

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

OZELLA MITCHELL,

Plaintiff and Appellant,

v.

LACEY ANN GREEN, as Trustee, etc., et al.,

Defendants and Respondents.

A132647

(Sonoma County
Super. Ct. No. SPR 81425)

LACEY ANN GREEN, as Trustee, etc.,

Plaintiff and Respondent,

v.

OZELLA MITCHELL,

Defendant and Appellant.

(Sonoma County
Super. Ct. No. SCV 244501)

In a family dispute over the ownership of real property, the court purported to enforce a stipulated settlement agreement between Ozella Mitchell and her son, Jason Mitchell, and Jason's domestic partner, Lacey Ann Green.¹ (Code Civ. Proc., § 664.6, hereafter § 664.6.) Ozella challenges the validity of the enforcement order, claiming it is inconsistent with the terms agreed upon. We conclude that the order directing sale of the family home and distribution of the sale proceeds exceeds the terms to which the parties agreed. We are therefore constrained to reverse the judgment.

¹ Given a shared family name, we refer to the parties by their first names.

FACTS

Ozella and John Mitchell were married in 1972. Their son Jason was born about a year later. Ozella and John separated several times over the course of their marriage, and often lived apart. They had been separated for many years when John died in 2008.

Upon John's death, a family dispute arose over ownership of the Petaluma home in which he lived. Ozella claimed ownership under a 1992 deed and agreement that granted the property to John and Ozella as joint tenants with the right of full ownership to the surviving joint tenant upon the death of the other, with Jason to receive title upon the death of both parents. Jason claimed half-ownership under a deed and trust executed days before John's death. The deed transferred title from John as joint tenant to John as tenant in common, severing the joint tenancy and Ozella's right of survivorship, and was executed by Jason under a power of attorney. The trust named Jason as the beneficiary to receive all of John's assets and made Jason's domestic partner, Lacey, the trustee.

Lacey, as trustee, sued Ozella, seeking partition and sale of the Petaluma house.² Lacey also filed a notice of lis pendens on the property. Ozella filed an answer denying the validity of the deed and trust granting Jason an interest in the Petaluma house and also a probate petition contesting the validity of the trust. Lacey countered with a probate petition claiming that the trust has a community property interest in several additional properties purchased by Ozella while married to John. The civil and probate actions were consolidated and set for trial.

A settlement conference was held in January 2010, a month before the scheduled trial. A mediator met with Ozella, Jason, Lacey and their attorneys and ultimately advised the court that a settlement had been reached. Jason and Lacey agreed to transfer title of the Petaluma property to Ozella in exchange for \$135,000. The terms of the stipulated settlement were stated on the record: Jason and Lacey would remove the notices of lis

² On appeal, respondents Lacey and Jason request judicial notice of an appraisal report valuing the property. The report was not before the trial court when it ruled and is irrelevant to the issues on appeal. Judicial notice is denied.

pendens on all properties and within six months of removal Ozella would deposit \$135,000 into an escrow account. Jason and Lacey would then deposit into the same escrow account a deed transferring all interest in the Petaluma property to Ozella, and the money would be released to them. Further, Ozella's attorney stated, "Additionally, there will be a document that everybody has to sign which is called a stipulation [f]or the entry of judgment that will have all the terms that we agreed to today written down and that way if for whatever reason payment of the money is not made in the time frames provided, they will then be able to get a judgment for \$135,000, okay?" Fees and costs were waived and the parties agreed to a general release of all claims. The court queried the parties and obtained their consent to the settlement and their acknowledgment that the settlement was enforceable by the court.

Eight months later, in August 2010, Jason and Lacey filed a motion to enforce the settlement agreement. (§ 664.6.) Their attorney declared that the notices of lis pendens were removed in February 2010 but that Ozella had neither deposited \$135,000 into escrow nor executed a stipulation for entry of judgment in that amount. Ozella opposed enforcement, claiming that she did not consent to the settlement and that any consent was vitiated by lack of capacity. At a November 2010 hearing, the court rejected Ozella's defenses and found the settlement valid and enforceable. But the court said it was "concerned about where we go from here." Jason wanted the court to enter judgment against Ozella for \$135,000 without transferring title of the Petaluma house to her. Jason claimed that the settlement presented "a carrot-and-stick" situation in which Ozella would have received title to the property if she deposited the money but now faced the penalty of a money judgment without receiving title. The trial judge who presided over the settlement agreement rejected that interpretation: "I think the real intent here was she pay the \$135,000 in exchange for transfer of title to the property to her." Jason did not want to transfer title in exchange for a money judgment because the judgment could be difficult to collect. Ozella's attorney suggested that Ozella might be able to obtain a loan on the Petaluma property to pay Jason, especially if Jason were willing to deposit title in escrow to obtain the loan. The court directed the parties to meet and confer and

encouraged Ozella to perform consistent with the agreement by depositing \$135,000 into an escrow account for the transfer of title. The court expressed the hope that the parties would reach a solution to “finalize the settlement.”

Court proceedings resumed in December 2010. Through their attorneys, the parties advised the court that they had discussed obtaining a loan on the Petaluma property or, if that failed, putting the house up for sale, but had not reached any final resolution. Ozella’s attorney said that Ozella “was suggesting that she believed that it will take about 60 days to get a loan if she qualifies. If she doesn’t qualify, you put the house up on the market and they get the first [\$]135,000 out of it.” The attorney for Jason and Lacey expressed doubt that Ozella would follow through with the plan without a court order. The court said, “Well, what about this as a solution, we give [Ozella], in good faith, the 60 days to get the loan to make the payment that leads us through the rest of the settlement, and if that doesn’t happen in 60 days when we come back, the court would order an immediate process to sell the home so that money could be generated by a sale.” Ozella’s attorney replied, “I think that is – I think she’s indicating that she agrees with your suggestion.” Jason’s attorney accepted the proposal, provided the court would force the sale if Ozella did not comply, and the court said it would appoint a receiver, if need be, “to step in and sell the property.” The court directed Jason’s attorney to prepare a written order and submit it to opposing counsel for approval. It appears that a written order was submitted to opposing counsel but never approved, and never submitted to the court. However, a minute order states “the court will order Ozella . . . to obtain a loan within 60 days of today’s date. If a loan cannot be obtained, the court will order a sale of the property.”

Further court proceedings were held about two months later, in February 2011. Ozella’s attorney withdrew from representing her. Ozella told the court that she applied for a loan “two or three times” but was denied because she had bad credit. She said she would have to sell the house and wanted time to complete the sale. The court denied her request for more time and ordered sale of the house by a receiver. The court issued a

formal written order directing placement of the Petaluma property into receivership and sold, with \$135,000 paid to Jason and Lacey from the proceeds.

Weeks later, in March 2011, the attorney for Jason and Lacey applied for an amended order. Counsel explained that a receivership was not an appropriate and effective remedy and requested an amended order partitioning the property and appointing a probate referee with power of sale. The court issued the amended order, which included several new terms concerning payments to respondents Jason and Lacey. The court awarded respondents 10 percent interest on \$135,000 measured from the date of settlement in January 2010 and directed that the remaining proceeds be split equally between Ozella and respondents. The amended order also ordered Ozella to vacate the property immediately and to make all mortgage, tax and insurance payments on the property until it was sold.

Ozella, represented by new counsel, filed a motion for reconsideration of the March 2011 amended order. The grounds for the motion are not clearly stated but appear to be a repetition of her earlier claim that she did not consent to a settlement in January 2010. The court denied the motion for reconsideration. Ozella has filed a notice of appeal challenging the February and March 2011 orders directing sale of the property and the May 2011 order denying reconsideration.³

DISCUSSION

“Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit.” (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.) “Although a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment [citations], nothing in section 664.6 authorizes a judge to *create* the material terms of a settlement, as opposed to deciding what terms the

³ The March 2011 order finally determined the rights of the parties to the action and will be deemed to include a judgment. (*Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1250-1252; *Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1183.)

parties themselves have previously agreed upon.” (*Id.* at p. 810; accord *Lindsay v. Lewandowski* (2006) 139 Cal.App.4th 1618, 1622-1625; *Terry v. Conlon* (2005) 131 Cal.App.4th 1445, 1458-1460.)

“A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. [Citation.] An essential element of any contract is ‘consent.’ [Citations.] The ‘consent’ must be ‘mutual.’ [Citations.] ‘Consent is not mutual, unless the parties all agree upon the same thing in the same sense.’ ” (*Weddington Productions, Inc. v. Flick, supra*, 60 Cal.App.4th at pp. 810-811.) “If there is no evidence establishing a manifestation of assent to the ‘same thing’ by both parties, then there is no mutual consent to contract and no contract formation.” (*Id.* at p. 811.)

Moreover, to be enforceable under section 664.6, the stipulated settlement must be “ ‘sufficiently certain as to make the precise act which is to be done clearly ascertainable.’ ” (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1301.) The settlement here left some matters undefined. The parties’ continuing dispute over the terms of the settlement and the trial court’s long struggle to reach a compromise solution evidence this fact.

The stipulated settlement was clear in requiring an exchange of money for title in an escrow account but unclear on the consequences if the parties failed to comply. It was agreed that Ozella would deposit \$135,000 into an escrow account and that Jason and Lacey would receive the money upon depositing into the escrow a deed transferring their interest in the property to Ozella. That much is clear. However, the parties failed to express a clear agreement to the consequences if Ozella failed to pay the \$135,000 into the escrow account. Her attorney stated that “there will be a document that everybody has to sign which is called a stipulation [f]or the entry of judgment that will have all the terms that we agreed to today written down and that way if for whatever reason payment of the money is not made in the time frames provided, they will then be able to get a judgment for \$135,000” But no one at the time of settlement indicated whether Jason and Lacey would be required to transfer title to the property to Ozella upon obtaining only a judgment for \$135,000 rather than receiving the agreed payment. The stipulated

settlement does not clearly say so, and the trial judge who presided over the settlement agreement expressly rejected that interpretation: “I think the real intent here was she pay the \$135,000 in exchange for transfer of title to the property to her.” Nor did the parties agree that if the money was not paid, the property would be sold and the proceeds divided; moreover, they did not agree on the proportions in which any such proceeds would be divided.

When the parties reappeared before the court following Ozella’s failure to make her payment into the escrow account, Ozella’s attorney acknowledged that Jason and Lacey were not required by the settlement agreement to transfer title to Ozella as a prerequisite to obtaining a money judgment. Jason and Lacey also disclaimed that interpretation and told the trial court they would not transfer title in exchange for a money judgment. In an attempt to salvage the settlement, the court encouraged the parties to confer to “accomplish what was originally intended” and to “finalize the settlement.”

Jason and Lacey assert that Ozella agreed at the December 2010 hearing to a partition and sale of the Petaluma house to raise the money promised at the earlier settlement conference. But no such agreement ever received the parties’ personal assent. The attorneys discussed obtaining a loan on the Petaluma property or, if that failed, putting the house up for sale. The court said: “Well, what about this as a solution, we give [Ozella], in good faith, the 60 days to get the loan to make the payment that leads us through the rest of the settlement, and if that doesn’t happen in 60 days when we come back, the Court would order an immediate process to sell the home so that money could be generated by a sale.” Ozella’s attorney replied, “I think that is – I think she’s indicating that she agrees with your suggestion.” The attorney’s statement is equivocal and Ozella was not asked to confirm her assent. Ozella never stated her agreement on the record and was never queried about her understanding of the proposal. Moreover, nothing was said as to how the proceeds of a sale would be divided—whether Jason and Lacey would receive the first \$135,000 plus half the remaining proceeds, as the court ordered, or only the \$135,000 they would have received under the agreed settlement with the balance going to Ozella.

Parties must personally assent to a settlement for it to be enforceable under section 664.6. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 581-586.) Our Supreme Court explained the rationale for this requirement: “The litigants’ direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent. This protects the parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle, and minimizes the possibility of conflicting interpretations of the settlement. [Citations.] It also protects parties from impairment of their substantial rights without their knowledge and consent.” (*Id.* at p. 549, fn. omitted.) In deciding whether the parties entered into a binding settlement, a 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 Marriage of Assemi* (1994) 7 Cal.4th 896, 911.)

The trial court here did not question the parties as to whether they agreed to a partition and sale or regarding their understanding of such an agreement, the parties did not expressly acknowledge an understanding of such terms, and the terms were in fact never specified. Moreover, the parties did not orally agree to be bound by such an agreement. This is insufficient. Settlement is a serious step that requires a party’s “knowledge and express consent.” (*Levy v. Superior Court, supra*, 10 Cal.4th at p. 583.) At least one court has held that verbal consent, not a head nod, is required to enforce a stipulated settlement. (*Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 551.) Certainly, unambiguous assent of some kind is required.⁴ (*Levy, supra*, at p. 593.)

⁴ The lack of assent also defeats Jason and Lacey’s contention that Ozella is estopped from contesting the court’s order for sale of the house and distribution of the proceeds. “[T]he invited error doctrine requires affirmative conduct demonstrating a deliberate tactical choice on the part of the challenging party.” (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 706.) Here, there was no affirmative, deliberate endorsement of the terms appearing in the final order.

Section 664.6 permits entry of judgment only where the parties have agreed to the material terms of a settlement contract. (*Weddington Productions, Inc. v. Flick, supra*, 60 Cal.App.4th at p. 797.) “If no meeting of the minds has occurred on the material terms of a contract, basic contract law provides that no contract formation has occurred. If no contract formation has occurred, there is no settlement agreement to enforce pursuant to section 664.6 or otherwise.” (*Ibid.*) Despite the laudable efforts of the court to help mother and son resolve their controversy, the fact remains that the parties failed to agree to a disposition of the partition action if Ozella was unable to raise the \$135,000 to purchase the interest of Jason and Lacey. While sale of the Petaluma house and distribution of the proceeds may in all events be the result of litigating the partition action to judgment, this disposition is beyond the terms of the only agreement reached between the parties and cannot be upheld under section 664.6.

DISPOSITION

The order and judgment of March 3, 2011 is reversed. The matter is remanded to the trial court with directions to deny the section 664.6 motion to enforce settlement and for further proceedings consistent with this opinion. Respondents’ request for judicial notice in connection with their motion for sanctions on appeal is granted but the motion for sanctions is denied. The parties shall bear their own costs on appeal.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.