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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SHEILA AYUB,

Plaintiff and Respondent,

v.

ROGER CLARK et al.,

Defendants and Appellants.

A137528

(Humboldt County
Super. Ct. No. DR100250)

After a court trial, Roger and Kristi Clark appeal from a judgment enforcing their oral promise to pay Sheila Ayub \$100,000 to buy out her rights under a real property lease/option agreement. The Clarks contend the trial court erred in failing to find the oral agreement was unenforceable because it (1) was required to be in writing under the statute of frauds, or (2) constituted the compromise of an illegal contract. We find no error, and affirm the judgment.

I. BACKGROUND

The Clarks owned an approximately 12-acre improved real property on Dyerville Loop Road, near Garberville, California. Ayub and her former husband Hector Gonzalez began living on the property in June 2005. Hector's brother, Omar, is married to the Clarks' daughter. In May 2007, the Clarks granted Ayub and Hector a five-year lease/option to purchase the property. The written lease/option agreement called for payment of a \$20,000 option fee, which was paid by Ayub and her husband. The purchase price was originally agreed to be \$580,000. That price was reduced to \$500,000 in the lease/option executed by the parties after the Clarks were paid \$80,000 in cash as a

downpayment “outside the contract.” The lease/option agreement was modified in June 2009, with a change to the term from five years to six years, and was signed again by the parties, notarized, and recorded in July 2009.

The 2009 lease/option called for monthly rent payments of \$2,500 per month with all rent paid counting toward the purchase price. The purchase option was irrevocable until May 6, 2013.¹ From May 7, 2007 to November 6, 2009, Ayub paid the Clarks over \$100,000 pursuant to the terms of the lease/option agreement. Ayub and Hector also made extensive improvements to the house worth as much as \$140,000 while living on the property.

Ayub testified Hector and the Clarks had an unwritten side agreement about Hector growing marijuana on the property. Under that agreement, Hector made payments to the Clarks based on the marijuana growing business over and above the rent she and Hector paid, and those payments were also to be counted toward the purchase price for the property. Some of the money that came from the marijuana growing was used to support Ayub and her family. She also had a job cleaning houses at \$25 per hour, and Hector had jobs as a cook, handyman, and in construction for approximately \$13 to \$14 per hour.

Ayub and her husband began having marital difficulties in 2009 that resulted in Hector moving out of the primary residence. During this time, Ayub petitioned for divorce, and reported Hector to the police for domestic violence, for which he was arrested. In October 2009, Roger Clark invited Ayub and Norma Ortiz, a retired lawyer who was an acquaintance of Ayub’s, to a meeting to take place on November 6, 2009 at the Clarks’ residence.² According to Ortiz, Clark told her he was taking Hector’s side of the marital dispute because his son-in-law was Hector’s brother, and he intended to offer Ayub money to get her off the property. Clark, Ayub, Ortiz, Hector, and Hector’s two

¹ The statement of decision states the option was irrevocable until May 6, 2012, but that appears to be an oversight based on the superseded, 2007 version of the option.

² Clark apparently obtained Ortiz’s cell phone number from Ayub so he could invite her to represent or support Ayub.

brothers, Oswaldo and Omar, attended the November 6 meeting. Although the parties disputed what took place at the meeting, the trial court accepted the testimony of Ayub and Ortiz that Roger Clark and Ayub negotiated the amount necessary to buy her out of the lease/option and get her to vacate the premises. The court found Roger Clark orally promised to pay Ayub \$100,000 by the end of November, and Ayub agreed to vacate the premises and give up her rights under the lease/option after receiving payment. The Clarks never paid the money, and eventually evicted Ayub from the property.

Ayub sued the Clarks in March 2010, alleging breach of the November 6, 2009 oral agreement, and two other causes of action based on the lease/option agreement. A court trial began on August 26, 2011. At the outset of trial, Ayub's counsel advised that she would only be pursuing the breach of oral contract claim. At the close of Ayub's case-in-chief, the Clarks moved for judgment pursuant to Code of Civil Procedure section 631.8, in part on the grounds that the November 6 oral agreement was unlawful. The Clarks contended the oral agreement was illegal because an agreement to compromise an illegal contract—a contract to share profits from the growing of marijuana in this case—is also illegal. The court granted the motion as to the two causes of action Ayub had elected not to pursue, but declined to render judgment on the breach of oral contract claim until the close of evidence.³ The court ultimately granted judgment in favor of Ayub on that cause of action.⁴

³ Code of Civil Procedure section 631.8 provides in pertinent part: “(a) After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. . . . [¶] (b) If it appears that the evidence presented supports the granting of the motion as to some but not all the issues involved in the action, the court shall grant the motion as to those issues and the action shall proceed as to the issues remaining. . . .”

⁴ The record on appeal includes no findings by the trial court specifically addressing the Clarks' contention that the oral contract was unenforceable due to illegality. In their request for a statement of decision and objections to Ayub's proposed statement of decision, the Clarks did not ask the court to address these issues. Illegality was also not raised in the Clarks' motion to vacate the judgment.

The court issued its tentative decision in favor of Ayub on July 9, 2012. Following submission of a proposed statement of decision by Ayub and objections thereto by the Clarks, the court issued its final statement of decision and entered judgment in favor of Ayub on September 19, 2012. This timely appeal followed.

II. DISCUSSION

The Clarks contend the November 6, 2009 oral agreement is unenforceable because (1) it was required to be in writing under the statute of frauds (Civ. Code, § 1698, subd. (c)); and (2) the trial court erred in not dismissing Ayub’s breach of oral contract claim for illegality on the Clarks’ motion under Code of Civil Procedure section 631.8.

A. *Statute of Frauds*

In its statement of decision, the trial court describes the November 6 agreement between the Clarks and Ayub as “an oral agreement wherein [Ayub] agreed to release and/or terminate her rights under the Lease-Option Agreement . . . and to vacate the premises in consideration for payment by Roger Clark [of] the sum of \$100,000.” With regard to the Clarks’ statute of frauds defense, the trial court found as follows: “The Court determined that the oral agreement entered into by plaintiff and defendant Roger Clark is not required to be in writing to be enforceable. The oral agreement was a modification of a written agreement and was supported by new consideration. Performance by the parties under the terms of the oral agreement was less than 60 days.”

Civil Code section 1698 provides in pertinent part: “(c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied *if the contract as modified is within its provisions.*” (Italics added.)⁵ The Clarks theorize the phrase “contract as modified” for purposes of the statute is the 2009 written lease/option agreement as modified to provide for the buyout of Ayub’s rights in the agreement, for her vacation of the premises in return for a \$100,000 payment from the

⁵ Subject to certain exceptions, agreements for the leasing of real property for more than one year, and for the sale of real property are required to be in writing under the statute of frauds. (Civ. Code, § 1624, subds. (a)(1), (3).)

Clarks, and for Hector to be the sole lessee/optionee. The contract as modified was not, as the court seems to have assumed, the oral buyout agreement assertedly made between Ayub and the Clarks on November 6, 2009. The latter, according to the Clarks, was the attempted oral modification, but not the “contract as modified” for purposes of the statute. The Clarks reason that because the *lease/option agreement*, as modified to provide for a buyout of Ayub’s interest, was a lease between Hector and the Clarks with more than a year remaining on its term, and included an option for Hector to purchase the property, and because no statutory exception such as estoppel or part performance assertedly applied,⁶ the “contract as modified” came within the statute of frauds and the oral modification was therefore ineffective.

Even assuming the Clarks’ interpretation of subdivision (c) of Civil Code section 1698 is correct, their legal analysis omits critical facts. The lease/option agreement “as modified” on November 6, 2009 had already been partly performed by Ayub and Hector by the time of its modification. Monies had been paid for rent and toward the purchase of the property, and the tenant/optionees had made significant improvements to the property in reliance on the purchase option. “The doctrine of part performance by the purchaser is a well-recognized exception to the statute of frauds as applied to contracts for the sale or lease of real property.” (*Sutton v. Warner* (1993) 12 Cal.App.4th 415, 422.) Either partial payment of the purchase price or the making of substantial improvements on the property will satisfy it. (*Ibid.*) The Law Revision Comments to section 1698 state: “Subdivision (c) makes clear that the Statute of Frauds, Section 1624, must be satisfied where the contract as modified is within its provisions. However, the contract is not ‘within’ the provisions of the Statute of Frauds where the contract as modified does not fall into a category described in Section 1624 *or where a*

⁶ Civil Code section 1698, subdivision (d) provides: “Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.”

doctrine such as part performance takes the contract as modified out of the statute.” (Cal. Law Revision Com. com., 9 West’s Ann. Civ. Code (2011 ed.) foll. § 1698, p. 458, italics added.) Because the “contract as modified” had been partly performed *before* it was modified, section 1698, subdivision (c) did not by its terms invalidate the oral amendment.

Even apart from the applicability of part performance as an exception to the writing requirement, we are not convinced the “contract as modified” for purposes of Civil Code section 1698, subdivision (c) should be construed to be part and parcel of Hector’s lease/option agreement with the Clarks. The purpose of the oral agreement was to buy Ayub *out* of the lease/option. Thus, if Hector had not been a party to the lease/option agreement there is no question the “contract as modified” would simply be the Clarks’ oral agreement to pay Ayub \$100,000 in return for relinquishment of her lease/option rights. As discussed below, a modification of that nature would clearly not have required a writing under well-established case law. It makes little sense to apply a different rule merely because a second person, Hector, continued to have rights concerning the property that Ayub had agreed to relinquish. As relevant here, the purpose of the statute of frauds is to prevent uncertainty, fraud, and perjury with respect to agreements creating certain interests in real property. Since Ayub is not seeking recognition of any such interest, or making any other claim falling under Civil Code section 1624, the evidentiary and protective purposes of the statute of frauds would not be served by applying it to her claim. (See *Seaman’s Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 764–765, overruled on another ground in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85 [requirement of a memorandum must be read in light of the dispute which arises].) Put another way, the law recognizes that if a contract contains two or more promises of performance that can easily be distinguished by the court by reference to the agreement itself, only that promise of performance which falls clearly within the statute of frauds cannot be enforced. (*White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 345–346.) Here, the Clarks’ promises of performance to Hector are readily distinguishable from their promise

to pay Ayub \$100,000. Only the former arguably came within section 1624 (setting aside the effect of Hector’s part performance).

The law governing mutual rescission or abandonment of real property contracts—rather than Civil Code section 1624—is most germane to the promise Ayub seeks to enforce. In *Hastings v. Matlock* (1985) 171 Cal.App.3d 826 (*Hastings*) the defendants appealed from a judgment enforcing an oral settlement agreement of a dispute over a realty purchase agreement, contending the settlement agreement was subject to the statute of frauds. (*Id.* at pp. 831–834.) The oral settlement rescinded the written purchase agreement, required the plaintiff sellers to pay the defendant buyers \$142,842.86, and required the defendants to vacate the premises. (*Id.* at p. 834.) The Court of Appeal held that “where, as here, an oral out-of-court settlement agreement purports to effect a rescission of a written contract for the purchase and sale of real property, the settlement agreement is not within the statute of frauds and need not be in writing.” (*Id.* at p. 837.) The court applied the more general principle that “[t]he rescission of a written contract for the purchase and sale of an interest in real property may be accomplished by an oral agreement.” (*Ibid.*, citing cases.)

We find this case indistinguishable from *Hastings* and the consistent holdings of many other cases that parties to real estate contracts required to be in writing can mutually agree to abandon such contracts without the necessity for a writing. (See, e.g., *Post v. Palpar, Inc.* (1960) 184 Cal.App.2d 676, 679; *San Roque Properties, Inc. v. Pierce* (1937) 18 Cal.App.2d 379, 380.) Such agreements, like the oral agreement in issue here, are not agreements for the leasing or conveyance of real property. Moreover, mutual rescission or abandonment does not require that the parties return to their former positions. The courts will enforce terms orally negotiated by the parties as long as there is no conveyance of real property. (See *Aderholt v. Wood* (1924) 66 Cal.App. 666, 669–670.) The fact the Clarks agreed to pay cash consideration for the termination of Ayub’s contractual rights or that a lease/option agreement continued to exist between Hector and the Clarks does not remove the November 6 oral agreement from the operation of these well-established rules.

Contrary to the Clarks' contention, Civil Code section 1624.5⁷ is also inapplicable. Ayub was not *selling* her rights in the lease/option agreement to a third party, she was waiving those rights. Further, the compromise of disputed claims is not a sale of personal property. (*Greyhound Lines, Inc. v. Superior Court* (1979) 98 Cal.App.3d 604, 608–609.) Here, the evidence established the oral agreement was intended in part to resolve disputes and conflicts arising from Ayub's divorce proceedings against Hector.

For these reasons, Civil Code section 1698, subdivision (c) does not require reversal of the judgment.

B. Illegality

The Clarks contend that because the evidence showed the parties had an illegal side agreement under which proceeds from the growing of marijuana were to apply toward the purchase price of the property, the oral buy-out agreement was tainted with illegality and could not be enforced by the court.

The statement of decision in this case did not discuss the factual findings upon which the trial court based its decision to reject the Clarks' illegality defense, and the Clarks did not request the court to address those issues either in their request for a statement of decision or their objections to the proposed statement of decision. Accordingly, we must infer the trial court made every factual finding necessary to support the conclusion that the oral agreement was not tainted by illegality. (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 61–62.) The question then becomes whether substantial evidence supports the implied factual findings. (*Id.* at p. 48.)

⁷ Civil Code section 1624.5 provides in part: “[A] contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars (\$5,000) in amount or value of remedy unless there is some record, as defined in subdivision (m) of Section 1633.2, but solely to the extent permitted by applicable law, that indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed . . . by the party against whom enforcement is sought or by his or her authorized agent.”

The relevant evidence includes the following: According to Ayub's testimony, she was not a party to Hector's separate agreement with the Clarks concerning the use of marijuana growing proceeds, and she was not involved in Hector's marijuana growing business. There was also testimony that Hector, Ayub, and the Clarks all possessed medical marijuana identification cards which would have entitled them to some cultivation of marijuana for personal medical use. (Health & Saf. Code, §§ 11362.71, subd. (e), 11362.77, subds. (a)–(c).) The asserted illegality of the growing activities on the property was suggested at trial, but it was never directly proven or found as a fact.⁸ Testimony established Hector and Ayub made initial payments to the Clarks in 2007, totaling \$100,000, consisting of the \$20,000 option fee and \$80,000 as a cash downpayment, and thereafter made rental payments and completed improvements to the property worth possibly more than \$100,000. No testimony pinned down how much, if any, of these amounts were funded from Hector's marijuana business.⁹ Finally, there was testimony from which it could be inferred the buyout had a perfectly legal family-related objective of ending marital conflicts between Ayub and Hector, and inducing her to leave the property.

The burden of establishing that a particular contract is illegal is on the party claiming the illegality. (*Fellom v. Adams* (1969) 274 Cal.App.2d 855, 863.) We conclude the trial court was justified in finding the evidence insufficient to establish Ayub's oral buyout agreement with the Clarks was tainted with illegality. The court was entitled to infer from the testimony the amount of the buyout was not inflated as a result

⁸ The Clarks attacked the alleged oral agreement on multiple grounds in their closing trial brief, but not on the ground of illegality.

⁹ The Clarks cite testimony by Ayub which they construe as an admission that all of the money she and Hector put into the property except for the option fee derived from the marijuana growing operation. We find the testimony ambiguous. Ayub was discussing interrogatory answers she had provided which admitted that *some* money paid to the Clarks had come from the marijuana growing. The record before us does not support the conclusion that she admitted *all* of the money stemmed from that source, much less that the \$100,000 the Clarks agreed to pay was based on proceeds from the growing.

of any illegal activity on Ayub's part, or by Hector's side agreement with the Clarks. The trial court could have reasonably concluded that the \$100,000 payment Ayub negotiated reflected her share of lawful payments made under the lease/option agreement as well as the Clarks' eagerness to end or dampen a troublesome family conflict by inducing her to promptly leave the property.

The Clarks fail to demonstrate error in the denial of their motion under Code of Civil Procedure section 631.8.

III. DISPOSITION

The judgment is affirmed.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.