Filed 8/22/18 Shadab v. Goldberg CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SAM SHADAB et al., Appellants, v. ELINOR GOLDBERG et al., Respondents.	2d Civ. No. B277925 (Super. Ct. No. 56-2013-00431174-CU-OR-VTA) (Ventura County)

Sam Shadab, Jamshid Shadab and Siamak Haghighi (appellants) and Elinor Goldberg and Albert Goldberg (respondents) jointly own a parcel of undeveloped residential property. Following a dispute regarding payment of the property expenses, the parties sued each other for, among other things, partition and an accounting. The matter proceeded to a bench trial at which the parties submitted evidence of their expense payments but no expert accounting testimony. The trial court

ultimately entered judgment in favor of respondents, awarded them $41,283.71 in property expenses, and ordered Jamshid and Haghighi to pay Elinor[1] $99,761.46 in attorney fees as the prevailing party. Appellants challenge these rulings, contending that (1) the court abused its discretion in denying their request for an accounting referee; (2) the judgment is not supported by substantial evidence; (3) the court prematurely issued its statement of decision; and (4) the court erred in awarding attorney fees to Elinor as the prevailing party. We affirm.

FACTS AND PROCEDURAL HISTORY

In 2002, Albert, Sam, and Jamshid wanted to purchase 5.3 acres of undeveloped property in Thousand Oaks (the property) but were unable to secure the necessary financing. At Albert's behest, his mother Elinor—who had sufficient credit to qualify for such financing—agreed to sign on the loan as a purchaser. Thereafter, Elinor and Sam made a successful offer to buy the property. Upon close of escrow, Elinor became a 33.33% legal owner of the property and Sam became a 66.66% legal owner.

Both Elinor and Sam were obligated on the $280,000 purchase money loan and the sellers' $40,000 carry-back second loan. Albert and Jamshid became silent co-owners, with the parties orally agreeing to divide the property into three buildable lots and sell them for an anticipated profit. They also orally agreed that until the property was sold, Sam would pay two-thirds of the property expenses and Elinor would pay the rest.

In August 2005, Jamshid and Haghighi purchased 23% of Elinor's 33.33% ownership interest in the property for $258,750. Elinor's interest in the property was thereafter reduced to

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[1] For ease of reference, parties with the same last name shall be referred to only by their first names.

10.33%, while Sam maintained his 66.66% interest and Jamshid and Haghighi each obtained an 11.5% interest.

During the August 2005 purchase, respondents gave Jamshid and Haghighi a $62,054.69 credit toward the $258,750 purchase price. According to respondents, the parties had agreed that the credit would be used to pay down the mortgage on the property. The principal owed at the time was $268,274, and the credit equaled approximately 23% of the outstanding balance. But neither Jamshid nor Haghighi ever made the payment.

A year later, on August 25, 2006, Sam unilaterally paid $95,000 towards the mortgage. The principal owed at that time was $265,378.67, so his payment equaled 37.19% of the outstanding balance. Although the payment did not match his 66.66% ownership interest, Sam refused to pay any additional mortgage payments and tried to recalculate the other parties' payments by increasing them proportionately.

On October 15, 2007, Haghighi's sister paid $53,000 toward the mortgage. The principal owed at that time was $166,954.57. The $53,000 payment constituted 31.7% of the outstanding balance, and thus exceeded Haghighi's 11.5% ownership interest in the property. Haghighi, however, never personally paid any money toward the property costs.

By 2007, respondents had decided not to pay any more money to support the property and demanded that it be sold. Appellants refused to sell and Sam continued to pay the property costs. As the trial court later explained, "When the economy cratered in 2008, the value of the property cratered along with it. The investment turned into a money pit causing disagreement among the parties regarding payment of the continuing costs

associated with owning the property, and the parties' inability to agree on terms for selling the property."

In 2013, appellants sued Elinor for quiet title, partition, accounting, partnership dissolution, breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty and contribution. Elinor cross-complained against appellants and included Albert as cross-defendant and interested party. Albert also filed a cross-complaint against appellants and Elinor, and appellants cross-complained against respondents. Each cross-complaint requested partition and an accounting.

The parties subsequently stipulated to an interlocutory judgment for partition by sale. The stipulation provided that the property would be marketed for sale at $1.2 million and that each party would bear their pro-rata share of the costs related to the sale and receive their share of the net profits. In addition, the parties dismissed all causes of action except their claims for quiet title, partition and an accounting.

Following opening statements at trial, appellants' counsel asked the trial court to appoint an accounting referee. The court denied the request as untimely.

After taking the matter under submission, the court issued the following minute order: "In reviewing the testimony and evidence in this case, it becomes apparent that accounting testimony would have been enormously helpful. The testimony and evidence regarding the accounting issues is present in raw form. The court does not feel compelled to act as an accountant or auditor. Each side is asked to submit within twenty (20) days of this order their submission of the credits and debits due and/or incurred by their client. This should not exceed five pages in length, and is to be based on the testimony and evidence received

at trial. New material will not be considered." Respondents filed a joint accounting stating they were owed $41,283.71 in property costs. Appellants' accounting, which was prepared by a certified public accountant, showed that respondents owed $81,873 for "[e]xpenses." Appellants requested a total of $692,491 for expenses, costs, damages and attorney fees.

In its notice of intended decision, the trial court observed that the "testimony and evidence presented by [appellants] at trial were confusing. The most knowledgeable of the [appellants] was Mr. Sam Shadab, but even he was unable to present a coherent and comprehensive account of the debts incurred on account of the property, and the payments which were made. There is no question that payments were made to keep the mortgage and property taxes current, but an allocation of these among the interested parties in summary, or any form was not done."

After reviewing the parties' accounting submissions, the court found "that the materials provided by the [respondents are] more accurate and more comprehensive in capturing the costs incurred for the development and maintenance of the property since the inception." The court concluded that "the summary submitted by the [respondents] is well organized, and cross-referenced to the exhibits received into evidence. As a result, judgment is in favor of [respondents], and against [appellants] in the amount of $41,283.71. [Respondents] are the prevailing parties, and are entitled to their statutory costs of suit."

Appellants objected to the notice of intended decision and asked the court to clarify who was required to pay the $62,054.69 credit toward the unpaid balance of the mortgage. The court granted the parties leave to submit additional briefing on the

issue. On June 14, 2016, the court issued an amended notice of intended decision stating that "[appellants have] taken more than one position regarding allocation of the $62,054.69 owed to [the mortgage company] after the August 30, 2005 closing of escrow. The court agrees with the [respondents] that this has never been convincingly accounted for by the [appellants]. It remains a credit that accrues to the benefit of . . . Elinor Goldberg and Albert Goldberg." The court further stated that the amended notice of intended decision "will become the court's Statement of Decision unless objections are filed within the statutory time."

On June 29, 2016, appellants objected to the amended notice of intended decision and filed proposed findings of fact and conclusions of law. The next day, the court issued a minute order stating that the time to file objections had run and that it intended to sign respondents' proposed judgment.

On July 6, 2016, appellants objected to the court's order and requested that the court hear their objections to the amended notice of intended decision. The court declined the request and entered judgment in favor of respondents, who thereafter moved for an award of costs and attorney fees as the prevailing party. The court denied the motion as to Albert, but granted attorney fees to Elinor in the amount of $99,761.46.[2]

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[2] While this appeal was pending, Jamshid filed a Chapter 13 bankruptcy petition. Neither Jamshid nor his attorney, however, timely notified this court of that filing. In May 2018, Elinor moved for calendar preference in this case on the basis of her advanced age and allegedly ill health. Appellants did not oppose the motion. We subsequently ordered the matter on calendar for July 11, 2018, and denied Elinor's motion as moot. At the request of appellants' counsel, the matter was set for oral argument. On July 6, appellants' attorney requested that the

DISCUSSION

Request for Accounting Referee

Appellants contend the court abused its discretion by denying their request for an accounting referee. We disagree.

Although the trial court must appoint a referee to divide or sell the property in a partition action (Code Civ. Proc.,[3] § 873.010, subd. (a)), it has no sua sponte duty to appoint a referee to conduct an accounting of the amounts due the parties for pre-sale property expenses. Section 639, subdivision (a),[4]

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argument be continued. For the first time, counsel informed this court of Jamshid's bankruptcy petition and asserted that the appeal had been automatically stayed by the filing of that petition (11 U.S.C. § 362). Counsel requested that the argument be continued to allow him to seek relief from the automatic stay in the bankruptcy court, a hearing upon which was scheduled for July 31. Respondents opposed the request, asserting that Jamshid's bankruptcy petition had no effect on this appeal because he was a plaintiff in the action. (See *In re Mitchell* (Bankr. C.D.Cal. 1997) 206 B.R. 204, 212 [recognizing that "the [s]ection 362 stay does not apply where . . . the debtor is the plaintiff in a lawsuit"].) We declined to continue the argument, but deferred submission of the matter. On July 31, 2018, pursuant to the parties' stipulation, the bankruptcy court issued an order granting relief from the automatic stay provision as it may relate to this action. We deemed the matter submitted the following day.

[3] All further undesignated statutory references are to the Code of Civil Procedure.

[4] Subdivision (a) of section 639 states: "When the parties do not consent, the court may, upon written motion of any party, or of its own motion, appoint a referee in the following cases . . . :

which authorizes the appointment of an accounting referee in these circumstances, requires any party seeking such a referee to file a "written motion." Appellants not only failed to do so, but waited until after opening statements before orally requesting that a referee be appointed. As the court observed, appellants' request was "late in the game" and "should have been addressed earlier."

Appellants emphasize the court's post-trial statement that "accounting testimony would have been enormously helpful" in deciding the case. This does not mean, however, that an accounting referee was required. The parties could have offered expert accounting testimony in addition to the raw accounting data. Had they done so, the court likely could have dispensed with its request for a post-trial accounting.

Moreover, the record reflects that appellants had over two years to prepare for trial, yet neither formally requested an accounting referee nor retained an expert accountant to assist the court. Under these circumstances, we cannot conclude the court abused its discretion in denying appellants' last-minute request for a referee.

Sufficiency of the Evidence

Appellants assert that the evidence is insufficient to support the judgment. They claim there is no evidence to support the court's finding that respondents were entitled to an offset for

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[¶] (1) When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein. [¶] (2) When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect."

the $62,054.69 credit they gave to Jamshid and Haghighi as part of their August 2005 purchase of a portion of Elinor's ownership interest in the property.

"[W]hen the 'findings of fact are challenged in a civil appeal, we are bound by the familiar principle that "the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.]' [Citation.] 'In applying this standard of review, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . ." [Citation.]' [Citation.] '"Substantial evidence" is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value.' [Citation.] We do not reweigh evidence or reassess the credibility of witnesses. [Citation.] We are 'not a second trier of fact.' [Citation.] A party 'raising a claim of insufficiency of the evidence assumes a "daunting burden." [Citation.]' [Citation.]" (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245-1246 (*Pope*).)

Moreover, a party raising a claim of insufficient evidence '"must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable. [Citation.]' . . . . [Citation.]" (*Pope*, *supra*, 229 Cal.App.4th at p. 1246, italics omitted.) "Appellants' 'fundamental obligation to this court, and a prerequisite to our consideration of their challenge' [citation], is to 'set forth the version of events most favorable to [respondent]' [citation]. 'Accordingly, if, as [appellants] here contend, "some particular issue of fact is not sustained, they are required to set forth in their brief all the material evidence on the point and not

merely their own evidence. Unless this is done the error is deemed to be waived.'" [Citation.]" (*Ibid*, italics omitted.)

We agree with respondents that appellants have failed to meet this requirement by only citing evidence that is favorable to their position. For example, appellants highlight two payments they subsequently made to reduce the mortgage principal, yet fail to acknowledge that those payments are included in respondents' accounting. Moreover, respondents noted below that "[i]f [the credit] had been paid toward the mortgage as it was supposed to be, it would have over time reduced the monthly mortgage payment and the ultimate payoff thereby benefiting all of the parties."

Appellants offered nothing to indicate otherwise. Instead, they asserted below that they had "agreed to pay the $62,054.69, ONLY through a monthly payment of the %23 [*sic*] of . . . Elinor Goldberg's mortgage." The trial court rejected this position. Moreover, the assertion is undermined by the escrow instructions related to the August 2005 purchase agreement, which directed the escrow holder "to debit the Seller and credit the Buyer in the amount of $62,054.69, *which represents an amount paid towards the current mortgage by Buyers*." (Italics added.)

Because appellants' briefs do not set forth all of the evidence that was relevant to the court's decision, their claim of insufficient evidence is waived or forfeited. (*Pope*, *supra*, 229 Cal.App.4th at p. 1246.) In any event, the above-referenced evidence is sufficient by itself to support the challenged ruling.

Objections to Amended Statement of Intended Decision

Appellants contend the trial court's failure to rule on their objections to the amended statement of intended decision constituted prejudicial error. We are not persuaded.

Although a party is allowed to file objections to a proposed statement of decision (Cal. Rules of Court, rule 3.1590(g)), appellants do not direct us to any authority stating the court is obligated to rule on such objections. "In rendering a statement of decision under . . . section 632, a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court's determination would reversible error result. [Citations.] Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings. [Citation.] A failure to find on an immaterial issue is not error. [Citations.] The trial court need not discuss each question listed in a party's request; all that is required is an explanation of the factual and legal basis for the court's decision regarding the principal controverted issues at trial as are listed in the request." (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.)

Here, the trial court issued a minute order stating that "there have been no further objections to the [Amended] Notice of Intended Decision," and that "[a]s such, the [Amended] Notice of Intended Decision becomes the Statement of Decision in this matter." The day before that order issued, however, appellants had filed objections to the amended notice of intended decision and a request for clarification. It appears the court did not review the objections before issuing the minute order.

The trial court did not, however, immediately enter judgment based on its statement of decision. On July 6, 2016, appellants objected to the minute order and requested that the

court rule on their objections to the amended statement of intended decision. That the court waited until July 18, 2016, to enter judgment suggests that it considered the objections and found them inconsequential.

In any event, appellants must demonstrate the court committed prejudicial error in failing to expressly rule on their objections. The record confirms that appellant's objections sought virtually the same clarification and findings as their objections to the initial statement of intended decision. The trial court addressed those objections in its amended statement of intended decision. It was not required to do so again. The final statement of decision adequately addressed the court's factual and legal basis for its decision regarding the principal controverted issues at trial, and any alleged omission or deficiency was harmless.

Attorney Fees

Appellants contend the court erred in awarding Elinor $99,761.46 in attorney fees. They assert that Elinor was not the prevailing party and that the amount of the award is both excessive and "unreasonable." We are not persuaded.

"The standard of review on issues of attorney's fees and costs is abuse of discretion. The trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice." (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545, fn. omitted.)

Elinor was awarded her attorney fees as the prevailing party pursuant to an express provision in the August 2005 purchase agreement.[5] The court alternatively found that the fees

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[5] The provision states in relevant part that "[i]n any action . . . between Buyer and Seller arising out of this Agreement, the

were warranted under Code of Civil Procedure sections 874.010 and 874.040, which govern the allowance and apportionment of such fees as part of the costs of a partition action.[6]

In awarding Elinor all of her claimed attorney fees, the court found that "[p]laintiffs stonewalled at every opportunity during the discovery phase of the case. As a result, defendant Elinor Goldberg was required to make several discovery motions, all of which were granted, and included the imposition of sanctions on plaintiffs and their attorney. Plaintiffs' presentation at trial was disorganized, and as evidenced by the court's ruling, not persuasive as well. As such, the amount of fees being claimed on behalf of Elinor Goldberg is justified based on the totality of the circumstances of the litigation." The court further found that the hourly rate charged by Elinor's attorney was reasonable and that the tasks he performed were necessary.

In challenging these findings, appellants once again focus exclusively upon evidence purportedly favorable to their position and ignore the overwhelming evidence that supports the court's ruling. To the extent they challenge the court's failure to apportion the attorney fees as the costs of partition (which

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prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller." This provision is broad enough to encompass both contract and non-contract claims. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

[6] Subdivision (a) of section 874.010 provides that the costs of partition include "[r]easonable attorney's fees incurred or paid by a party for the common benefit." Section 874.040, as relevant here, states that "the court shall apportion the costs of partition among the parties in proportion to their interests or make such other apportionment as may be equitable."

includes attorney fees) pursuant to section 874.040, the court expressly found that "the equities in this case justify a fee award in favor of Elinor . . . without any apportionment due to the persistently obstructionist conduct of the plaintiffs and their counsel." Substantial evidence supports this finding.

In any event, appellants concede in their opening brief that the prevailing party in the action was entitled to recover their reasonable attorney fees pursuant to the express provision to that effect in the August 2005 purchase agreement. They claim, however, that Elinor either was not the prevailing party or that the fee award should have been reduced because she "achieved only an arbitrary limited success." On the contrary, she achieved all that she sought. As respondents aptly put it, "[t]here is nothing in the Court's written decision or the record on appeal that would remotely support a claim that the Court's decision exceeds the bounds of reason . . . or that Elinor . . . did not achieve full success." (Capital letters omitted.)

DISPOSITION

The judgment and order awarding attorney fees are affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Henry J. Walsh, Judge
Superior Court County of Ventura

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