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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

Estate of CANDACE MORRIS, Deceased. BRANDEN L. SMITH, Plaintiff and Respondent, v. MARY PELLEGRINO, Defendant and Appellant.	B148178 (Super. Ct. No. BP058292)

APPEAL from an order of the Superior Court of Los Angeles County, John B. McIlroy, Judge. Affirmed in part and reversed in part with directions.

Eroen & Eroen, Jill Rosenthal Eroen, and Robert C. Eroen for Defendant and Appellant.

Scherer, Bradford and Lyster and Christopher T. Bradford; Orren & Orren and Tyna Thall Orren for Plaintiff and Respondent.

INTRODUCTION

Candace Morris died intestate on August 26, 1999. Respondent Branden L. Smith filed a petition in her estate claiming that he and the deceased held title to certain real property in joint tenancy even though he had signed and recorded a quitclaim deed conveying his interest in favor of Candace prior to her death. He petitioned the probate court to impose a constructive trust on the property and order the administrator to convey it to him, contending that he and Candace had agreed that the quitclaim deed was executed only to facilitate his purchase of a condominium and was not intended to extinguish his joint tenancy interest.

Appellant Mary Pellegrino, Candace's mother, as the sole intestate beneficiary, filed objections to the petition claiming the conduct of Branden and Candace contradicted respondent's contentions that the joint tenancy was not terminated and Candace had agreed to reconvey Branden's interest to him whenever he wanted it, and that any such agreement violated the statute of frauds. She also asserted that Branden's claim is barred by the defense of unclean hands.

After taking evidence, the probate court found sufficient evidence to impose a constructive trust on the property and ordered the personal administrator of the estate to convey it to Branden. We shall affirm in part and reverse in part with directions.

FACTS

In 1990, Candace and Branden began living together. They were "lovers" and "best friends." On February 17, 1995, they purchased a house in Burbank, California. They paid $11,400 down and financed the balance with a promissory note for $182,400 secured by a trust deed and took title as joint tenants. Branden provided the funds for the down payment and the closing costs. Candace and Branden cohabited in the Burbank residence and each contributed equally to the

payment of the mortgage and cost of maintenance and improvements.[1] On July 7, 1996, they separated and Branden moved out.

Branden made arrangements to buy a condominium with financing through a mortgage broker. In order to qualify for a loan he was required to and did sign and record a quitclaim deed that conveyed his interest to Candace and removed him from the title to the Burbank house. He was not required to and did not obtain a release of his obligation for the purchase money promissory note encumbering the property. The requirement for the quitclaim deed was corroborated by the testimony of Sarah MacDonald, the real estate agent who represented Branden in the acquisition of his condominium. She testified that the loan broker told her that if Branden quitclaimed his interest in the Burbank house it would help close the loan. She further testified that as far as she knew, Branden was going to get the Burbank house back. "He was just doing the quitclaim to accommodate the loan so that he could qualify for the loan."

Branden testified that he did not understand that signing the quitclaim deed would sever his interest as a joint tenant in the Burbank house or that he was permanently transferring his property to Candace. Branden also testified that he asked Candace to do this--go along with the quitclaim simply to help him to finance his condominium--as a courtesy to him, and she said, "fine, you can have it back whenever you want it." The form quitclaim deed was filled in by Candace and signed by Branden on July 20, 1996. On its face, Candace filled in the space for the amount of transfer tax required for recordation, and declared the transfer was a "gift" and applied her signature.

Branden and Candace never resumed cohabiting after July 1996, but they maintained a relationship and continued to see each other. He visited her at the

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[1] At trial, the parties stipulated that Branden and Candace contributed to the payment of the mortgage and costs of maintenance "fifty/fifty."

Burbank house and they exchanged e-mails. In an e-mail sent by Candace to Branden on September 14, 1998, she wrote: "I am here for you. As for the house, now that we have established it will be yours, do you have any objections to what I'm doing with it or is everything okay for you? If I'm lucky, it might be paid off when you inherit it."[2] Branden repeatedly testified on direct and cross-examination that it was orally agreed between them that she would transfer the Burbank property back to him whenever he requested her to do so.

Carol Beasley, a long-time acquaintance of Candace and Branden, testified that she knew that they had an intimate relationship and bought the Burbank house together and lived as a couple for a long period of time. She was also aware that Branden had moved out and vacated the Burbank residence. The weekend before Candace died she told her that Branden had signed the quitclaim deed and Candace had agreed to it "because Branden needed to be able to free up enough financial resources to buy his apartment, . . . that it was a matter of convenience between them that he would be temporarily released, at least, of the formal obligation on the house so that he could do that; and then, in the future, he would be reinstated when his finances were more amenable to that." Beasley also testified that Branden "was not an owner of the house in the legal sense, but that he would continue to pay his share of the mortgage, and the upkeep on the house, and continue to be responsible as if he were half owner of it." Based on what Candace told Beasley, she understood that Candace was simply holding Branden's "share" of the property for him. Branden disagreed with Beasley's testimony that he agreed to continue to pay on the mortgage or otherwise pay for the upkeep of the Burbank house. In fact, he paid nothing on the mortgage after the separation in July 1996.

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[2] The e-mail was entered into evidence over objection. Appellant, however, has not raised this or any other evidentiary issue as a ground for her appeal.

Candace's niece, Michelle Pellegrino, is the administrator of the estate. She had a very close relationship with her aunt. She lived with her from July 1996 until she died. Michelle has known Branden for 10 years, from the beginning of his relationship with Candace. Michelle described the relationship between Candace and Branden as "very strong," "they both loved each other." She testified that they were "lovers" and "best friends" up until Candace passed away. Michelle knew that Branden had moved out of the Burbank house in July 1996 and said Candace and Branden had "split up," but remained friends and didn't know if the separation was temporary or permanent. Michelle didn't know about the quitclaim deed and assumed that everything was the same "because his name was still on all the bills." She testified that Candace had told her she wanted the property to go to her and Branden. Michelle described Candace's relationship with Mary Pellegrino as estranged.

Mary Pellegrino testified that her relationship with her daughter was not good while Candace and Branden were living together. She thought that Branden was too young and she disapproved of cohabitation. She was aware that Candace and Branden had purchased the Burbank house in 1995.

After Branden moved out, Candace asked her mother for financial help because she decided to return to school. Mary sent her $4,000 each month to pay for her living expenses, including the mortgage payments. In addition, she gave Candace approximately $28,000 to pay down the mortgage.[3] She testified that she might not have provided financial assistance if it was to pay "someone else's mortgage." She asked Candace if she owned the property and Candace told her

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[3] Candace was provided with additional financial assistance through her mother. She received $38,000 from her grandfather's estate and an additional $38,000 from her brother. Mary Pellegrino also wired her daughter $50,000. The funds were used to pay down the mortgage and for remodeling.

she did. It was Mary's understanding that Candace was the sole owner of the Burbank residence and was attempting to refinance it. She only learned about the quitclaim deed after Candace's death when it was discovered in a bank safety deposit box owned by Candace and Michelle.

In August 2000, the balance owing on the mortgage was $141,482, indicating a substantial increase in the equity in excess of the purchase price of $193,800.

STANDARD OF REVIEW

"The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct*. 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2001) ¶ 8:15, p. 8-4.)

Appellant contends that pursuant to Civil Code section 683.2, subdivision (a)(2), the joint tenancy was severed when the quitclaim deed was executed and an oral agreement between Branden and Candace for the reconveyance of the property violated the statute of frauds. She makes a similar contention based on Probate Code section 15206 that provides a trust in relation to real property is not valid unless evidenced by a written instrument. Neither provision necessarily renders the oral agreement unenforceable.

Civil Code section 2224 permits the imposition of a constructive trust as an equitable remedy wherever the evidence establishes that a party has gained "a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Accordingly, we review the record to determine if there is substantial evidence to overcome the statute of frauds. In other words, is there

sufficient evidence to show fraud, accident, mistake, undue influence, violation of trust, or other wrongful act?

"The 'substantial evidence' rule . . . is *not* a question of whether there is 'substantial conflict' in the evidence but, rather, whether the record as a whole demonstrates substantial evidence in support of the appealed judgment or order." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶¶ 8:38-8:39, pp. 8-15 to 8-16.) If the record demonstrates that there is real evidence by way of testimony and exhibits that support the judgment and there is a reasonable basis for the trial judge to find it credible, an appellate court should defer to the trial court's determination because that judge had the benefit of observing the witnesses and was in a position to find them believable or not. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.)

DISCUSSION

Branden contends that the doctrine of equitable estoppel applies and renders the oral agreement enforceable. To support that contention he must show an unconscionable injury would result from denying enforcement after he has been induced to make a serious change of position in reliance on the agreement or where unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute of frauds. (*Redke v. Silvertrust* (1971) 6 Cal.3d 94, 101.) The premise of Branden's contention on appeal is that Candace promised that the quitclaim deed would not terminate their joint tenancy and he could have his interest back whenever he wanted it.

Branden was asked what they said about the quitclaim deed. He stated: "I asked her to do this as a courtesy to me, and I hoped that I could obtain the loan at the condominium; and she said: 'Fine, you can have it back whenever you want it.'" He was then asked: "When did you discuss that with her?" and he answered, "in July of 1996." The quitclaim deed was signed on July 20, 1996. Candace

promised Branden that he would retain his interest in the Burbank house. Although the record does not precisely indicate when Candace made this promise, Branden testified that when he asked her about the quitclaim deed, he said he "hoped that [he] could obtain the loan." This statement implies that he had not provided the lender with the quitclaim deed as of the time he discussed it with Candace. Moreover, the fact that Candace filled in the blank spaces on the form of the quitclaim deed, including the space for the determination of the transfer tax required for recordation, is evidence that the agreement was made when the quitclaim deed was signed.

Because Branden made the initial down payment of $11,400 and shared the mortgage payments from February 1995 through July 1996, he had a substantial interest that would be forfeited if his agreement with Candace were not enforced. The thrust of his testimony is that he would not have signed the quitclaim deed if Candace had not agreed to hold his interest in the property for him until he wanted it back. In view of the fact that Candace made all the mortgage payments after July 1996 and reduced the loan by at least an additional $28,000 and made a substantial investment in improvements, Branden's showing of unjust enrichment is not inconsequential.

In California, cases support the view that the statute of frauds cannot be used to perpetrate a fraud, and that, on proof of the oral agreement and repudiation of that agreement a constructive trust will be imposed. (11 Witkin, Summary of Cal. Law (9th ed. 1990) Trusts, § 312, pp. 1148-1150.) This approach is fully discussed in *Steinberger v. Steinberger* (1943) 60 Cal.App.2d 116. There, the grandmother of the plaintiff deeded her real property to Earle Steinberger, his uncle, William Steinberger, and Earle's brother. Each received a one-third undivided interest. Earle planned to be unavailable to help with the management of the property for an extended period of time and William requested Earle to convey his interest to him

and orally promised to reconvey it to Earle when requested. Before Earle made any request for reconveyance of his one-third interest request, William died.

The administrator of William's estate refused to recognize Earle's interest in the property. The administrator did not deny the fact of the confidential relationship or the oral agreement, but argued that the evidence is inadmissible as a violation of the parol evidence rule and the statute of frauds. The court found that Earle and William had a confidential relationship and that Earle executed the deed to make it more convenient to manage the property in Earle's absence and imposed a constructive trust to restore Earle's interest in the property.

The question present in the *Steinberger* case is whether the predecessor of Probate Code section 15206, providing that no trust in relation to real estate is valid unless created by a written instrument, bars the imposition of a constructive trust as in the circumstances presented here. The court observed that California has aligned itself with the English and the minority American view citing *Taylor v. Morris* (1912) 163 Cal. 717. "Without reference to the confidential relationship there existing, the court stated (p. 722): 'The statute of frauds is never permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol. When it rests in parol, either parol evidence must be received to establish the trust, or the faithless trustee will always prevail. Certainly no elaboration of so plain a proposition is necessary.'" (*Steinberger v. Steinberger, supra,* 60 Cal.App.2d at p. 119.) But, the *Steinberger* court observes, the proposition is qualified and requires that a confidential relationship exists between the transferee and the transferor. "It is well settled in this state that breach of the oral promise to reconvey by the transferee or his administrator when the transferee was in a confidential relationship with the transferor *at the time of the transfer* constitutes sufficient 'fraud' to create the constructive trust." (*Id.* at p. 121, italics added.)

"It is either the actual fraud that induced the conveyance, or the constructive fraud arising from the confidential relationship coupled with the breach of the oral promise, that brings the provisions of [section 2224] into play." (*Orella v. Johnson* (1952) 38 Cal.2d 693, 697.) "Whether the doctrine of equitable estoppel should be applied in a given case is generally a question of fact." (*Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1068.)

In the present matter, Branden and Candace had a "confidential relationship" when the quitclaim deed was executed. The uncontroverted evidence is that they were "lovers" and "best friends" and cohabited before and after buying the Burbank house until they separated in July 1996. Branden testified that, at the time of their separation, they did not contemplate it would be permanent. A meretricious relationship is sufficient to enforce the breach of an oral agreement to reconvey real property. (*Cole v. Manning* (1926) 79 Cal.App. 55, 58.)

Just before she died Candace confirmed to Carol Beasley that she was holding Branden's interest in the Burbank house for him and intended to return it to him. Candace's niece, Michelle Pellegrino, testified that Branden and Candace were lovers and friends up until Candace's death.

There is substantial evidence that a confidential relationship between Candace and Branden existed at the time of the conveyance based on their long-term cohabitation, joint tenancy, and continuing close friendship. The record supports the judgment to impose a constructive trust on the Burbank house and to order it conveyed to Branden.

Unclean Hands

Appellant Mary Pellegrino asserted the defense of unclean hands in her objection to the petition. She contends that the execution of the quitclaim deed, coupled with an agreement that it would not extinguish Branden's joint tenancy in the Burbank house, perpetrated a fraud on the lender that financed Branden's

purchase of the condominium. The defense is inapplicable because its premise is that the lender was defrauded. Branden did sign the quitclaim deed to comply with the technical requirements of the lender, but the position of the lender was not compromised. In fact, the lender's position was enhanced because Branden's assets were much improved by the equity in the Burbank property. Dana Frederick Gibbs, a loan broker for the company that financed the condominium, testified that the execution of the quitclaim deed was essentially ineffectual. More significantly, the execution of the quitclaim deed was simply not prejudicial to the lender and certainly not to Candace. Appellant has failed to demonstrate that the conduct here supports an affirmative defense of unclean hands.

Equitable Lien

Neither in the trial court nor in this court did the parties address the applicability of the obligation of "[O]ne who seeks equity must do equity." This is a fundamental maxim of equity jurisprudence. (2 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 385, pp. 51-55.) Prior to oral argument, we raised this issue and requested the parties to submit letter briefs addressing the concept that a court of equity should impose a lien in favor of the estate in an amount of the mortgage payment paid and the investments made to improve the property after July 1996 to the date of Candace's death. We specifically asked the parties to focus on the question of whether we could remand the case to the trial court so that an equitable lien could be imposed against the property in favor of the estate, citing *Steinberger v. Steinberger, supra,* 60 Cal.App.2d 116, 124. Counsel for both Branden and the estate responded.

Branden argued that remanding the case would impose an extreme financial hardship and that the estate pressed the case to obtain the entire property, expressly rejecting any settlement. He acknowledged that a reviewing court has discretion to entertain new issues, but should do so only in compelling cases. Predictably, the

estate urged that an equitable lien should be imposed against the property. We read and considered their letter briefs and the issue was discussed at oral argument. Where we have raised an issue of law relevant to the just disposition of the appeal and afforded the parties an opportunity to submit additional briefing addressing the issue, we are "free to consider the matter since it involves an issue of law on undisputed facts which may be raised for the first time on appeal." (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1341, fn. 6.)

In equity, the trial court should fashion a decree that is fair and just and we, as an appellate court, should not countenance a manifest injustice. Here, the reconveyance of the Burbank property to Branden without any regard to the economic disparity between his financial contribution of the $11,400 down payment compared to the significant reduction in the mortgage obligation and remodeling costs incurred by Candace after July 1996 is patently unjust and inequitable. This is a compelling case to apply the obligation to do equity even though not raised in the trial court and not raised by the parties in their opening appellate briefs.

As a court of equity, the trial court was required to compel Branden to do equity by reimbursing Candace for expenses she incurred on his behalf that he otherwise would have been obligated to incur as a joint tenant, at least to the extent of the reduction of the mortgage and payment of real property taxes. "There can be no doubt that where a constructive trust is imposed the court should require the beneficiary of the trust to do equity." (*Steinberger v. Steinberger, supra,* 60 Cal.App.2d 116, 124.) "[A] court can compel a plaintiff seeking equitable relief to accommodate the equities favoring the defendant by conditioning the plaintiff's relief upon the enforcement of those equities. [Citations.] The plaintiff need not have acted inequitably for the maxim to be given effect, as long as equitable rights

favoring the defendant arise from the same matter in controversy." (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446.)

The concept of avoiding unjust enrichment is a fundamental underpinning of equitable estoppel and the constructive trust. The mortgage has been reduced to $141,482 as of August 10, 2000, a reduction in principal of $40,918 in less than five years. Allowing Branden to obtain the economic benefit conferred by Mary Pellegrino and her family significantly reducing the mortgage debt simply ignores the equities favoring Candace's estate. Equity compels that Branden not be afforded this "windfall" as it would be an unjust enrichment. We are therefore, compelled to reverse and remand the matter to the trial court with directions.

CONCLUSION

We affirm the trial court's determination to impose a constructive trust on the property for Branden, but remand the matter to the trial court to take evidence to determine the total amount paid on account of all real property taxes and assessment and all principal and interest on the purchase money promissory note from August 1996 by Candace to the date of her death as well as any such payments paid by the estate after her death. Branden is obligated to pay one-half of that total sum to the estate of Candace Morris and the court shall impose and record an equitable lien against the property to secure its payment within a reasonable time from the entry of judgment, not to exceed six months from that date.

The claim of the estate that it is entitled to reimbursement for improvements made to the residence and Branden's claims for the rental value for the time the administrator occupied the residence and certain other amounts for damages to the property during the relevant time period are not to be considered by the trial court. Finally, the estate is not entitled to any appreciation in the value of the property since its purchase by Branden and Candace.

DISPOSITION

We affirm in part and reverse in part and remand with directions. The trial court shall order a new hearing and take evidence and proceed in accordance with the provisions of this opinion. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED

VOGEL (C.S.), P.J.

We concur:

EPSTEIN, J.

CURRY, J.