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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GLORIA LUNA et al. Plaintiffs and Appellants, v. ERICA BROWNELL, Individually and as Co-Trustee, etc., et al., Defendants and Respondents.	B212757 (Los Angeles County Super. Ct. No. BC359144)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Raphael A. Rosemblat for Plaintiffs and Appellants.

Frank J. Valdez for Defendants and Respondents.

Hollins & Levy, Byron S. Hollins and Laura M. Levy for Defendant and Respondent Frank J. Valdez, Individually.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of sections 1 and 2 of the Discussion.

INTRODUCTION

This case presents the following issue: If real property is transferred by a quitclaim deed to the trustee of a trust that has not been formed, is the deed void? We shall conclude that under the circumstances of this case, the deed is not void and is deemed delivered as of the date the trust was formed.

This is a family dispute over real property located at 112 South Russell Avenue in Monterey Park (the Property). Plaintiffs and appellants Gloria M. Luna (Gloria) and Ann Brownell (Ann) are the sisters of Alfonso Luna (Al), now deceased. Defendant and respondent Erica Brownell (Erica) is Ann's granddaughter and the successor trustee of the Luna Trust (the Trust). Defendant and respondent Frank J. Valdez (Valdez) was Al's attorney.

Shortly before Al's death, Gloria and Ann signed four grant deeds transferring the Property to Al as an individual and as the trustee of the Trust. Al then executed a quitclaim deed transferring his interest in the Property as an individual to himself as trustee of the Trust. Al subsequently created the Trust.

Less than a week after Al's death, plaintiffs commenced this action. Plaintiffs challenged the validity of the grant deeds and quitclaim deed on numerous grounds. After a bench trial, the superior court entered a judgment in defendants' favor. We affirm.

In the published portion of this opinion, we reject plaintiffs' argument that the quitclaim deed was void because the Trust was not formed as of the date the deed was signed. In the unpublished portion of this opinion, we shall address plaintiffs' remaining arguments.

FACTUAL AND PROCEDURAL BACKGROUND

On September 6, 1983, Al executed an individual grant deed transferring the Property to Gloria, Ann, Marcus M. Luna (Marcus)[1], and himself, as joint tenants. This deed was recorded on September 24, 1984.

There apparently was no consideration for the transfer of most of Al's interest in the Property to his siblings. The siblings understood that the Property belonged to Al, but it was placed in all of their names so that if Al died, the Property would simply pass on to his sisters and brother.[2]

On August 8, 2006, Gloria and Ann each executed two grant deeds. One set of grant deeds transferred plaintiffs' interest in the Property to Al as an individual. The other set of grant deeds transferred plaintiffs' interest in the Property to Al as the trustee of the Trust. Attorney Valdez drafted two sets of deeds on Al's behalf because he "wasn't sure which type of transfer should occur at that time." There was no consideration given to plaintiffs for executing the grant deeds.

The grant deeds were executed during a meeting at the home of Gloria and Ann. At that meeting, Gloria, Ann, Al, Valdez's paralegal David J. Pantoja (Pantoja), notary public Steven Perez (Perez), and a driver employed by Valdez were present. Pantoja advised Gloria and Ann that they would be signing deeds giving the Property back to Al. Gloria and Ann stated that the Property was Al's, and that he could do what he wanted with it.

On August 13, 2006, Al executed a quitclaim deed transferring his interest in the Property as an individual to himself as trustee of the Trust.

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1 Marcus is the brother of Al, Gloria, and Ann. Marcus was initially a plaintiff in this action. However, before trial Marcus requested a dismissal of his claims without prejudice. The trial court granted the request.

2 Plaintiffs dispute the purpose of the transfer. We shall address the conflicting evidence regarding disputed factual issues relating to various deeds conveying the Property in section 2 of the Discussion, *post*.

On August 29, 2006, Al executed the declaration of trust for the Trust. The declaration of trust stated that Al was the trustee, and that the successor trustees were Valdez, Valdez's law office, and Erica. The beneficiaries of the Trust were Erik Brownell, Sr., Erik Brownell, Jr. and Erica.[3]

On September 8, 2006, the grant deeds transferring plaintiffs' interest in the Property to Al as trustee of the Trust were recorded. The quitclaim deed transferring Al's interest in the Property, as an individual to Al, as trustee of the Trust, was also recorded. The grant deeds transferring plaintiffs' interests in the Property to Al as an individual were not recorded.

Al died on September 19, 2006. Less than a week later, on September 25, 2006, plaintiffs filed the complaint in this action.

The complaint set forth causes of action for (1) revocation/cancellation on grounds of lack of intent/mistake, (2) revocation on grounds of undue influence, (3) revocation on grounds of fraud, (4) negligent misrepresentations, (5) quiet title, (6) constructive trust for real property, (7) personal property claims, (8) breach of fiduciary duty, (9) conspiracy, (10) permanent injunction, and (11) accounting. At trial, plaintiffs pursued the first, third, fourth, fifth and sixth causes of action, but did not pursue the remaining causes of action.

The superior court held a one day bench trial on June 23, 2008. On August 19, 2008, the court issued a ruling in defendants' favor.

In its ruling, the court summarized the testimony of the witnesses at the trial, including the testimony of notary public Perez. The court noted that Perez testified as follows: "Mr. Perez heard Mr. Patoja explain the Grant Deeds to Ms. [Gloria] Luna and Ms. [Ann] Brownell. He also heard Mr. Patoja explain why the deeds were needed. Mr. Perez heard Mr. Patoja explain to Ms. Luna and Ms. Brownell that they were releasing any interest they might have in the Property. Mr. Perez believed that the women were not

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[3] Erik Brownell, Sr. is Ann's son and Al's nephew. Erik Brownell, Jr. is Erik Brownell Sr.'s son.

asserting any interest in the Property. They also voiced no objection to signing the deeds."

The court found Perez to be "credible." By contrast, the court "found the testimony of both plaintiffs unreliable and often not credible."

With respect to plaintiffs' argument that the deeds were void because the Trust was not formed on the date the deeds were executed, the court stated the following: "[I]n a situation where a property transfer has been made to one who has no legal existence, there is authority in some jurisdictions that provides as a matter of equity, such a deed is valid between the grantor and the grantee only but not as to third parties. [Citations.]"

After the court entered judgment for defendants, plaintiffs filed a timely appeal.

CONTENTIONS

Plaintiffs make three major arguments. The first is that the grant deeds executed on August 8, 2006, were void under the doctrine of undue influence. The second is that the trial court erroneously failed to find certain facts that were allegedly favorable to plaintiffs. Finally, plaintiffs argue that the trial court erroneously failed to find that the grant deeds and the quitclaim deed were void as a matter of law because the Trust did not exist when the deeds were executed and physically given to Valdez's law firm.

DISCUSSION

1. *Plaintiffs Forfeited Their Undue Influence Cause of Action*

In the complaint, plaintiffs asserted a cause of action for "revocation on grounds of undue influence."[4] Plaintiffs alleged that there was a confidential relationship between plaintiffs and Al and defendants, and that defendants "took advantage of this trust and confidence" and "substituted their will" for that of Al and plaintiffs.

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[4] "Undue influence consists: [¶] 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; [¶] 2. In taking an unfair advantage of another's weakness of mind; or, [¶] 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress." (Civ. Code, § 1575.)

Defendants' alleged undue influence over Al and plaintiffs was so great that the grant deeds executed on August 8, 2006, were void.

Plaintiffs, however, did not pursue this cause of action at trial. At a status conference 10 days before the trial, plaintiffs' counsel stated that his clients would not be proceeding on their second cause of action. In his closing argument at trial, plaintiffs' counsel did not make any arguments relating to the second cause of action. And in its written "ruling on submitted matter," the trial court stated that plaintiffs "elected to proceed on the following claims only: Lack of Intent/Mistake, Fraud, Negligent Misrepresentation, Quiet Title, and Constructive Trust." The trial court did not discuss plaintiffs' undue influence cause of action in its ruling on submitted matter because there was no trial on that cause of action.

On appeal, plaintiffs argue that they should have prevailed on their undue influence cause of action. Plaintiffs, however, forfeited their argument on appeal relating to undue influence because they did not pursue the cause of action in the trial court. (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794 ["It must appear from the record that the issue argued on appeal was raised in the trial court. If not, the issue is waived"].)

Plaintiffs contend that they "argued" the cause of action in their trial brief. This is simply not true. Although plaintiffs made statements in their trial brief that ostensibly relate to the undue influence doctrine (e.g., plaintiffs allegedly lacked "mental vigor"), they did not relate such statements to a coherent assertion of an undue influence cause of action. Undue influence was simply not an issue raised in the trial and thus has been forfeited on appeal.

2. *The Trial Court Did Not Erroneously Fail to Make Factual Findings in Plaintiffs' Favor*

In its ruling on submitted matter, the trial court summarized paralegal Patoja's testimony. That summary included the following statement:

"Mr. Patoja was employed by Mr. Valdez' legal office. Mr. Patoja first met Al in June 2006 when Mr. Valdez took Mr. Patoja to meet with Al. Prior to August 8, 2006, Mr. Patoja had met with Al three to five times.

"Al told Mr. Patoja that he owned property on Russel [*sic*] Street [*sic*] in Monterey Park. Mr. Patoja then did a title search and learned that title to the Russell Street [*sic*] property had multiple owners, Al and his two sisters, Ms. [Gloria] Luna and Ms. [Ann] Brownell, and his brother [Marcus]. . . .

"Mr. Patoja called Ms. Luna and Ms. Brownell sometime prior to August 8, 2006. He explained to whoever answered the phone that he was working for Mr. Valdez' office and that he was attempting to marshal assets for Al. He further related that Al told him that they were holding property for him in their name and that Al said they would be happy 'to sign it over.' Mr. Patoja 'inquired of the person on the phone if that [was] correct. She said it was.' Mr. Patoja indicated that he would be calling them back to set up a meeting with them.

"Five to seven days before August 8, 2006, Mr. Patoja called the Luna/Brownell household to set up the meeting.

"On August 8, 2006, Mr. Patoja went to the home of Ms. Luna and Ms. Brownell. Al also attended that meeting as did a notary. (Mr. Patoja had never met or worked with this particular notary before.)

"When Mr. Patoja arrived at the home of Ms. Luna and Ms. Brownell, he knocked on the door and explained who he was. He also stated that he was there to have some documents executed. Mr. Patoja then entered the home. A few minutes later, Al arrived with a driver. As the driver was assisting Al into the wheelchair, the notary arrived.

"Mr. Patoja took two deeds with him for Ms. Luna and Ms. Brownell to sign. One deed transferred the Property to 'Alfonso Luna, as trustee for the Luna Trust.' The other deed transferred the Property to 'Alfonso Luna' in his individual capacity. . . .

"Mr. Patoja explained: 'I told [Ms. Luna and Ms. Brownell] they were going to be signing deeds giving away or releasing certain property on Russell Street [*sic*] that Mr. Luna claimed was his and that they were just holding for him and that they were going to

give back and that they didn't have to sign the documents if they didn't want to if they didn't agree with Mr. Luna. If they wanted to keep copies and have those documents reviewed by an attorney we would all leave and they can have them reviewed and I would call them back and . . . set up another meeting.'

"According to Mr. Patoja, 'They said fine. It is his property. He can do what he wants.' Ms. Luna and Ms. Brownell did not have any questions. They also did not voice any objection. Mr. Patoja believed that Ms. Luna and Ms. Brownell understood the transaction. Mr. Patoja did not tell them anything about a trust. He thought that would be confusing to them."

Plaintiffs dispute many of these facts. They contend, for example, that on August 8, 2006, men arrived at their home without an appointment and "pushed" their way in. Plaintiffs further contend that Patoja did not explain anything about the transaction to them. The trial court, however, did not find plaintiffs' version of the facts credible. An appellate court "has no power to reweigh the evidence, or to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn from the evidence." (*Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc.* (2009) 177 Cal.App.4th 624, 643 (*Williams*).)

We review a trial court's factual findings under the substantial evidence standard of review. (*Spencer v. Marshall* (2008) 168 Cal.App.4th 783, 792.) We must presume that the record contains evidence to support every finding of fact of the trial court unless the appellant proves otherwise. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 737.)

In this case, plaintiffs have not argued, much less proved, that there was no substantial evidence to support the trial court's findings regarding Patoja's testimony.[5] Instead, plaintiffs argue the following: "The trial court was *clearly erroneous* in failing to find there were two serious admissions made by David Pantoja of the Valdez law firm:

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[5] We have reviewed Patoja's testimony and find that there was substantial evidence supporting the trial court's summary of that testimony.

(1) that Mr. Pantoja admitted the two plaintiffs did not have the capacity to *fully understand* the transaction and (2) that he did not make a *full disclosure* of its details[.]" (Underscoring added.)

This argument is based on the following testimony of Pantoja:

"Q. You said a moment ago when you were testifying that you never advised them [plaintiffs] about anything having to do with the trust?

"A. Correct.

"Q. But you will agree with me that the document you gave them, at least two of them, one to each of the ladies, said 'trust' on it?

"A. Yes, correct.

"Q. Why didn't you explain to them while you were having them sign one set of the grant deeds to the trustee for a trust yet to be formed, and the other to Mr. Luna individually?

"A. I didn't think it was necessary.

"Q. And what gave you the understanding that it wasn't necessary?

"A. I just didn't believe it was necessary because they wouldn't have understood the reason for signing two deeds.

"Q. So you formed the impression that even if you explained to them why they were signing two separate sets of deeds, they wouldn't have understood?

"A. I think it would have been confusing."

"As a general rule, '[p]rovided the trier of fact does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted. [Citations.]' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) Further, the trier of fact is free to draw reasonable inferences from the testimony of a witness, which the appellate court cannot second guess on appeal. (*Williams, supra*, 177 Cal.App.4th at p. 643.)

Here, the trial court acknowledged Patoja did not tell plaintiffs anything about a trust. However, the trial court noted that Gloria testified that one of the men in her home

on August 8, 2006, "indicated that Al wanted to sign a trust."[6] The trial court concluded that "after understanding that Al wanted his property in his own name for purposes of creating a trust, the plaintiffs did not dispute his ownership, were advised they could seek counsel, did not appear confused, and voluntarily executed the deeds." There was substantial evidence supporting the trial court's findings.

Plaintiffs do not cite any authority, nor have we found any, to support their argument that the trial court was obligated to make any *additional findings* regarding Patoja's testimony. We thus reject plaintiffs' second argument on appeal.

3. *The Conveyance of the Property to the Trust is Not Void*

"A deed does not transfer title to the grantee until it has been legally delivered." (3 Miller & Starr, Cal. Real Estate (3d ed. 2000) Deeds, § 8:36, p. 66, fn. omitted; see also Civ. Code, § 1054.) "Delivery is a question of intent." (*Osborn v. Osborn* (1954) 42 Cal.2d 358, 363.) "A valid delivery of a deed depends upon whether the grantor intended that it should be presently operative, and a manual transfer is not conclusive evidence of such intention." (*Huth v. Katz* (1947) 30 Cal.2d 605, 608.) Although physical delivery of a deed raises an inference that the grantor intended to immediately transfer title, that inference may be overcome by evidence showing a contrary intent. (*Helm v. Hess* (1955) 131 Cal.App.2d 251, 254.) The trier of fact must determine intent by reviewing all of the surrounding circumstances of the transaction. (*Perry v. Wallner* (1962) 206 Cal.App.2d 218, 221 (*Perry*).) "Where there is substantial evidence, or where an inference or presumption may be drawn from the evidence to sustain the court's finding of delivery or nondelivery, the finding will not be disturbed on appeal." (*Ibid.*)

"In addition, acceptance by the grantee is necessary to make a delivery effective and the deed operative. Whether the deed was accepted by the grantee so as to complete a transfer of title to him is likewise a question of fact for the trial court." (*Perry*, *supra*, 206 Cal.App.2d at p. 222.)

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[6] Gloria testified that at the August 8, 2006, meeting, a man told her that, "Al wants you and Ann to sign for trust." (*Sic*.)

Here, the trial court found that on August 8, 2006, "after understanding that Al wanted his property in his own name for purposes of creating a trust, the plaintiffs did not dispute his ownership, were advised they could seek counsel, did not appear confused, and voluntarily executed the [grant] deeds" conveying the Property to Al, as an individual, and Al, as trustee of the Trust. As we explained in section 2 *ante*, there was substantial evidence supporting these findings. Further, it is undisputed that on August 8, 2006, in Al's presence, plaintiffs physically gave the grant deeds to Al's agent. This is substantial evidence that those grant deeds were accepted by the grantee.

Plaintiffs contend that, as a matter of law, there was no legal delivery of the grant deeds because as of August 8, 2006, the Trust did not exist. Defendants do not dispute that the Trust was not in existence until August 29, 2006, when Al executed the declaration of trust.[7] However, defendants contend that the grant deeds were nevertheless valid because it was the intent of plaintiffs to return title to the property to Al, as an individual or as trustee of the Trust.

As the trial court recognized in its minute order, "even assuming that the deeds transferring the property to [Al, as trustee of the Trust] were void because the [Trust] did not yet exist, the deeds transferring the property to [Al] as an individual [were] effective in transferring the property interests of Ms. Brownell and Ms. Luna to Al. (The fact that those deeds may not have been recorded is of no consequence to effectively transfer title. [Citations].)"[8] The question before this court therefore is whether the quitclaim deed executed by Al on August 13, 2006, transferring the Property from Al as an individual to Al as trustee of the Trust was void because the Trust did not exist on the date the deed was executed.

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[7] "The five elements required to create an express trust are (1) a competent trustor, (2) trust intent, (3) trust property, (4) trust purpose, and (5) a beneficiary." (*Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 337.) It is undisputed that the declaration of trust dated August 29, 2006, created the Trust.

[8] See *Goodman v. Goodman* (1931) 212 Cal. 730, 733.

We have not found a California case that directly addresses this issue. However, there is substantial law regarding similar fact patterns in other jurisdictions.

In *John Davis & Co. v. Cedar Glen # Four, Inc.* (Wash. 1969) 450 P.2d 166 (*John Davis*), the appellants challenged the validity of a quitclaim deed transferring real property to a corporation. The appellants argued that the deed was void because it was executed and recorded prior to the date the corporation filed its articles of incorporation, i.e., prior to the date the corporation became a legal entity. (*Id.* at p. 170.)

The Supreme Court of Washington rejected the appellants' argument. The court stated: "Although it is true as a general rule that a deed is void if the named grantee is not a legal entity, the facts of this case fall within an exception to the rule. [¶] A deed to a corporation made prior to its organization, is valid between the parties. Title passes when the corporation is legally incorporated. This is particularly true as against one who does not hold superior title when the corporation goes into possession under the deed." (*John Davis*, *supra*, 450 P.2d at p. 170.)

In *Heartland v. McIntosh Racing Stable.* (W.Va. 2006) 632 S.E.2d 296 (*Heartland*), real property was conveyed by grant deed to Heartland, a limited liability company, about six months prior to the dates the articles of organization for Heartland were filed. Heartland was named the grantee on the deed because at the time the deed was executed and delivered, the purchasers of the property intended to form Heartland. (*Id.* at p. 299.) The grantor of the deed argued that the property was not conveyed to Heartland because Heartland was not formally organized as a legal entity on the date the deed was signed. (*Id.* at p. 301.)

After reviewing relevant case law, the Supreme Court of Appeals of West Virginia rejected the grantor's argument. The court stated: "Based upon the foregoing authority, this Court holds that a deed drawn and executed in anticipation of the creation of the grantee as a corporation, limited liability company, or other legal entity entitled to hold real property is not invalidated because the grantee entity had not been established as required by law at the time of such execution, if the entity is in fact created thereafter in

compliance with the requirements of law and the executed deed is properly delivered to the entity, the grantee, after its creation." (*Heartland, supra,* 632 S.E.2d at p. 303.)

John Davis and *Heartland* are consistent with cases in other jurisdictions which have addressed this issue. (See e.g. *Corporate Dissolution v. Rawson-Sweet* (Wash.Ct.App. 2006) 134 P.3d 1188, 1194 ["A deed to a corporation made before its organization is valid between the parties but is void when asserted against third parties. [Citations.] Title passes when the corporation is legally incorporated"]; *Community Credit Union v. Federal Exp.* (D.C.App. 1987) 534 A.2d 331, 334 [same].)

Based on the foregoing persuasive authority, this court holds that a quitclaim deed transferring property to the trustee of a trust is not void as between the grantor and grantee merely because the trust had not been created at the time the deed was executed, if (1) the deed was executed in anticipation of the creation of the trust and (2) the trust is in fact created thereafter. Such a deed is valid between the grantor and grantee on the date the trust was formed.

Applying this rule to the facts of this case, there was substantial evidence for the trial court to infer that on August 13, 2006, when Al executed the quitclaim deed, he anticipated the Trust would be formed. The quitclaim deed itself referred to the "the Luna Trust" and to Al, as its trustee. There was also evidence that on August 8, 2006, someone informed Gloria in Al's presence that "Al wants you and Ann to sign for [the] trust." Moreover, after the quitclaim deed was executed, the Trust was in fact established and the quitclaim deed was recorded. Under these circumstances, the quitclaim deed was not void simply because the Trust was not formed when the quitclaim deed was executed. Rather, the quitclaim deed was deemed legally delivered on August 29, 2006, when the Trust was established.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.