, delay, and defraud Mercator; and (c) Mercator may avoid the transfers to the extent necessary to satisfy its judgment.[2]

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[1] All further statutory references are to the Civil Code unless otherwise indicated.

[2] The record contains hearsay and hints about the events leading up to this judgment. For context only, we glean or infer the following: Mercator sold its shares in an Australian hotel and casino to Sumampow but he did not pay when the money came due. Mercator sued Sumampow in Australia and obtained a judgment against him in

Mercator's motion for summary judgment in case No. SC107790; the order and judgment; this appeal

In its motion for summary judgment, Mercator noted that the siblings claimed title to the properties based on bequest agreements dated April 30, 2007, and that the bequest agreements did not require payment and were not signed by Sumampow. Mercator argued that there was no merit to the siblings' complaint because they could not prove title to the properties. In particular, they could not produce deeds and therefore could not prove a valid transfer of the properties to them pursuant to section 1091. In addition, Mercator argued (1) it had attachment liens against the properties effective July 7, 2008; (2) in the action against Sumampow, the trial court made a determination under section 3439.04 that any transfers to Iefenn and Ievan were made with the intent to hinder, delay and defraud creditors, specifically Mercator; (3) the siblings have no standing to challenge the trial court's findings in the prior action; and (4) the siblings did not pay consideration for the properties, so they have no defense to Mercator's attachment liens.

The siblings opposed. Though they acknowledged that a transfer of real property generally cannot be enforced without a deed, they cited an exception. Under that exception, equity will protect a gift of real property if the transferees are in possession and if they made valuable improvements. With respect to the other issues raised by the motion, they argued that there was no admissible evidence that consideration was lacking, that Sumampow was the record owner of the properties, or that Mercator had any attachment liens.

Iefenn submitted a declaration stating that Sumampow transferred the Rexford Property to her in the Spring of 2007, in Indonesia. Since taking ownership, she paid half of the 2008 property taxes, $1,700 for landscaping, $15,455 to demolish the garage and $1,250 to fence the pool. Also, she pays a monthly gardening fee of $120 and a

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2000. After an appeal by Sumampow and various collection efforts by a liquidator, only a portion of the judgment was satisfied. When searching for assets, Mercator discovered that Sumampow owned the Rexford Property and the Wilshire Condo. As a result, it filed an action to recognize and enforce the Australian judgment in California. In June 2008, it recorded attachment liens.

management fee of $500. Ievan also submitted a declaration. He declared that Sumampow transferred the Wilshire Condo to him in the Spring of 2007, in Indonesia. Ievan paid half of the 2008 property taxes and he spent $4,200 to repair the air conditioning system. On a monthly basis, he pays a $1,707 homeowners association fee and a $250 management fee.

At the hearing on the motion, the trial court ruled that there were no triable issues as to whether the siblings possessed title either through deeds or parol transfers. As a result, it granted the motion. In doing so, it stated that the siblings "do not establish that [their expenditures on the properties] exceed the value of the benefit of the estate in land. . . . [¶] And I find no other evidence here concerning monetary detriment, payments reasonably equivalent to the use of the land, or any other circumstance of hardship. [¶] Here, we have a pair of real properties which I think the parties agreed are extremely valuable. I can take judicial notice of the fact [of] . . . where they are and the value. . . . And it seems to me that [the detriment cited by the siblings is] obviously and drastically inadequate to show the elements that would vindicate or support the parol gift theory. And the I think the [siblings] know it."

Judgment was entered for Mercator.

This timely appeal followed.

STANDARD OF REVIEW

On an appeal from summary judgment, we employ the de novo standard of review. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) In doing so, we follow the traditional three-step analysis. "We first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]" (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836.) "[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the

motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

DISCUSSION

The siblings proffer a single issue for our consideration: Is there a triable issue as to whether the properties were orally transferred?

The answer is no.

I. Applicable Case Law.

The case law regarding parol transfers of real property was established from the late 1800's to the 1950's. This law involves present gifts of property or promises to give property upon certain conditions.

When the California Supreme Court was in its infancy, it considered whether a parol contract to convey property could be enforced. (*Burlingame v. Rowland* (1888) 77 Cal. 315 (*Burlingame*).) The facts were these. A father and equitable owner of property promised his daughter that if she lived on the property with her husband and family, then he would convey the property when he obtained legal title. She moved onto the property and made valuable and lasting improvements. When the father obtained legal title, the daughter demanded a conveyance. The father refused. The court noted: "The evidence shows a plain, unequivocal promise to convey the property, which is fully identified and located. It sufficiently appears that, acting upon this promise, the daughter and her family went upon the property, which was wholly unimproved, moved a house upon it, erected other buildings, and cultivated the land. The authorities are clear that such a contract, acted upon and partially performed, and shown here, may be specifically enforced." (*Id*. at p. 317.)

In *Burris v. Landers* (1896) 114 Cal. 310 (*Burris*), Landers promised to deed land to the plaintiff if he occupied and improved it. Claiming he had made valuable and lasting improvements to the land, the plaintiff sued the administrators of Lander's estate to compel them to convey the property. The trial court found in favor of the plaintiff. The California Supreme Court reversed.

The court noted that when a present parol gift is made, "and the donee has entered under the gift, and has made permanent and valuable improvements upon the realty, and the circumstances are such that it would be unjust to the donee if he were thereafter to be deprived of the property by reason of imperfections in the gift, equity will treat the acts of the donor, together with the acts of the donee, as being such performance of the gift as will relieve the contract from the operation of the statute of frauds, and it will under such circumstances lend its assistance to the perfection of the donee's title." (*Burris*, *supra*, 114 Cal. at p. 314.) This rule applies in an action "to compel the perfection of a gift presently but incompletely made." (*Ibid*.)

The *Burris* court cited what it considered to be a second rule. It occurs when a donor makes a promise that induces a donee to change his position. "If a donor by promises induces the donee to change his position to his detriment, after the change is made the donor can be compelled to make his promise good. The relation between them then becomes one of contract. [Citation.] . . . 'Where the donee has accepted the promise, entered into possession of the land, made improvements on the faith of the promise, and thus changed his condition, the donor will be required to make good his gift. Such a state of facts will take the case out of the statute of frauds.' [¶] But, to give the plaintiff the benefit of this rule, the expenditures must have been made upon the faith of the promise, and must be in the nature of lasting benefits and improvements to the land, tending to enhance its value over and above the value of the use of the property to the plaintiff. [Citation.] Slight and temporary improvements, or trivial outlays, made to suit the taste or convenience of the occupant, do not raise an equity in favor of the donee [citations]; for, if the value of the expenditures made by the occupant does not exceed the benefit to him of the use of the land without charge or rental, then, generally, and in the absence of other circumstances of hardship shown, he not only will not have been injured, but will in fact have been advantaged by the promises made." (*Burris*, *supra*, 114 Cal. at pp. 314–315.)

In the court's view, the plaintiff had sued upon the second rule. It reversed because the evidence showed that the plaintiff's expenditures did not exceed the value of

the use of the land calculated as the rental value of the land during his four-year occupancy, and because the expenditures did not enhance the land's value. (*Burris*, *supra*, 114 Cal. at pp. 315–316.)

A century ago, in *Kinsell v. Thomas* (1912) 18 Cal.App. 683 (*Kinsell*), the Court of Appeal considered these facts. The defendant lived on the property at issue with his parents and took care of it. Desiring to compensate the defendant, the parents orally transferred the property to him. They asked him to fence it off and erect a house, barn and other buildings. Thereafter, he placed a house, barn and stable on the property, built a fence, sunk a well and filled in a lot with soil and gravel. By doing so, he increased the value of the property from $75 to $1,500. After the gift, he performed labor and services for his parents for which he received no compensation. The defendant's mother died. The father moved in with and was cared for by the defendant without compensation. Then the father conveyed the land to the plaintiff for $10. The plaintiff had full knowledge of the facts. (*Id*. at pp. 685–690.)

The *Kinsell* court upheld the parol transfer to the defendant. (*Kinsell*, *supra*, 18 Cal.App. at p. 688.) Citing various cases, the court noted that it cannot be "'questioned that a parol gift of real property, under certain circumstances or conditions, will be sustained by courts of equity'" such that "'[a] gift of real estate may be made by parol if possession is given and taken under such gift and acts done by the donee to carry out the purpose of the gift;'" "'it is, of course, settled law that courts will compel the specific performance of parol contracts for the sale of real property where there has been a part performance of the contract, and parol gifts will be enforced under like circumstances and conditions as parol sales;'" and "'[e]quity protects a parol gift of land equally with a parol agreement to sell it if accompanied by possession and the donee, induced by *a promise to give it*, has made valuable improvements on the property, and this is particularly true where the donor stipulates that the expenditure shall be made, and by doing this makes it the consideration or condition of the gift.'" (*Id*. at p. 688.) Pushing forward, the court concluded that the equities favored the defendant after noting that he had made substantial improvements to the property. Also, the plaintiff was not a good

faith purchaser because he had paid only $10 for the property, and because he purported to take title with full notice of the defendant's acts and possession. (*Id*. at pp. 689–693.)

Similar holdings were rendered in *Peixouto v. Peixouto* (1919) 40 Cal.App. 782 [the court upheld a parol transfer of real property via a contract between a father to son when the donee son accepted the transfer and erected a house, cultivated the land and remained in possession] and *Kennedy v. Scally* (1923) 62 Cal.App. 367 [based on *Burris* and other cases, a gift of real property was upheld after the donee made improvements exceeding the rental value].

In *Andreotti v. Andreotti* (1964) 224 Cal.App.2d 533 (*Andreotti*), the court explained that "the statute of frauds forecloses a gift of real property by a mere oral transfer. [Citations.] However, it now is established that where a parol gift of real property is made *in praesenti* pursuant to which possession thereof is given to and taken by the donee who, in reliance thereon, places valuable and permanent improvements upon the realty, makes substantial expenditures in connection therewith, or otherwise so acts in relation thereto as to make it unjust to deprive him of the property by reason of an imperfection in the mode of transfer, equity will not permit reliance upon the statute of frauds to defeat the intended gift. [Citations.] Fundamentally, the rule as stated is based upon the equitable principle of estoppel. [Citations.] Its application requires proof not only of the transfer of possession of the subject property to the donee, but also of his receipt in reliance thereon of a detriment of a sufficient degree to make it unjust not to effect the attempted transfer of title to him. Where the monetary detriment suffered by the donee does not exceed the benefit to him of the use of the land without charge or rental, and no other circumstances of hardship are shown, the basis for an estoppel does not exist. [Citations.]" (*Id*. at p. 538.)

In support of their appeal, the siblings claim that *Andreotti* improperly conflated the two rules recognized in *Burris*. We disagree. In our view, *Andreotti* reflects a rational understanding of the law. The present gift rule recognized in *Burris* does not specifically require that detriment exceed the value of the use of the property. It does, however, require a finding of injustice in the event that the donee is denied title. We, like

Andreotti, fail to see how an injustice will result if the detriment is not greater than the value of the use the property. This stands to reason because if the detriment is lesser, then the donee has not been harmed.

II. The Siblings' Reading of *Kinsell* is Misplaced.

According to the siblings, *Kinsell* represents a split of authority regarding oral transfers of real property. In their view, the *Kinsell* holding breaks away from cases such as *Burlingame*, *Burris* and *Andreotti* to establish that "an oral gift of real property will be upheld based upon evidence that a gift of the property was intended and the gift recipient has acted upon the intended gift by demonstrating . . . intent to accept it." For several reasons, we disagree.

Kinsell quoted statements of the law from different cases. One quote came from *Bakersfield T.H. Ass'n v. Chester* (1880) 55 Cal. 98 (*Bakersfield*). When the court denied a petition for rehearing, it stated, "A gift of real estate may be made by parol, if possession is given and taken under such gift, and acts done by the donee to carry out the purpose of the gift." (*Id*. at pp. 102–103; *Kinsell*, *supra*, 18 Cal.App. at p. 688.) It is this quote that the siblings rely on to establish that a gift and acceptance is enough to overcome the statute of frauds applicable to the transfer of real estate.

A close reading of *Kinsell* establishes that the court did not construe the law as suggested. Prior to the *Bakersfield* quote, *Kinsell* noted that "a parol gift of real property, under certain circumstances or conditions, will be sustained by courts of equity." (*Kinsell*, *supra*, 18 Cal.App. at p. 688.) After the *Bakersfield* quote, *Kinsell* cited *Burlingame* and other authorities for the proposition that equity will uphold a parol transfer of real property only if a donee was induced to make valuable improvements upon the land. (*Ibid*.) When analyzing the issues, the *Kinsell* court examined the improvements made by the donee. That examination would have been superfluous if *Kinsell* construed the law as the siblings suggest. Thus, we conclude that *Kinsell*, like other cases, required the donee to establish that he or she detrimentally changed position by making valuable improvements or otherwise expending money such that the failure to recognize a transfer would be unjust.

Even supposing that *Kinsell* declined to follow the lead of *Burlingame* and *Burris*, we would not. *Burlingame* and *Burris* are California Supreme Court cases, and we therefore have no power to ignore them. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Finally, the siblings reading must be rejected because it is newly minted on appeal. Below, in their opposition, the siblings stated: "The principal exception to the requirement of a deed to transfer real property is described in [*Kinsell*], following the U.S. Supreme Court's decision in *Neale v. Neale* [(1869) 76 U.S. 1]: [¶] 'Equity protects a parol gift of land equally with a parol agreement to sell it if accompanied by possession and the donee, induced by a promise to give it, has made valuable improvements on the property. . . .'" The siblings then argued that by paying taxes, maintaining the properties and improving them, they satisfied the *Kinsell* exception to the requirement of written deeds. Now, before us, they argue for the first time that *Kinsell* represents a split from the very rule that they cited *Kinsell* for below. To permit them to raise a new issue that was not raised in the trial court would not only be unfair to the trial court, but manifestly unjust to Mercator. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.)

III. There is no Triable Issue as to the Validity of the Parol Transfers.

Even if case law requires a showing of detriment, the siblings contend that their papers show enough detriment to defeat summary judgment.

This contention lacks merit.

Preliminarily, we must determine whether the issue is even cognizable. A quiet title action must plead "[t]he title of the plaintiff as to which a determination under this chapter is sought and the basis of the title." (Code Civ. Proc., § 761.020, subd. (b).) The siblings did not allege that they obtained title to the properties after detrimentally relying on parol transfers and expending substantial sums of money. All they alleged is that they "obtained title to the Properties from their father, [Sumampow]." This allegation was deficient to raise the issue of whether the siblings obtained title through the application of equity.

It is well-established that "'[t]he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*. A "moving party need not '. . . refute liability on some theoretical possibility not included in the pleadings.' [Citation.]"'" (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 332.) "A plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing. [Citations.]" (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 90.) But this rule is not absolute. If a new theory is argued in an opposition and the moving party does not object, the trial court has the discretion to either reject the new theory or consider it on the merits. (*Ibid*.) Thus, whether we need to examine the siblings argument depends upon whether Mercator objected to it, and whether the trial court considered it.

A review of the record reveals that Mercator did not object to the parol transfer argument, and the trial court ruled on it. Thus, the argument is in play.

We turn to our analysis.

Mercator met its burden to negate a triable issue regarding the siblings claim to title by citing section 1091 and showing that the bequest agreements purporting to transfer the properties to the siblings were not signed by Sumampow. Section 1091 provides: "An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing." Absent an exception, section 1091 establishes that the bequest agreements did not transfer title.

The burden shifted to the siblings to establish a triable issue regarding an exception to the application of section 1091. Under the case law, this means that they were required to demonstrate: (1) they made (a) valuable and permanent improvements or substantial expenditures and (b) the monetary detriment they suffered exceeded the benefit of the use of the land without charge or rental; or (2) they suffered some other

detriment that is sufficient to make it unjust to deprive them of the properties for want of properly executed deeds.

The siblings did not meet their burden. Through their declarations, the siblings established that they paid half of the 2008 property taxes and paid management fees. In addition, Iefenn made some improvements and paid a monthly gardening fee, and Ievan repaired the air conditioning system and paid homeowners association dues. The problem is that the siblings did not offer evidence that the detriment they suffered exceeded the benefit of the use of the properties without charge or rental. More specifically, they did not show the value of the use of the properties. As a result, they failed to show a basis for equity.

Despite their omissions below, the siblings contend that the trial court erred when it granted Mercator's motion because, at the hearing, the trial court indicated that it could take judicial notice that the properties were extremely valuable due to their location in Beverly Hills, California. The siblings argue that this was improper, and that judicial notice did not support the trial court's conclusion that their detriment fell below the value of the use of the properties. Assuming for the sake of argument that the siblings are correct, the point is moot. They bore the burden on this issue, and they did not meet it. Moreover, a review of the trial court's oral pronouncement reveals that its ruling was not dependent on taking judicial notice of the value of the properties. Before it took judicial notice, the trial court properly ruled that the siblings had not met their burden of establishing a triable issue. Thus, in our view, the trial court's decision to take judicial notice was superfluous.

DISPOSITION

The judgment is affirmed.

Mercator shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD