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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROBERT C.J. MCKINSTRY,

Plaintiff and Appellant,

v.

ARON SCALABRINI,

Defendant and Respondent.

A130059

(Sonoma County
Super. Ct. No. SCV 245867)

INTRODUCTION

Plaintiff Robert C.J. McKinstry appeals from a judgment of the Sonoma County Superior Court in favor of defendant Aron Scalabrini on McKinstry's action to recover on a \$125,000 promissory note signed by Scalabrini related to the sale of property owned by McKinstry and purchased by Scalabrini. McKinstry contends the trial court erred in failing to consider certain evidence, including parol evidence favorable to McKinstry and in considering parol evidence favorable to Scalabrini. He further argues the court "erred in its conclusions regarding the facts" and that Scalabrini was estopped to deny the existence and enforceability of a real estate purchase contract with a total obligation of \$625,000. The record designated by McKinstry and before us on this appeal does not contain the statement of decision issued by the court. In these circumstances, McKinstry's contentions boil down to a question of substantial evidence. We shall affirm the judgment.

FACTS and PROCEDURAL BACKGROUND

McKinstry and Scalabrini met in 2003 or 2004 and became friends. McKinstry was the owner of real property near Annapolis in Sonoma County, California. The property included a residence, a small rental building, a garage, a shop and a well. In 2004, McKinstry had a seizure and in August of that year, he was told he needed surgery to remove a mass from his brain. He did not have surgery at that time. In August 2005, McKinstry lost his temper at a squatter and fired into a mobile home on his property in which “Wild man Donny” was residing. McKinstry was immediately arrested and incarcerated pending trial. He spent seven months in jail. He needed money for his criminal defense and for medical bills he would be incurring for surgery to remove the tumor. He went from jail into the hospital in March 2006 and the tumor was removed at that time. The criminal matter was resolved and McKinstry was placed on four years probation.

McKinstry, who had experience as a residential real estate agent, needed to sell the property in order to pay for his criminal defense and medical bills. Scalabrini came to visit McKinstry frequently and became a caretaker for the property in McKinstry’s absence, paying bills and installing locks, for which he was reimbursed. McKinstry and Scalabrini discussed McKinstry’s selling the property to Scalabrini continually during the time McKinstry was incarcerated. McKinstry proposed to sell the property to Scalabrini for \$625,000. McKinstry engaged attorney Velina Consuelo Underwood to act on his behalf in the property sale, giving her a power of attorney to act as his attorney in fact. Underwood knew a conventional lender wanted no more than 80 percent of the property value to be financed. An appraisal conducted for the loan broker by real estate appraiser Gordon Giordano concluded that the fair market value of the property was \$509,000. Scalabrini did not have \$125,000 cash with which to purchase the property.

The parties reached an oral agreement, the details of which are disputed. McKinstry testified that they agreed to a sale price of \$625,000. The purchase and sales agreement was to reflect a price of \$500,000 to satisfy the lender’s concerns and

Scalabrini was to give McKinstry a note for the \$125,000 balance, payable in three years with no interest. Scalabrini testified he knew McKinstry wanted \$625,000 for the property. He testified that he told McKinstry in October or November of 2005 that he could not borrow \$125,000 from his parents. He also testified that his offer for the property was “whatever the appraised value [was] and the bank approved.” He testified that his offer was \$500,000 and that \$509,000 was the fair market value of the property at the time he signed the purchase agreement. McKinstry told him to do the promissory note, due in three years for \$125,000 and assured him that the value of the property would appreciate during the three years and that Scalabrini could then refinance and pay off the note. If the property decreased in value or did not go up, he would not have to pay McKinstry. He knew that McKinstry was experienced in real estate and he trusted his advice.

On October 18, 2005, the parties entered into a written California Residential Purchase Agreement for McKinstry to sell the property to Scalabrini with Underwood signing for McKinstry as his attorney in fact. The agreement stated a total purchase price of \$500,000. The agreement provided in relevant part: “24. TIME OF ESSENCE; ENTIRE CONTRACT; CHANGES: Time is of the essence. All understandings between the parties are incorporated in this Agreement. Its terms are intended by the parties as a final, complete and exclusive expression of their Agreement with respect to its subject matter, and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. If any provision of this Agreement is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. **Neither this Agreement nor any provision in it may be extended, amended, modified, altered or changed, except in writing Signed by Buyer and Seller.**”

(Original bolding.) Between the time the parties signed the purchase agreement for \$500,000 and the close of escrow in December 2005, the price changed to \$509,000, the appraised value. The bank loaned \$425,000, secured by a deed of trust on the property. Scalabrini made cash deposits in escrow totaling \$5,000 and an additional cash payment of \$20,658 through the escrow. He gave McKinstry a promissory note in the amount of

\$76,350, including ten percent interest per month secured by a second deed of trust on the property. The closing settlement statement reflected a “Total Consideration” of \$509,000, including \$407,200 from lender Mylor Financial and \$76,350 from lender McKinstry and \$25,658 in cash payments by Scalabrini.

Escrow closed in December and a grant deed dated December 9, 2005, was recorded by First American Title Company on December 14, 2005. Almost one month later, on January 9, 2006, Scalabrini signed a promissory note to McKinstry for \$125,000. McKinstry and Underwood testified that the \$125,000 promissory note was prepared by Underwood and signed in January because escrow closed shortly before the Christmas holidays and she did not work the last two weeks of December and because the note was to be outside the escrow process. Scalabrini testified he signed the note on January 9, 2005, because McKinstry wanted more money for the property and told him the property would appreciate and that Scalabrini could refinance in three years when the note was due and could pay him the \$125,000 at that time. If the value of the property did not go up, he would not have to pay. The \$125,000 was a “cap” or limit on what Scalabrini could owe on appreciation of the property. McKinstry denied that there was any condition on the note and denied assuring Scalabrini that the property would appreciate in value.

When the note became due in January 2009, Scalabrini had the property appraised by Giordano. The appraisal valued the property at \$460,450. When McKinstry went to see Scalabrini about the note in May of 2009, the first thing Scalabrini told him was that the property had gone down in value. McKinstry offered to reduce the amount due by 30 percent. Scalabrini did not respond.

McKinstry sued Scalabrini on the note.¹ In a nonjury trial conducted on May 26, 2010, the parties presented evidence of the foregoing. Underwood testified that the

¹ The record does not indicate when the suit was filed, but Scalabrini states, and McKinstry does not dispute, that the complaint was filed on September 15, 2009, for

purchase price for the residence was \$625,000 and that the promissory note arrangement was done to get around the lender's 80 percent loan to value requirement. She did not know of any conditions on the note, but acknowledged she was not present during all conversations between the parties and it was possible there were other arrangements between them regarding the note. The court entered judgment in favor of defendant Scalabrini on August 18, 2010. This timely appeal followed.

DISCUSSION

A. *Standard of Review/Adequate Record*

At the outset, we observe that while the court refers in the judgment to its having “issued a final statement of decision,” the record on appeal does not contain a statement of decision or any requests therefore. Nor does it contain any references to objections to a proposed statement of decision. It does not contain any briefs of the parties addressing the parol evidence rule or any argument at the hearing regarding the admissibility or inadmissibility of any of the evidence presented.²

“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.’ [Citations.]” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶ 8-15, p. 8-5 (Eisenberg et al., Civil Appeals and Writs), citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267; *Winograd v. American Broadcasting Co.* (1998)

breach of contract for failing to pay on the \$125,000 note. Scalabrini raised defenses of lack of consideration and failure of a condition precedent.

² Counsel for McKinstry refers in his briefing to “the FINAL RULING AFTER COURT TRIAL FOR BREACH OF CONTRACT AND THE COURT’S STATEMENT OF DECISION,” specifically referencing “FINAL RULING, page 5, l. 5-6” and “FINAL RULING AFTER COURT TRIAL, p. 6, l. 7-9, inclusive.” However, he failed to designate such final ruling or statement of decision in his notice designating the record on appeal, filed November 29, 2010. He did designate other parts of the clerk’s transcript, various exhibits and the reporter’s transcript.

68 Cal.App.4th 624, 631–632.) “Appellate courts *never speculate* that trial court error occurred. Any ambiguity in the record is resolved in *favor* of the appealed judgment or order. (Similarly, in applying the ‘substantial evidence rule,’ appellate courts will resolve all evidentiary conflicts in favor of the respondent. . . .)” (Eisenberg et al., Civil Appeals and Writs, *supra*, ¶ 8-16, p. 8-5.) “Appellant has the burden of overcoming the presumption of correctness and, for this purpose, *must provide an adequate appellate record demonstrating the alleged error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant.* [Citations.]” (*Id.* at ¶ 8-17, p. 8-5, (italics added), citing *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 [“ ‘if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed’ ”].) “Because of the presumption of correctness, judgments and orders are sometimes affirmed on the assumption the trial judge made a particular finding of fact or decided an issue in a particular way, even though this may not actually have occurred. In reviewing a judgment or order for error, appellate courts ordinarily must look to the trial court’s ruling, not at its *reasons* in support of that ruling” (Eisenberg et al., Civil Appeals and Writs, *supra*, ¶ 8-18, p. 8-6.)

In circumstances such as these, where the appellant has failed to supply the statement of decision, the doctrine of “implied findings” applies. Under that doctrine, we “will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record; i.e., the necessary findings of ‘ultimate facts’ will be implied and the only issue on appeal is whether the ‘implied’ findings are supported by ‘substantial evidence.’ [Citations.] [¶] The doctrine is a ‘natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.’ [Citation.]” (Eisenberg et al., Civil Appeals and Writs, *supra*, ¶ 8:22, p. 8-8, quoting *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.)

McKinstry's challenges to the judgment based on claims that the court *failed to consider* his parol evidence on the parties' oral agreement or that it *wrongly credited* parol evidence presented by Scalabrini as to why he signed the promissory note are not supported. There is nothing in the record before us explaining how the court reached its determination and whether it considered certain evidence and refused to consider other evidence.

“The parol evidence rule, with certain exceptions, prohibits the introduction of any *extrinsic evidence* (oral or written) to vary or add to the terms of an *integrated written instrument* (a contract, deed, or will). [Citations.]” (2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 59, p. 179.) The party who did not object to the erroneous introduction of parol evidence at trial “cannot contend on appeal that it was error to admit the extrinsic evidence” (*id.* § 64, p. 185) and “ ‘cannot complain if that evidence is considered by the trier of fact.’ ” (*Ibid.*, quoting *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23.)

However, because the parol evidence rule is a rule of substantive law, the failure of a party to object to the erroneous introduction of such evidence below does not prevent the party from arguing “on appeal that such extrinsic evidence conflicts with any interpretation to which the instrument is reasonably susceptible.” (*Tahoe National Bank v. Phillips, supra*, 4 Cal.3d at p. 24; 2 Witkin, Cal. Evidence, *supra*, Documentary Evidence, § 64, pp. 184-185.) Accordingly, “in determining whether substantial evidence supports a judgment, extrinsic evidence inconsistent with any interpretation to which the instrument is reasonably susceptible becomes irrelevant; as a matter of substantive law such evidence cannot serve to create or alter the obligations under the instrument. Irrelevant evidence cannot support a judgment.” (*Tahoe National Bank v. Phillips, supra*, 4 Cal.3d at p. 23; 2 Witkin, Cal. Evidence, *supra*, Documentary Evidence, § 64, p. 185.) If the only substantial evidence supporting the judgment is erroneously admitted parol evidence inconsistent with an integrated agreement, the judgment cannot stand.

Therefore, the main issue before us is whether substantial evidence supports the trial court's determination.

B. Substantial Evidence Supports the Court's Judgment in Favor of Defendant Scalabrini

The real estate purchase agreement by its terms stated there was no prior or contemporaneous oral agreement regarding the property's purchase and it stated the purchase price to be \$500,000. McKinstry's evidence of a prior oral agreement for a \$625,000 purchase price directly contradicted the purchase agreement and could be ignored by the court. To the extent that McKinstry contends the promissory note constituted a written modification of the purchase agreement, the transfer of the property had already occurred in December and any such after-the-fact modification was without consideration. The purchase agreement, the initial 2005 appraisal of the property, the settlement statement, and the timing of the close of escrow and transfer of the property in December, nearly a month before the signing of the promissory note, provide substantial evidence that the property was not purchased for \$625,000, but for \$509,000 and that the subsequent promissory note for \$125,000 was given without consideration. The purchase agreement appears to be unambiguous. It contains a merger clause and the court could properly determine that McKinstry's claimed previous or contemporary oral agreement for a sales price of \$625,000 was so inconsistent with the purchase agreement as to be inadmissible parol evidence. (See 2 Witkin, Cal. Evidence, *supra*, Documentary Evidence, § 70, pp. 189-190.) In any event, as we have discussed above, there is no indication in the record whether the court did or did not consider this parol evidence. If it did consider the evidence, but did not believe McKinstry, any error was harmless.

The trial court could resolve in favor of Scalabrini all conflicts in the evidence as to the parties' understanding of the operation of the promissory note. It could believe Scalabrini that the note would only take effect if the property increased in value to the point that he could refinance and pay off the note and that condition never happened. Scalabrini's testimony about that oral condition on the note is not precluded under the parol evidence rule, because it supported his defense of inadequate consideration for the

promissory note. (2 Witkin, Cal. Evidence, *supra*, Documentary Evidence, § 99, p. 221 [“Because an instrument lacking in consideration is invalid, this fact may be shown by extrinsic evidence (see [Code Civ. Proc., §] 1856[, subd.] (f)), and a recital of consideration in the written agreement is ordinarily not binding (Ev[id. Code, §] 622). Hence, even though a contract recites that a consideration was received, it may be shown by parol evidence that none was in fact received. [Citations.]”]; 10 Cal.Jur.3d (2011) Bills and Notes, § 433, p. 567, fns. omitted [“The parol evidence rule does not apply where the consideration for a note or bill is the subject of inquiry. Thus, in an action between the parties to an instrument, want of consideration may be shown by parol evidence.”].)

As explained in *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116: “[N]egotiable instruments are subject to the defense of failure of consideration. (Cal. U. Com. Code, § 3303, subd. (b).) ‘ “A promissory note is presumed to have been given for a sufficient consideration . . . and in an action thereon, the introduction of the note in evidence establishes a *prima facie* right to recover according to its terms. The burden of showing a want of consideration . . . is cast upon the party seeking to avoid it, and if he fails to make this showing, the presumption prevails and furnishes sufficient evidence to support a finding that the note was given for a good and valuable consideration.” ’ (*Meyer v. Glenmoor Homes, Inc.* (1966) 246 Cal.App.2d 242, 258-259) At the same time, ‘ “[t]he absence of consideration is always a defense to a suit on a promissory note [citation] and since an instrument lacking in consideration is invalid, this fact may be shown by extrinsic evidence. [Citations.]” Where the evidence produced by the plaintiff reflects the absence of consideration it is proper to grant a nonsuit. [Citation.]’ (*Id.* at p. 259; accord, *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 397 . . . [‘[A] general denial puts in issue the question whether consideration was given for the note which recites that it was given for valuable consideration. [Citation.] *Such a defense, because it challenges a facial claim of the note, is not subject to the parol evidence rule.*’].)” (*Id.* at p. 1133, fns. omitted, italics added.)

McKinstry acknowledged that he had not provided any consideration to Scalabrini for signing the promissory note, *other* than the initial transfer of the property that had already taken place in December. He testified that he never would have allowed Scalabrini to move had Scalabrini not signed the note, but the property belonged to Scalabrini at that point. Moreover, McKinstry also testified that he had allowed Scalabrini to move in to the property in September or October, when they first talked, well before the promissory note was signed and before transfer of the property. Substantial evidence supports the implied conclusion of the court that the promissory note was without consideration and, therefore, invalid.

C. No Promissory Estoppel

Nor are we persuaded by McKinstry's claim that Scalabrini was estopped to deny that he promised to pay \$625,000 for the property and that he still owes a balance of \$125,000 to McKinstry. The premise of this claim is that Scalabrini promised to pay \$625,000 for the property. Substantial evidence supports the court's implied finding that no such promise was made or that such promise, if made, was subject to a condition that did not occur.

DISPOSITION

The judgment is affirmed. Scalabrini is awarded his costs on appeal.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.