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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ELIZABETH CARPENTER,

Plaintiff, Cross-defendant,
and Appellant,

v.

JAMES CARPENTER, JR.,
Individually and as Administrator,
etc.,

Defendant, Cross-
complainant, and Respondent.

B284363

(Los Angeles County
Super. Ct. No. BC598903)

APPEAL from judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Jr., Judge. Affirmed.

Bret D. Lewis, for Plaintiff, Cross-defendant, and Appellant.

Robert Cipriano, for Defendant, Cross-complainant,
and Respondent.

Plaintiff, cross-defendant, and appellant Elizabeth Carpenter appeals from a judgment in favor of defendant, cross-complainant and respondent James Carpenter, Jr., individually and as administrator of the estate of their mother Betty Jo Carpenter, in this quiet title action.¹ On appeal, Elizabeth contends: (1) the trial court abused its discretion by allowing James to voluntarily dismiss a cause of action during trial without prejudice; (2) property transfers between the parties in 2004 established a title presumption which was not rebutted by the evidence and triggered the statute of limitations on an action for a resulting trust; and (3) the trial court abused its discretion by refusing to allow oral testimony at a hearing on a motion for new trial and denying her motion on the merits. We conclude the trial court did not abuse its discretion by allowing James to dismiss a cause of action without prejudice. Substantial evidence supports the trial court's finding that Elizabeth and James held title to the properties at issue on behalf of their mother, resulting in a trust arrangement which was not breached until Elizabeth

¹ Because more than one party shares the last name Carpenter, they will be referred to individually by their first names for clarity.

claimed sole ownership of the properties in this quiet title action. We also find no abuse of discretion in connection with the motion for a new trial. Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Ownership of Properties

Betty Jo owned seven parcels of property and had eight children, including Elizabeth and James. Elizabeth and James lived with their mother in her house at various periods of time. Target Stores brought a lawsuit against several defendants, including Betty Jo and her daughter Charlotte Browning. Fearing a judgment would be entered against her, Betty Jo signed quitclaim deeds on May 9, 1999, granting her properties to Elizabeth and James as joint tenants. Betty Jo wanted to make sure that she did not lose her property. Three days later, judgment was entered against Betty Jo, Charlotte, and others in the amount of \$171,729.10. Betty Jo retained possession of the quitclaim deeds after they were recorded and continued to live in the house. The rent from the properties and Betty Jo's social security checks were deposited into a bank account that Betty Jo held jointly with Elizabeth. Money from the accounts paid Betty Jo's living expenses and all the costs of the properties. In 2003, Betty Jo applied for a loan of \$8,000 on one of the properties in order to pay for kitchen cabinets.

She told the lender that she owned the property. James, Elizabeth and Betty Jo signed the loan documents.

On February 10, 2004, James quitclaimed his interest in several of the parcels to Elizabeth. Three days later, Elizabeth quitclaimed five percent interest in the parcels back to James. In 2009, Elizabeth moved back in with Betty Jo to assist her with financial affairs and caretaking. Elizabeth earned very little from outside employment. Betty Jo died intestate on July 15, 2015.

Quiet Title Proceedings

On October 23, 2015, Elizabeth filed this action against James for quiet title and quantum meruit. She alleged that although she and James owned the properties, Elizabeth had paid the taxes and maintenance. She wanted to purchase the interest held by James, with an equitable offset for amounts that she had spent which should have been shared expenses. On December 16, 2015, James, individually and in his capacity as administrator of Betty Jo's estate, filed a cross-complaint against Elizabeth for declaratory relief, cancellation of written instruments, quiet title, and double damages under Probate Code section 859.

A bench trial was held on October 31 and November 1, 2017. In Elizabeth's opening statement, her attorney stated that the evidence would show Betty Jo was proud of the property that she had accumulated and wanted it to be protected. She loved her family but did not love the choices

that her children had made. When Elizabeth was a child, Betty Jo said that the property would be hers one day. Betty Jo said that she was going to take care of her children and grandchildren during her lifetime, but before she died, the property would belong to Elizabeth and it would be up to her to decide what she wanted to do with it. James had transferred his interest to Elizabeth in 2004 in order to avoid a paternity judgment reaching the property, which demonstrated unclean hands. Elizabeth's attorney also stated that two days before Betty Jo passed away, she told Elizabeth that "she'd love for her to keep this property together in the family. But she said to her, 'After I go, if things go crazy, if your brothers and sisters start, you know, making claims to this property, doing crazy things,' she said, 'sell the property, move away and don't give anyone your forwarding address.' Because she was fearful of what was going to happen after her passing. And she was right in many respects because what she feared has actually taken place."

Elizabeth was the sole witness for her case-in-chief. Elizabeth testified that her mother had loved all of her children. Betty Jo was not in agreement with the decisions that her children made, but she maintained a relationship with them. When Elizabeth was 13 years old, her mother said she was going to take care of her grandchildren while she was alive, but before she died, she would transfer the property to Elizabeth and it would be hers. Elizabeth stated, "Her [hope] was that I could keep the property in the family."

That somehow the family would come together, we would work together to maintain the property and build on what she had originally established.” Elizabeth did not know why her mother gave half of the property to her and half to James. James quitclaimed his share of the property to Elizabeth in 2004 to evade a child support judgment. Elizabeth was paying all the bills on the property. She and her mother did not feel James’s girlfriend was entitled to a share of the property given to them by Betty Jo. Elizabeth quitclaimed five percent back to James because he had an income from driving trucks, while Elizabeth, who was taking care of her mother, only had income from the property. Two days before her mother died, Betty Jo told Elizabeth that she wished Elizabeth to keep the property in the family. Betty Jo did not want the property sold. She did not want loans to be taken out on the property, except for repairs or property development, and no refinancing of the properties to take money out. She told Elizabeth that if her brothers and sisters started fighting her to take the property, Elizabeth should sell it and move forward with her life. If that happened, Elizabeth should not interact with them in any way, change her name and address, and not to leave a forwarding address or phone number. Elizabeth claimed the properties on her income taxes except one parcel that James was supposed to claim on his taxes.

James testified in his case-in-chief that he signed the 2004 quitclaim deeds without reading them, because Elizabeth said his mother wanted them signed to get some

repairs done. Betty Jo told James that if anything happened to her, she wanted her kids to have her property. If the properties were returned to the estate, as administrator of Betty Jo's estate, he intended to distribute the properties to Betty Jo's children in equal shares.

James also called two of Betty Jo's daughters as witnesses. Betty Jo's daughter Sandra Jones testified that James and Elizabeth lived with Betty Jo and maintained rooms in her house. Betty Jo explained that she had a judgment against her and did not want to lose her property, so she was transferring everything to James and Elizabeth. Betty Jo also said everything she had was to go to all eight of her kids. Jones did not know about the transfer of James's interest to Elizabeth. Browning testified that Betty Jo said she wanted the family to keep the property, which included all of the children, and she did not want it to be sold. A week before Betty Jo died, she told Browning that she wanted the property to remain in her family so her grandchildren would always have a place to come back to.

After the presentation of evidence, James moved to dismiss the cause of action for double damages under Probate Code section 859 without prejudice. The trial court clarified that it was the fourth cause of action on the cross-complaint and stated that it would be dismissed. The court permitted the parties to file amended pleadings in order to correct the descriptions of the properties at issue. Elizabeth filed an amended complaint. James filed an amended cross-complaint on November 9, 2016, containing proper

descriptions of the parcels and alleging causes of action for declaratory relief, cancellation of written instruments, and quiet title.

On February 1, 2017, the trial court issued a tentative statement of decision in favor of James, individually and in his capacity as administrator of Betty Jo's estate. The court found clear and convincing evidence that Betty Jo intended James and Elizabeth to hold title to the properties in trust for the benefit of all the siblings. Betty Jo did not intend an immediate transfer of title, as she continued to collect and use rents for her living expenses. She only transferred the properties to shield them from a potential judgment lien. It was her intent to protect the properties for the benefit of all her children. She maintained custody of the deeds after recording. Three siblings testified that the properties were for the benefit of all the siblings, and Elizabeth testified that Betty Jo wanted to keep the properties in the family. Betty Jo maintained all the indicia of ownership after she quitclaimed the properties.

The court found a resulting trust was created at the time that Betty Jo executed the quitclaim deeds. The properties were transferred to James and Elizabeth with their full knowledge that they were to hold title in trust and for the benefit of all of Betty Jo's children. Elizabeth and James accepted the transfers with the knowledge of Betty Jo's intentions. Elizabeth breached her duty to hold the property in trust for the intended beneficiaries on October 23, 2015, when she filed the instant action seeking to quiet

title entirely in her name. The court found the proper remedy was to cancel the quitclaim deeds under Civil Code section 3412. Upon cancellation of the deeds, the trial court restored the properties to Betty Jo's estate.

The court found in favor of James in his capacity as administrator of Betty Jo's estate on the causes of action for quiet title and declaratory relief. The court further found that the deeds in which James conveyed his interest in the properties and Elizabeth conveyed an interest back to James were to be cancelled. The court found the deeds were derivative of the void or voidable 1999 quitclaim deeds from Betty Jo to James and Elizabeth. The court found against Elizabeth on her causes of action for quiet title and quantum meruit. Elizabeth had failed to meet her burden of proof that she had expended any of her own funds for expenses related to the properties or had the resources to do so. Although she had raised the statute of limitations as an affirmative defense to the cross-complaint, the court found that the statute of limitations did not accrue until Elizabeth filed this action on October 23, 2015, and asserted a sole fee interest in the properties. James's cross-complaint filed less than two months later was not barred by the applicable statute of limitations.

As a result, the court found in favor of James in his individual capacity and as the administrator of Betty Jo's estate on each cause of action asserted in the cross-complaint. The court ordered the 1999 and 2004 quitclaim deeds cancelled under Civil Code section 3412, and quieted

and restored title to the estate of Betty Jo. As administrator, James was to distribute the properties equally to all of the children of Betty Jo. The court found James was the prevailing party as well.

Elizabeth filed a substitution of attorney substituting attorney Bret Lewis in place of her former attorney Robert Liskey. She filed objections to the statement of decision and proposed judgment. On March 15, 2017, the trial court entered judgment in favor of James, cancelling the 1999 and 2004 quitclaim deeds related to the property.

On June 23, 2017, Elizabeth filed a motion for a new trial on the grounds of irregularity in the proceedings, order of the trial court that prevented Elizabeth from having a fair trial, accident or surprise, newly discovered evidence, and abuse of discretion of the court. Elizabeth stated that a former girlfriend of James had introduced her to a paralegal who worked with attorney Liskey. The paralegal had provided legal advice to Elizabeth, was illegally practicing law, and was impermissibly splitting fees with Liskey. This conflict of interest caused an irregularity in the proceedings that justified a new trial. Liskey consented to James's appointment as administrator of Betty Jo's estate. If Elizabeth had been aware of the preexisting relationships between the parties, she would not have hired the paralegal. Liskey conducted no discovery and sabotaged Elizabeth's case by admitting in the opening statement that Betty Jo wanted to keep the property in the family. Elizabeth asked the court to grant an evidentiary hearing so that she could

demonstrate the extent to which her representative had conspired with James, his former girlfriend, and the paralegal. She filed a declaration in support of the motion for a new trial stating that she never should have filed an action for quiet title, because she did not dispute the state of recorded title. Her representative had not discussed a partition action with her.

James opposed the motion for a new trial. He argued that Elizabeth had not shown her attorney's conduct resulted in any prejudicial error as to how the case was litigated or would have resulted in different findings by the trial court. The court's decision was based on the evidence at trial, including Elizabeth's testimony. Elizabeth filed a reply in which she argued it was attorney misconduct to bring the action on her behalf at all, because the statute of limitations would have run on claims against the estate if she had waited a year.

Elizabeth filed a request on July 18, 2017, to produce oral evidence at the hearing on the motion for a new trial. Specifically, she sought to introduce testimony from Liskey and the paralegal. A hearing was held on the motion on July 21, 2017. Attorneys appeared on behalf of the witnesses who had been subpoenaed. The trial court refused to allow oral testimony and denied the motion for a new trial. Elizabeth filed a timely notice of appeal.

DISCUSSION

Dismissal of Probate Code Cause of Action

Elizabeth contends the trial court abused its discretion by allowing James to voluntarily dismiss his cause of action under Probate Code section 859 without prejudice. We conclude that no abuse of discretion has been shown.

Under Code of Civil Procedure section 581, subdivision (e), if a party requests dismissal of a cause of action after trial commences, the court must dismiss the cause of action with prejudice, “unless all affected parties to the trial consent to dismissal without prejudice or by order of the court dismissing the same without prejudice on a showing of good cause.”² “The proper decision “rests almost entirely in the discretion of the court below, and appellate tribunals will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion.” [Citations.]” (*Katz v. Campbell Union High School Dist.* (2006) 144 Cal.App.4th 1024, 1036.)

² Code of Civil Procedure section 581, subdivision (e), provides in full: “After the actual commencement of trial, the court shall dismiss the complaint, or any causes of action asserted in it, in its entirety or as to any defendants, with prejudice, if the plaintiff requests a dismissal, unless all affected parties to the trial consent to dismissal without prejudice or by order of the court dismissing the same without prejudice on a showing of good cause.”

On appeal, we presume the trial court's order is correct and require the appellant to affirmatively demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*); *In re Marriage of Bowen* (2001) 91 Cal.App.4th 1291, 1301 (*Bowen*) [appellant has the burden of proving error].) When the appellate record is silent on a matter, the reviewing court indulges all intendments and presumptions that support the order or judgment. (*Denham, supra*, at p. 564; *Bowen, supra*, at p. 1301.) We infer that the trial court made implied findings of fact consistent with its order. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143.)

Failing to object during trial to a party's request for dismissal of a cause of action without prejudice has been found to relieve the moving party of the duty to establish good cause under Code of Civil Procedure section 581, subdivision (e). (See *J.A.T. Entertainment, Inc. v. Reed* (1998) 62 Cal.App.4th 1485, 1493–1494 [moving party was not required to demonstrate good cause for dismissal of alter ego allegations, because inattentive attorney failed to object to dismissal when asked about objections].)

In this case, the trial court impliedly found good cause to dismiss the cause of action without prejudice, particularly because there was no objection by Elizabeth to the request. Elizabeth has not shown that she was aggrieved by the dismissal of the cause of action without prejudice. There is no evidence that James dismissed the claim to manipulate the judicial process or avoid an inevitable end. The causes of

action remaining in the case were decided in his favor. Elizabeth contends that the trial court abused its discretion by allowing James to split a single claim, but she has not demonstrated that the cause of action had to be litigated in the quiet title action, rather than the probate action that was also pending.³ We note that under the doctrines of issue

³ None of the authorities regarding claim splitting cited by Elizabeth suggest that the remedy for a party's failure to pursue a particular claim that involves the same primary right as other claims the party pursues is to require the party to re-litigate its case including the previously omitted claim. Rather, if a party fails to pursue a particular claim, the remedy is for the court in any subsequent action to abate or bar the claim that could have been brought in the prior action. (*Grisham v. Phillip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 642 [“The primary right theory . . . is invoked most often when a plaintiff attempts to divide a primary right and enforce it in two suits. The theory prevents this result by either of two means: (1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement (Code Civ. Proc., § 430.10, subd. (c); [citation]); or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of res judicata [citation.].’ [Citation.] [¶] The cases have invoked the rule against splitting causes of action in order to abate a later suit or bar it on res judicata grounds when that suit alleged a different theory of recovery for the same injury [citations], or a different remedy for the same injury [citations]”).) Thus, even assuming James pursues a Probate Code section

and claim preclusion, the matters decided on the merits in this case could not be relitigated. (Compare *Mesa Shopping Center-East, LLC v. O Hill* (2014) 232 Cal.App.4th 890, 901–902 [party could not voluntarily dismiss claim for injunctive relief after losing at arbitration to avoid paying attorney fees, but any attempt to pursue injunctive relief action would have been precluded by principles of res judicata and collateral estoppel].) Elizabeth failed to object to dismissal of the cause of action without prejudice, which would have required James to demonstrate good cause. No abuse of the trial court’s discretion has been shown.

Resulting Trust and Statute of Limitations

Elizabeth contends the 2004 deeds transferring title established a title presumption which was not rebutted by the evidence. She additionally contends that the 2004 deeds repudiated the trust, triggering the statute of limitations to bring a quiet title action. We conclude substantial evidence supports the trial court’s finding that title was not held as reflected in the title documents, and the trust was not repudiated until the filing of this quiet title action.

“A resulting trust arises by operation of law from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest. [Citations.] Such a resulting trust carries out and enforces

859 claim in the future, the issue regarding claim splitting is an issue to be raised in that other litigation.

the inferred intent of the parties. [Citations.] “Ordinarily a resulting trust arises in favor of the payor of the purchase price of the property where the purchase price, or a part thereof, is paid by one person and the title is taken in the name of another. [Citations.] ‘The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired.’ [Citations.]” (*Lloyds Bank California v. Wells Fargo Bank* (1986) 187 Cal.App.3d 1038, 1042–1043.) In other words, the relationship between resulting trustee and beneficiary arises where one, in good faith, acquires title to property *belonging to another*. The law implies an obligation on the part of the one in whom title has vested to hold the property for the owner’s benefit and eventually convey it to the owner. The trustee has no duties to perform, no trust to administer, and no purpose to pursue except the single purpose of holding or conveying the property according to the beneficiary’s demands. (*Bainbridge v. Stoner* (1940) 16 Cal.2d 423, 428.)” (*In re Estate of Yool* (2007) 151 Cal.App.4th 867, 874.)

“The applicable statute of limitations on an action to establish a resulting trust is the four-year statute found in Code of Civil Procedure section 343. (*McCosker v. McCosker* (1954) 122 Cal.App.2d 498, 501.) The statute of limitations does not begin to run against a voluntary resulting trust in the absence of repudiation by the trustee, that is, until demand has been made upon the trustee and the trustee

refuses to account or convey. (*Berniker v. Berniker* (1947) 30 Cal.2d 439, 447–448.)” (*In re Estate of Yool, supra*, 151 Cal.App.4th at p. 875.)

The question of whether a trial court applied the correct statute of limitations under the facts before it is subject to de novo review. (*Board of Retirement v. Lewis* (1990) 217 Cal.App.3d 956, 964; *Stoltenberg v. Newman* (2009) 179 Cal.App.4th 287, 292.) The court’s factual findings are reviewed under the substantial evidence standard. (*Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App.4th 1218, 1223.) We view the evidence in the light most favorable to the judgment and accept as true all evidence tending to support the judgment, including all facts that reasonably can be deduced from the evidence. We must affirm the judgment if an examination of the entire record viewed in this light discloses substantial evidence to support the judgment. (*Ibid.*) The standard of clear and convincing proof required to rebut a title presumption operates in the trial court, not the appellate court. “The standard of review on appeal remains the same whether the normal “preponderance of the evidence” standard or the higher “clear and convincing evidence” standard applied in the proceedings below. [Citations.]” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2006) ¶ 8:63, p. 8–25 (rev. # 1, 2006).)” (*In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 345.)

In this case, there is substantial evidence to support the trial court’s finding that Betty Jo did not intend to

transfer the beneficial interest in her properties to Elizabeth and James, as the children were aware. Betty Jo put her properties in her children's names to insulate the properties from a judgment against her, but maintained beneficial ownership and control. A trust is presumed to have resulted by operation of law to enforce the parties' intentions. The children had no duties to perform except the single purpose of holding or conveying the property according to Betty Jo's demands. James did not breach the trust in 2004 when he transferred the property interests that he held to Elizabeth, because he believed he was following his mother's directions. Betty Jo wanted him to sign the deeds transferring his interest to Elizabeth. Elizabeth transferred a smaller interest in the property back to James, because his reported income was needed for an unspecified purpose. This was not adverse to Betty Jo's wishes and her interest in the properties. Both children were aware that they held the properties under the 2004 deeds on behalf of Betty Jo and all of the siblings to keep the property in the family. There is no evidence that Elizabeth or James ever refused to hold the property for Betty Jo's benefit, or refused to convey the property to Betty Jo upon demand, until Elizabeth filed this quiet title action asserting sole ownership. The trial court's findings are supported by substantial evidence that a resulting trust was created in 1999, which was not breached by the 2004 transfer of properties, but was breached when Elizabeth repudiated the trust by filing this action.

Motion for New Trial

Elizabeth contends that the trial court should have allowed her to present oral testimony in support of her motion for a new trial. She further contends that even without oral testimony, the trial court should have granted her motion for a new trial based on evidence of misconduct by her legal representatives. We find no abuse of the trial court's discretion to refuse to allow oral testimony and deny the motion for new trial.

A. Oral Testimony

A court may vacate the verdict in a case and grant a new trial on certain grounds, including “[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.” (Code Civ. Proc., § 657, subd. (1).) California Rules of Court, rule 3.1306(a) provides the limitation that “[e]vidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown.”

In this case, Elizabeth's request to present oral testimony was properly denied. In a law and motion hearing, the trial court has broad discretion to decide a case on the basis of declarations and other documents, rather than live, oral testimony. The trial court did not abuse its

discretion because the facts were adequately presented in the declarations and documents proffered by the parties. The trial court observed the entire trial, including the opening argument and conduct of Elizabeth's attorney, and was in the best position to evaluate whether the alleged conduct had an impact on the result of the trial.

B. New Trial Motion

“A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. “The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.” [Citation.]’ [Citation.]” (*Garcia v. Rehrig Internat., Inc.* (2002) 99 Cal.App.4th 869, 874 (*Garcia*).)

“Misconduct of counsel as a ground for new trial presents a matter primarily committed to the trial court. [Citation.] The judge who presides over the trial, who hears the testimony and the arguments, and whose own experience gives him a fine sense of the general atmosphere of trial proceedings, is in a far better position than appellate judges to evaluate the effect of disputed argument.’ (*Henninger v. Southern Pacific Co.* (1967) 250 Cal.App.2d 872, 881.)” (*Garcia, supra*, 99 Cal.App.4th at p. 874.)

“However, article VI, section 13 of the California Constitution provides: ‘No judgment shall be set aside, *or new trial granted*, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’ [¶] “[T]he trial court is bound by the rule of California Constitution, article VI, section 13, that prejudicial error is the basis for a new trial, and there is no discretion to grant a new trial for harmless error. [Citation.] . . . The grant of a new trial for harmless error violates the constitutional provision and wastes judicial time and resources to no purpose. [¶] Accordingly, the order granting a new trial is valid only if prejudicial error occurred at the trial.” [Citation.]’ (*Garcia v. County of Los Angeles* (1986) 177 Cal.App.3d 633, 641.)” (*Garcia, supra*, 99 Cal.App.4th at pp. 874–875.)

The trial court was in the best position to evaluate whether the result in this case would have been different in the absence of Elizabeth’s attorney’s alleged conduct. Elizabeth has not shown that the conduct alleged in her new trial motion adversely affected the litigation or the result in this case. Elizabeth argues that her attorney should have counseled her not to file a quiet title action, but this is not a reason to grant a new trial. She alleges that her attorney’s

representations in opening statement affected the outcome of the case, but the opening statement was not evidence, and the statements were entirely consistent with Elizabeth's testimony during trial. No other allegation relates directly to the outcome of the trial. The trial court could properly evaluate whether the attorney's conduct was prejudicial in light of the evidence and the result in the case. No abuse of the trial court's discretion to deny the new trial motion has been shown.

DISPOSITION

The judgment is affirmed. Respondent James Carpenter, Jr., is awarded his costs on appeal.

MOOR, J.

We concur:

BAKER, Acting P.J.

KIN, J.*

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