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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

LINDA DOMINGUEZ,

Plaintiff, Cross-defendant and
Appellant,

v.

BRUCE CARROLL et al.,

Defendants, Cross-complainants and
Respondents.

B228309

(Los Angeles County
Super. Ct. No. BC399684)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Debre K. Weintraub, Judge. Affirmed.

Linda Dominguez, in pro. per., for Plaintiff, Cross-defendant and Appellant.

Young & Young and George W. Young for Defendants, Cross-complainants
and Respondents.

Plaintiff, cross-defendant and appellant Linda Dominguez (Linda), in propria persona, appeals a judgment in favor of defendants, cross-complainants and respondents Purita Dominguez (Purita) and Bruce Carroll (Carroll), following a jury trial.¹

Linda raises numerous assignments of error. We do not perceive any prejudicial error in any of the trial court's rulings and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Pleadings.

a. Linda's complaint.

In April 2009, Linda filed the operative first amended complaint against her sister, Purita, and Purita's husband, Carroll. Linda alleged in relevant part:

In July 2007, the parties entered into an oral agreement that when Linda was ready to relocate from Hawaii to California, she could occupy a portion of the home owned by Purita and Carroll in Glendale (the Glenhurst property), for a rent of \$1,100 per month. Each month thereafter, to secure her commitment, Linda sent Purita and Carroll a check for \$1,100, even though Linda was still living in Hawaii. In January 2008, while Linda was still in Hawaii, Purita and Carroll breached the contract by terminating the rental agreement and advising Linda the house would be occupied by others.

The complaint also included a cause of action for recovery of personal property. Linda alleged that in 2006, while the parties were on good terms, Linda entrusted Purita with several items of jewelry worth several hundred thousand dollars, based upon Purita's "inducement, promise and commitment that she shall safely keep said valuables in her custody until [Linda] would ask for their return when [Linda] has finally relocated to California." In July 2008, Linda requested return of the jewelry but Purita refused to return the valuables and ignored Linda's request.

¹ We refer to the Dominguezes by their first names for purposes of clarity and not out of disrespect. (*In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

The complaint also pled causes of action for invasion of privacy, intentional infliction of emotional distress, embezzlement, conversion and theft.

b. Purita and Carroll's cross-complaint.

In May 2009, Purita and Carroll filed a cross-complaint against Linda.

Carroll sought to recover from Linda the balance due on a promissory note. Carroll alleged that in February 2007, he lent Linda \$115,000 pursuant to a written promissory note (a copy of which was attached to the pleading). Carroll alleged that in April 2007, the parties entered into a written modification (also appended to the pleading), at which time Linda repaid all but \$30,000 of the amount due. The current balance due and owing was \$33,600 but Linda had refused to pay.

As for Purita, she alleged that in 2004, she lent Linda \$50,000 by check with "loan" written thereon, and in 2007, she lent Linda an additional \$50,000, which loans were due on demand. Linda had refused to repay the loans, causing damage to Purita in the amount of \$100,000 plus prejudgment interest.

c. Trial and verdict.

On April 12, 2010, the matter came on for a jury trial. The evidence showed, inter alia:

Linda gave certain jewelry to Purita because Linda wanted to remove her assets from Hawaii before they were seized by her judgment creditors.

Linda needed a personal loan while she refinanced her personal residence in Hawaii in order to satisfy a malpractice judgment against her. Carroll lent Linda \$115,000 for a short term loan. On February 9, 2007, Linda signed a promissory note for the \$115,000, due in full on March 10, 2007; said note contained an attorney fee clause. Linda repaid Carroll \$85,000 but requested additional time to pay the remaining \$30,000. Carroll agreed to a two-year extension and on April 20, 2007, Linda signed the loan modification. However, Linda later failed to repay Carroll the \$30,000.

Linda also borrowed a total of \$100,000 from Purita, which remained unpaid. The first loan was by way of a check from Purita to Linda, dated May 7, 2004; the check bore the notation “loan.” The second loan was by way of a \$50,000 wire transfer to Linda, dated January 29, 2007. Linda admitted at trial that she borrowed \$100,000 from Purita. There was no dispute as to the existence of the \$100,000 loan; the controversy was whether it had been repaid.

The evidence showed Linda had not repaid the \$100,000 the Purita. Linda was asked, “you never paid [Purita] any cash; correct?” Linda responded, “I paid her the condominium.” Linda’s position at trial was that she repaid Purita by transferring part ownership of a Honolulu condominium to her. However, the conveyance by Linda was to two other siblings, Norma Isip and Tessie Dominguez, *not to Purita*. Further, the deed contained a recital that the conveyance was “in consideration of . . . \$425,000, *paid by the buyers,*” i.e., the transferees. (Italics added.) Purita was not one of the transferees named in the conveyance.

The jury returned a special verdict in favor of Purita and Carroll, awarding them damages of \$100,000 and \$30,000 respectively. With respect to the jewelry, the jury found Purita had to return the jewelry to Linda, but that Linda was not damaged by Purita’s failure to return the jewelry to her.

Pursuant to the verdict, the trial court entered judgment as follows. On Linda’s complaint, it entered judgment in favor of Purita and Carroll, “*except* that [Purita] shall return jewelry to [Linda].” On Purita and Carroll’s cross-complaint, the trial court awarded Carroll damages against Linda in the sum of \$30,000 as well as attorney fees pursuant to the contract, and awarded Purita damages against Linda in the sum of \$100,000, as well as prejudgment interest.

Linda unsuccessfully moved for a new trial. Linda then filed a timely notice of appeal from the judgment.

CONTENTIONS

Linda does not challenge the sufficiency of the evidence to support the verdict.

Linda's contentions are as follows: (1) the trial court erred in denying her motion to continue the trial date and to extend or reopen discovery; (2) she was substantially prejudiced by the trial court's erroneous statement of the case to the jury; (3) the trial court committed prejudicial evidentiary error in excluding her exhibits; (4) Purita's claims with respect to the two loans are time-barred as a matter of law; (5) cross-complainant Purita is not entitled to prejudgment interest; (6) cross-complainant Carroll is not entitled to attorney fees and costs; and (7) it is Linda who is entitled to attorney fees, costs and prejudgment interest.

DISCUSSION

1. *Trial court acted within its discretion in denying Linda's request to continue the trial date and extend or reopen discovery.*

On March 9, 2010, Linda filed a motion to continue the date of trial, which was scheduled to commence on April 6, 2010. Linda's supporting declaration stated she needed to take the deposition of her sister, Norma Isip, a nonparty, who lives in Seattle.

Purita and Carroll opposed a continuance of trial. Their papers indicated they had commenced discovery in May 2009, but Linda did not begin her discovery until late January 2010.

The trial court denied Linda's request for a continuance of trial. At the hearing on the motion for new trial, the trial court explained why it had denied a continuance of the trial: "[Linda] had over 18 months to conduct discovery. Plaintiff waited until 45 days before trial to attempt to take Norma Isip's deposition. There was no good cause to continue the trial and reopen discovery. Plaintiff provided no good cause why the deposition could not have been taken earlier. This court finds it was not an abuse of discretion to deny plaintiff's request to continue trial and reopen discovery." (Italics added.)

We review the trial court's decision denying a continuance under the deferential abuse of discretion standard. (*Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 858, 863.) In view of Linda's delay in prosecuting discovery, we do not perceive an abuse of discretion in the trial court's denial of Linda's request for a continuance.

Linda emphasizes this was her *first* motion to continue the trial date and therefore the motion should have been granted. However, Linda was not merely seeking an extension of time to respond to pleadings or discovery – rather, she was seeking to delay the trial. The controlling rule is California Rules of Court, rule 3.1332(a), which states: “To ensure the prompt disposition of civil cases, *the dates assigned for a trial are firm*. All parties and their counsel must regard the date set for trial as certain.” (Italics added.)

Although a party's “excused inability to obtain essential testimony . . . despite diligent efforts” (Cal. Rules of Court, rule 3.1332(c)(6)) would justify a continuance, the trial court properly denied Linda a continuance on that basis.

2. *No merit to Linda's contention relating to trial court's opening statement to the jury.*

At the commencement of trial, the trial court read an opening statement to jury, which provided in pertinent part: “Plaintiff *admits* the defendant Bruce Carroll lent her \$115,000 *on which she currently owes \$30,000* but claims the amount is not yet due. [¶] Defendant Purita Dominguez claims that she lent plaintiff \$100,000 which plaintiff has not repaid. *Plaintiff asserts this was a gift and denies she owes defendant Purita Dominguez any money.*”

Linda contends these statements were erroneous and seriously prejudiced her case. The record is contrary.

a. *The statement that Linda “admits” owing \$30,000 to Carroll.*

Prior to trial, the trial court and counsel discussed the scope of the issues. Attorney Young, who represented Purita and Carroll, stated: “[Linda] doesn’t dispute she owes [Carroll] \$30,000. . . . The question is – her only issue is: is it now due or is it not now due?”

The trial court then asked Linda: “When is it due?” Linda responded “There is actually a period of time that I was supposed to pay him. . . . That date was when I was going to receive my money from the corporation.”

In view of the above, the trial court properly advised the jury that Linda admitted the existence of the \$30,000 debt to Carroll, and that Linda’s position was that the \$30,000 payment was not yet due.

b. *The trial court’s statement that Linda claimed the \$100,000 from Purita was a gift.*

The trial court also told the jury that Linda claimed she had received \$100,000 from Purita as a gift and therefore she did not owe Purita anything. To quote, the trial court told the jury: “*Plaintiff asserts this was a gift* and denies she owes defendant Purita Dominguez any money.” (Italics added.)

Linda asserts this statement was erroneous; Linda asserts the reason she did not owe Purita any money is that she had *repaid* Purita with real estate. Outside the presence of the jury, Linda stated to the trial court: “I have a concern about the statement of the court to the jury about the \$100,000 that Purita Dominguez loaned me, and that it was [a gift]. *I never said it was a gift*, your honor. I said that it was paid by the condominium that I have in Honolulu. . . . That’s why I wanted to . . . rectify it.” (Italics added.)

The trial court responded that Linda had not objected at the time the trial court read the opening statement, and that Linda could correct it during her opening statement.

Shortly thereafter, the trial court gave preliminary instructions to the jury, at which time it clarified this point. The trial court stated: “Now, at the beginning of this trial, I read to you a brief statement of what the case was about. Now, that was not evidence, and the court may have misspoke, that the plaintiff does not assert that the money that

defendant Purita Dominguez claims she lent plaintiff, \$100,000, which plaintiff has not repaid. *Plaintiff does not assert it was a gift*, but she does deny that she owes any money to her.” (Italics added.)

Given this clarification by the trial court, Linda cannot show prejudicial error in the trial court’s earlier statement that Linda claimed Purita had given her \$100,000 as a gift.

3. *Evidentiary rulings relating to exclusion of Linda’s trial exhibits.*

Linda contends her rejected exhibits showed that Purita became a co-owner of the Honolulu condominium and that Purita agreed to be paid for the 2004 and 2007 loans via a proportionate share of said real property. Although Linda contends the trial court committed prejudicial error in its evidentiary rulings sustaining objections to numerous exhibits, the discussion in Linda’s briefs is confined to exhibits 24 and 26.

Our review is guided by the principle that “to obtain a reversal based on the erroneous exclusion of evidence, [appellant] is required to show a ‘miscarriage of justice,’ meaning that ‘a different result was probable if the evidence had been admitted.’” (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1223; see Cal. Const., art. VI, § 13; Evid. Code, § 354.)” (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1348.) Linda has not her burden.

a. *Exhibit 24.*

Exhibit 24 was a copy of a letter from Linda to her family members dated April 13, 2008.

The respondent’s brief points out that Linda’s opening brief does not contain a transcript reference that exhibit 24 was offered into evidence. Linda’s reply brief acknowledges the trial court’s “unmention” of exhibit 24 in its evidentiary rulings, but again fails to show exhibit 24 was actually offered into evidence. Therefore, we do not address the admissibility of exhibit 24.

b. *Exclusion of exhibit 26; no merit to Linda's theory it should have been admitted as an adoptive admission.*

Exhibit 26 was an April 14, 2008 letter from Linda which was directed to her sister Tessie Dominguez. At the top of the letter is the notation: "Purita, please assist in faxing to Mrs. Isip." The letter to Tessie stated in pertinent part: "I told you that if you wish your contribution back, the other owners or another private person can buy your portion of the ownership. The bank will finance the loan of the buyer and pay you off completely including the portion of Celiang Liclican (*Purita can be included if she wants to*)." (Italics added.)

At trial, Purita testified she received the letter via fax and that she simply put it aside because she was recuperating after being hospitalized.

Linda's theory of admissibility was that Purita, as a recipient of the letter, made an adoptive admission that she was a part owner of the Honolulu condominium.

The trial court excluded exhibit 26 on the ground of "authenticity, foundation, and hearsay."² In substance, the trial court ruled, "I don't think [Purita] adopted the contents. What I heard her say is she received it. That's what I heard, not that she adopted it."

Ordinarily, receipt of a letter containing false statements does not impose on the recipient the duty to reply, but failure to reply when such statements "are calculated to draw forth a reply, may be the ground for an inference that the statements are true." (*Simpson v. Bergmann* (1932) 125 Cal.App. 1, 8; see generally, 31 Cal. Jur. 3d Evidence § 263, updated February 2012 [adoptive admissions; adoption by conduct; failure to deny].) The trial court properly found that Purita's mere receipt of the letter, which stated "Purita can be included if she wants to," was insufficient to show that Purita adopted the contents thereof.

Moreover, this documentary evidence was merely cumulative. The exclusion of exhibit 26 did not prevent Linda from presenting her case. Linda testified that she repaid

² We note the parties previously had stipulated to the authenticity of exhibit 26, but not to its admissibility.

Purita for the \$100,000 loan by giving Purita a proportionate interest in the Honolulu condominium.

Purita, in turn, disputed Linda's claim that she repaid Purita by giving her partial ownership of the condominium. The reporter's transcript contains the following colloquy between Purita and Linda, who represented herself at trial.

Purita testified: "I was thinking that at some point you are going to pay me, give me money for the loan that you borrowed. . . . I was telling you that I need money. I needed money, *and that I'd rather have money instead of being a part of the condominium.*" (Italics added.)

The colloquy continued:

"Q Now, *when you said that you would rather have money than the condominium after the sale of the condominium*, who did you say that to?

"A To you.

"Q Now, *and did I tell you that I did not have money to pay you? Did I tell you that?*

"A *You told me that.*" (Italics added.)

In sum, there was no evidentiary error by the trial court in its exclusion of exhibit 26. Further, the trier of fact heard all the testimony, weighed the conflicting evidence and disbelieved Linda's assertion she repaid Purita the \$100,000 by giving her partial ownership of the Honolulu condominium. The jury determined Linda did not "make a payment toward the amount due [to Purita] by transferring any interest in the Hawaiian condo," and that finding is supported by substantial evidence.

4. *Trial court properly denied Linda's post-trial motion seeking dismissal of Purita's cross-complaint on statute of limitations grounds.*

The jury returned its verdict on April 23, 2010. Three months later, on July 29, 2010, Linda filed a motion to dismiss Purita's cross-complaint on the ground both the 2004 loan (evidenced by a \$50,000 check) and the 2007 loan (evidenced by a \$50,000 wire transfer) were barred by the two-year statute of limitations applicable to an action on an oral contract. (Code Civ. Proc., § 339.)

The trial court rejected Linda's post-trial attempt to invoke the statute of limitations. It noted, "[Linda] did not raise the defense at the trial, did not seek a jury instruction for the statute of limitations, did not seek a jury finding on the special verdict for the defense of the statute of limitations. . . . [Linda] waived the issue by failing to address it at trial." The trial court's ruling was proper.

"Forfeiture of a time-bar defense transpires by the failure to raise the applicable statute of limitations in the answer. [Citations]." (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 912.) Further, a defendant must prove the facts necessary to enjoy the benefit of a statute of limitations. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10.)

The record reflects Linda's answer to the cross-complaint did not specifically plead the bar of the two-year statute of limitations. (Code Civ. Proc., § 339.) Linda merely alleged in general terms that the cross-complaint was barred in whole or in part by the "Statutes of Limitations and/or laches."

We conclude Linda forfeited this affirmative defense by failing to plead it and then prove it at trial. The trial court properly denied Linda's post-trial motion to dismiss Purita's claims on statute of limitations grounds.

5. Trial court properly awarded Purita prejudgment interest.

Linda contends the trial court erred in awarding Purita prejudgment interest. The contention fails.

Civil Code section 3287 states in pertinent part at subdivision (a): "Every person who is entitled to recover damages *certain, or capable of being made certain by calculation*, and the right to recover which is vested in him *upon a particular day*, is entitled also to recover interest thereon from that day," (Italics added.)

Linda acknowledges Purita's claim was "certain at \$100,000." However, Linda contends Purita was not entitled to prejudgment interest pursuant to Civil Code section 3287, subdivision (a), because the two loans had no "particular day" to be paid. The argument fails. According to Purita, the two \$50,000 loans were to be repaid on demand.

On May 13, 2009, Purita commenced her cross-complaint to collect on the loans. Thus, the loans were clearly due and payable by the date Purita filed the cross-complaint.

Accordingly, the trial court properly awarded Purita prejudgment interest from May 13, 2009, the date Purita filed her cross-complaint, up to the date of entry of judgment, amounting to \$12,519.88.

6. Trial court properly awarded attorney fees and costs to Carroll pursuant to the attorney fee provision in the promissory note.

Linda asserts the trial court erred in awarding attorney fees and costs to Carroll. The contention fails.

The February 9, 2007 promissory note for \$115,000 contained an attorney fee provision for the maker (Linda) “to pay all collection and attorney’s fees and costs” upon any default. On April 20, 2007, the parties entered into a one-paragraph modification agreement, signed by Linda, giving her an additional two years to repay the \$30,000 balance.

Carroll prevailed on his cross-complaint to collect the balance due on the promissory note; the jury awarded him \$30,000. Having prevailed in his action to enforce the note, the trial court properly awarded Carroll attorney fees and costs thereunder.

7. Linda’s contention she is entitled to prejudgment interest, attorney fees and costs.

Linda contends the trial court should have awarded her prejudgment interest, attorney fees and costs. The argument fails.

As indicated, both Purita and Carroll prevailed on Linda’s complaint for damages and they also prevailed on their cross-complaint. Linda was solely successful on her cause of action for recovery of the jewelry.

Civil Code section 3336 sets forth the measure of damages for wrongful conversion of personalty. However, the jury specifically found Linda was not harmed by Purita's failure to return the jewelry, and it did not award Linda any damages.

Nonetheless, Purita contends she is entitled to prejudgment interest on her cause of action for conversion, pursuant to Civil Code section 3287, subdivision (a). The argument is unavailing. Civil Code section 3287 provides in pertinent part at subdivision (a): "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day." (*Ibid.*) Here, because the trier of fact did not award Linda any damages for conversion, there were no damages on which to base an award of prejudgment interest.

Linda also contends she is entitled to attorney fees on her cause of action for conversion. The argument is without merit. Although damages recoverable under Civil Code section 3336 include "the time and money properly expended in pursuit of the property" (*ibid.*), such damages do not include attorney fees. (*Viner v. Utrecht* (1945) 26 Cal.2d 261, 272.)

Linda also invoked Code of Civil Procedure section 1021.9 as a basis for an award of attorney fees incurred in the recovery of her property, on the theory that the statute provides for fees against one who "trespassed" on "personal property." However, that statute by its terms is inapplicable.³

In sum, Linda's contentions that she should have been awarded attorney fees, costs and prejudgment interest are meritless.

³ Code of Civil Procedure section 1021.9 states: "In any action to recover damages to personal or real property *resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock*, the prevailing plaintiff shall be entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law." (Italics added.)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.