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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

JAN BENNETT-COOPER, Plaintiff and Appellant, v. SUSAN COOPER; HENRY COOPER; AND ARLENE GOLDMAN, Defendants and Respondents.	2d Civil No. B236355 (Super. Ct. No. 230297) (Ventura County)

Jan "Gigi" Bennett-Cooper appeals from the judgment entered in favor of respondents, Susan Cooper and Arlene Goldman, following a court trial. Appellant unsuccessfully sought to impose a constructive trust on a residence owned by respondents.

Appellant contends that the trial court's statement of decision is deficient. In addition, she contends that the trial court erroneously enforced a 1985 settlement agreement in which she waived her right to the residence. Appellant argues that the agreement was unenforceable because it was unconscionable and because there was a failure of consideration. We disagree and affirm.

This is the third appeal in this matter. We filed unpublished opinions in the previous appeals: *Bennett-Cooper v. Cooper* (Aug. 15, 2007) B192354, and *Bennett-Cooper v. Cooper and Goldman* (Aug. 15, 2007) B188221.

Factual and Procedural Background

In August 1980 Henry Cooper (Henry), respondents' father, purchased the residence for $110,000. He took title to the residence in his own name. The escrow statement shows that the total amount paid through escrow was $111,139.10. Out of his own funds, Henry made a down payment of $56,400. A loan of approximately $32,000 was secured by a first deed of trust, and a loan of $22,600 was secured by a second deed of trust. The lender of the $22,600 agreed to accept $15,000 as payment in full for the loan. Henry paid the $15,000 out of his own funds.

Henry met appellant in 1969. In 1980 he " 'was considering marriage to her.' " According to appellant, Henry promised that he would "put [her] on title" to the residence if she paid half of the monthly payments due on the loans secured by the deeds of trust. Appellant claims to have made the monthly payments, but Henry did not put her on title. Henry disputed appellant's version of events. He testified that her "house payments" were actually rent. Henry "repeatedly told her . . . she had no interest in the house."

Appellant moved into the residence in 1981 or 1982. In 1983 Henry and appellant had "a falling out." Henry filed an unlawful detainer action and evicted appellant from the residence. He obtained a judgment against her for $1,400.

In August 1983 appellant filed an action against Henry. Appellant was represented by counsel. The complaint alleged four causes of action. In the first three causes of action, appellant sought an accounting, support payments, and the reasonable value of services that she had rendered to Henry (quantum meruit). In the fourth cause of action, appellant sought to impose a constructive trust on one-half of the residence and to compel Henry, as constructive trustee, to transfer the half-interest to her.

In March 1984 Henry and appellant reconciled. In June 1985 they signed a settlement agreement that was drafted by an attorney. The trial court found that the attorney "was retained by [Henry] and represented only [Henry]." Appellant was unrepresented.

The 1985 agreement provided that Henry would waive his right to the $1,400 judgment in the unlawful detainer action and would file a satisfaction of judgment.

Appellant, in turn, would dismiss her action against Henry "with prejudice" and release the lis pendens that she had recorded. For a period of 18 months beginning on July 1, 1985, appellant would have "exclusive possession" of the residence. Henry agreed "to bring no eviction proceeding against [her] during this time period." The parties further agreed "that neither side may ever again file a legal action for Contractual or Quasi-Marital Issues arising out of the relationship of the parties as so far as such arose during the relationship up to [the] date of this Agreement." On July 31, 1985, a dismissal with prejudice was entered in appellant's action.

In 1988 Henry conveyed a half-interest in the residence to his daughter, respondent Susan Cooper. In 1991 he conveyed the remaining half-interest to his other daughter, respondent Arlene Goldman. The conveyances were gifts.

In 1991 Henry and appellant married. They separated in 2002 and were divorced in 2003. Appellant was evicted from the residence in 2002 or 2003. Appellant lived in the residence from July 1, 1985, until her eviction.

In November 2004 appellant filed the instant action against Henry and respondents. After extensive litigation and two appeals to this court, the only remaining cause of action against respondents sought to impose a constructive trust on one-half of the residence and to compel them, as constructive trustees, to transfer the half-interest to appellant. The cause of action was based on Henry's alleged violation of an implied contract with appellant "to pool their assets." Appellant asserted that the implied contract was entered into during "the early 1970's" and remained in effect until November 2002.

In its statement of decision, the trial court concluded that appellant's and Henry's conduct after the signing of the 1985 settlement agreement had not created an implied contract to share their property. As to the issue of whether their pre-agreement conduct had created such an implied contract, the court concluded that "the prior [1985] judgment in [appellant's action against Henry] operates to bar the relitigation of the claims asserted therein, and that by entering into the [1985] agreement, and dismissing her prior . . . action with prejudice, [appellant] has waived any claim to the real property that she could

have asserted as of that time on an implied contract theory." The court found that the 1985 settlement agreement was not "unconscionable."

Statement of Decision

After the trial court issued its proposed statement of decision, appellant requested that "the court issue a further statement of decision with regard to . . . [t]he existence of an implied contract prior to the 1985 settlement." In a minute order denying the request, the trial court explained: "It was unnecessary for the court to determine whether there was an implied contract between [appellant] and [Henry] Cooper prior to the settlement because the court's finding that the settlement was enforceable makes the existence or non-existence of such an agreement moot."

Appellant contends that the trial court's denial of his request constitutes reversible error. We disagree. The issue of the existence of an implied contract prior to the 1985 settlement was rendered moot by the court's ruling that the settlement agreement was enforceable. In the agreement, appellant gave up any right she may have had at that time to the residence. The court was not required to resolve a moot issue. "Only where a trial court fails to make findings as to a material issue which would fairly disclose the determination by the trial court would reversible error result." (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1525.)

Unconscionable Contract

Appellant argues that the 1985 settlement agreement was substantively unconscionable because "the only consideration [she] received was $1,400 . . . ." Appellant explains: "In equity, [she] was half-owner of a house purchased for $110,000 five years before the settlement. Her share was therefore $55,000, even if prices hadn't risen. Yet the settlement gave her just $1,400. The figure shocks the conscience." Appellant also argues that the settlement agreement was procedurally unconscionable because she was unrepresented by counsel while Henry was represented by the attorney who drafted the settlement agreement.

"Settlement agreements are governed by contract principles. [Citations.] A contract or contract term is unenforceable if it is 'unconscionable.' [Citation.] . . . The

court determines unconscionability with reference to the time the contract is entered into, rather than in light of subsequent events. [Citation.]" (*Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1035.)

"Unconscionability is ultimately a question of law, which we review de novo when no meaningful factual disputes exist as to the evidence. [Citations.] We review the court's resolution of disputed facts for substantial evidence. [Citation.]" (*Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 708.)

" '[U]nconscionability has both a "procedural" and a "substantive" element,' the former focusing on ' "oppression" ' or " 'surprise" ' due to unequal bargaining power, the latter on " 'overly harsh" ' or " 'one-sided" ' results. [Citation.] 'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.]" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.)

"Procedural unconscionability focuses on the elements of oppression and surprise. [Citation.] Oppression occurs where there is an inequality of bargaining power which results in a lack of real negotiation and an absence of meaningful choice. Surprise involves the extent to which the terms of the bargain are hidden in a verbose printed form drafted by the party in a superior bargaining position." (*Lanigan v. City of Los Angeles, supra,* 199 Cal.App.4th at p. 1035.)

The only procedural element at issue here is oppression. The settlement agreement was not oppressive merely because it was drafted by Henry's attorney while appellant was unrepresented. Appellant has not referred us to any evidence in the record showing that there was "an inequality of bargaining power which result[ed] in a lack of real negotiation and an absence of meaningful choice." (*Lanigan v. City of Los Angeles, supra,* 199 Cal.App.4th at p. 1035.) Appellant had significant bargaining power because of her pending action against Henry. Moreover, in that action appellant was represented by counsel. Appellant could have consulted counsel before entering into the settlement agreement, but she apparently chose not to.

"Substantive unconscionability addresses the fairness of the term in dispute. It 'traditionally involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms.' [Citation.]" (*Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1159.) We reject appellant's contention that the 1985 settlement agreement was unconscionable because "the only consideration appellant received was $1,400 in exchange for one half of the [residence]." Appellant's contention is based on the assumption that, when she signed the settlement agreement, she was clearly entitled to a half-interest in the residence. But it was uncertain whether appellant would have prevailed on this issue in her action against Henry. Moreover, the consideration received by appellant was not limited to the $1,400. For a period of 18 months beginning on July 1, 1985, she was granted "exclusive possession" of the residence.

Furthermore, the 1985 settlement agreement was not unconscionable in view of each party's investment in the residence. Henry's investment dwarfed appellant's. Out of his own funds, Henry made a down payment of $56,400 and paid off the second deed of trust for $15,000. He also made half the monthly payments on a loan of approximately $32,000 that was secured by a first deed of trust. Appellant, on the other hand, contributed none of her own funds toward the downpayment or payment of the second deed of trust. When she signed the settlement agreement in 1985, her investment consisted of no more than half of the monthly loan payments.

Failure of Consideration

"Strictly speaking, '[f]ailure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party.' [Citations.]" (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 398.) Appellant argues that there was a failure of consideration for the 1985 settlement agreement because it provided that Henry would file a satisfaction of judgment in his unlawful detainer municipal court case, "[y]et the only place Henry entered a satisfaction of judgment, was in [appellant's] palimony case" in superior court. Irrespective of whether Henry filed the satisfaction of judgment in the wrong case, appellant received the

consideration for which she had bargained. Henry waived his right to the $1,400 judgment in the unlawful detainer action and allowed appellant to exclusively possess the residence for 18 months. Because we uphold the trial court's decision that appellant was not entitled to the imposition of a constructive trust on one-half of the residence, we do not consider appellant's contention that she should have been awarded damages "for the years she's been excluded from the property."

Disposition

The judgment is affirmed. Respondent to recover costs.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Mark S. Borrell, Judge

Superior Court County of Ventura

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Malcolm Tator, for Appellant

Gary M. Bright; Bright & Powell, for Respondents.