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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROBERT CARL GETTY, Plaintiff and Appellant, v. JANET RIZZO, Defendant and Respondent.	B275371 (Los Angeles County Super. Ct. No. YC070033)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Robert D. Feighner; Hitchcock, Bowman & Schachter and Robert Schachter for Plaintiff and Appellant.

Law Office of David Carico and David D. Carico for Defendant and Respondent.

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Robert Carl Getty appeals from a judgment in favor of respondent Janet Rizzo. Getty and Rizzo were unmarried but romantically involved. They lived together for 20 years in a house in which Rizzo held sole legal title. When their relationship ended Rizzo sold the house, and Getty brought suit claiming 50 percent ownership of the house and its sales proceeds based on an alleged agreement with Rizzo. The trial court found that Getty had failed to prove entitlement to a share in ownership, and that his claim for quantum meruit was barred by the statute of limitations. We affirm the judgment.

BACKGROUND

1. Facts

Getty and Rizzo began dating in 1991. In 1992 Rizzo moved into Getty's house in Rancho Palos Verdes. Getty lost the house to foreclosure in 1993, and he and Rizzo moved to a rented house in San Pedro, with Rizzo's name on the lease.

In July 1994, Rizzo took sole title in a house in Lomita. Rizzo was the only signatory to the purchase agreement and the mortgage documents; Getty was not involved in applying for the mortgage loan. Rizzo paid the $30,000 down payment with a personal loan from Getty's friend Robert Browning. Rizzo paid Browning back a few months later with funds from her 401(k) retirement account.

Getty and Rizzo lived together in the Lomita house for approximately 20 years, until 2014. During that time, Rizzo opened a bank account in her name that the parties referred to as the "house account." Getty was the paid-on-death beneficiary. Throughout the 20 years they lived together, Getty provided funds to Rizzo for the house account either by writing checks or signing over third party checks from customers of his equipment

rental business. Rizzo then used the funds in the house account to pay the mortgage, property taxes, and home insurance (hereinafter house payments). Rizzo would use her own separate checking account to pay any amounts not covered by the funds in the house account, and never deposited her own funds in the house account. Getty and Rizzo filed separate tax returns, with Rizzo taking the deductions for mortgage interest and property taxes on the Lomita house.

Bank records indicated that from 2008 to 2014, Getty provided the majority of the funds for the house payments, contributing $110,000 of the estimated $118,500 paid during that period. The parties could not obtain bank records for periods prior to 2008, but Getty provided checks to the court showing he had contributed at least $73,000 during the years 1994 to 2007, a period in which the house payments totaled approximately $243,000. Getty also provided checks indicating that he had paid a number of utility bills (between two and six in a year) for the period 1994 to 2009.

Getty, who had significant construction experience, made various repairs and improvements to the house. Getty claimed that he paid for all or substantially all of the projects himself, and estimated the value of his labor in making the repairs and improvements in the tens of thousands of dollars.

Rizzo refinanced the Lomita house five times. During the third refinance in 2004, Getty asked Rizzo about adding his name to the title. Rizzo declined, explaining that transferring title would cost too much, an explanation Getty accepted. In March 2012, around the time of the fifth refinance, Getty again asked to be added to title, and Rizzo again refused. Getty threatened to hire an attorney but did not do so.

In December 2013 or January 2014 Rizzo told Getty she wished to separate. Rizzo sold the Lomita house in July 2014, and she and Getty moved out.

2. Proceedings Below

Getty filed a complaint against Rizzo in August 2014, alleging that he was entitled to a 50 percent ownership interest in the Lomita house and 50 percent of the proceeds from the sale. Getty sought declaratory relief and a resulting trust. He also alleged a quantum meruit cause of action for the "money and funds, work and services, supplies and materials" he provided.

Getty testified that the couple purchased the house together, but took title in Rizzo's name only because of Getty's poor credit at the time. Getty claimed that Rizzo agreed that he would be added to the title later, although there was no specific agreement as to when. Rizzo disputed this, claiming the couple had never agreed to share ownership of the house. Getty claimed that he had paid the vast majority of the house payments, which along with the many improvements he had made to the house proved the existence of an agreement to share ownership, or an equitable entitlement to an equal share of the sales proceeds.

After a bench trial, the court issued a statement of decision ruling for Rizzo on all causes of action. As to the causes of action for declaratory relief and resulting trust,[1] the court ruled that Getty was disputing Rizzo's claim to title, and therefore under Evidence Code section 662 Getty had to prove his claims by clear

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[1] Although Getty's complaint sought a resulting trust, the statement of decision instead discussed a constructive trust. We have found no explanation for this in the record. As will be discussed *post*, the distinction is immaterial for purposes of this appeal.

and convincing evidence. The court found Getty had not met his burden. The court questioned why, if Getty believed he was entitled to share ownership, he had not been more insistent about being added to title, instead waiting 18 years before threatening legal action.[2] The court stated that it could not accept Getty's claim that he had paid substantially all of the house payments throughout the relationship when he provided bank records only for the period after 2008; although Getty submitted documentary evidence that he had contributed $73,000 in the 13 years prior, this was far less than the $243,000 in house payments during that time. As for Getty's argument "that he would have no reason to provide the majority of the money for the mortgage, property taxes and insurance unless he believed he would be a co-owner," the court found that the evidence "demonstrated that [Getty] was acting in a fashion no different than a renter living in [Rizzo's] home and making contributions." The court found no evidence that Getty's contribution to the house payments was more than what he might pay in rent, and that a renter might pay utility bills and make improvements to a rental property just as Getty had.

The court ruled that the quantum meruit cause of action was barred by the statute of limitations. The court found that Getty's causes of action arose no later than March 2012 when he

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[2] The court acknowledged that Rizzo had been "stringing [Getty] along" by making excuses not to add him to title, when Rizzo in fact had no intention of doing so. On this basis the court found the statute of limitations on Getty's claims was tolled until 2012, when Getty first threatened legal action.

threatened to hire an attorney, and thus the two-year limitations period for a quantum meruit claim had expired.[3]

The court entered judgment for Rizzo on April 5, 2016. Getty timely appealed.

DISCUSSION

1. Declaratory Relief and Resulting Trust

Getty's claims for declaratory relief and resulting trust[4] all stem from his assertion that he and Rizzo had an agreement to share ownership of and sales proceeds from the Lomita residence. Getty's characterization of this agreement is a moving target: in the pretrial joint statement of the case, he claimed there was an express oral agreement, but on appeal he argues that the

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[3] The court found Getty's other claims were subject to a four-year statute of limitations and therefore not barred.

[4] A resulting trust arises "[w]hen a transfer of real property is made to one person, and the consideration therefor is paid by or for another." (*In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 342.) The trial court, for reasons unknown, treated the claim as one for a *constructive* trust, which " 'may be imposed . . . where there is a wrongful acquisition or detention of property to which another is entitled.' " (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 238.) For purposes of this appeal, the difference is immaterial. Getty's briefs make no arguments particular to either resulting or constructive trusts, and draw no distinction between his trust claim and his claim for declaratory relief, implicitly arguing that all are supported by evidence of an agreement between Getty and Rizzo to share ownership of the Lomita house and any sale proceeds. Given our holding (discussed *post*) that neither the law nor the evidence establishes that such an agreement existed, or that Getty is otherwise equitably entitled to ownership or a share of the sale proceeds, Getty's claims fail regardless of the legal theory or remedy.

agreement was instead implied by the parties' conduct. Further confusing the issue, in his opening brief on appeal Getty claims the agreement to share sales proceeds was in fact separate from and independent of the agreement to share title, a claim he does not appear to have made below. This separate agreement is at one point in the brief referred to as "oral," but elsewhere appears to be characterized as implied. Regardless of the characterization of the agreement or agreements, Getty asserts their existence is proven by the same evidence: (1) his payment of nearly all house-related expenses during the 20 years he lived with Rizzo; and (2) the extensive improvements and repairs he made to the property.

a. Standard of review

Getty disputes the trial court's finding that he did not meet his burden of proof. " '[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." ' " (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466 (*Sonic*).) "Where, as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor. That is because unless the trial court makes specific findings of fact in favor of the losing plaintiff, we presume the trial court found plaintiff's evidence lacks sufficient weight and credibility to carry the burden of proof. [Citation.] We have no power on appeal to judge the credibility of witnesses or to

reweigh the evidence." (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486 (*Bookout*).)

b. Lack of legal basis for Getty's claims

As an initial matter, even if the evidence is as Getty claims, he has failed to point to any statutory or case authority for the proposition that paying the vast majority of house-related expenses and performing extensive improvements or repairs on a property proves the existence of an agreement or creates an entitlement to share ownership or sales proceeds as a matter of law. Getty's briefs are notably bereft of discussion of any cases dealing with facts analogous to his. On this basis alone the judgment can be affirmed, regardless of whether Getty's claim arises under express or implied contract, equitable entitlement, or otherwise. (See *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 391 [declining to consider argument that "fail[s] to provide proper legal support"].)

Getty's reliance on *Marvin v. Marvin* (1976) 18 Cal.3d 660 (*Marvin*) is unavailing. As relevant to this appeal, *Marvin* held that upon dissolution of a relationship, a nonmarital partner had "the same rights to enforce contracts and to assert her equitable interest in property acquired through her effort as does any other unmarried person." (*Id.* at p. 684, fn. 24.) This holding was in response to prior cases permitting nonmarital partners to enforce express agreements only, and precluding them from seeking equitable remedies. (*Id.* at pp. 676-678.) Importantly, *Marvin* did not create any special rights for nonmarital cohabitants, but merely put them on equal footing with other unmarried civil litigants. (See *id.* at p. 684, fn. 24.) Thus, although *Marvin* permits Getty to bring causes of action in equity, it provides no

basis for Getty to claim that as a matter of law he is entitled to share in the Lomita house.

Though he acknowledges that "*Marvin* does not afford rights simply by the fact of cohabitation," Getty claims that he "is entitled to a vast array of relief based upon the facts of this case." He points to a statement in *Marvin* that nonmarital partners "may well expect that property will be divided in accord with the parties' own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort." (*Marvin, supra*, 18 Cal.3d at p. 682.) He also notes that *Marvin* contemplates the possibility of courts applying additional remedies beyond those stated in the opinion. (See *id.* at p. 684, fn. 25 ["Our opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise."].) Getty argues that these statements create a "mandate to expand the judicial remedies for relief."

We see no such mandate in *Marvin*. *Marvin* opened the door to courts applying appropriate equitable remedies to disputes between nonmartial partners, but did not dictate when or how courts must do so. Nothing in *Marvin* compels a court as a matter of law to divide property a certain way based on particular evidence.[5] To the extent Getty is suggesting the court

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[5] Getty quotes *Bergen v. Wood* (1993) 14 Cal.App.4th 854, 857, for the proposition that "*Marvin* requires only a 'showing of a stable and significant relationship arising out of cohabitation.' " To the extent Getty is suggesting that this showing is all that is

in this case failed to consider specific remedies, we note that the court considered every remedy Getty proposed, and did not reject any as not cognizable or beyond the court's power to grant. If Getty believes the court should have considered other remedies, it was his burden to present them.

c. Lack of evidence in support of Getty's claims

Getty has not shown that the law supports his position even if the evidence were as he characterizes it. But the evidence is not as he characterizes it, which is yet another reason to affirm the judgment. While Getty argues that the record indisputably establishes that, in addition to making significant improvements to the Lomita house, he also paid nearly all of the house payments, we find no error in the trial court's conclusion to the contrary.

Getty does not dispute that he obtained bank records for only the last seven years he and Rizzo lived together, and thus was unable to show by documentary evidence that he paid the majority of the house payments for the first 13 years as well. Getty argues, however, that such documentation was unnecessary because Rizzo admitted during her trial testimony that Getty paid the majority of the house payments throughout the 20-year period. Getty cites two portions of Rizzo's testimony: first, in response to being asked whether "this same procedure where Mr. Getty gave you checks [for the house account] continue[d] through the whole relationship," Rizzo answered, "Yes. Most of the time they were [third]-party checks." Second,

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required to justify equitable relief, we reject his argument. *Bergen* held that cohabitation was a *prerequisite* to asserting a claim under *Marvin*, not that it was sufficient in and of itself to prove entitlement to relief. (*Bergen*, at pp. 857-858.)

when asked whether it was "accurate that it was Mr. Getty's money that went into the [house] account, and then you wrote the check," Rizzo said, "It was some of his money, yes. I mean I couldn't—nobody gets to live somewhere for free." When asked if this "procedure . . . continued for the whole 20-year period," Rizzo said, "Till the end, yes, . . . except for the months that he didn't have any money."

This testimony establishes that the procedure by which Getty contributed to the house payments continued throughout the 20-year period. It fails to establish that his contributions were the majority of the house payments—Rizzo said nothing about the amounts Getty paid, or how frequent or infrequent were "the months that he didn't have any money." In fact, when asked if Getty paid the mortgage, taxes, and insurance, and Rizzo only paid for utilities and groceries, Rizzo said, "I wouldn't say that, no." When asked what percentage Getty paid, Rizzo said, "Again, it depended on how his work was. Times when there was no money in there, I paid it out of my personal account." While Rizzo's testimony does not preclude the possibility that Getty paid the majority of the house payments, it certainly does not confirm it such that the court had to find this fact in Getty's favor.[6]

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[6] Getty argues that Rizzo's claim that he did not contribute to the house account every month is belied by the fact that there was a significant surplus in the account when Getty and Rizzo separated, allegedly as a result of Rizzo's requirement that Getty maintain a six-month buffer. We disagree; there is no evidence that the "buffer" existed throughout the 20 years, as opposed to accumulating more recently, and therefore it does not prove that Getty kept the house account funded at all times.

Getty raises several other arguments against the court's evidentiary findings, none of which are availing. He asserts that Rizzo denied that his payments to her were either rent or a gift, which Getty argues leaves only the possibility that he was making the payments to honor an agreement to share sales proceeds. But the trial court was not bound by Rizzo's characterization of the payments, especially since other portions of her testimony make clear that she did regard the payments as either a rent or gift, whatever she might call them. For example, she testified that Getty "volunteered and wanted to pay and add to the household expense money. That's what I did when I was living with him in his house [at the beginning of their relationship]." When asked if the payments were a gift, Rizzo said, "No. It was . . . part of the household expenses, and he wanted to give me that money." As already mentioned, when asked about the arrangement by which Getty contributed to the house account, Rizzo said, "[N]obody gets to live somewhere for free." These statements are inconsistent with the notion that Rizzo was accepting the money as part of an agreement to share ownership or sales proceeds. Instead, they suggest that Getty provided the money either in exchange for living in Rizzo's house (thus effectively paying rent) or because he gratuitously wished to contribute to his girlfriend's household expenses.

Getty asserts that testimony from his niece Robin Thomas and friend Browning supports the notion that Getty and Rizzo purchased the Lomita house together. For example, Thomas testified that Rizzo had told her they had bought the house together, and Rizzo wanted to add Getty to title. Browning testified that "[Getty and Rizzo] said they were buying a house together." Aside from the question of whether such testimony

establishes Getty's entitlement to the property as a matter of law, the trial court either rejected it as not credible or found it of insufficient weight to tip the scale in Getty's favor, a conclusion we cannot disturb on appeal. (See *Bookout, supra*, 186 Cal.App.4th at p. 1486.)

Getty claims the court's finding that his conduct was consistent with that of a renter is belied by the "extensive improvements" he made to the Lomita house. But he cites no authority holding that extensive improvements prove as a matter of law that the party that made those improvements is an owner or that an agreement to share sales proceeds exists. The trial court could reasonably conclude that renters make improvements to the property in which they live. Getty's conduct could also be consistent with that of a boyfriend wishing to improve his girlfriend's house, all the more so if he lives there with her.

Finally, Getty argues that the court failed to consider whether the parties had an agreement to share sales proceeds independent of their alleged agreement to share ownership. Getty does not explain why the distinction is significant, but we presume he seeks to avail himself of a lower standard of proof than that required to dispute Rizzo's claim to title. (See Evid. Code, § 662 [requiring "clear and convincing" proof to rebut presumption that owner of legal title is also the owner of full beneficial title].)

We have found no indication in the record that Getty ever claimed before the trial court that there was a separate agreement to share sales proceeds independent of title. Getty argues he made the assertion in his complaint, which asks for a judgment declaring him "entitled to fifty percent (50%) of the sales proceeds from the sale of the residence and/or a fifty percent

(50%) fee interest in the property." To the extent the "and/or" may fairly be interpreted as alleging separate agreements, we have found no evidence or argument before the trial court specific to such a claim, nor does Getty direct us to any. "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.) We reject Getty's argument that he is raising an issue of law that may properly be asserted for the first time on appeal. The existence of a separate agreement is most certainly a question of fact, not of law, and one the trial court was entitled to consider in the first instance.

But even were we to reach the question, Getty's claim fails on the merits. Again, he has offered no legal support for the proposition that the evidence presented establishes as a matter of law the existence of an agreement to share either ownership or sales proceeds. And the trial court's finding that Getty "was acting in a fashion no different than a renter" is as fatal to his claim for shared sales proceeds as it is to his claim for shared ownership, as a renter would expect neither.[7]

2. Quantum Meruit

"[A] nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the

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[7] To the extent Getty is claiming that he is equitably entitled to a share of the proceeds, even absent an agreement, this claim is also defeated by the finding that he was, in effect, a renter, as well as his failure to cite to applicable legal authority supporting such an entitlement as a matter of law (as discussed *ante*, *Marvin* does not mandate such an equitable entitlement).

reasonable value of support received if he can show that he rendered services with the expectation of monetary reward." (*Marvin, supra*, 18 Cal.3d at p. 684.) The court ruled that Getty's quantum meruit claim was barred by the two-year statute of limitations, which the court found began running in March 2012 when Getty threatened to hire an attorney. This ruling appears to be in error; at a minimum, Getty was not barred from asserting a claim for any "household services rendered" within the two years immediately prior to filing his complaint.[8]

Reversal is not warranted, however. On this record, Getty cannot prevail on his quantum meruit claim. "To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made' [citations]." (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 458 (*Huskinson*).) Getty claims that his expectation of compensation arose from his purported agreement with Rizzo to share sales proceeds, and the improvements he made to the house were "made in reliance" on that agreement. In other words, although Getty is not required to prove the existence of a contract to recover in quantum meruit, Getty points to no "understanding or expectation" of compensation independent of Rizzo's purported promise to share sales proceeds with him. He does not claim, for example, that there was a separate understanding or expectation that he would be paid back for his

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[8] Getty argues his claims arose when his relationship with Rizzo terminated in late 2013 or early 2014. Because we affirm the judgment on a basis other than the statute of limitations, we need not address this.

contributions to the house payments, or be compensated for the repairs and improvements. Indeed, his expectation was not repayment for the reasonable value of his services, but entitlement to half of the increased value of the Lomita house, a recovery not permitted in quantum meruit. (See *Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 450-451 [no recovery in quantum meruit for " 'resulting benefit' " of services, such as increased value of a business].)

Thus, although the doctrine of quantum meruit as a general matter does not require proof of an agreement, Getty's particular claim *does* rely on the existence of an agreement, as that is the only evidence he offers to prove the parties' expectation that he be compensated. As discussed above, Getty has failed to prove as a matter of law the existence of the agreement.[9] Nor has he provided any case authority otherwise establishing entitlement to quantum meruit on the evidence presented here—for example, he offers no authority for the proposition that improvements of the type he performed as a matter of law cannot be deemed gratuitous or, as the trial court found, the act of a renter. "[W]e may affirm a trial court judgment on any basis presented by the record whether or not

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[9] This contrasts with cases in which a party sought recovery in quantum meruit for services performed in reliance on an existing but invalid agreement. (See, e.g., *Huskinson, supra*, 32 Cal.4th at p. 464 [attorney entitled to recover in quantum meruit despite invalidity of fee-sharing agreement].) In such cases, there is no dispute that an agreement exists, but because it is unenforceable recovery is limited to the reasonable value of the services provided. Here, however, the trial court found that Getty had failed to prove the existence of any agreement at all, valid or invalid.

relied upon by the trial court." (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1.) The court's ruling must be upheld regardless of any error concerning the statute of limitations.[10]

DISPOSITION

The judgment is affirmed. Rizzo is entitled to costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.

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[10] In responding to Getty's objections to its statement of decision, the trial court hinted that it would rule against Getty's quantum meruit claim on the merits. The court noted that *Marvin* discussed quantum meruit in the context of "household services," while Getty's case focused on his ownership interest "based upon his contributions which the Court previously found were not supported by competent admissible evidence."