Filed 1/18/13 Estate of Hellen CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| Estate of PATRICIA FAYE HELLEN, Deceased. | B242872<br><br>(Los Angeles County Super. Ct. No. LP013667) |
| RAYMOND L. HELLEN, As Administrator, Etc.,<br><br>Petitioner and Appellant,<br><br>v.<br><br>JP MORGAN CHASE BANK,<br><br>Objector and Respondent. | |

APPEAL from an order of the Superior Court of Los Angeles County, James A. Steele, Judge. Affirmed.

Raymond L. Hellen, in pro. per. for Petitioner and Appellant.

Anderson, McPharlin & Conners LLP, Jesse S. Hernandez and Richard P. Tricker, for Objector and Respondent.

## I. INTRODUCTION

Plaintiff, Raymond L. Hellen, the administrator of his deceased wife's estate, appeals from an order dismissing his declaratory relief petition. Plaintiff, in his capacity as administrator, sought to invalidate a trust deed held by the objector, JPMorgan Chase Bank, securing a loan to the decedent. The probate court dismissed the petition after sustaining a demurrer without leave to amend on statute of limitations ground. We affirm.

## II. FACTS

In reviewing an order after a demurrer is sustained without leave to amend, all well-pleaded factual allegations must be assumed as true. (*Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 864-865; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The first amended declaratory relief petition contains the following allegations. The decedent took title to the residence in West Hills, California as an unmarried woman in 1994. Plaintiff and the decedent were married on September 7, 1999. The couple remained married until the decedent's death on October 10, 2007. They resided at the residence prior to and after their marriage until the decedent's death.

In 2005, the couple jointly applied for a loan with Stearns Lending, Inc. During the application process, the lender gained knowledge that the Hellens were married and residing at the residence. The decedent requested in writing that title to the residence vest as, "Patricia Hellen and Raymond L. Hellen, as husband and wife" and as community property. In June 2005, the lender elected to make a loan solely to the decedent. On June 24, 2005, a notary witnessed the decedent signing a grant deed vesting title in the property as, "Patricia Hellen, a married woman as her sole and separate property." The notary also witnessed the decedent signing the trust deed to the objector. Plaintiff did not execute the trust deed. The grant and trust deeds were recorded on July 7, 2005. On or

after July 7, 2005, the decedent received the full amount of the loan as stated in the closing documents in the approximate amount of $423,000.

After the decedent's death in 2007, plaintiff filed verified petitions for spousal property and letters of administration on May 27, 2008. The spousal support petition alleged the residence was community property. The spousal support petition listed the encumbrance in the amount of $476,481.38 against the residence. On May 4, 2010, the court ruled that plaintiff owned an undivided one-half interest in the residence. The estate retained an undivided one-half interest in the property.

On April 4, 2011, plaintiff filed the first amended declaratory relief petition as the estate administrator. The first amended petition alleges an actual controversy exists between plaintiff and objector concerning their rights and duties under the trust deed. Plaintiff contends: the trust deed is void ab initio; the objector has no interest in the residence; and the objector does not have a priority status over other estate creditors. The objector demurred to the first amended petition on the grounds the trust deed was valid and the petition was time barred by Family Code[1] section 1102, subdivision (d).

The probate court held a hearing on the demurrer on January 10, 2012. According to the February 28, 2012 minute order, the probate court allowed the parties to file supplemental briefs "solely" on the statute of limitations issue. However, plaintiff did not include the reporter's transcript of the January 10, 2012 hearing in the record on appeal. Nor has plaintiff provided us with the minute order of the January 10, 2012 hearing. After the January 10, 2012 hearing, the parties filed supplemental briefs in support of and in opposition to the demurrer. On February 28, 2012, citing the one-year statute of limitation in section 1102, subdivision (d), the probate court sustained the demurrer without leave to amend. The minute order indicates that the probate court had considered plaintiff's claims section 1102, subdivision (d) was inapplicable because Stearns Lending, Inc. was not a bona fide purchaser for value. The probate court ruled the superior court file indicated that plaintiff knew the encumbrance existed on the

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

property no later than May 27, 2008, when the spousal property petition was filed. Yet, plaintiff waited until April 4, 2011, to file the probate petition seeking to invalidate the trust deed. No hearing was held on February 28, 2012. Notice of entry of the order was served April 23, 2012. This timely appeal followed.

## III. DISCUSSION

### A. Standard of Review

Our Supreme Court has defined our task as follows**,** "'Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action.'" (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We assume the truth of the petition's allegations which have been properly pleaded and give them a reasonable interpretation by reading it as a whole and with all its parts in their context. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558; *People ex rel. Lungren v. Superior Court*, *supra*, 14 Cal.4th at p. 300; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) However, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact. (*People ex rel. Lungren v. Superior Court*, *supra*, 14 Cal.4th at pp. 300-301; *Moore v. Regents of University of California*, *supra*, 51 Cal.3d at p. 125.) Furthermore, any allegations that are contrary to the law or to a fact of which judicial notice may be taken will be treated as a nullity. (*Interinsurance Exchange v. Narula* (1995) 33 Cal.App.4th 1140, 1143; *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.) Our Supreme Court has held: "On appeal from a judgment of dismissal entered after a demurrer has been sustained without leave to amend, unless failure to grant leave to amend was an abuse of discretion, the appellate court must affirm the judgment if it is correct on any theory. [Citations.] If there is a reasonable possibility that the defect in a complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend. [Citation.] The burden

is on plaintiff, however, to demonstrate the manner in which the complaint might be amended. [Citation.]" (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

B. Limitation Of Action

Plaintiff contends the probate court's dismissal order must be reversed because: the trust deed is void ab initio under section 1102, subdivision (a); the objector is not a bona fide purchaser in that the lender had knowledge of the marital relationship; the lender's actual knowledge precludes application of section 1102, subdivision (d); the grant and trust deeds contain numerous irregularities; and foreclosure proceedings are required to be brought in the probate court. We disagree.

Section 1102, subdivision (a)[2] requires both spouses to execute instruments conveying any community real property or interests therein for a period exceeding one year. Because of the decedent's death, any transfer of community real property in violation of this section is not void; rather, it is voidable by the timely challenge of the non-consenting spouse. (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 31, 33-35; *Marvin v. Marvin* (1976) 18 Cal.3d 660, 672-674; *Hyatt v. Mabie* (1994) 24 Cal.App.4th 541, 545-546.) The non-consenting spouse's right to invalidate the transfer applies only to his or her community interest. (*Droeger v. Friedman, Sloan & Ross*, *supra*, 54 Cal.3d at pp. 33-35; *Hyatt v. Mabie*, *supra*, 24 Cal.App.4th at pp. 545-546.) In

[2] Section 1102, subdivision (a) provides, "Except as provided in Sections 761 and 1103, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses, either personally or by a duly authorized agent, must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered."

any event, section 1102, subdivision (d)[3] requires an action to avoid any instrument failing to comply with subdivision (a) be commenced within one year of its recording.

Here, the instrument encumbering the property was recorded on July 7, 2005. Thus, in order to void the instrument, plaintiff was required to commence an action by July 6, 2006. (§ 1102, subd. (d).) However, plaintiff waited until April 4, 2011, to file the declaratory relief petition. This was almost six years after the instrument encumbering the property was recorded. Section 1102, subdivision (d) requires the action to avoid the instrument be commenced within one year after it is recorded. Thus, the declaratory relief petition was untimely filed.

Furthermore, plaintiff is incorrect that application of the standard in *Byrd v. Blanton* (1983) 149 Cal.App.3d 987, 993 requires a different result. In *Byrd*, the appellate court refused to apply the one-year statute of limitation against a widow claiming a community interest in real property. (*Id*. at p. 990.) The husband conveyed title to himself and his mother without the wife's knowledge or consent. (*Id*. at p. 989.) The mother-in-law knew of the marriage relationship and the wife's lack of knowledge or consent to the conveyance. (*Id*. at p. 989.) *Byrd* does not control the disposition of this case. Plaintiff knew about the encumbrance no later than May 2008. However, plaintiff waited almost three years to file the petition seeking to avoid the effect of the recordation of the deed. The objector's demurrer was properly sustained because plaintiff failed to make a timely challenge to the instrument. (§ 1102, subd. (d); *Droeger v. Friedman, Sloan & Ross*, *supra*, 54 Cal.3d at pp. 31, 33-35.)

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[3] Section 1102, subdivision (d) states, "No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of that instrument in the recorder's office in the county in which the land is situated."

C. Amendment

We are unable to conclude the probate court abused its discretion in sustaining the demurrer without leave to amend. A judgment is presumed to be correct and an appellant has a duty to provide the reviewing court with an adequate record to demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494; *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58.) In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 [transfer order]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [attorney fee motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived and the minor consented to informal adjudication]; *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1672 [transcript of judge's ruling on an instruction request]; *Vo v. Las Virgenes Municipal Water Dist.*(2000) 79 Cal.App.4th 440, 447 [trial transcript when attorney fees sought]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [surcharge hearing]; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [nonsuit motion where trial transcript not provided]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [monetary sanctions hearing]; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532 [reporter's transcript fails to reflect content of special instructions]; *Buckhart v. San Francisco Residential Rent etc. Bd.* (1988) 197 Cal.App.3d 1032, 1036 [hearing on Code Civ. Proc., § 1094.5 petition]; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385-386 [motion to dissolve preliminary injunction hearing]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 713-714 [demurrer hearing]; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71-73 [transcript of argument to the jury]; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 462 [failure to secure reporter's transcript or settled statement as to offers of proof]; *Wetsel v. Garibaldi* (1958) 159 Cal.App.2d 4, 10 [order confirming arbitration award].) The

objector is correct that plaintiff's failure to secure a reporter's transcript on appeal or a settled statement requires the order dismissing the petition be affirmed. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [lead opinion of George, C. J.]; *Ballard v. Uribe*, *supra*, 41 Cal.3d at pp. 574-575.)

## IV. DISPOSITION

The dismissal order is affirmed. The objector, JPMorgan Chase Bank, is awarded its costs on appeal from plaintiff, Raymond L. Hellen, administrator of the estate of Patricia Faye Hellen.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.