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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

LOIS FRIEDMAN, as Trustee, etc., Plaintiff and Respondent, v. JOHN MURPHY et al., Defendants and Appellants; JEFFREY MUNJACK et al., Plaintiffs and Real Parties In Interest.	B237967 (Los Angeles County Super. Ct. No. SP007578)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Joseph S. Biderman, Judge. Affirmed in part and reversed in part.

Schreiber & Schreiber, Edwin C. Schreiber and Eric A. Schreiber for Defendants and Appellants.

Blum, Propper & Hardacre and David W. Hardacre for Plaintiff and Respondent.

Wershow & Cole and Jonathan M. Cole for Plaintiffs and Real Parties in Interest.

Dr. John Murphy and Dr. Dennis Munjack were business partners, each owning a 50-percent interest in Southwestern Research, Inc. (SRI). When Dr. Munjack invited Dr. Murphy to join SRI, they orally agreed they would have no other partners, and if either of them left the practice or died, the surviving partner would receive the other's shares. Dr. Munjack passed away, leaving his assets in a trust for the benefit of his two children. The trustee of the Dennis Munjack Trust, Lois Friedman, commenced probate proceedings (under Probate Code section 850)[1] to determine the distribution of the trust's property, including Dr. Munjack's shares in SRI. Dr. Murphy filed a cross-petition, asserting his right to Dr. Munjack's shares of SRI. The trust responded that the agreement was barred by the statute of frauds. The trial court, by minute order, denied Dr. Murphy's cross-petition, and ordered Dr. Munjack's shares of SRI to be distributed in equal shares to his children, Jeffrey Munjack and Julie Munjack.[2] Later, a "judgment" was entered, and the trust filed its memorandum of costs. Dr. Murphy appeals the judgment and contends the trust's memorandum of costs was untimely. We affirm the judgment, but find that the memorandum of costs was untimely.

BACKGROUND

In October 1994, Dr. Murphy was a resident in the University of Southern California's psychiatry program, where Dr. Munjack was a professor. Before studying psychiatry, Dr. Murphy worked as a physician in Florida. However, after his business partner was arrested, which ended their practice, he decided to get a fresh start.

In addition to his professorship, Dr. Munjack also worked in SRI, a clinical trials practice founded by his wife, Dr. Debora Phillips. Dr. Munjack mentored Dr. Murphy during his residency and invited him to join SRI as a 50-percent partner. Dr. Murphy planned to return to Florida after completing his residency, but decided to accept the offer after discussing it with his wife. Doctors Munjack and Murphy agreed that Dr. Murphy

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

[2] Real Parties in Interest, Jeffrey Munjack and Julie Munjack, filed a joinder in this action, joining in the trust's arguments.

would pay nothing for his share of the partnership, they would be equal partners, and if one of the partners died or left the practice, they were entitled to nothing and the remaining partner would receive all of the shares. At the time Dr. Murphy joined SRI, it was making very little money. However, by 2007, SRI made $5.5 million annually.

Doctors Munjack and Murphy incorporated SRI in 1999, with each partner receiving 1,000 shares. In 2007, they modified their agreement, after Dr. Munjack discovered he was suffering from cancer. They agreed, in the event one of the partners died, the remaining partner would pay the deceased partner's surviving spouse 10 percent of the remaining partner's annual income from SRI. The other provisions of the agreement were to remain the same.

On February 4, 2008, Doctors Murphy and Munjack met with an attorney to have a "formal shareholder agreement" drafted. They told Attorney Jerry Sparks that "it was their intent that in the event one of them died, was disabled or retired, that the shares of the deceased, retiring or disabled shareholder would go to the remaining shareholder, and in exchange the . . . estate or the retired or disabled shareholder would receive a percentage of what the remaining shareholder earned on an annual basis." The agreement was never drafted.

Susie Pincus, Dr. Munjack's personal assistant, testified that Dr. Munjack told her about an agreement with Dr. Murphy, "that if either wanted to leave, retire, or in the event that one of them died, the company would automatically transfer . . . to the remaining or surviving partner at no cost." Ms. Pincus also took minutes at an August 5, 2004 staff meeting, where she noted that "SRI . . . is ½ owned by each doctor. If something God forbid happens and they pass away, their shares in the company would all transfer over to the remaining doctor . . . to run SRI." The meeting notes also stated that at the August 5, 2004 meeting, Dr. Munjack joked that he "hopes it's Dr. Murphy who dies first."

A November 28, 2007 document, handwritten and signed by Dr. Munjack, purported to "amend any legal document which pertains to the inheritance of my half of [SRI]. In years past, I have left my shares, in case of my death to Dr. John Murphy. As

of now I would like to change the beneficiary to . . . my wife, . . . my son, . . . and . . . my daughter each with an equal 1/3 share of my half of the business."

Dr. Munjack died on May 10, 2008.

The parties submitted trial briefs to the court. The trust contended Dr. Murphy's claim to SRI was barred by the statute of frauds applicable at the time the 1994 agreement was made, former section 150. (Stats. 1990, ch. 79, § 14, repealed by Stats. 2000, ch. 17, § 2.) The trust contended that none of the exceptions to the statute were satisfied, as the holographic instrument introduced into evidence did not contain the material terms of the agreement, and did not evidence the existence of a contract. The trust also argued that equitable estoppel did not apply, because there was scant evidence that Murphy relied upon the promise to his detriment. Dr. Murphy's trial brief contended that the statute of frauds was inapplicable, because the doctors' agreement was not a contract to make a will, but a partnership contract that "became an executory contract once the first doctor died." Dr. Murphy also contended that even if the statute of frauds applied, the contract fell within its exceptions, because Dr. Munjack's holographic will referenced the agreement, and estoppel prevents application of the statute of frauds, because Dr. Murphy worked for SRI for 14 years based on the agreement, and would not have done so otherwise because of his bad experience with business partners. Dr. Murphy also contended that section 21700 applied to the contract, rather than former section 150.

Before taking the matter under submission, the trial court stated that "based upon the testimony that I have heard I believe there's been unrefuted clear and convincing testimony regarding the existence of this oral agreement between [Dr.] Munjack and Dr. Murphy, so that remains to be a legal issue as to whether that would be enforceable, but there has been no countervailing testimony and no impeachment that I found credible regarding the existence of the agreement between these two individuals. [¶] I think it is more a legal question as to whether that survives anything further inasmuch as I heard other testimony and I think we have admitted the holographic instrument that was executed by Dr. Munjack and it would be whether, number one, whether the oral

agreement is enforceable; and then number two, whether it is superseded or otherwise canceled out by Dr. Munjack's later writing."

The trial court ruled on the submitted matter by minute order dated October 26, 2011, granting the trust's petition and denying Dr. Murphy's cross-petition. Dr. Murphy requested a statement of decision on October 31, 2011, which the trial court denied as untimely, because the trial lasted for less than one calendar day. Dr. Murphy filed a notice of appeal on December 16, 2011. The trial court issued a judgment on January 26, 2012, reiterating its rulings made in the October 26, 2011 minute order.

The trust filed a memorandum of costs on February 7, 2012. Dr. Murphy moved to strike the cost bill as untimely, arguing that the October 26, 2011 minute order granting the trust's petition and denying Dr. Murphy's cross-petition was the operative order for purposes of calculating the time within which the cost memorandum had to be filed, rather than the later judgment. The trust countered that the memorandum of costs was timely, because the October minute order was not a final judgment. On April 13, 2012, the trial court found that the memorandum was timely. Dr. Murphy filed another notice of appeal on March 22, 2012. This court consolidated the appeals.

We asked the parties to provide further briefing on "whether the trial court's October 26, 2011 minute order is a final appealable judgment (see §§ 850, 1300, 1048, subd. (a)) initiating the deadline for filing a memorandum of costs (Cal. Rules of Court, rule 3.1700; see *Oppenheimer v. Ashburn* (1959) 173 Cal.App.2d 624, 635 ['Since the statute requires that the memorandum be filed not later than "(10) days after the entry of the judgment," the words "after the entry of the judgment" must refer to the date of finality of judgment, the date from which the time for appeal commences from such judgment']), or was instead a tentative decision (Cal Rules of Court, rule 3.1590); and . . . whether the modification to the parties' contract requires application of [] section 21700 to the entire contract (see Rest.2d Contracts, § 149), or whether former [] section 150 applies." The parties filed timely letter briefs addressing these issues.

DISCUSSION

1. Enforceability of the Agreement

Dr. Murphy argues for a de novo or "clear and convincing evidence" standard of review on appeal. We apply the substantial evidence standard of review because the trial court decided questions of fact and mixed questions of law and fact, and the determination of whether Dr. Murphy's claims fell within the statute of frauds turned primarily on factual findings concerning the character of the agreement rather than any question of law. (See *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271.) Furthermore, there is no "clear and convincing evidence" standard of review on appeal. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.) However, the question of which section of the Probate Code—section 21700 or former section 150—applies to the agreement is one we determine de novo. (*Redevelopment Agency v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.)

Our power to review factual issues begins and ends with the determination as to whether there is any substantial evidence, contradicted or not, which supports the trial court's finding. (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 781.) We do not reweigh the evidence. (*Ibid*.) In resolving the issue of the sufficiency of the evidence, "we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment . . . ." (*Estate of Baker* (1982) 131 Cal.App.3d 471, 476-477.) All conflicts in the evidence must be resolved in favor of the respondent. (*Id*. at p. 477.)

Further, the judgment is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown" by the appellant. (*Ibid*.) Moreover, " '[t]he absence of a statement of decision . . . does not affect the standard of review. We presume that the court's order is supported by the record; if there is substantial evidence in the record to support the court's implied finding

of fact, the factual finding will be upheld.' " (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148, italics omitted.)

The statute of frauds applies to a "contract to make a will or devise" or "not to revoke a will or devise." (See § 21700; see also former § 150.) The "[p]urpose of the statute of frauds is to prevent fraud and perjury with respect to certain agreements." (*Sousa v. First California Co*. (1950) 101 Cal.App.2d 533, 542.) Dr. Murphy relies on *Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1065, contending the agreement was not to make a will, but was a partnership agreement outside the statute of frauds. However, *Byrne v. Laura* concerned a cohabitant support agreement against decedent's estate, and concluded that decedent's promise to "take care of [the claimant] for the rest of her life" was not a contract to make a will. (*Id*. at pp. 1063, 1065.)

Here, there was ample evidence that Dr. Murphy and Dr. Munjack agreed that if either of them died, the other would succeed to the other's 50-percent interest in SRI, and that the decedent's shares of SRI would not be passed to anyone else. Although there was testimony that the agreement also contemplated the transfer of shares to the remaining partner upon retirement or disability, the agreement clearly sought to limit the doctors' ability to make contrary dispositions of the shares of SRI by testamentary instrument. Therefore, substantial evidence supports the trial court's implied finding that the contract Dr. Murphy attempted to enforce against the estate was a contract to make a will, and therefore fell within the statute of frauds.

At the time the agreement between the doctors was made, former section 150 applied. (See former § 150; § 21700, subd. (c).) It provided that "(a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate . . . can be established only by one of the following: [¶] (1) Provisions of a will stating material provisions of the contract[;] [¶] (2) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract[;] [¶] [and] (3) A writing signed by the decedent evidencing the contract." (Former § 150.) The doctrine of equitable estoppel has been applied in cases decided under former section 150. (*Juran v. Epstein* (1994) 23 Cal.App.4th 882, 892 (*Juran*).) The evidence adduced at trial showed the

parties' agreement was amended after the effective date of section 21700, which replaced former section 150, to include a 10-percent widow's benefit. (See § 21700, subd. (c).) Section 21700 differs from former section 150 in that it additionally permits establishment of a contract by "[c]lear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity." (§ 21700, subd. (a)(5).)

Neither this court nor the parties found any controlling authority on which statute of frauds applies when a contract is modified after the statute was amended. To the extent the widow's benefit agreement modified the earlier agreement, we conclude that the most sensible approach is that section 21700 controls the entire agreement, as a modified contract is generally viewed as encompassing the earlier one. (Rest.2d Contracts, § 149, subd. (1), p. 374 ["For the purpose of determining whether the Statute of Frauds applies to a contract modifying but not rescinding a prior contract, the second contract is treated as containing the originally agreed terms as modified."]; *id*., § 149, com. a, p. 374 ["Where one contract modifies another, the terms of the new contract are found partly in the original contract and partly in the modifying contract. In applying the Statute of Frauds, the new contract is viewed as a whole."]; see also Civ. Code, § 1642 ["Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together"].)

Nevertheless, under either statute, substantial evidence supports the trial court's implied finding that the contract was unenforceable. Dr. Murphy contends that Dr. Munjack's holographic will satisfies the statute of frauds, as a will stating the material provisions of the contract; an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or a writing signed by the decedent evidencing the contract. (See former § 150; § 21700.) The November 28, 2007 document was handwritten and signed by Dr. Munjack, purporting to "amend any legal document which pertains to the inheritance of my half of [SRI]. In years past, I have left my shares, in case of my death to Dr. John Murphy. As of now I would like to change

the beneficiary to . . . my wife, . . . my son, . . . and . . . my daughter each with an equal 1/3 share of my half of the business." The writing does not satisfy the requirements of the Probate Code, because it does not contain the material terms of the agreement, and does not necessarily evidence a *contract* between Dr. Munjack and Dr. Murphy, but rather could equally reflect an intent to gift Dr. Munjack's shares of SRI to Dr. Murphy. (See *Juran, supra,* 23 Cal.App.4th at p. 891.)

Dr. Murphy also contends the trust is estopped from invoking the statute of frauds. The doctrine of estoppel has been applied where, after one party has been induced to make a serious change of position in reliance on the contract, denying enforcement would result in an unconscionable injury. (*Estate of Housley* (1997) 56 Cal.App.4th 342, 351; *Juran, supra,* 23 Cal.App.4th at p. 897.) For example, when a party devotes work, energy and effort on behalf of a promissor and in reliance on the promises made forgoes opportunities elsewhere, " 'equity will give relief equivalent to specific performance by impressing a constructive trust upon the property which decedent had promised to leave to plaintiff.' [Citation.]" (*Estate of Brenzikofer* (1996) 49 Cal.App.4th 1461, 1467.) Whether equitable estoppel should be applied in a given case is generally a question of fact. (*Byrne v. Laura*, *supra*, 52 Cal.App.4th at p. 1068.) Here, the only evidence of estoppel was that Dr. Murphy had intended to return to Florida after completing his residency, and that he would not have entered into the partnership if he knew he would have a partner other than Dr. Munjack. However, he did not pay anything for his shares of SRI, there was no evidence of forgone opportunities, or of any detriment from the new partnership structure. In fact, in the later years of the partnership, both doctors received substantial compensation of over $1 million annually. Therefore, there is substantial evidence supporting the trial court's implied finding of no estoppel.

Lastly, Dr. Murphy contends the trial court concluded "there was clear and convincing evidence" of the existence of a contract, and therefore, section 21700, subdivision (a)(5) was satisfied. Although the court stated that there was "clear and convincing" evidence of an agreement between the parties, a judgment may not be impeached by a judge's comments on the evidence. (*Estate of Hudspeth* (1964) 225

Cal.App.2d 759, 764-765.) Furthermore, the trial court acknowledged it was still required to determine "whether the oral agreement is enforceable."

2. Costs

Dr. Murphy contends the trust's cost bill was untimely, because it was not filed within 15 days of notice of the trial court's October 26, 2011 "RULING AFTER TRIAL BY COURT," which ruled on "[t]he matter . . . submitted" following the "bench trial in this matter," and denied Dr. Murphy's cross-petition under section 850. This order also directed the clerk to give notice, did not order one of the parties to prepare a final judgment, and was not signed by the judge. Dr. Murphy filed a notice of appeal from this order on December 16, 2011. The trial court later issued a separate "Judgment After Trial By Superior Court" on January 26, 2012, making the same findings as contained in its earlier minute order. The trust filed its memorandum of costs on February 7, 2012. Dr. Murphy filed a second notice of appeal on March 22, 2012.

Under Code of Civil Procedure section 1034, subdivision (a), prejudgment costs "shall be claimed and contested in accordance with rules adopted by the Judicial Council." Rule 3.1700 of the California Rules of Court provides that "[a] prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first." Code of Civil Procedure section 664.5, establishing the requirements for entry of judgment, provides that a " 'judgment' . . . includes any judgment, decree, or signed order from which an appeal lies." (Code Civ. Proc., § 664.5, subd. (c).) The time requirements for filing a cost bill are mandatory. (*Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, 426.)

The trust contends the October 26 minute order was not a formal judgment, and therefore did not trigger the deadline for filing a memorandum of costs. We disagree. The Probate Code does not require formal judgments. (§§ 1046 ["The court shall hear and determine any matter at issue and any response or objection presented, consider

evidence presented, and make appropriate orders."]; 1048, subd. (a) [orders of the probate court need only be entered into the court's minutes to be effective]; see also *Carroll v. Carroll* (1940) 16 Cal.2d 761, 768 [formalities of Code Civ. Proc., § 664 et seq., concerning civil judgments, are inapplicable to probate proceedings].) In fact, the proceedings here were commenced under section 850, which provides, "The following persons may file a petition requesting that the court make an *order* . . . ." (§ 850, subd. (a), italics added.) The time for filing a memorandum of costs runs from "the date of finality of judgment, the date from which the time for appeal commences from such judgment." (*Oppenheimer v. Ashburn*, *supra*, 173 Cal.App.2d at p. 635.) Code of Civil Procedure section 904.1, subdivision (a)(10) provides that an appeal may be taken from "an order made appealable by the provisions of the Probate Code." Section 1300, subdivision (k) provides that "[o]rders . . . adjudicating the merits" of a section 850 claim are appealable. (*Estate of Redfield* (2011) 193 Cal.App.4th 1526, 1534.) Nothing in any of these sections requires a formal judgment from the court.

The trust characterizes the minute order as a "statement of . . . ruling," rather than a judgment. However, the trial court was not required to issue a tentative decision because the trial lasted less than one day, and no request for a statement of decision was timely made. (Code Civ. Proc., § 632.) It is clear that the order was not preliminary and did not contemplate preparation of a final judgment. (Cal. Rules of Court, rule 3.1590, subds. (h), (*l*) [the issuance of a tentative decision is necessary only when a written judgment is required]; rule 8.104, subd. (c)(2) ["The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed"].) Therefore, the formal judgment later issued by the court is a nullity.

Because the October 26, 2011 minute order was an appealable order, the time for filing a memorandum of costs began to run from the date that the clerk gave notice of entry of that order (also October 26), and the February 7, 2012 memorandum of costs was untimely.

DISPOSITION

The judgment is affirmed. The order awarding costs is reversed. The parties are to bear their own costs on appeal.

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GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

SORTINO, J. *

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.