Filed 10/5/18 McCuien v. Davis CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STANLEY ALEC MCCUIEN et al., Plaintiffs and Respondents, v. MIKE DAVIS, Defendant and Appellant.	B276979 (Los Angeles County Super. Ct. No. TC027419)

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian S. Currey, Judge. Affirmed.

Keiter Appellate Law and Mitchell Keiter for Defendant and Appellant.

No appearance for Plaintiffs and Respondents.

I. INTRODUCTION

Defendant Mike Davis appeals from a judgment following a bench trial. Stanley McCuien purported to grant deed title of a house (the property) to defendant. McCuien and defendant mistakenly believed that McCuien was the owner of the property in fee simple absolute, when McCuien held only a life estate, and the Lola Maye McCuien Revocable Trust, dated September 3, 1999 (the Trust), held the remainder. Plaintiff LaVar Bashir Ephform, as trustee, filed an action against defendant to quiet title to the house in favor of the Trust and to cancel the grant deed. Defendant cross-complained against Ephform and McCuien to quiet title, or alternatively, for fraud and negligent misrepresentation.

Following a bench trial, the court quieted title to the property in favor of Ephform as trustee, with McCuien holding a life estate. The trial court found defendant's causes of action failed. Defendant was ordered to pay McCuien $104,000 in restitution for the deprivation of his life estate. Defendant was also ordered to pay $105,665 in attorney fees pursuant to statute and a lease agreement between defendant and McCuien.

Defendant contends the trial court erred by ruling against his negligent misrepresentation claim. Defendant also contends that even if he did not obtain full title to the property, he acquired McCuien's life estate. Next, defendant argues the trial court erred in its calculation of restitution to McCuien. Finally, defendant asserts there was no statutory or contractual basis to award attorney fees. We affirm.

II. BACKGROUND

A. *Factual Background*

The trial court's factual findings at trial, which are not disputed, are summarized as follows: McCuien's mother, Lola Maye McCuien, previously owned the property, located in Compton, California. Two weeks before her death in 1999, McCuien's mother executed the Trust and a warranty deed. Both documents were recorded with the Los Angeles County Recorder. McCuien's mother transferred title to the property to the Trust. Upon her death on September 12, 1999, she transferred a life estate in the property to McCuien. The warranty deed and the Trust provided that McCuien could reside at the property for as long as he lived, with a stipulation that he pay $300 per month to the trustee for the upkeep and maintenance of the property, including "property taxes, insurance, and other incidentals necessary to maintain the premises in a [habitable] condition." The deed provided that after McCuien's death, the property would pass to Ephform, the trustee, for his own personal use or to dispose of as he saw fit, with the proceeds to be divided equally among McCuien's mother's heirs. McCuien lived at the property with Evelyn Patton, who was McCuien's mother's granddaughter, McCuien's niece, and Ephform's mother.

By 2010, the property was in disrepair, uninhabitable, and the subject of a Los Angeles County tax lien. On August 23, 2010, Los Angeles County issued an official notice, addressed to McCuien's mother, listing McCuien as the owner, stating that the property was scheduled for auction from October 18 to October 20, 2010 to pay off past due property taxes pursuant to

the tax lien. The notice provided that in order to avoid the forced sale, the owner or a person with a legal interest in the property was required to pay the property tax, ranging from $33,521.22 if paid by August 31, 2010 to $34,105.30 if paid by October 15, 2010. McCuien and Patton could not locate Ephform, who had a falling out with his family and was not performing his duties as trustee. McCuien and Patton did not have the funds to pay the tax lien.

Before the date of the scheduled auction, Patton opened a letter from defendant addressed to McCuien. In the letter, defendant informed McCuien that he knew about the tax problem and could help. Defendant denied sending the letter, but the trial court found his testimony not credible on this point.

Defendant, McCuien, and Patton met on October 13, 2010. At that time, McCuien and Patton erroneously believed McCuien was the owner of the property, rather than a life tenant. Defendant likewise believed McCuien owned the property: McCuien and Patton told him so; McCuien was listed as the owner on the official tax auction notice; and at some time he called a customer service representative of Orange Coast Title Company and was told that McCuien owned the property.

By the end of the meeting, McCuien signed an October 13, 2010 grant deed purporting to transfer ownership of the property to defendant. The grant deed was notarized. Defendant stated he would pay the property taxes owed. Defendant, McCuien, and Patton also signed a lease agreement, stating that defendant was the landlord and McCuien and Patton were the tenants. Rent was $600 per month. Defendant testified this was a discount because the fair market value for rent was $1,600 per month. The lease agreement provided that defendant would not sell the

property for two years, during which time the tenants could repurchase the property.

There was no mortgage on the property, and the only lien was the tax lien. The 2012 assessed value of the property for tax purposes was $246,840, with the land having a stand-alone value of $183,600.

Defendant testified that he paid the property tax by cashier's check, the day after the meeting. The trial court concluded that because the payment was near the October 15, 2010 deadline, the amount of the payment was $34,105.30. Eventually, McCuien and Patton fell behind in their rental payments and defendant evicted them. Defendant obtained an unlawful detainer judgment against McCuien and Patton on September 21, 2012.

B. *Procedural History*

1. Case No. TC026954

On October 5, 2012, McCuien filed a complaint against defendant, case No. TC026954. McCuien moved to stay enforcement of the unlawful detainer judgment entered on September 21, 2012. The case was subsequently dismissed for lack of prosecution on April 19, 2013.

2. Case No. TC027419

On May 10, 2013, McCuien filed another action against defendant, case No. TC027419. On October 15, 2013, McCuien and Ephform purportedly filed a first amended complaint against

defendant. Plaintiffs alleged causes of action for: breach of contract; fraud and deceit; negligent misrepresentation; intentional misrepresentation; constructive trust; quiet title; cancellation of deed; and declaratory relief. On January 28, 2014, Ephform moved for leave to join or intervene in the action.

Defendant filed his cross-complaint on December 12, 2013. Defendant alleged causes of action against McCuien and Ephform for: breach of contract of the October 13, 2010 grant deed; estoppel; fraudulent misrepresentation; fraudulent promise without intention to perform; fraudulent concealment; negligent misrepresentation; negligence; and quiet title.

On August 27, 2014, McCuien requested and obtained dismissal of his complaint in case No. TC027419 without prejudice. Defendant's cross-complaint against McCuien and Ephform remained. Although the first amended complaint lists Ephform as a plaintiff, it appears Ephform was a party to the cross-complaint only.

3. Case No. TC027923

On August 27, 2014, Ephform filed a complaint against defendant, case No. TC027923. Ephform alleged causes of action for: constructive trust; quiet title regarding the grant deed and the warranty deed; cancellation of deed; and declaratory relief. Ephform sought to invalidate the October 13, 2010 grant deed as null and void.

On September 22, 2014, the trial court ordered case No. TC027923 consolidated with case No. TC027419. On October 29, 2014, defendant filed an amended cross-complaint against Ephform and McCuien. Defendant alleged causes of

action for: quiet title; breach of the implied covenant against encumbrances; fraud; and negligent misrepresentation.

C. *Bench Trial*

A bench trial on Ephform's complaint and defendant's amended cross-complaint was held on March 21, 2016. Defendant testified that he had viewed photographs of the property and compared it to homes in the area. In context, it appears defendant viewed such photographs prior to his meeting with McCuien and Patton in October 2010. He estimated the property was worth $60,000 in its then condition. Defendant testified he could not rent the property on the open market because it had no working bathroom and kitchen, only a stove and a refrigerator. Defendant testified he paid the property taxes, but produced no evidence in support. However, the auction on the property did not take place. Comparable sales analysis indicated the property had a fair market value between $190,000 and $270,000 in 2012. The trial court took judicial notice that in 2010 and 2012, real estate market values were considerably lower than they were at the time of trial.

Defendant was an experienced real estate investor. He understood that a title search would reveal defects in the title he expected to obtain. Defendant testified that he ultimately chose not to seek a preliminary title report or obtain title insurance because he needed to pay the taxes immediately to avoid a tax auction and he did not want to spend the money on title insurance.

Defendant made some improvements on the property because it was not in a habitable condition. He offered before and

after photographs taken in 2010 which showed improvements to the kitchen and bath, as well as general clean-up, carpet replacement, and new paint. Defendant estimated he spent $49,000 on labor and materials. He had no receipts or other records documenting such improvements.

McCuien did not understand any of the documents he had signed. He thought he was giving temporary ownership of the property to Patton. He was unsophisticated concerning real estate business transactions. Patton also was unsophisticated in business transactions. She believed that: defendant was paying the taxes with the property as collateral; defendant would make repairs to the house; she and McCuien would continue living there; the $600 monthly payment would go towards repaying the debt to defendant; and at the end of two years, she and McCuien would get the house back.

D. *Statement of Decision*

On March 30, 2016, the trial court issued its statement of decision. The trial court found that defendant was not a credible witness. Regarding defendant's knowledge, the trial court concluded, "[i]t is not clear when he learned about the true ownership of the Property." The Trust and warranty deed made clear that McCuien's mother had conveyed a life estate in the property to McCuien, and the fee was owned by Ephform as trustee. The trial court quieted title to the property in favor of Ephform as trustee. Defendant was not a bona fide purchaser because the Trust and warranty deed could be located through an ordinary search of county records. The trial court thus cancelled the grant deed from McCuien to defendant as null and void.

As to defendant's fraud claim, the trial court found it was without merit. The trial court determined defendant could not show he justifiably relied on any representations. Specifically, the trial court noted that defendant "chose not to have a title search conducted and was on constructive notice of what such a search would reveal."

The trial court considered defendant's claims for recovery of the alleged improvements to the property under the good faith improver statutes (Code Civ. Proc., §§ 871.1-871.7). The court concluded that defendant had made some improvements to the property but denied defendant any recovery because the equities did not favor such recovery and defendant failed to provide sufficient evidence to establish the value of the improvements. The trial court granted defendant restitution in the amount of $34,105.30 for payment of the property taxes.

The trial court found that because McCuien had been denied his right to a valid life estate in the property, defendant owed McCuien restitution. The trial court calculated restitution to be $1,600 per month, based on defendant's testimony as to the fair market rental value of the property in 2010. The judgment of $104,000 against defendant was calculated as $1,600 times 65 months, the period of time from when defendant received the grant deed (October 13, 2010), to when the trial court issued its statement of decision (March 30, 2016). The trial court noted: "[n]o doubt the true amount is more because rents have risen with property values, but no party offered evidence on the current rental value." Finally, the trial court permitted Ephform and McCuien to move for attorney fees, citing Code of Civil Procedure section 871.5.

E. *Motion for Attorney Fees*

On April 26, 2016, McCuien and Ephform moved for attorney fees. Plaintiffs contended they were the prevailing party, and attorney fees were authorized by contract, citing Civil Code section 1717 and Code of Civil Procedure sections 1032 and 1033.5, subdivision (a)(10). Specifically, plaintiffs cited the lease agreement as providing the basis for recovery of attorney fees. Plaintiffs requested attorney fees in the amount of $105,665.

On June 9, 2016, the trial court granted the motion for attorney fees in its entirety, citing Code of Civil Procedure sections 871.5 and 1032, and Civil Code section 1717. Judgment was entered on June 9, 2016.

F. *Untimely Motion for New Trial*

On July 11, 2016, defendant filed a motion for new trial. The court denied the motion as untimely, a finding that defendant does not challenge on appeal.

III. DISCUSSION

A. *Negligent Misrepresentation*

Defendant contends the trial court erred by denying his cause of action for negligent misrepresentation. "The elements of fraud, which give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage. [Citation.] The

tort of negligent misrepresentation, a species of the tort of deceit [citation], does not require intent to defraud but only the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.)

Defendant argues that the trial court "erroneously conflated the 'reasonable reliance' needed for bona fide purchaser status with the 'justifiable reliance' needed to establish negligent misrepresentation." As defendant acknowledges, the trial court expressly found that defendant failed to establish justifiable reliance: "[Defendant] cannot show that he acted in justifiable reliance" on McCuien's "representation that he owned the Property." To the extent defendant argues that notwithstanding the trial court's statement to the contrary, the trial court had in mind and applied the wrong legal standard, we disagree. "Evidence Code section 664 provides that '[i]t is presumed that official duty has been regularly performed' and scores of appellate decisions, relying on this provision, have held that 'in the absence of any contrary evidence, we are entitled to presume that the trial court . . . properly followed established law.' (*Serrano v. Workman's Comp. Appeals Bd.* (1971) 16 Cal.App.3d 787, 790-791)." (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.)

According to defendant, had the trial court correctly applied the "justifiable reliance" standard, it "would have factored into its determination that [defendant] had not even 48 hours to decide whether to pay the tax and prevent the foreclosure auction." But the trial court expressly rejected defendant's denial of earlier sending McCuien a letter offering to help with McCuien's tax problems. The trial court thus implicitly rejected defendant's argument that he had insufficient time to

conduct a thorough title search. The record supports the trial court's denial of defendant's negligent misrepresentation cause of action.

B. *McCuien Did Not Transfer Life Estate to Defendant*

Defendant contends that the trial court erred in not granting him a life estate. A grantor may transfer a life estate to a grantee despite the grantor purporting to transfer a fee simple absolute. (*Goldman v. Goldman* (1953) 116 Cal.App.2d 227, 242; *Holman v. Holman* (1938) 25 Cal.App.2d 445, 457; Civ. Code, § 1108 ["A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer"].) Nonetheless, defendant's argument is unavailing.

First, defendant did not seek a life estate in the trial court, and as a general rule, an appellant cannot assert a new theory of liability for the first time on appeal. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603; *In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 695; *Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn. 9.) Second, defendant's argument fails on the merits because the Trust by its express terms prohibited McCuien from transferring his interest in the property. We interpret a trust instrument de novo. (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439; accord, *Pratt v. Ferguson* (2016) 3 Cal.App.5th 102, 109.) Article IX of the Trust, entitled "NON-ASSIGNABILITY OF THE TRUST PROCEEDS[,]" provides: [¶] "The interest of the beneficiaries of this trust shall not be assignable, and beneficiaries shall not have the right to pledge, assign, convey or

otherwise transfer, lien or encumber any portion of the income or principal of the trust." (See Civ. Code, § 1039 ["Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another"]; *Commercial Discount Co. v. Cowen* (1941) 18 Cal.2d 610, 614 ["assignment" construed to mean transfer of title, not possession].) Thus, under Civil Code section 1108, McCuien's grant to defendant "pass[ed] to [defendant] all the estate [that McCuien] could lawfully transfer[,]" which, in this instance, was none.

Defendant next argues that the trial court should have modified the Trust to permit McCuien's transfer of his life estate to defendant. Defendant cites in support Probate Code section 15409 and cases permitting courts, sitting in equity, to modify trust terms. But defendant did not seek a modification of the Trust. He has thus waived this argument on appeal. (*Johnson v. Greenelsh, supra*, 47 Cal.4th at p. 603.) Even on the merits, his argument would fail. Probate Code section 15409, subdivision (a) provides that on petition by a trustee or beneficiary, the court may modify the dispositive provisions of the trust if continuation of the trust would defeat or substantially impair the purpose of the trust. (See *Adams v. Cook* (1940) 15 Cal.2d 352, 355, 358 [on petition by *beneficiary*, court in equity may change method of administering a trust estate when such change is necessary to prevent loss or destruction of trust property].) Defendant is neither a trustee nor a beneficiary.

C. *Trial Court Did Not Err by Awarding McCuien Restitution*

Defendant contends the trial court erred in its calculation of restitution awarded to McCuien. "The equitable remedy of

restitution to avoid 'unjust enrichment' has its roots in the common law. '[O]ne person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.'" (*Gardiner Solder Co. v. Supalloy Corp., Inc.* (1991) 232 Cal.App.3d 1537, 1542.) Restitution includes "'giving equivalent for any loss, damage, or injury . . . .'" (*Id.* at p. 1544.)

Defendant did not raise a challenge to the amount of the restitution award in a motion for new trial. "'Ordinarily, errors are not waived on appeal by the failure to make a motion for new trial. [Citation.] But there is one significant exception: A claim of excessive or inadequate damages cannot be raised on appeal unless appellant first urged the error in a timely motion for new trial [(Code Civ. Proc., § 657, subd. (5))]. The theory is that trial courts are in a better position than appellate courts to resolve disputes over the proper amount of damages. [Citations.] [Citation.] 'A failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court. [Citation.]'" (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759; see also *Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 720 [rejecting appellant's argument that because he challenged the trial court's owelty award, not damages, he could raise a challenge without making an earlier motion for new trial: "[w]hether the award is termed owelty or damages, it still requires an evaluation of the amount awarded in light of the evidence presented at trial"]; but cf.

Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 672 ["Whether or not restitution is an equitable remedy, that remedy still requires substantial evidence to support it"].)

As noted, the judgment of $104,000 was based on 65 months of $1,600 rent. Defendant contends the trial court should have reduced the restitution for each month that McCuien lived at the property as McCuien could not have rented the property out during that time. Based on the record, McCuien lived at the property from October 13, 2010 to at least September 21, 2012, a period of approximately 23 months. During some portion of that time, McCuien and Patton paid defendant monthly rent. Defendant also contends that McCuien's restitution should be reduced by $3,600 for the monthly $300 payment prescribed by the Trust and for the taxes that he paid after 2012 for the property. Defendant cites to no record in support of his assertion that he paid any taxes above the $34,105.30 he paid for the tax lien, which the trial court awarded to defendant. Arguments that have no basis in the record are disregarded. (*Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1416.) Because defendant failed to raise either of these arguments in a timely motion for new trial, we do not consider them on appeal.

D. *Attorney Fees*

Finally, defendant contends the trial court erred by awarding attorney fees. Defendant does not argue the awarded fees were excessive or that the trial court abused its discretion in making the award. Instead, defendant challenges the legal basis for the attorney fees, which we review de novo. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213-1214.) The trial court

concluded an award of attorney fees was appropriate, citing, inter alia, Code of Civil Procedure section 871.5.

"California follows what is commonly referred to as the American rule, which provides that each party to a lawsuit must ordinarily pay his own attorney fees." (*Trope v. Katz* (1995) 11 Cal.4th 274, 278.) As a general matter, a party may not recover attorney fees on a quiet title action. (*Tremper v. Quinones* (2004) 115 Cal.App.4th 944, 946 (*Tremper*).) Section 871.3 of the Code of Civil Procedure describes a cause of action for relief as a "good faith improver": "[a] person who makes an improvement to land in good faith and under the erroneous belief, because of a mistake of law or fact, that he is the owner of the land." (Code Civ. Proc., § 871.1, subd. (a).) Code of Civil Procedure section 871.5 provides in pertinent part: "When an action or cross-complaint is brought pursuant to [s]ection 871.3, the court may, subject to [s]ection 871.4, effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties (including, but not limited to, lessees, lienholders, and encumbrancers) as is consistent with substantial justice to the parties under the circumstances of the particular case. The relief granted shall protect the owner of the land upon which the improvement was constructed against any pecuniary loss but shall avoid, insofar as possible, enriching him unjustly at the expense of the good faith improver. In protecting the owner of the land against pecuniary loss, the court shall take into consideration the expenses the owner of the land has incurred in the action in which relief under this chapter is sought, including but not limited to reasonable attorney fees."

The record indicates the parties did not specifically cite section 871.3 of the Code of Civil Procedure in their pleadings.

However, California is a fact pleading jurisdiction, and requires pleading only of ultimate facts. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 551, fn. 5.) A court is not bound by the caption or labels of a cause of action in the pleading; rather, the nature of a pleading is determined from the facts alleged. (*Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1281; *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 98.) Here, defendant pleaded: he believed he was the owner of the property based on the representations made to him; he made improvements to the property because of such belief; and he sought as damages the amount of the improvements he made on the property. Thus, the trial court correctly found that defendant brought an action for relief under Code of Civil Procedure section 871.3, and Code of Civil Procedure section 871.5 therefore applied.

As defendant concedes, "[t]o be sure, [defendant] did ask the court to recognize the improvements he had made, and provide compensation for them, but the court *refused such compensation*." According to defendant, because the court did not award him relief as a good faith improver, Code of Civil Procedure section 871.5 does not permit attorney fees. Defendant cites *Tremper* in support. In that case, the court held: "Because the trial court granted [the defendant's] relief as a good faith improver of the [plaintiffs'] property, [the defendant] must compensate the [plaintiffs] for their litigation expenses, without regard to whether those expenses were incurred in prosecuting their rights to the exclusive use and possession of their property, or in defending against [the defendant's] claim to the improvements thereon." (*Tremper, supra*, 115 Cal.App.4th at p. 949.) *Tremper*'s holding that a court must award attorney fees

to a landowner when it awards relief to a good-faith improver does not conversely prohibit a trial court from awarding fees to a landowner when it declines to award relief to an improver. The plain language of Code of Civil Procedure section 871.5 is to the contrary: "[T]he court may . . . effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties . . . as is consistent with substantial justice to the parties under the circumstances of the particular case." (Code Civ. Proc., § 871.5.) In other words, "'substantial justice to the parties under the circumstances of the particular case'" is the primary statutory objective. (*Raab v. Casper* (1975) 51 Cal.App.3d 866, 875.) "This objective requires a trial court to weigh competing values; it will often entail loss to one side or the other." (*Id.* at pp. 875-876.) The trial court has discretion in its "adjustment of the rights, equities, and interests" of the parties pursuant to the statute. Thus, Code of Civil Procedure section 871.5 permits the awarding of fees even when the court declines to provide relief to a purported good faith improver.

Defendant next argues that public policy does not support the awarding of fees in a case such as this. In *Tremper*, the court recognized that "one may innocently and in good faith trespass upon and improve the property of a neighbor. When realized, the good faith improver may seek to recover the improvements placed upon the neighbor's land and seek the assistance of the court in doing so. In making that decision, however, the improver must weigh the cost of the loss of the improvement against his recovery, which will include 'protect[ing] the owner of the land upon which the improvement was constructed against any pecuniary loss.' [(Code Civ. Proc., § 871.5.)]" (*Tremper, supra*,

115 Cal.App.4th at p. 946.) According to defendant, "[t]he purpose of this litigation was not to save a mistaken owner from undue loss but to determine who was entitled to own, rent, and live at the property, an issue for which each side had a strong self-interest in pursuing. Section 871.5 did not apply." Defendant cites no authority for the proposition that a trial court may not award attorney fees for litigants whose motive in filing an action was to determine ownership rights. Indeed, the parties in *Tremper*, like the parties here, raised their claims in a quiet title action, and disputed ownership of particular property. (*Tremper, supra*, 115 Cal.App.4th at p. 947.) We conclude that the award of attorney fees was authorized by Code of Civil Procedure section 871.5. Because we find Code of Civil Procedure section 871.5 provided a sufficient legal basis for the award of attorney fees, we need not discuss defendant's arguments concerning Code of Civil Procedure section 1032, Civil Code section 1717, or the lease agreement's attorney fees provision. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259.)

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

I concur:

MOOR, J.

Stanley Alec McCuien et al. v. Mike Davis
B276979

BAKER, Acting P. J., Concurring in Part and Dissenting in Part

I join all but Part III.D of the majority opinion (and the associated introductory and dispositional language). I believe the trial court's award of attorney fees is unjustified on this record.

Code of Civil Procedure section 871.5 states: "When an action or cross-complaint is brought pursuant to Section 871.3, the court may . . . effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties . . . as is consistent with substantial justice to the parties under the circumstances of the particular case. The relief granted shall protect the owner of the land upon which the improvement was constructed against any pecuniary loss but shall avoid, insofar as possible, enriching him unjustly at the expense of the good faith improver. In protecting the owner of the land against pecuniary loss, the court shall take into consideration the expenses the owner of the land has incurred in the action in which relief under this chapter is sought, including but not limited to reasonable attorney fees."

The award of attorney fees here is not "consistent with substantial justice to the parties under the circumstances of the particular case," nor does it avoid "enriching [Stanley McCuien and LaVar Ephform, the owners of the land,] unjustly at the expense of [Mike Davis,] the good faith improver." (Code Civ.

Proc., § 871.5.) McCuien and Ephform would have litigated this case regardless of Davis's claim for improvements—in fact, McCuien initiated the litigation before later dismissing his complaint once Davis filed a cross-complaint.

Even if *some* fee award could be justified in these circumstances, the majority errs in affirming the trial court's award, which was not limited to that portion of attorney fees incurred in defending against the good faith improver claim. Contrary to the terms of Code of Civil Procedure section 871.5, McCuien and Ephform have been given a windfall here—effectively free attorney representation to pursue quiet title and tort remedies they certainly would have pursued entirely of their own volition.[1] To boot, they have also been given back title to,

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[1] The facts and procedural posture here differ meaningfully from *Tremper v. Quinones* (2004) 115 Cal.App.4th 944 (*Tremper*). In that case, the good faith improver planted a crop of cacti on land that belonged to his neighbors. (*Id.* at p. 946.) That caused the neighbors to sue for quiet title and the improver to cross-complain for the value of his improvements (the cacti). (*Ibid.)* The trial court found for the neighbors on the quiet title claim, for the improver on his improvements claim, and awarded attorney fees to the neighbors—but just for fees incurred related to the good faith improver claim, not for fees incurred in litigating ownership of the property. (*Id.* at pp. 947-948.) The Court of Appeal reversed the fee award and held the neighbors were entitled to an unapportioned award of fees "[b]ecause all of the causes of action in the [neighbors'] complaint were necessitated by the very act that gave rise to [the improver's] status as a good faith improver . . . ." (*Id.* at p. 950.)

Here, unlike *Tremper*, the quiet title claims brought by McCuien and Ephform were entirely independent of improvements Davis made to the property, rather than being necessitated by the acts that gave rise to Davis's claim that he

and occupancy of, a house that by all accounts is now in better condition than how they left it. Even accounting for Davis's misrepresentations, that is excessive, and it is not substantial justice.

McCuien's arguments for attorney fees apart from Code of Civil Procedure section 871.5 are all meritless. I would accordingly reverse the attorney fees award but affirm the remainder of the judgment.

BAKER, Acting P. J.

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was a good faith improver. An award for *all* attorney fees incurred in this litigation therefore unjustly enriches McCuien and Ephform.