Filed 11/15/16 Kalpakoff v. Muser 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JOYCE KALPAKOFF, Plaintiff and Respondent, v. WOLFGANG MUSER, Defendant and Appellant.	B271897 (Super. Ct. No. 56-2014-00459104-CU-BC-VTA) (Ventura County)
Estate of DELBERT M. NICHOLS, Deceased.	(Super. Ct. No. 56-2015-00471681-PR-TR-OXN) (Ventura County)
WOLFGANG MUSER, Petitioner and Appellant, v. JOYCE KALPAKOFF, Objector and Respondent.	

In these consolidated cases, Wolfgang Muser appeals from a judgment entered against him and in favor of Joyce Kalpakoff, respondent. The trial court ruled that respondent is the owner of a promissory note bequeathed to her by her brother, Delbert M. Nichols. Appellant is an obligor on the note. The court found that the amount due and payable by appellant is $65,819.70. We reject appellant's multiple contentions of error and affirm.

Factual and Procedural Background

In 1995 Delbert M. Nichols (Delbert) and Ksenia Nichols (Ksenia) created The Nichols Family Revocable Trust (Trust). Ksenia was appellant's mother, and Delbert was his stepfather. Delbert and Ksenia, who were co-trustees, transferred their home to the Trust. Before the transfer, they owned the home as joint tenants.

In July 2000 Delbert and Ksenia loaned $50,000 to appellant and his then wife, Alexandra Mathews, so they could purchase a mobile home. The promissory note for the loan (the 2000 note) is entitled "Contract Note" and states that payments shall be made to Delbert and Ksenia personally, not to them as trustees of the Trust. Delbert and Ksenia financed the loan by borrowing $50,000 from Bank of America. The bank loan was secured by a deed of trust encumbering their home. According to Delbert, appellant and Mathews did not borrow the $50,000 from the bank because they "were unable to obtain a loan in this amount, or, if [they] could, it would be at exorbitant interest rates."

Pursuant to the 2000 note, appellant's and Mathews' $50,000 loan was repayable at the same rate as the Bank of America loan: "$490.78 per month for 240 consecutive months,

until paid." The note provided: "[T]his rate ($490.78) is based on the monthly coupons furnished by Bank of America to Delbert M. Nichols and Ksenia Nichols. Should this amount change, it is agreed that the corrected amount shall be paid."

In March 2001 the repayment terms of the 2000 note were modified by an "Addendum." The modification occurred because the Bank of America loan had "been rewritten at a lower interest rate."

Neither party has cited evidence in the record showing that Delbert and Ksenia transferred the 2000 note to the Trust. We therefore assume that they did not transfer it to the Trust.

Ksenia died in November 2001. Delbert became the Trust's sole trustee. According to Delbert, "the name on the Bank of America loan was changed to [his] name only, Delbert M. Nichols."

In October 2002 Delbert loaned an additional $24,000 to appellant and Mathews. He financed the loan by borrowing the same amount from Bank of America. On November 25, 2002, appellant and Mathews signed a document entitled "Contract Note Page 2" and designated as "Addendum #2" (the 2002 note). Appellant and Mathews "promise[d] to repay Delbert M. Nichols" personally the "new loan balance" of $72,316.75 "at the rate of $548.00 per month for 240 consecutive months, until paid."[1] In

[1] The full text of the 2002 note is as follows: "As set forth in Bank of America memo dated November 12, 2002 (copy attached), this loan has be[e]n rewritten at a lower interest rate of 6.690%, with an additional amount of $24,000 received. The new loan balance is $72, 316.75. [¶] In consideration thereof, we, the undersigned [appellant and Mathews], promise to repay Delbert

March 2004 Delbert listed the loan under the 2002 note as an asset of the Trust.

In March 2004 Delbert took out a reverse mortgage loan on his home and used part of the proceeds to pay off the Bank of America loan. Appellant's trial brief states: "On March 8, 2004, Delbert obtained a reverse mortgage from Seattle Mortgage Company in the amount of $143,074 which paid off the Bank of America Equity Loan in the amount of $70,649.10." When appellant learned that the Bank of America loan had been repaid, he refused to continue making payments to Delbert pursuant to the 2002 note. Appellant stopped making payments after October 2004.

On December 11, 2004, Delbert wrote a letter to appellant and Mathews demanding that they repay the balance of their loan at the rate of $548 per month as provided in the 2002 note. Delbert stated: "Since the Bank of America loan is paid, I have noted my records to say that I am not charging you any interest. The whole [$]548.00 reduces your principal each month, making it possible to pay this off in a shorter time. This is quite a saving, considering that the monthly interest would run in the neighborhood of $350-$400 monthly. I have also noted [on] my records to say if I die before the Note is paid, it (the Note) will be considered PAID IN FULL at that time (the time of my death.)"

M. Nichols, said amount ($72,316.75) at the rate of $548.00 per month for 240 consecutive months, until paid. The first payment shall be due on November 25, 2002, and each succeeding payment due on the 25th of the month thereafter." The record on appeal does not include the "Bank of America memo dated November 12, 2002" that was attached to the note.

Appellant and Mathews did not resume payments, so Delbert filed a complaint against them for breach of contract.[2] Delbert dismissed the action without prejudice based on appellant's and Mathews' promise to resume payments. The first resumed payment was made on June 30, 2006.

In March 2008 Delbert amended his will by signing a codicil leaving the "outstanding balance" on the 2002 note to respondent, his sister. In the codicil Delbert stated: "While I had previously considered forgiving these notes upon my death, I had to file a lawsuit against [appellant] when he stopped making the payments he promised to make. . . . I have not made any promise to [appellant] that I would forgive the notes upon my death."

In May 2008 Delbert "assign[ed]" to himself "from the assets of the Nichols Family Revocable Trust . . . the assets given by me as noted in the latest version of my Will." The 2002 note is attached as an exhibit to the assignment.

In December 2009 appellant wrote a letter to Delbert saying that his marriage to Mathews had been dissolved. After July 2011 appellant stopped making payments on the 2002 note. In September 2011 he informed Delbert that he was "unable to pay [his] debts at this time" and "[did] not know when or how this situation will change."

In February 2014 Delbert died at the age of 91. In October 2014 respondent, as successor in interest to Delbert, filed an action against appellant and Mathews for breach of the 2002

---

[2] In her trial brief, respondent alleged that appellant had filed a cross-complaint against Delbert "accusing [him] of misappropriating and wasting assets belonging to [appellant's] contingent interest from [the Trust]." As a result, "[t]he relationship between [appellant] and Del[bert] soured."

note and for unjust enrichment. In August 2015 appellant filed a petition for an order decreeing that the Trust is the rightful owner of the 2002 note. The two cases were consolidated for all purposes under the case number of respondent's action.

A court trial was conducted in January 2016. Appellant and William Kalpakoff, Delbert's nephew, testified. A court reporter was not present.

Trial Court's Ruling

The trial court found that in March 2004 Delbert had transferred the 2002 note to the Trust and in May 2008 had retransferred it back to himself. In determining whether Delbert had the authority to make the May 2008 transfer, the court considered the following provisions of the Trust: Upon Ksenia's death, the Trust assets were to be divided into two separate shares. One share, "Survivor's Trust A," was to consist of Delbert's separate property and one-half of the community property. The other share, "Decedent's Marital Share," was to consist of Ksenia's separate property and the other half of the community property. Decedent's Marital Share was to be "divided into Decedent's Trust B and Trust C," which were irrevocable. Delbert was entitled to the income from Decedent's Trust B and Trust C and could invade principal to the extent necessary or advisable for his medical care, education, and maintenance. Upon Delbert's death, all of the assets in Decedent's Trust B and Trust C would be distributed to appellant. Delbert's Survivor's Trust A was revocable while he was alive. He could withdraw all or any part of its principal at any time and for any purpose. When Delbert died in 2014, the Trust provided that all of the assets in Survivor's Trust A shall be distributed to appellant.

Based on the above provisions of the Trust and the evidence, the trial court concluded that in May 2008 Delbert had the authority to transfer the 2002 note from the Trust to himself. Thus, the 2002 note was Delbert's personal property at the time of his death and had been bequeathed to respondent under the codicil to his will. The court found it unnecessary to determine whether the note was community property when Delbert transferred it to the Trust in March 2004. The court reasoned: "The nature of the asset is not controlling. . . . So long as the note was not more than 1/2 of the value of the community property in the trust in 2008, [the] determination of the character of the notes is not really an issue. Delbert could take the principal out of [Survivor's] [T]rust A at any time." (For example, if the 2002 note were community property and if its value were one-half the value of the Trust's total community property, including the note, Delbert could have lawfully allocated the note to Survivor's Trust A provided that he had allocated the remaining Trust community property to Decedent's Trust B. Delbert could then lawfully assign the note from Survivor's Trust A to himself.)

The court rejected appellant's claim that he was no longer liable under the 2002 note after Delbert had paid off the Bank of America loan: "The fact that [Delbert] borrowed money in order to loan it to [appellant] does not mean that [appellant] would no longer owe the money if [Delbert's and Ksenia's] equity loan was paid off."

The court also rejected appellant's claim that Delbert's December 11, 2004 letter manifested "a binding intent on the part of [Delbert] to deem the note paid in full at the time of his death in the event that he died before it was paid in full." The court noted that, after the letter was written, Delbert had

filed a lawsuit against appellant and Mathews because they refused to resume payments.

The court found that the loan balance due and payable by appellant was $65,819.70.

Appellant's Motion for a New Trial

In its ruling denying appellant's motion for a new trial, the court observed that "[t]he only issue under submission was the entitlement of [appellant] to full credit for $53,974.51 in payments against the loan amount of $74,000." In a January 14, 2010 letter to appellant, Delbert's counsel said that the balance due on the loan was $71,025.70. The court reasoned: "[Appellant's] response to that letter was simply to make payments. He made 18 payments after the January 14, 2010 letter and did not at any time object to the amount stated as owing. The Court views his lack of objection and continued payments as agreement to the amount stated. . . . [A]fter receiving the letter[], the payments of $274.00 each between January 2010 and September 2011 reduced the balance to $65,819.70, not including interest."

Appellant Is Precluded from
Arguing that the Evidence Is Insufficient

Where, as here, there is no statement of decision, "[t]he general rule is that . . . the reviewing court must conclude that the trial court made all findings necessary to support the judgment under any theory which was before the court. [Citations.]" (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1550.) "[W]e must presume [that] the judgment is correct . . . and . . . that the record contains evidence sufficient to support the judgment. [Citations.]" (*Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241,

1251.) "[A] party challenging a judgment has the burden of showing reversible error by an adequate record. [Citations.]" (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.)

There is no reporter's transcript of the court trial. Nor is there an agreed or settled statement in lieu of a reporter's transcript. (See Cal. Rules of Court, rules 8.130(h), 8.134, 8.137.) Appellant is therefore precluded from arguing that the evidence is insufficient. "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters.* To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript [or agreed or settled statement in lieu of a reporter's transcript] will be precluded from raising an argument as to the sufficiency of the evidence. [Citations.]" (*In re Estate of Fain* (1999) 75 Cal.App.4th 973, 992; see also *Bond v. Pulsar Video Productions* (1996) 50 Cal.App.4th 918, 924 ["In a judgment roll appeal based on a clerk's transcript, every presumption is in favor of the validity of the judgment and all facts consistent with its validity will be presumed to have existed"].)

Appellant's Contentions

Appellant's contentions, and our reasons for rejecting them, are as follows:

(1) After Delbert's use of the reverse mortgage loan proceeds to prepay the Bank of America loan, he was not entitled to receive any further payments from appellant under the 2002 note. The amount due on the note "became zero." But neither the 2000 note nor the 2002 note contains a provision to this

effect. We recognize that the $50,000 loan under the 2000 note was repayable at the same rate as the $50,000 Bank of America loan. But this did not mean that the remaining balance under the 2000 note would be forgiven if Delbert prepaid the bank loan. Moreover, the 2000 note was superseded by the 2002 note, which states that the loan balance shall be repayable "at the rate of $548.00 per month for 240 consecutive months until paid."

(2) Delbert breached his "promises" in the letter of December 11, 2004, "that if [appellant] resumed payments on the Bank of America Note," he would "first, apply all future payments to principal only, and, second, exonerate [appellant's] obligation upon Del[bert's] death." We disagree. It is reasonable to infer that the "promises" were conditional upon appellant's timely resumption of payments, without default, in the amount specified by the 2002 note: $548 per month. Delbert stated: "The Bank of America loan may be gone, but your note to me is still outstanding." "The whole [$]548 reduces your principal each month, making it possible to pay this off in a shorter time." "I look forward to the resumption of your monthly payments beginning with 11/25/04."

Appellant failed to satisfy the required condition. He refused to resume payments. After October 23, 2004, no payments were made until June 30, 2006. The court found that Delbert "was forced to bring a lawsuit against [appellant] in order to have payments recommence." In addition, starting in January 2010 appellant reduced his monthly payment from $548 to $274. After July 2011 he stopped making payments altogether.

(3) After Delbert had paid off the Bank of America loans, he "fraudulently induced [appellant] to recommence making payments which Del[bert] converted to his own use."

(Capitalization, bold, and underlining omitted.) Appellant relied on Delbert's "written promises that all payments [would] go to principal and that the Note would be forgiven on his death . . . ." "[Appellant's] payments of $28,222.00 to Del[bert] subsequent to the [dismissal of Delbert's complaint against appellant] were fraudulently obtained and are owed by his estate to appellant . . . ."

These contentions involve evidentiary matters that cannot be raised on appeal because of an inadequate record. Appellant testified at the trial. His unreported testimony may have shown that he resumed payments in settlement of Delbert's lawsuit, which was dismissed, not in reliance on Delbert's "promises" in the letter of December 11, 2004.

In any event, Delbert did not "fraudulently induce[] [appellant] to recommence making payments which Del[bert] converted to his own use." Pursuant to the 2002 note, appellant was obligated to make the payments. Furthermore, as previously explained, Delbert's "promises" were conditional, and appellant failed to satisfy the required condition.

(4) The trial court erroneously concluded that in May 2008 Delbert had the authority to transfer Decedent's Trust B's half interest in the 2002 note to himself. Delbert "unabashedly misappropriated [Decedent's] Trust B assets to his own use with a *total lack of either documentation or justification*. . . . [T]he evidence proved that Del[bert] had assets and income sufficient to meet his needs without his unfettered invasion and misappropriation of [Decedent's] Trust B assets." Delbert's alleged lack of authority to make the transfer was stated as an affirmative defense in appellant's answer to respondent's

complaint.[3] A defendant ordinarily has the burden of proving an affirmative defense. (*Morris v. Williams* (1967) 67 Cal.2d 733, 760.)

Appellant's contentions involve evidentiary matters that cannot be raised on appeal because of an inadequate record. Moreover, appellant assumes, without supporting evidence, that in March 2004 when Delbert transferred the 2002 note to the Trust, he was required to allocate half to Decedent's Trust B and half to Survivor's Trust A because the note was community property. In his trial brief appellant argued, "Upon Ksenia's death, the Note should have been separated into two trusts so that one-half of the Note belonged to [Survivor's] Trust A and one-half belonged to [Decedent's] Trust B."

The trial court did not determine the character of the 2002 note. If it were community property, Delbert could have lawfully allocated it to Survivor's Trust A provided that he had transferred from that trust to Decedent's Trust B community property equal to half the value of the note. The Trust provides: "The Trustee [Delbert] shall have the sole discretion to select that portion of the joint assets [i.e., community property] which shall be included in the Marital Share (Decedent's Trust B and Trust C)." In his declaration in support of respondent's opposition to appellant's motion for a new trial, respondent's counsel stated, "[Appellant's trial] testimony regarding the value of the house [which was a Trust asset] shows that there were sufficient assets

---

[3] Appellant's Tenth Affirmative Defense alleged: "[Respondent] has no ownership rights to the Note because the Note is property of the . . . Trust . . . and Delbert Nichols lacked authority to transfer the Note to himself for purposes of a gift upon his death."

belonging to Del[bert's] portion of the Trust to provide that [the 2002 note] was in Del[bert's] portion of the Trust."

(5) Delbert violated various sections of the Probate Code. This contention is based on the unproven assumption that in May 2008 Delbert lacked the authority to transfer the 2002 note from the Trust to himself.

(6) The trial court erroneously found that appellant had "waived" his right to dispute that in January 2010 the remaining balance under the 2002 note was $71,025.70. The alleged waiver was based on a January 14, 2010 letter that Delbert's counsel had sent to appellant and Mathews. In the letter counsel stated that the remaining balance was $71,025.70. Counsel attached detailed schedules showing how this amount had been calculated. Counsel wrote the letter in response to appellant's request for an accounting.

The trial court did not find a "waiver" by appellant. It found that "his lack of objection [to the amount stated in the letter] and continued payments" to Delbert constituted "agreement to the amount stated." The trial court did not err. "When a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered. [Citations.]" (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 753.)

Appellant asserts that "there was no evidence that [he] was ever sent or received the January 14, 2010, letter." But we presume that appellant's unreported trial testimony would show that he had received the letter. (*In re Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992.) Respondent claims that appellant "admitted on cross-examination that he received the January 2010 letter."

Disposition

The judgment is affirmed. Respondent shall recover her costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Rebecca S. Riley, Judge*

Superior Court County of Ventura

Shane, DiGiuseppe & Rodgers, Richard A. Rodgers, for Defendant and Appellant.

Donner & Donner, J. Caleb Donner, for Plaintiff and Respondent.

* (Retired judge of the Ventura Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)