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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CYNTHIA BI et al.,

Plaintiff, Cross-defendant and
Appellant,

v.

GUIQIN ZONG et al.,

Defendants, Cross-complainants and
Respondents;

KEVIN CHUNG,

Cross-defendant and Appellant.

B240198

(Los Angeles County
Super. Ct. No. BC421870)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest H. Hiroshige, Judge. Reversed in part, affirmed in part.

Kasai Law Group, Wayne T. Kasai and Kristin Snow Reynolds for Plaintiff, Cross-defendant and Appellant Cynthia Bi.¹

Kevin Chung, in pro. per., for Cross-defendant and Appellant.

Mark M. O'Brien for Defendants, Cross-complainants and Respondents.

¹ While represented by counsel on the briefs, Cynthia Bi appeared in pro. per. at oral argument.

SUMMARY

Plaintiff, Cross-defendant and Appellant Cynthia Bi (“Bi”) appeals from a judgment entered into on December 15, 2011, dissolving the partnership between herself, her husband (Min Hwa Chung (“Chung”))² and another couple, Defendants, Cross-complainants and Respondents Guiqin Zhong (“Zhong”) and Guoliang Li (“Li”) (collectively “Respondents”), and partitioning the real property purchased by the partnership as part of a settlement between parties. Bi challenges the portion of the judgment ordering her and her husband to pay Respondents \$83,800.49, arguing that the monetary award was not part of the settlement but a determination made by the court after a trial on the cross-complaint, that the court abused its discretion by performing the accounting during the trial rather than referring the matter to an accountant, and that the court’s monetary award was based on an erroneous accounting report from Respondents’ expert.

Cross-defendant and Appellant Kevin Chung (“Kevin”), the son of Bi and Chung, challenges the partition, contending that it is incorrect as to the ownership percentages.

We find that Bi has standing and agree that the \$83,800.49 award is not supported by substantial evidence. We also find that Kevin has standing to seek a correction of the partition. We note that Kevin does not seek to change the partition as to Respondents, but only to change the partition’s division of ownership within the Bi family’s³ share. We, therefore, reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Bi and Chung entered into a partnership with Respondents in 2001 to purchase real property commonly known as 1132-1136 Sunset Boulevard in the City of Arcadia (the “property”). At the time, the property had three income-generating rental units.

² Although initially involved in the litigation, Chung did not participate in the trial below and has not appealed.

³ By Bi’s family, we refer to Bi, Chung, Kevin and Xinan Bi.

Although the initial plan was for each party to contribute or finance their own share of an equal, 50-50 ownership in the property, Respondents contributed a larger percentage and essentially financed Bi and Chung. The parties later had an oral agreement to develop the property into two detached homes under a condominium plan with each family contributing half the cost. After problems and delays with the general contractor, the first home was completed and Respondents occupied the unit; 28 months later the second home was completed and Bi occupied that unit.

In September 2009, Bi and Chung filed the instant action against Respondents alleging, inter alia, breach of contract, negligent and intentional misrepresentation and unjust enrichment arising from problems and delays in the construction on the property and the use of funds intended for the construction.⁴ In December 2009, Respondents filed a cross-complaint seeking dissolution of the partnership as to Bi and Chung and partition of the property. In the partition claim, the cross-complaint stated that the Respondents owned a one-half undivided interest in the property and that Bi, Chung, Xinan Bi (“Xinan”, Bi’s brother) and Kevin co-owned the property and “will be materially affected by this action.”⁵

In July 2010, Respondents requested entry of default against Xinan and Kevin which the clerk entered. In December 2010, Kevin moved to set aside default.

At the start of the scheduled trial, on January 19, 2011, the court denied without prejudice Kevin’s motion to set aside. The court then elected to proceed with the bench trial on Respondents’ cross-complaint, rather than the jury trial on Bi and Chung’s complaint.

At the bench trial where Bi was in pro. per., Respondents’ expert witness, an accountant, testified that he had prepared a report summarizing spreadsheets provided by Li from October 2001 to August 2010. The expert did random checks of entries from

⁴ Although initially represented by counsel, in October 2010, Bi and Chung filed substitution of attorney forms to proceed in pro. per.

⁵ In January 2008, Bi and Chung deeded half their interest in the property to Xinan and Kevin so that each had a one-eighth undivided interest.

Li's spreadsheets with the supporting documentation Li provided. The expert opined that Respondents had over-contributed \$83,800.49 and would be entitled to that amount from Bi and Chung.

After testimony from parties, the court found that "Bi owe[d] \$83,800.49 to [Respondents]." The court then urged Bi and Li to negotiate a settlement on the partition issue.

After a recess, Respondents' counsel, Li and Bi returned to the courtroom and Respondents' counsel indicated that parties were able to reach a resolution and recited the following: Zong and Li shall recover from Bi and Chung "the sum of \$83,800.49 to be paid 90 days after the subject subdivision is approved. [¶] Interest thereon as allowed by law shall accrue from today[,] January 26th, 2011. [¶] [Respondents] will execute all documents reasonably required to effect the subdivision process relating to the real property. [¶] The court shall retain jurisdiction to appoint a referee to effect partition of said real property and to make other orders consistent herewith. [¶] [Bi and Chung] hereby dismiss their complaint with prejudice."

Li, in response to the court's questions, indicated that he understood "all the terms and conditions of the settlement", agreed to the settlement and did not have any questions about any of the terms and conditions. Bi, in response to the court's questions, indicated she understood "all the terms and conditions of *the judgment that was earlier rendered by this court and the resolution or settlement* of the terms and conditions that were mentioned by counsel in the settlement" and indicated that she agreed to the settlement. (Italics added.)

On March 16, 2011, the trial judge entered an order prepared by Respondents' counsel reciting that Bi, Zong and Li "having completed trial relating to the Cross Complaint for partition of the Real Property, for an accounting, and for dissolution of the partnership between Plaintiffs and Cross [Complainants], and the parties having entered into a stipulation orally before the court, [¶] IT IS ORDERED as follows: [¶] 1. [Bi and Chung] shall pay to [Zong and Li] the sum of \$83,800.49 plus interest thereon at 10% per annum from January 26, 2011, within 90 days after the recordation of the Condominium

Plan for [the property] previously prepared by Trittech Associates, Inc. with signature lines amended to provide the names of all owners thereof. [¶] 2. [Zong and Li] shall execute all documents reasonably required to effect the subdivision of the Real Property into two condominiums. [¶] 3. The Court shall retain jurisdiction to appoint a referee to effect a partition of the Real Property and to make further orders consistent herewith. The Court may enforce the settlement herein pursuant to the provisions of Code of Civil Procedure § 664.6. [¶] 4. Upon payment as specified herein and upon completion of the said subdivision, the partnership between Plaintiffs and Defendants shall be dissolved, and said parties shall dismiss their various actions ‘with prejudice.’”

In June 2011, Kevin moved to set aside entry of his default and the motion was granted.

Respondents moved for the appointment of a referee to oversee the partition which Bi and Kevin opposed. The matter came for hearing on December 6, 2011 and was continued until January 2012.⁶

On December 15, 2011, the trial court signed a judgment prepared by Respondents’ counsel. Specifically, the judgment dissolved the partnership between Bi, Chung and Respondents, stated that Respondents “shall recover from [Bi] and [Chung] the sum of \$83,800.49 plus interest at the rate of 10% per annum from January 26, 2011,” and ordered the property to be partitioned so that, on the one hand, Respondents each received a one-half undivided interest as tenants in common in one unit of the condominium plan and, on the other hand, Bi received a one-half undivided interest, Xinan received a one-fourth undivided interest and Kevin received a one-fourth undivided interest as tenants in common in the second unit of the condominium plan.

After motions for a new trial were denied, Bi and Chung appealed.

⁶ No transcript for December 6, 2011, is included in the record.

DISCUSSION

On appeal, Bi contends that the trial court abused its discretion by performing an accounting at trial rather than referring the accounting to an accountant, that the monetary award was based on an incomplete and defective accounting report from Respondents' expert, and the trial court erroneously excluded relevant evidence of credits to which Bi was entitled. In addition, Bi contends that the monetary award was not part of the stipulated settlement. She apparently does not challenge the partition.

Chung contends on appeal that the judgment ordering the partition contains errors and the trial court failed to follow established partition procedure, including ordering an accounting.

Respondents contend that Bi does not have standing to appeal because she agreed to the settlement and the monetary award was part of that settlement. As to Kevin, Respondents argue that he is not an "aggrieved" party for standing purposes because his arguments concern the accounting and his interests are not affected by the accounting. Respondents do not address the merits of appellants' claims.

I. Bi's Standing

A party who consents or stipulates to a judgment is not aggrieved by the judgment and thus, ordinarily, lacks standing to appeal. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 2:290, p. 2-152.6, citing *Papadakis v. Zelis* (1991) 230 Cal.App.3d 1385, 1387.) Code of Civil Procedure section 664.6 provides that "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." "[S]trict compliance with the requirements of section 664.6 is prerequisite to invoking the power of the court to impose a settlement agreement." (*Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1256, quoting *Sully-Miller Contracting Co. v. Gledson/Cashman Construction, Inc.* (2002) 103 Cal.App.4th 30, 37.)

In order to determine “whether the parties entered into a binding settlement of all or part of a case, . . . [the] court should consider whether (1) the material terms of the settlement were explicitly defined, (2) the supervising judicial officer questioned the parties regarding their understanding of those terms, and (3) the parties expressly acknowledged their understanding of and agreement to be bound by those terms.” (*In re Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 544, quoting *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.)

Based on our review of the reporter’s transcripts, we conclude that Bi did not consent as part of the settlement to the award of \$83,800.49. At the bench trial, after testimony from parties, the court heard argument from both sides during which Bi, who was proceeding in pro. per., disagreed with Respondents’ contention that she owed them \$83,800.49. The court asked Bi “hypothetically” if she had “\$83,800.49 to pay Li if that was the order?” and she indicated that she did not but that if the condominium plan was signed and the property partitioned she could get a loan on her unit. The court then asked, if Bi could get a loan for at least \$83,800.49, would she be willing to pay to Li if the partition in kind occurred, allowing each side to keep their half of the property to sell or develop as they wished. Bi responded that she was “willing to do that but first I got to make sure this amount is correct.” The court responded, “*No. I make that determination*” and further stated, “that is what this trial was about[,] what was the amount.” (Italics added.)

Then, after discussing whether a referee was necessary for the partition, the court noted, “I guess, I would still have to make a determination as to what the amount –” and Respondents’ counsel interrupted to agree, “Yes, your Honor, you would.” After further argument from Respondents’ counsel, the court noted, “it seems to me assuming that the court resolves the other issues based on the cross-complaint,” presumably referring to the accounting claim, “then either you could draft an order or you could enter into negotiation with [Bi] to resolve the rest of the issues.” After hearing additional argument from Respondents’ counsel about the accountant’s findings, the court stated that “based

on the evidence that was presented the court would find that . . . Bi owes \$83,800.49 to [Respondents].”

The court then indicated that it would order a partition but “I think that I would urge the parties to negotiate a resolution as to the partition.” The court directed the parties to attempt to negotiate a resolution on the partition issue in which “both sides would rather have the in kind partition and then each of you have your separate lots for, you know, for your use in the future. Period. *Contingent on your paying the \$83,800.49.*” (Italics added.) The court then noted that if good faith efforts to accomplish a partition in kind were unsuccessful, there would be a partition by sale ordered by the court. The court then asked if Bi was “willing to forego your trial on the complaint if you can arrive at a settlement.” The court went on to explain, “This is sort of a settlement so that if you agree to the settlement which means the first—*the first precondition is that you have to get the loan to pay off the sum of money that I have awarded.* Then you could—then you could move into the partition in kind, but as I said there are certain legal problems with the partition in kind. But the attorney feels there is some chance or at least a reasonable likelihood that it might be accomplished.” (Italics added.) The court briefly explained the appointment of a referee and how the referee would have to be paid and might come up with the same solution as the parties on their own but suggested “we might as well get this on track in the quickest, most expeditious way possible” to accomplish a partition in kind. The court then asked Bi “as part of the settlement this is in effect a settlement you would dismiss your complaint. Is that all right with you? No?” Ms. Bi responded, “[n]o” and went on to explain that she did not believe the partition in kind would raise any problems once the condominium plan reflected a 50-50 ownership and started to ask a question when the court interrupted and stated, “[y]ou don’t really have a veto power here. I could just order it. You just lost on the cross-complaint. I’m giving you the opportunity to have the plan worked out so that you’re satisfied that you’re protected and you’re accomplishing what you wanted. [¶] But on the other hand I’m going to have him try to talk you into whether or not you can agree to the type of order. I’m going to have a court order because that is what the cross-

complaint was about. So I'm going to order it. [¶] But I just thought it was in the best interest of both sides to try and reach an agreement on how the partition is going to be done, but I would keep jurisdiction over the project until it gets done. . . . [¶] . . . I'm giving you an opportunity, I don't have to, to input as to how this is going to be done. *I've decided the money part.*" (Italics added.)

The court then told parties that they were going to have negotiations, "[n]obody is excused . . . you will have a discussion with counsel about the procedure and the terms and conditions of the partition."

After a recess for the parties to confer, Respondents' counsel, Li and Bi returned to the courtroom and Respondents' counsel indicated that parties were able to reach a resolution and recited that Zong and Li shall recover from Bi and Chung "the sum of \$83,800.49 to be paid 90 days after the subject subdivision is approved. [¶] Interest thereon as allowed by law shall accrue from today January 26th, 2011. [¶] [Respondents] will execute all documents reasonably required to effect the subdivision process relating to the real property. [¶] The court shall retain jurisdiction to appoint a referee to effect partition of said real property and to make other orders consistent herewith. [¶] [Bi and Chung] hereby dismiss their complaint with prejudice."

Li, in response to the court's questions, indicated that he understood "all the terms and conditions of the settlement", agreed to the settlement and did not have any questions about any of the terms and conditions. The court then asked Bi, "do you understand all the terms and conditions of *the judgment that was earlier rendered by this court* and the resolution or settlement of the terms and conditions that were mentioned by counsel in the settlement?" (Italics added.) Bi responded, "[y]es", and also indicated in response to the court's questioning that she agreed to the settlement. The court did not ask Bi if she had any questions.

Based on this evidence, we agree with Bi that she did not consent to a settlement with respect to the monetary award of \$83,800.49. We therefore conclude that she has standing to appeal the monetary award.

II. Failure to Refer for Accounting

Bi contends that the trial court abused its discretion when it proceeded to perform the accounting at trial rather than make a reference for that purpose. Bi argues that because the accounting provided by Respondents' expert in this case was so incomplete, the court should have referred the matter to an accountant to resolve.

Code of Civil Procedure section 639 provides that upon a motion of a party, or its own motion, the trial court may appoint a special referee in certain specified circumstances: “(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. [¶] (3) When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action. [¶] (4) When it is necessary for the information of the court in a special proceeding.”

Whether to refer the accounting to an accountant is “a matter entirely within the discretion of the trial court to determine whether it was necessary.” (*Walsh v. Jack Rubin & Sons, Inc.* (1960) 182 Cal.App.2d 652, 654.)

Preliminarily, we note that Bi does not indicate that she moved the trial court for reference to an accountant. Moreover, Bi presents no argument that the trial court abused its discretion by proceeding with the bench trial rather than referring the matter to an accountant because her contention that Respondents' expert's accounting was incomplete and deficient would not have been known until the trial was already under way. Accordingly, Bi has not demonstrated that the trial court abused its discretion by not referring the matter to an accountant.

III. Deficiencies in the Accounting by Respondents' Expert

Next, Bi makes several arguments related to the deficiencies in Respondents' expert's accounting upon which the trial court relied. She argues that the Respondents' expert was not engaged to do an accounting but merely to summarize the information provided by Li in the spreadsheets Li prepared and had not reviewed a single bank

statement from the partnership's joint account. In addition, Bi argued that Respondents' expert incorrectly disallowed Bi credit for \$27,069.54 in payments, which Li had given credit for in his spreadsheets, because Li did not have the supporting documentation for those payments by Bi even though the expert had stated that he had randomly checked Li's entries and found them to be supported by documentation. In addition, Bi alleged several deficiencies in Respondents' expert's report as part of her earlier claim regarding the failure to refer the matter to an accountant, including the expert's failure to determine the partnership's capital balance and to include Li's withdrawals from the partnership's account to pay for personal expenses. We assume that Bi seeks to make a substantial evidence argument with these contentions.

“When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 8:39, p. 8-20, citing *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Nonetheless, expert testimony cannot constitute “substantial evidence” when it is based on conclusions or assumptions not supported by evidence in the record. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 8:55.1, p. 8-27, citing *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.* (1998) 62 Cal.App.4th 1123, 1137.)

The most problematic aspect of Respondents' expert's analysis is that it tracked four categories: partnership-related expenses, income from tenants, contributions from Bi and Chung, and contributions from Respondents; it did not, however, track the capital balance in the partnership's joint account.⁷ Thus, the expert's analysis did not determine if there was (or should have been absent non-partnership expenditures) a balance

⁷ Indeed, the expert never looked at bank statements from the partnership account.

remaining in the partnership account that should be credited to parties.⁸ It was undisputed that Li used the partnership account to pay for personal expenses. Li stated that he was using, with Bi's agreement, his share of tenant income to fund these personal expenses, but he also stated that Bi did not "take the money out of the [joint] account, but she used the money to apply to the cost of building the property." But neither Li's agreed-upon withdrawal nor Bi's contribution to the partnership capital is reflected in the expert's analysis.

The expert's analysis is also troubling because it is merely a summary of Li's spreadsheet records and did not, other than a few random checks, attempt to verify the accuracy of Li's entries. At trial, however, it was clear that a number of the entries were incorrect. For example, Li was given credit for making contributions to the partnership when he made payments for partnership expenses even though those payments were made from the partnership's joint account, not his personal account.

Nonetheless, despite the fact that the expert did not attempt to verify or audit Li's entries and instead testified that he found no errors in Li's entries, the expert disallowed Bi approximately \$27,000 in credit for payments by Bi on behalf of the partnership, which Li entered into his spreadsheets, including payments for property taxes and gardening because Li did not have the supporting documentation. As the expert was assuming the accuracy of Li's entries as to his credits without checking supporting documentation, the decision to exclude credits for Bi unless supporting documentation was in Li's possession, was patently unfair.

⁸ Although the expert's analysis did not provide any subtotals or totals for partnership-related expenses, in her brief Bi contends that adding up this column results in a total of partnership expenditures that is nearly \$40,000 less than the total of all contributions credited to parties and tenant income.

We find based on the above deficiencies that Respondents' expert's testimony was based on conclusions or assumptions not supported by evidence in the record and therefore cannot constitute "substantial evidence."⁹

IV. Bi's Additional Contentions During Oral Argument

During oral argument, Bi argued for the first time in the appeal that the judgment should be reversed as to the dismissal of her complaint and as to the partition. Bi did not challenge the partition as to the ownership or right of Respondents to one-half the property; rather, she contends there are alleged errors in the ownership percentages as to Bi, Chung, Xinan and Kevin (the "Bi Family") and that the partition did not provide the correct distribution among the Bi Family members of the Bi Family's partition.

As a general rule, new issues cannot be raised for the first time at oral argument. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 10.22, p. 10-6 [citations omitted].) Indeed, we note that not only does her appellate brief challenge only the accounting issues, but it concedes that Bi had "agreed to a settlement of the non-monetary aspects of the partition and the dismissal of her complaint." Accordingly, we affirm the dismissal of Bi's complaint. However, as discussed below, the partition from the cross-complaint is reversed but only as to the distribution within the Bi family.

V. Kevin's Standing

Respondents contend that Kevin lacks standing because his arguments concern the accounting and his interests are not affected by the accounting.

Respondents are correct that to the extent Kevin is challenging accounting-related issues and problems with the construction project undertaken by the partnership, Kevin does not have standing as he is neither a party to the monetary award against Bi and Chung nor to the partnership between Respondents and Bi and Chung that purchased and developed the property; accordingly, he is not an aggrieved party. (Code Civ. Proc., § 902.) However, Kevin is also challenging the partition and in particular the division of

⁹ In light of this conclusion, we do not address Bi's remaining arguments alleging further errors in the accounting.

ownership between himself, Xinan, Bi and Chung. As the judgment purports to decide his fractional ownership interest in the property, and he contends that the division is incorrect, he is an aggrieved party and has standing. Because Kevin was not a party to the settlement between Bi and Respondents,¹⁰ he did not consent to the judgment and has standing to appeal.

VI. Partition Among Bi Family Members

Kevin contends in his appellate brief that the trial court erred in deciding the “ownership percentages of the persons inside” the Bi family group. Specifically, the judgment provides that Bi received a one-half undivided interest, Xinan received a one-fourth undivided interest and Kevin received a one-fourth undivided interest as tenants in common in the second unit of the condominium plan. At oral argument, Kevin represented that this division was erroneous as to the Bi family and should have been divided in equal thirds among Bi, Kevin and Xinan, with Chung having no ownership interest. In addition, he contends the judgment should have stated that the Bi family owned the property as joint tenants and not tenants in common.

We reverse the judgment only as to the ownership interests among the Bi family members.

¹⁰ After the settlement between Bi and Respondents was announced to the trial court and the court inquired whether Bi had authority to settle on behalf of Chung, the court then asked if there was “another Chung involved,” referring to Kevin, and Respondents’ counsel responded that “[t]his is different. The judgment does not effect that.”

DISPOSITION

The judgment is affirmed in part, and reversed in part. The judgment is reversed as to the monetary award to Li and Zong on their cross-complaint. The matter is remanded for a new trial on the accounting to determine which party owes the other moneys from the partnership and the amount, if any. The trial court may, at its discretion, refer the accounting under Code of Civil Procedure section 639. The judgment is also reversed as to the partition only as to the ownership interests among the Bi family members and the partition is affirmed as a stipulated judgment as to Respondents' ownership interest. On remand, the trial court may, at its discretion, conduct a hearing or accept documentary evidence to determine the ownership interests among the Bi family members and to determine whether an additional parcel number is warranted. The judgment is affirmed in all other respects. Costs awarded to Bi and Kevin.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, Acting P. J.

MILLER, J.*

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