Filed 8/16/17 Kim v. Kim CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DANIEL KIM,

Plaintiff and Appellant,

v.

AI SOO SONG KIM, as Trustee, etc.,

Defendants and Respondents.

B267969
(Los Angeles County
Super. Ct. No. YC069691)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stuart Rice, Judge. Affirmed.

Law Offices of Renee L. Campbell and Renee L. Campbell; Felicia Mobley for Plaintiff and Appellant.

No appearance by Defendants and Respondents.

In the underlying action, appellant Daniel Kim sought the partition of a condominium that he and his mother, respondent Al Soo Kim, owned as tenants in common, and requested an accounting of the rent respondent collected as manager of the property. Prior to trial, the parties sold the property. Following a bench trial on appellant's request for an accounting, the trial court entered a judgment awarding him no share of the rent. Appellant challenges the judgment, contending that there is insufficient evidence to support the court's findings, and that the court misapplied the statute of frauds. We reject those contentions and affirm.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

In June 2013, appellant initiated the underlying action against respondent in her capacity as the trustee of the Ai Soo Song Kim Trust. Appellant's complaint sought partition of a one-bedroom condominium located in Redondo Beach (Code Civ. Proc., §870 et seq.), an accounting, and declaratory relief. The complaint alleged that the property was jointly owned in the form of a tenancy in common by appellant and respondent in her capacity as trustee, that respondent was the sole tenant in possession of the property, and that she collected rent from the property. Appellant sought partition of the property by sale, and an accounting of all rents and profits from the property.

In July 2014, appellant informed the court that because the parties had arranged for the condominium to be

sold, he intended to file a request to dismiss his cause of action for partition. After the condominium was sold, the court ordered a bench trial limited to appellant's request for an accounting.

In May 2015, prior to trial, the parties agreed to following facts: In 1991, the parties took title to the condominium as tenants in common. Although their names appeared on the loan undertaken to buy the property, only respondent made a down payment. After the acquisition, respondent managed the property, which was rented to third parties. She collected the rental payments arising from it, and paid all expenses relating to the condominium, including mortgage payments, property taxes, repairs, and homeowners' association fees. Respondent never made any distribution of rent from the property to appellant.

During a one-day bench trial, appellant testified that while the parties owned the property, he never requested an accounting of the rent owed him because respondent falsely told him that the property "was operating at a loss."[1] Appellant denied that the parties ever agreed that he was to receive no rent.

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[1] Appellant has provided an agreed statement in lieu of a reporter's transcript of the trial. The agreed statement was filed in the trial court on June 3, 2016, more than 40 days after the notice of appeal was filed and the record was designated (Cal. Rules of Court, rule 8.134(b)(2)), and was not included in the clerk's transcript. We have nonetheless considered the agreed statement in our review of appellant's contentions.

Respondent testified that after obtaining her real estate license, she bought several properties and owned some of them jointly with her children. According to respondent, in the case of the pertinent property, she created a tenancy in common with appellant as "an estate planning tool," with the understanding that appellant would receive no rent from the property, but would receive the property when she died. She testified that she made the down payment, received no funds from appellant to pay for the property, and provided all managerial services, including finding tenants, collecting rent, and ensuring that maintenance and repairs were performed.

Following the trial, the parties submitted closing briefs. Respondent maintained that the evidence at trial was sufficient to rebut the presumption established in Evidence Code section 662, which provides that the owner of legal title to property is presumed to own the full beneficial interest. Relying on her trial testimony, she argued that when the condominium was purchased, she permitted appellant to hold title as a tenant in common, but told him that he would receive no rents or income from the condominium, aside from his share of proceeds from its sale. Respondent placed special emphasis on her testimony that it was "her pattern and practice" to put the names of her five children on the title to properties she bought, and use the income from the properties to support and educate the children.

Appellant contended that as a tenant in common not in possession of the condominium, he was entitled to a share of rent paid by third parties to respondent. He further argued that any purported oral agreement limiting his entitlement to rent failed under the statute of frauds, which requires specified agreements relating to the sale or lease of interests in real property to be in writing (Civ. Code, § 1624, subd. (a)(3)).

On July 24, 2015, the trial court filed its statement of decision, concluding that appellant was entitled to no rent from the condominium. The court found that although both parties were on the title to the property, respondent acted as property manager, collected rents, paid all expenses, and performed all maintenance. The court further determined that respondent had rebutted the presumption under Evidence Code section 662 that appellant held the full beneficial interest attributable to a tenant in common, stating: "The parties never intended for [appellant] to share in the rental proceeds from the property, which is supported by the fact that [appellant] has never collected any rental proceeds from any of the seven properties on which his mother placed him on the title. In addition, [respondent] testified that when she placed [him] on [the] title, she told [him] he was not entitled to the rental proceeds and the parties['] conduct was consistent with this arrangement." The court rejected appellant's contention regarding the statute of frauds, reasoning that the statute was

inapplicable because respondent was "not contesting [appellant's] ownership in the property."

On August 13, 2015, the trial court entered a judgment denying appellant's request for a share of the rental proceeds. This appeal followed.

DISCUSSION

Appellant contends (1) that there is insufficient evidence to support the finding that he had no entitlement to rental proceeds, and (2) that the court misapplied the statute of frauds. For the reasons explained below, we reject these contentions.[2]

A. *Governing Principles*

Under the statutory scheme governing partitions (Code Civ. Proc., § 872.210 et seq.), co-owners of undivided interests in real property such as tenants in common may seek partition. (*Milian v. De Leon* (1986) 181 Cal.App.3d 1185, 1195-1196). In connection with a request for partition, "[t]he court may . . . order allowance, accounting,

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[2] No respondent's brief was filed. In such circumstances, we "examine the record on the basis of appellant's brief and to reverse only if prejudicial error is found. [Citations.]" (*Votaw Precision Tool Co. v. Air Canada* (1976) 60 Cal.App.3d 52, 55; accord, *Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, 1192, fn. 7; *Carboni v. Arrospide* (1991) 2 Cal.App.4th 76, 80, fn. 2; see Cal. Rules of Court, rule 8.220(a)(2); *In re Bryce C.* (1995) 12 Cal.4th 226, 232-233.)

contribution, or other compensatory adjustment among the parties according to the principles of equity." (Code Civ. Proc., § 872.140.)

Here, appellant's claim for an accounting focused on the recovery of a share of rental proceeds paid by third parties. Generally, "[i]f one tenant in common . . . is in sole possession of the property, the other tenant cannot recover rent for the first tenant's occupancy or profits derived from the property by the occupant's own labor; nor can the other tenant have an accounting of those profits. [Citations.]" (12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 49, p. 98.) Nonetheless, in suitable circumstances, "if the tenant in possession leases the property to a third person, a suit by the other tenant against the lessor, requiring the lessor to account for rents collected from the third person, is proper. [Citations.]" (*Ibid.*)

Appellant's contentions implicate the presumption established in Evidence Code section 662, which states, "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." That statute "has application . . . when there is no dispute where legal title resides but there is [a] question as to where all or part of the beneficial title should rest." (*Murray v. Murray* (1994) 26 Cal.App.4th 1062, 1067, italics omitted.)

Also pertinent here is the statute of frauds, as codified in Civil Code section 1624, which requires that specified transfers of interests in real estate and other agreements

relating to those interests must be in writing. Under subdivision (a)(3) of that statute, contracts "for the sale of real property, or of an interest therein" are invalid unless in writing. Generally, that provision encompasses a broad range of agreements involving interests in real property. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 385, pp. 424-425.)

B. *Sufficiency of the Evidence*

Appellant contends there is insufficient evidence to support the trial court's finding that when the condominium was purchased, appellant knew that he was to receive no share of rent from it. The crux of his argument is that respondent's trial testimony supporting the inference that he agreed to forego rent is "'inherently improbable,'" and thus incapable of supporting the court's findings. Respondent testified that she had considerable experience with real estate, and that she created a tenancy in common with appellant as "an estate planning tool," with the understanding that appellant would receive no rent from the property, but would receive the property when she died. Appellant contends respondent's testimony must be rejected, arguing that an experienced real estate professional would know that a tenancy in common is useless for that estate planning purpose because it lacks a right of survivorship.

Appellant's contention misapprehends the standards applicable to review for substantial evidence.[3] On such review, "'even testimony which is subject to justifiable suspicion do[es] not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" (*Daly v. Wallace* (1965) 234 Cal.App.2d 689, 692, italics omitted, quoting *People v. Huston* (1943) 21 Cal.2d 690, 693, overruled on another ground in *People v. Burton* (1961) 55 Cal.2d 328, 352.) We reject the statements of a witness that the court has believed only if they are "'inherently improbable,'" that is, "physically impossible or obviously false without resorting to inference or deduction." (*Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1293; see *Daly, supra*, 234 Cal.App.2d at p. 692.) Under these stringent standards, we see no basis to reject respondent's testimony, as it was neither physically impossible nor obviously false on its face. In sum, there is sufficient evidence to support the judgment.

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[3] Generally, upon review for substantial evidence, "the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.)

C. *Statute of Frauds*

Appellant contends the trial court misapplied the statute of frauds, arguing that any agreement by which he gave up his right to rental proceeds effectively transferred that right to respondent, and thus was subject to subdivision (a)(3) of Civil Code section 1624. For the reasons discussed below, appellant has shown no error in the court's ruling.

At the outset, we observe that the trial court's determination that respondent rebutted the presumption set forth in Evidence Code section 662 did not, in itself, fully resolve appellant's contention regarding the statute of frauds. Generally, a statute stating specific rules applicable to the transfer of a type of property controls over the general presumption stated in Evidence Code section 662. (*In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1406; *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 594.) The court's determination under Evidence Code section 662 thus established that appellant, though holding title to the condominium as a tenant in common, *potentially* did not retain the full beneficial interest in the condominium ordinarily attributable to a tenancy in common. However, as the statute of frauds sets forth specific rules regarding transfers of interests in real property, the determination under Evidence Code section 662 was insufficient to show that appellant gave up his right to rental proceeds, absent a further determination that the statute of frauds was inapplicable.

The crux of appellant's contention under the statute of frauds is that the right of a tenant in common to rental proceeds in a specified situation -- namely, when a cotenant has possession of the land and rents it to third parties -- constitutes an "interest" in real property, for purposes of subdivision (a)(3) of Civil Code section 1624. Appellant has not cited -- and our research has not disclosed -- a decision directly addressing that question. However, as explained below, we conclude that appellant failed to show that his agreement to forego rental proceeds -- as determined by the trial court -- fell within the scope of the statute of frauds.

We begin by examining the origin and development of the right to rental proceeds. Under early common law, a tenant in common not in possession had no right to recover rental proceeds from a cotenant in possession who rented the property to a third party, absent an agreement that the cotenant was acting as a "bailiff" for the tenant not in possession. (Annotation, Accountability of Cotenants for Rents and Profits or Use and Occupation (1957) 51 A.L.R.2d 388, 394.) In 1705, that deficiency was rectified in England by the Statute of Anne (4 Anne., ch. 16, § 27), which authorized the tenant not in possession to recover proceeds derived when a cotenant in possession rented the property to third parties. (Annotation, Accountability of Cotenants for Rents and Profits or Use and Occupation, *supra*, at p. 394 & fn. 1.)

In *Pico v. Columbet* (1859) 12 Cal. 414, 419-424 (*Pico*), our Supreme Court determined that under the common law,

as then operative in California, a tenant in common had no entitlement to proceeds so derived unless there was an agreement that the cotenant in possession was acting as a "bailiff." There, a tenant in common sued his cotenant, who was in sole possession of the entire property, seeking a share of "the rents, issues and profits." (*Id.* at p. 419.) Noting that no law resembling the Statute of Anne had been adopted in California, the court determined that the claim must be evaluated under "the principles of the common law." (*Id.* at p. 420.) Relying on out-of-state decisions, the court concluded that the tenant not in possession had no entitlement to rents, issues, or profits, stating that "the action cannot be maintained against the occupying tenant unless he is *by agreement* a manager or agent of his co[]tenant." (*Ibid.*, italics added.)

In *Goodenow v. Ewer* (1860) 16 Cal. 461, 472-473 (*Goodenow*), the Supreme Court concluded that tenants not in possession were entitled to recover rental proceeds derived from third parties, without expressly requiring proof of an actual agreement that the cotenant in possession was collecting the rent as a manager or agent of the tenants not in possession. *Goodenow* involved property owned by three cotenants and rented to third parties. (*Id.* at pp 465-466.) The plaintiffs acquired the interests of one of the cotenants through foreclosure proceedings. (*Ibid.*) After noting the discussion in *Pico*, the court held that the plaintiffs were improperly denied recovery of a share of the rental proceeds from a cotenant in possession after the foreclosure

proceedings, stating: "It is an accounting . . . for the rents received by the defendant . . . from tenants of the premises, which the plaintiffs seek, and not for the profits made by his own labor and expenditures . . . . Of rents thus received, the jurisdiction of equity to direct an account . . . is unquestionable." (*Id.* at p. 472.)

In *McWhorter v. McWhorter* (1929) 99 Cal.App. 293, 296 (*McWhorter*), the appellate court, relying on *Goodenow*, stated that a tenant not in possession may recover rental proceeds from a cotenant who leases the property to a third party, without requiring the existence of an agreement between the tenant and cotenant. *McWhorter* involved real property owned as a joint tenancy by two persons. (*Id.* at p. 294.) After the trial court permitted the tenant not in possession to recover rent from the other tenant for the latter's occupancy of the property, the appellate court reversed. (*Id.* at p. 296.) In so ruling, the appellate court noted that a cotenant not in possession generally has no entitlement to recover rent from a cotenant occupying the property. (*Ibid.*) Pointing to *Goodenow*, the court further stated: "There is an exception to the general rule, however. One tenant may maintain an action requiring his cotenant to account for rents collected from their property from third persons to whom the property is leased." (*Ibid.*)

Following *McWhorter*, numerous decisions have relied on its discussion of the "exception to the general rule" as authority for the proposition that a tenant not in possession is entitled to a share of rental proceeds collected from third

parties by a co-tenant. (E.g., *Dabney-Johnston Oil Corp. v. Walden* (1950) 4 Cal.2d 637, 656 ["[I]t is the rule that where one of several cotenants has been in sole possession of the land and has produced crops thereon, he is entitled to retain the products of his labor, but where he receives rents from third persons for the use of the land, he must account to his cotenants for their share"]; *Edwards v. Edwards* (1949) 90 Cal.App.2d 33, 43 [in action in which parties are joint tenants, "[the] plaintiff will have to account to [the] defendant for [the] defendant's share of the rentals received by [the] plaintiff]; *In re Fazzio* (Bankr. E.D. 1995) 180 B.R. 263, 269 [under California law, "[a] cotenant in possession . . . who is collecting rents and profits from third persons for the use and occupancy of the commonly owned property is required to account for the amounts collected to a tenant out of possession"].)

Our examination of the case authority shows that the right to rental proceeds, though originally dependent upon the existence of an actual contract, now relies on the principle that as a matter of law, the cotenant in possession must share rent from third parties with the tenant out of possession. So understood, the right to rental proceeds is reasonably viewed as founded on an implied-in-law contract or quasi-contract, under which the cotenant in possession is obliged by law to act as the other tenant's agent or "bailiff," for purposes of collecting the latter's share of the rent from

third parties.[4] Ordinarily, an implied-in-law contract may be modified or superseded by an unwritten agreement. (*Willman v. Gustafson* (1944) 63 Cal.App.2d 830, 832-833; see *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419.)

In our view, the right to rental proceeds does not implicate a sufficiently substantive "interest" in real property to render agreements by which tenants give up that right subject to subdivision (a)(3) of Civil Code section 1624. Under such an agreement, the tenant out of possession grants the cotenant permission to retain his or her share of rental proceeds obtained from third parties. The agreement thus closely resembles a license, that is, a permission to perform a limited range of acts upon property. (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 36.) Licenses may be revocable at the will of

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[4] The term "implied contract" is often applied to two distinct types of obligation -- the implied-in-fact contract and the so-called contract implied-in-law, or quasi-contract. (*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 794.) "The only distinction between an implied-in-fact contract and an express contract is that, in the former, the promise is not expressed in words but is implied from the promisor's conduct." (*Ibid.*) In contrast, "[t]he so-called 'contract implied in law' in reality is not a contract. [Citations.] 'Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice.' [Citation.]" (*Ibid.*, quoting Rest. Contracts, § 5, com. a., p. 7.)

the licensor, or irrevocable due to equitable considerations (*Pacific Gas & E. Co. v. Peterson* (1969) 270 Cal.App.2d 434, 438) or because they are established by an agreement (*Golden West Baseball Co.*, *supra*, 25 Cal.App.4th at pp. 19-20, 36). Although licenses may be created orally and are often characterized as an "interest" in land, they generally do not constitute a sufficiently substantive interest to fall under the statute of frauds. (*Colvin v. Southern Cal. Edison Co.* (1987) 194 Cal.App.3d 1306, 1312, overruled on another ground in *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1107.) Thus, in *Stepp v. Williams* (1921) 52 Cal.App. 237, 254 (*Stepp*), the appellate court concluded that the statute of frauds did not encompass an oral license to take stream water rendered irrevocable by the licensee's investment of labor and money.

Here, the trial court found that in 1991, when the condominium was purchased, the parties intended that appellant was to receive no rental proceeds. It is undisputed that for the next 24 years, until the property was sold, respondent acted as the property manager, paid all expenses, and performed all maintenance. Those facts are sufficient to show that respondent effectively acquired an irrevocable license to retain appellant's share of rent through an implied agreement and through equitable considerations grounded in respondent's investment of labor and money. Under those circumstances, the agreement by which appellant gave up his right to rental proceeds did not implicate an "interest" in real property, within the meaning

of subdivision (a)(3) of Civil Code section 1624. (See *Stepp*, *supra*, 52 Cal.App. at p. 254.) Accordingly, appellant has shown no error in the trial court's ruling regarding the statute of frauds.[5]

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[5] We recognize that an agreement by which a tenant out of possession gives up the right to rental proceeds is potentially subject to another provision of the statute of frauds, namely, subdivision (a)(4) of Civil Code section 1624. Under that provision, a contract "authorizing . . . an agent . . . or any other person . . . to lease real estate for a longer period than one year" must be in writing. When applicable, the provision prohibits an agent from recovering compensation promised under an oral agreement with a property owner for services relating to leasing property. (*Westside Estate Agency, Inc. v. Randall* (2016) 6 Cal.App.5th 317, 324.) As appellant does not mention or discuss subdivision (a)(4) of Civil Code section 1624, he has forfeited any contention of error relating to it. Moreover, we would reject any such contention. As nothing before us shows that respondent leased the condomium for terms longer than one year, the record is insufficient to establish error under the provision.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.