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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

Conservatorship of the Person and Estate of
MARY S. SCARPACE.

LAWRENCE SCARPACE, as Coconservator,
etc., et al.,

Petitioners and Respondents,

v.

MARILYN E.S. HANSEN et al.,

Objectors and Respondents.

2d Civil Nos. B226388, B234904, B235312
(Super. Ct. No. PR 080027)
(San Luis Obispo County)

Estate of LORRAINE M. SCARPACE,
Deceased.

LAWRENCE SCARPACE, as Special
Administrator, etc., et al.,

Petitioners and Respondents,

v.

BARLETTA HANSEN, as Special
Administrator, etc.,

Contestant and Appellant;

MARILYN E.S. HANSEN.

Claimant and Appellant.

(Super. Ct. No. PR080030)
(San Luis Obispo County)

LAWRENCE SCARPACE,
Plaintiff and Respondent,

v.

MARILYN E.S. HANSEN et al.,

Defendants and Appellants.

(Super. Ct. No. CV080174)
(San Luis Obispo County)

This interfamilial dispute over commercial real property spawned three court cases in San Luis Obispo and another in Los Angeles. The parties, with the exception of Barletta Hansen, entered into a purported global settlement of the dispute. The agreement is not enforceable under Code of civil Procedure 664.6¹ because Barletta² did not agree at the settlement hearing and she did not sign the settlement agreement.

We affirm an order authorizing a conservator to borrow funds, but reverse orders enforcing a settlement against Barletta and her mother, Marilyn Hansen.

FACTUAL AND PROCEDURAL

Mary Scarpace and her adult daughter, Lorraine Scarpace, lived together in Kuauai until 2007. Mary is over 90 years old and suffers from dementia. Lorraine handled Mary's financial affairs and cared for Mary until Lorraine died in 2008.³

Mary owned commercial real estate that generated significant rental income. The property included a "Wendy's" restaurant in Riverside (Trautwein) and a "Jack-In-The-Box" in Riverside (Rubidoux). Mary and Lorraine together owned another "Jack-In-The-Box" property in Fresno (Kingsburg). Mary had a 15 percent interest in Kingsburg and Lorraine had an 85 percent interest. Lorraine owned the home in which she and Mary lived (the Kuauai property).

Lorraine has a brother, Lawrence Scarpace, and a sister, Marilyn Hansen. Marilyn has two daughters, Barletta Hansen and Marcella Hansen. Barletta and Marcella are litigating adverse claims to their father's estate in Los Angeles. (*In re Robert Hansen Trust* (Super. Ct. Los Angeles County (2006) No. SP006772), the Los Angeles action.) The family has a history of joint business dealings and litigation among its members.

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

² We use the parties' first names to avoid confusion and intend no disrespect.

³ The underlying cases have not been adjudicated on their merits. We necessarily rely upon the parties' allegations for a factual overview, but recognize that some of the recited facts remain in dispute.

Lorraine's Illness and Death

In November 2007, Mary and Lorraine came to California so Lorraine could be treated for back pain. Shortly after her arrival at Cedars-Sinai hospital, Lorraine learned she had cancer and would soon die. She died two months later. Marilyn and Barletta organized care for Mary and Lorraine in California. Using Mary's money, they purchased a condominium in Arroyo Grande (the condominium) in which Mary and Lorraine lived with caretakers during Lorraine's final illness.

Four days after Lorraine arrived in California, she handwrote a will that gave all of her property, except \$10.00, to Barletta. According to Lawrence, Lorraine was being treated with radiation and morphine, had brain tumors, and could not focus on documents or lift her hands when she gave a videotaped deposition three days later. Lorraine has no other will.

Before Lorraine died, she and Mary also executed several deeds that gave Marilyn and Barletta control of their property (the 2007 deeds).

The Conservatorship of Mary

When Lorraine died, Lawrence filed a petition to establish a conservatorship of the estate and person of Mary. (*Conservatorship of Mary S. Scarpace* (Super. Ct. San Luis Obispo County (2008) No. 080027).) He alleged that Marilyn and Barletta had taken control of all of Mary's assets and had overdrawn her account. The court appointed Jolene Harms as temporary conservator of the estate and person. Harms filed a petition to rescind the 2007 deeds and restore other property to Mary's estate, pursuant to Probate Code section 850, on the grounds that Marilyn and Barletta had exerted undue influence over Mary and Lorraine (the section 850 petition). Keith B. Cramer was later appointed conservator of Mary's estate.

Probate of the Lorraine's Will

Lawrence filed a probate petition in which he requested permission to administer Lorraine's estate. (*Estate of Lorraine M. Scarpace* (Super. Ct. San Luis Obispo Superior County (2008) No. PR 080030).) Barletta responded with a petition to probate Lorraine's handwritten will. Lawrence contested the will on the grounds that

Lorraine lacked testamentary capacity when she wrote it and it was the product of Marilyn and Barletta's undue influence and fraud. Lawrence took the position that all of Lorraine's property should go to Mary by intestate succession.

The Elder Abuse Action

Lawrence filed an elder abuse action on behalf of Mary against Marilyn and Barletta. (*Scarpace v. Hansen* (Super. Ct. San Luis Obispo County (2008) No. CV 080174).)

Settlement Negotiations

The court consolidated the three San Luis Obispo actions. In a written agreement that is not the subject of this appeal, Marilyn and Barletta agreed to rescind one of the 2007 deeds, to remove Marilyn's name from the title to the condominium, and to account for income received on Mary's behalf from Trautwein, Rubidoux, Kingsburg, and the condominium.

November 10, 2009

On November 9 and 10, all the parties worked with a mediator and the court in order to reach a global settlement of the remaining claims. They reached an agreement "in principal" in which the remaining 2007 deeds would be rescinded, and Mary and Lorraine's property would be distributed among Lawrence, Marilyn and Barletta. Marilyn would pay Lawrence \$600,000. Marilyn would pay the past fees of the conservator and the conservator's counsel, estimated to be \$240,000. Marilyn would pay Mary's future expenses.

Mary's counsel and the conservator were not present during the negotiations. They arrived as the parties were putting the settlement on the record and raised concerns about distributing Mary's property before her death.

The court put the matter over for ten days. The court asked Lawrence, Marilyn and Barletta "to agree that in principal that everything -- if Mary agrees and [Mary's counsel] agrees, and [the conservator's counsel] thinks it is a safe thing to do, that this is the way you want to resolve this case. [¶] So that's all I'm asking the parties at this point." Lawrence, Marilyn, and Barletta agreed on the record.

Counsel asked if Barletta could be excused for the next appearance, at which the court said it was going to "explain 1542," and "explain 664." Marilyn's counsel asked, "Is it okay if Marilyn brings Barletta's consent or --," and Barletta's counsel asked, "Or can she appear by court call?" The court said, ". . . Marilyn can just tell me that Barletta consents. I don't really need her consent. I just need to explain what those code sections mean. And the lawyers--you can explain it to her, Mr. Hall, then I don't need to do it."

November 20, 2009

The conservator did not agree to the terms of the November 10 settlement. All parties, except Barletta, appeared on November 19 and 20 to renegotiate the settlement with the help of a mediator and the court. Barletta was represented by Stephen Hall.⁴

The parties reached an agreement with new terms. Hall recited the terms on the record and said that he had spoken to Barletta and she agreed. The other parties all agreed. The court ordered Hall to prepare a written settlement agreement. He did not, and by December it was evident that Barletta would not comply with the agreement.

Lawrence's Motion to Enforce Under Section 664.6

Lawrence filed a motion to enforce the settlement agreement against Marilyn and Barletta. The court denied it as to Barletta because she did not personally participate in the agreement.⁵ The court granted it as to Marilyn. Marilyn appeals from the June 4, 2010 order.

⁴ On appeal, Marilyn and Barletta state that Hall was counsel of record for Barletta in only two of the three San Luis Obispo cases and that Barletta represented herself in the elder abuse case. We are unable to confirm this without citation to the record.

⁵ Section 664.6 provides, "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

Lawrence's Petition to Equitably Enforce

While Marilyn's appeal was pending, Lawrence filed a petition in equity to enforce the November 20 agreement against Barletta. The court conducted an evidentiary hearing. Barletta was represented by counsel, but did not appear. The court sustained a hearsay objection to her declaration. The court excluded Marilyn from participating on the grounds she did not have standing. Hall testified that he "believe[d]" Barletta gave him authority to agree on her behalf on November 20. Hall did not disclose the "words spoken" in their conversation, which he asserted were covered by the attorney-client privilege. Lawrence testified that, after the November 20 settlement, he instructed his attorneys to "stand down," in reliance on Hall's representation that Barletta had agreed.

The court found that Barletta was bound by the agreement, because she gave Hall "actual authority to agree to the settlement terms [Hall] recited on the record and bind her to them." The court relied on the November 20 transcript and on Hall's testimony at the May 5, 2011 hearing. The court found Hall's testimony that he "believed" Barletta gave him authority to be credible. Marilyn and Barletta appeal from the May 26, 2011 order.

Order Authorizing Conservator to Borrow Money to Pay Fees

The conservator's fees remained unpaid. In June 2011, the court granted the conservator's motion to borrow \$350,000, secured by Rubidoux, to pay the conservator's fees and the fees of the conservator's counsel. Marilyn's counsel objected on the grounds that this was contrary to the settlement agreement and should not be authorized pending appeal. Marilyn and Barletta appeal from the June 15, 2001 order.

DISCUSSION

If parties to pending litigation stipulate, either in writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, the court may entertain a motion to enter judgment pursuant to the terms of the settlement. (§ 664.6.) We will affirm a trial court's factual determination on a motion to enforce settlement under section 664.6 if it is supported by substantial evidence.

(*Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 711.) We make such a determination only after deciding whether the parties meet the statutory conditions of section 664.6. (*Ibid.*) Construction and application of the statute involves our independent review of questions of law. (*Ibid.*)

Enforcement of Settlement Against Barletta

The parties did not meet the statutory conditions for enforcement against Barletta. She did not personally participate in the settlement. (§ 664.6; *Levy v. Superior Court* (1995) 10 Cal.4th 578, 586.)

Section 664.6 is not the exclusive procedure for enforcing settlement agreements. They may also be enforced "by motion for summary judgment, by a separate suit in equity, or by amendment of the pleadings to raise the settlement as an affirmative defense." (*Nicholson v. Barab* (1991) 233 Cal.App.3d 1671, 1681.) Lawrence's equitable petition was an appropriate vehicle for enforcement. But no procedure exists to overcome the insuperable barriers to enforcement here.

Even if there were an agreement, the statute of frauds bars enforcement. Settlement agreements are governed by the ordinary rules of contract law. (*Nicholson v. Barab, supra*, 233 Cal.App.3d at p. 1681.) "[U]nless a writing is required by the statute of frauds, oral settlement agreements are enforceable in the same manner as oral agreements in general." (*Ibid.* [settlement agreement for the transfer of an interest in real property was invalid because it was not in a writing signed by the party to be charged].) The oral agreement to distribute Mary's and Lorraine's property involved the transfer of an interest in land. It was invalid because it did not satisfy the statute of frauds. (Civ. Code, § 1624, subd. (a)(3).)

The trial court thought it could save the day. It relied on *Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1534 (*Kohn*) to carve out an exception to the statute of frauds for settlements that "comport[] with section 664.6." But the exception does not apply where, as here, the parties have not complied section 664.6. "Where the parties choose not to comply with the requirements of Code of Civil Procedure section 664.6, no policy considerations favor exempting such judicially supervised settlement

agreements from the statute of frauds." (*Nicholson v. Barab, supra*, 233 Cal.App.3d at p. 1683.)

The purpose of the statute of frauds is to prevent fraud and perjury as to extrajudicial agreements. In *Kohn*, the oral settlement agreement was not to be performed within a year, but the parties' direct participation in compliance with section 664.6 rendered it enforceable. The court reasoned that the "concern addressed by the statute of frauds is not present when . . . a neutral court participates in the settlement process by assisting the parties to formulate the terms of the settlement. In so doing the court assures itself that the parties are being truthful and acting in good faith, and also that they each comprehend the scope of the agreement." (*Kohn, supra*, 23 Cal.App.4th at p. 1535.) When, as in this case, the parties do not personally participate, the statute of frauds is not satisfied. (*Nicholson v. Barab, supra*, 233 Cal.App.3d at p. 1683.) Attorney Hall's less than definitive statement to the court that he "believed" he had Barletta's authority to settle is not a sufficient substitute for Barletta's participation in the hearing.

The trial court also relied on Civil Code section 1624, subdivision (b)(3)(C) [in court admission that contract was made] and (b)(3)(D) [writing signed by authorized agent].) Those exceptions to the statute of frauds do not apply. They apply by their terms only to "qualified financial contracts," in which "each party thereto is other than a natural person." (Civ. Code, § 1624, subd. (b).) Barletta is a natural person.

In the trial court, Lawrence argued that Barletta was equitably estopped from asserting the statute of frauds. The trial court acknowledged the argument in its written decision, without agreeing or disagreeing. We do not decide it because it was not raised on appeal. Moreover, there is no substantial evidence of a material change in position or unjust enrichment resulting from Hall's representation that Barletta agreed. In its ruling on the 664.6 motion, the court found that the parties "have not performed its terms." Loss of the bargain, and resulting damage, are insufficient to estop reliance on the statute of frauds. (*Carlson v. Richardson* (1968) 267 Cal.App.2d 204, 208.) The order enforcing the oral settlement against Barletta must be reversed.

Enforcement of Settlement Against Marilyn

Marilyn personally participated in the November 20 settlement. She argues, however, that Barletta's absence rendered the agreement unenforceable against any party under section 664.6. (*Critzner v. Enos* (2010) 187 Cal.App.4th 1242 [lack of personal consent from two of the parties precluded the 664.6 enforcement, even though the owners had personally consented to the oral settlement and were the parties against whom the settlement was to be enforced].) But the settlement is unenforceable against Marilyn for a more fundamental reason.

Barletta's lack of participation changed material terms of the agreement. In enforcing a settlement agreement, a judge may decide the terms to which the parties previously agreed, but may not create material terms. (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360-1361.) Under the November 20 agreement, Marilyn and Barletta would have been jointly responsible for paying Lawrence \$500,000 within 90 days. Because the agreement is unenforceable against Barletta, this term has materially changed. Marilyn has lost her right of contribution against Barletta as a joint obligor. (Civ. Code, § 1432.) Also, Marilyn and Barletta were to pay Lawrence by borrowing \$500,000, secured by Kingsburg. Marilyn has no right or claim to Kingsburg and would not be able to use it to secure a loan. In addition, Barletta and Marilyn were to share Rubidoux equally after Mary's death. Barletta's claim to Rubidoux remains unresolved under the November 20 agreement and Marilyn could be required to defend against it.

*Ambiguous Terms, Civil Code Section 1542 Waiver, Exclusion from Hearing,
Attorney-Client Privilege, Cooperation in Los Angeles Action,
Enforcement Hearing During Pending Appeal*

Because the agreement is unenforceable against Barletta and Marilyn, we do not respond to their remaining arguments.

Order Authorizing Conservator to Borrow Funds and Execute Loan Document

We reject Marilyn's contention that the June 15, 2011, order authorizing the conservator of Mary's estate to borrow money to pay attorney's fees, conservator's fees, and expenses was invalid because the matter was automatically stayed pending appeal.

(§ 916 [an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby].) The conservator's ability to borrow money to pay fees was not embraced by the settlement. Under the terms of the November 20 settlement, the parties agreed that the conservator could use certain funds to pay past fees: an anticipated \$45,000 payment from the City of Riverside, an anticipated tax refund, the proceeds of the sale of the condominium, and the Kauai sale proceeds. But the conservator did not waive claims for past or future fees and was not precluded from using other sources when the parties did not honor the settlement agreement.

DISPOSITION

The June 4, 2010 order granting Lawrence Scarpace's motion to enforce settlement is reversed. The March 26, 2011 order granting Lawrence Scarpace's petition in equity to enforce settlement is reversed. The June 15, 2011, order authorizing the conservator to borrow funds and pay fees is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

HOFFSTADT, J.*

* Assigned by the Chairperson of the Judicial Council.

Dodie A. Harman, Judge
Superior Court County of San Luis Obispo

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