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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JEAN CLAUDE MARENGO et al.,

Plaintiffs,

v.

CHESTER CHU,

Defendant and Respondent;

SETA BOYADJIAN,

Claimant and Appellant.

D060194

(Super. Ct. No. 616647)

APPEAL from an order of the Superior Court of San Diego County, Michael S. Groch, Judge. Affirmed.

In this appeal, claimant Seta Boyadjian (Boyadjian) seeks reversal of the trial court's order denying her claim of exemption from a levy on certain rents derived from commercial property she claims to own in her name only. The levy on the rental income was obtained by defendant Chester Chu (Chu) to enforce a judgment entered in his favor against Boyadjian's husband, plaintiff Jean Claude Marengo (Marengo). Boyadjian

contends the trial court erred in denying the exemption because the leased property and its rental income are her separate property. We conclude the court did not err in finding that Boyadjian failed to meet her burden of proving the separate character of the property and rents in question. Accordingly, we affirm the order.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. *Boyadjian's Relationship to Marengo, the Judgment Debtor*

Boyadjian and judgment debtor Marengo were married in 1962. They physically (albeit not legally) separated in 1981, and they never divorced. Boyadjian asserts that in 1972, she acquired in her name only a certain property in La Jolla located at 1251 Prospect Street (the Property). Several years later, she entered into a lease of the Property with individuals who then assigned the lease to Alfonso's of La Jolla, Inc. (Alfonso's). Boyadjian alone signed the lease and assignment as lessor. Alfonso's has since operated a restaurant on the Property, and has paid its rent directly to Boyadjian.

### B. *The Levy Enforcement Proceeding*

Chu obtained a judgment against Marengo in 1991. That judgment went unpaid, compelling Chu to renew it three times in the intervening years, most recently in July 2010. In connection with Chu's efforts to obtain satisfaction of the judgment, Marengo produced to him multiple years of tax returns filed jointly with Boyadjian that listed as income the rents received from Alfonso's, as well as expenses apparently incurred in connection with that Property. To enforce the judgment, Chu obtained a writ of execution in September 2010 and served a rent levy on Alfonso's. Alfonso's challenged the levy, and Chu moved to compel its compliance.

In support of its opposition to the motion, Alfonso's contended that the Property was Boyadjian's separate property, that she alone was entitled to receive the rents, and that it never had dealings with Marengo regarding the Property. Chu maintained that until an appropriate interested party sought an exemption, Alfonso's only role was to comply with the levy. In any event, Chu contended, it was not the Property but the rents that were subject to the levy. He argued that the joint tax returns itemizing the rents from Alfonso's, as well as various expenditures made in connection with the Property, showed that this income was community property.

Boyadjian filed a separate opposition to Chu's motion, asserting that she alone held title to the Property, and that the only evidence offered by Chu to prove otherwise—the joint tax returns—was inadmissible, as she had not waived her privilege against their disclosure. In support of her opposition, Boyadjian offered her own declaration, Marengo's and that of their daughter-in-law, Deborah Marengo (Deborah). All of these declarations stated, in nearly identical language, that Boyadjian is the sole owner of the Property, that Marengo has no role in its maintenance or management, and that any maintenance and repairs not performed by Alfonso's is handled by Deborah. Chu responded that Boyadjian's opposition was premature, but in any event, her declarations lacked credibility as they were contradicted by, among other things, Boyadjian's deposition testimony in another case where she asserted that Marengo "manage[s]" the commercial properties she owns, and that Deborah has nothing to do with the Property.

After a hearing, the trial court ordered Alfonso's to comply with the levy. It also ruled that Boyadjian's opposition was premature, and indicated that she could separately claim an exemption after execution of the rent levy. Concluding, however, that Boyadjian's objections to the evidence submitted by Chu were "substantiated," the court directed Boyadjian's attorney to prepare a protective order regarding the joint tax returns, but also specified that the documents "will remain in the court file." There is no indication in the record that any protective order was prepared or entered.

C. *The Claim of Exemption Proceeding*

Boyadjian filed her claim of exemption on April 13, 2011, initiating the proceeding that is the subject of this appeal. In support of her assertions that the Property was her separate property and Marengo had no dealings with it, she again submitted Deborah's and her own declaration (with one exhibit), both of which were substantially identical to the declarations filed in the levy enforcement proceeding. She also resubmitted Marengo's declaration from that proceeding. She offered no other factual support for her claim of exemption at that time.

In his opposition, Chu relied on substantially the same evidence he submitted in the levy enforcement proceeding (including the joint tax returns), to cast doubt on the credibility of Boyadjian's declarations and support his assertion that Boyadjian had failed to meet her burden of proving that the rental income from Alfonso's was her sole and separate property. In reply, Boyadjian again challenged Chu's use of the joint tax returns on privilege grounds. She also asked the court to take judicial notice of the testimony of Alfonso's general manager, Jorge Fierro (whose deposition occurred after the levy

enforcement proceeding), in an effort to provide further corroboration for the declarations stating that Marengo had not been involved in the management of the Property.

D. *The Ruling Under Review*

After a hearing that focused largely on the admissibility of the joint tax returns, the trial court issued its order denying Boyadjian's claim of exemption on May 25, 2011.

The court agreed with Boyadjian that the joint tax returns were privileged from disclosure and that she had not waived her privilege. Accordingly, the trial court found that it could not consider that evidence in ruling on the claim of exemption. Addressing the remaining evidence, the trial court ruled that Boyadjian had failed to meet her burden as the moving party to establish that the Property and the rental income derived therefrom, were her sole and separate property. The court observed that Boyadjian's claim rested principally on "self-serving declarations . . . , none of which provide the court with any persuasive documentary evidence establishing the property is separate property, rather than a community asset."

The trial court explained that Boyadjian and Marengo remained married, and that property acquired during their marriage is presumed to be community property. (See Fam. Code, § 760.) It concluded that it was Boyadjian's burden, as the movant, to show the Property and its associated rental income, are her separate assets. Her declarations alone did not satisfy this burden, particularly in light of Chu's evidence that provided "ample reasons to question the reliability" of those declarations.

## II. DISCUSSION

### A. *Standard of Review*

The parties differ as to which standard should govern our review of the trial court's order denying Boyadjian's claim of exemption. Boyadjian contends that we may independently review the trial court's ruling in this case, asserting that "there are no disputed facts with respect to the character of the property itself as the parties agree that the property itself is BOYADJIAN's sole and separate property and has been for decades." Chu denies he made any such concession. In any event, he argues, the parties clearly disputed the question whether the rental income—the property actually levied upon—was separate or community property, and presented opposing evidence on that issue. Accordingly, Chu contends, the standard of review is whether substantial evidence supports the trial court's ruling. As it happens, neither party has it quite right.

Generally, when relevant facts are disputed, the trial court's order resolving that dispute must be upheld on appeal if it is supported by substantial evidence. (*Schwartzman v. Wilshinsky* (1996) 50 Cal.App.4th 619, 626.) This standard requires us to view the evidence in the light most favorable to the prevailing party, and to affirm if there is sufficient evidence to support the trial court's judgment, no matter how slight it might be, and even though there may be evidence that would have supported a different outcome. (*Ibid.*; see also *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912; see also *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.) On the other hand, to the extent an issue presented on appeal requires application of law to an undisputed set

of facts, we may review that issue de novo and draw our own conclusions of law.

(*McMillin-BCED/Miramar Ranch North v. County of San Diego* (1995) 31 Cal.App.4th 545, 553.)

This appeal does not fall neatly within either the substantial evidence or de novo standard. The trial court's order here rests on the conclusion that Boyadjian failed to meet her burden of establishing with sufficient credible evidence that the Property and its rents are her separate property. "When the trier of fact has expressly or implicitly concluded that the party with the burden of proof failed to carry that burden and that party appeals, it is somewhat misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279.) Instead, "the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." (*Ibid.*, citing, *inter alia*, *Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571 (*Roesch*)). To determine whether the trial court here erred as a matter of law in finding a failure of proof, we consider whether Boyadjian's evidence was impeached or contradicted by Chu, and even if not, whether it is "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding" in Boyadjian's favor. (*Roesch, supra*, at p. 571.)

In doing so, however, we remain mindful of two basic tenets of appellate law: First, the trial court's judgment is " "presumed correct; all intendments and presumptions are indulged to support [it]." " (See, e.g., *Clark v. Superior Court (Verisign, Inc.)* (2011) 196 Cal.App.4th 37, 46-47.) Second, "[i]t is not our function to retry the case." (*In re*

*I.W.* (2009) 180 Cal.App.4th 1517, 1528.) The task of weighing the evidence and determining the credibility of witnesses is peculiarly that of the trial court. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.)

B. *Boyadjian Failed to Overcome the Community Property Presumption*

1. The Burden Fell on Boyadjian to Prove the Separate Status of the Property, and thus, the Basis for her Claim of Exemption

We begin by addressing who had the burden of proof in this proceeding. In California, property acquired by either spouse during marriage, other than by gift or inheritance, is presumed to be community property. (Fam. Code, § 760; *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 289-290.) Income, rents, and profits from such property are also presumed to be part of the community estate, because such monies take on the same character as the source from which they are derived. (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 851 ["[I]ncome produced by an asset takes on the character of the asset from which it flows."] ) By the same token, property acquired before marriage, or by gift or inheritance, by one spouse is presumed to be that spouse's separate property, as is the income from, and any intrinsic increase in the value of, such property. (Fam. Code, § 770, subd. (a)(1)-(3).) "[B]ut the fruits of the community's expenditures of time, talent and labor are community property." (*In re Marriage of Dekker, supra*, at p. 850.) The community property presumption is a rebuttable one, and the burden of proof rests on the spouse asserting that the property is separate to establish that fact with "credible evidence." (*In re Marriage of Haines, supra*, at pp. 289-290.)

California law also provides that the assets of the community generally are liable for a debt incurred by either spouse during marriage, regardless of which spouse has control over or management of the property. (Fam. Code, § 910, subd. (a).) Conversely, the separate property of a spouse is not liable for the debts of the other spouse incurred during the marriage. (Fam. Code, § 913, subd. (b)(1).) When property is levied upon to satisfy a debt incurred during marriage, the nondebtor spouse has the burden of proving that the disputed property is separate property and therefore exempt from the levy. (Code Civ. Proc., § 703.580, subd. (b).)

Although Chu levied only upon Alfonso's rental income, and although the parties focused their evidentiary presentations on the question of whether that income was a community or separate asset, the critical threshold inquiry, as Boyadjian acknowledges, was whether the Property itself is presumptively separate or community. If it is community property, then the rental income is part of the community estate as well. If it is separate property, then as stated previously, the rents are presumed to be separate.

Boyadjian admits that the Property was acquired during her marriage to Marengo, and that she and Marengo have never legally separated or divorced. The presumption that the Property is a community asset therefore should apply, placing the burden squarely on Boyadjian to establish that the Property is her sole and separate property. (Fam. Code, § 760; *In re Marriage of Haines*, *supra*, 33 Cal.App.4th at pp. 289-290.) During oral argument, however, Boyadjian's counsel for the first time suggested that the Property should be presumed to be separate by virtue of the fact that it was acquired by Boyadjian before 1975, citing *In re Marriage of Ashodian* (1979) 96 Cal.App.3d 43.

That case discussed former Civil Code section 5110, which created a presumption that property acquired by a married woman before 1975 was presumed to be separate property. (*In re Marriage of Ashodian, supra*, at p. 46.) Former Civil Code section 5110 was repealed in 1994 (see Stats. 1992, ch. 162, § 3), and replaced by Family Code section 803, subdivision (a), which maintains the separate property presumption for property acquired by a married woman "by an instrument in writing" before 1975.

This argument does not help Boyadjian. First, we do not consider legal arguments raised for the first time on appeal, let alone for the first time at oral argument. (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874, 879.) Boyadjian did not address the implications of Family Code section 803 in the trial court, nor did she brief that issue on appeal. Second, Family Code section 803 does not change our analysis. By its terms, this statutory presumption applies only when the property was acquired "by an instrument in writing." (*Ibid.*) To have gained any benefit from this presumption, Boyadjian would have had to produce the "instrument in writing" establishing her title to the Property. It is undisputed Boyadjian failed to do this. In the absence of that writing, the community property presumption holds. (*Estate of Walsh* (1944) 66 Cal.App.2d 704, 708 [where "there is no evidence of a writing, the implication of the section is that the general rule that all property in possession after marriage is presumed to be community applies"].)

Boyadjian, however, not only had the burden of overcoming the community property presumption. There is also no dispute that the judgment against Marengo was entered during the marriage, and that Boyadjian, as the one seeking an exemption from the levy enforcing that judgment, bore the burden of establishing the basis for that

exemption. (Code Civ. Proc., § 703.580, subd. (b).) The trial court found that she had not satisfied these burdens because she failed to present "any persuasive documentary evidence establishing the property is separate property, rather than a community asset." Boyadjian contends the trial court erred in so ruling, but none of her arguments has merit.

C. *Boyadjian's Evidence was Neither Unimpeached Nor Inherently Determinative of the Status of the Property*

Boyadjian's principal contention is that the separate status of the Property was undisputed, and the trial court therefore erred in not crediting her evidence on that issue. She repeatedly asserts that Chu admitted the Property was her separate asset, but she cites no explicit concession by Chu to that effect. Instead, she pulls snippets from Chu's trial briefs referencing "Boyadjian's separate property," as well as the transcript of the exemption hearing, to show that Chu never disputed the Property was her separate property, even when given the opportunity to do so.

We cannot agree that the references to "Boyadjian's separate property" in Chu's trial briefs constitute admissions. As Chu plausibly explains, his focus was on the asset actually levied upon—the rental income—not the Property itself, and he had merely argued, in response to both Alfonso's and Boyadjian's contentions, that the income was community property even *assuming* the underlying real estate was Boyadjian's separate asset. Moreover, every one of the affirmative statements cited by Boyadjian appears in a brief (and not necessarily one filed in the exemption proceeding), rather than in a pleading or declaration attesting to certain facts under oath. The arguments of counsel, however, do not constitute evidence of a fact. (See, e.g., *Kransco v. American Empire*

*Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 409 [distinguishing between competent admissible evidence and the arguments of counsel, "which were not evidence"]; *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 895, fn. 9 ["It is axiomatic that the arguments of counsel are not evidence."].)

Chu's statements also do not constitute "judicial admissions," as Boyadjian suggests, because they are not clear and unequivocal statements acknowledging the separate character of the Property. In order for the doctrine of judicial admissions to apply, the statements at issue must be unambiguous and unequivocal, not tacit concessions. (See, e.g., *Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 385; *Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1522-1523.) Moreover, judicial admissions generally are affirmative statements found in pleadings, discovery responses, or stipulations of counsel. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 452, p. 585.) Boyadjian cites no authority for the proposition that judicial admissions properly may be gleaned from counsel's *silence* on a particular matter in a brief or at oral argument.

Because Chu made no clear admission as to the separate status of the Property, nothing relieved Boyadjian of her obligation to establish *through credible, admissible evidence* that the Property was her separate asset. Our inquiry therefore must turn to the nature and quality of Boyadjian's own evidence. Under the authorities cited previously, we examine first whether that evidence was "unimpeached" or "uncontradicted." (*Roesch, supra*, 24 Cal.2d at p. 571.) Even though Chu may not have explicitly conceded

Boyadjian's sole ownership of the Property, it is clear from the record that he also never directly challenged it. As he readily acknowledges, he focused on the status of the rental income, not the underlying commercial real estate, and apparently assumed, for the sake of argument, that the Property was Boyadjian's alone. His evidence was directed principally at impeaching Boyadjian's credibility on the question of Marengo's involvement with her business affairs and the management of the Property. We have found no evidence propounded by Chu, and Chu cites to none, that directly refutes Boyadjian's claim of sole ownership of the Property.

That Chu may not have directly contradicted Boyadjian's declarations on this issue, however, does not end the matter. The trial court apparently viewed Chu's evidence as casting doubt on Boyadjian's credibility overall. During the hearing, the trial court, in announcing its tentative ruling, observed that there was "conflicting evidence that called into question the legitimacy of the credibility of the claim of exemption." Ultimately, the trial court found that: "[t]here were ample reasons to question the reliability of . . . Boyadjian's declarations. Many of those reasons were detailed in [Chu's opposition to the claim of exemption]." From the court's standpoint, then, Chu had impeached the credibility of Boyadjian's evidence and her claim as a whole.

We note at the outset that the evidence ultimately considered by the trial court did not include the joint tax returns. Although the trial court concluded the returns were privileged, Chu urges us to find that Boyadjian waived any privilege associated with that evidence. He made that same argument unsuccessfully to the trial court, and we will not revisit that decision here.

With his other evidence, Chu principally challenged the categorical assertions in Boyadjian's declarations that Marengo had no role in the management of the Property. For example, Chu offered sworn testimony of Boyadjian from a different case in 2000 where, when asked generally if Marengo "manage[s]" her "real properties," Boyadjian unqualifiedly replied, "Yes." Her declarations in this proceeding state that since 1995, Deborah performed all maintenance not done by Alfonso's. But in her 2000 testimony, Boyadjian denied that Deborah assisted with the management of the Property.

Boyadjian contends this evidence is "vague and ambiguous." She also points out that she offered other evidence—specifically, the deposition testimony of Jorge Fierro—to corroborate Boyadjian's declarations on the question of Marengo's role in the Property's management, and thus bolster her own credibility. Essentially, this is simply an invitation for us to reweigh the competing evidence. The task of assessing the credibility of witnesses lies with the trier of fact. (*Shamblin v. Brattain, supra*, 44 Cal.3d at p. 479.) It is not our province to reweigh the evidence, or substitute our own deductions for those of the trial court. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968; *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429, fn. 5.)

Significantly, even if we were to conclude that Boyadjian's declarations were effectively uncontradicted or unimpeached, such a conclusion would not mandate reversal here. A trier of fact, presented with undisputed facts, still must determine whether that evidence is so inherently persuasive as to lead to only one conclusion, in this case, that the proponent of that evidence has met her burden of proof. (See *Roesch*,

*supra*, 24 Cal.2d at pp. 570-571; *In re I.W.*, *supra*, 180 Cal.App.4th at pp. 1528-1529.)

The trial court here determined otherwise, and we discern no error in that decision.

The *only* evidence Boyadjian submitted to the trial court in support of her assertion that the Property itself was her separate property was the declaration testimony of Boyadjian, Marengo and Deborah. (The deposition testimony of Jorge Fierro, as noted previously, did not relate to ownership of the Property, just to its management.) For the most part, Marengo's and Deborah's declarations use the same cookie-cutter language, and both aver that Boyadjian "holds title to [the Property] as her sole and separate property and has since 1972." They claim to rest on "personal knowledge," but fail to explain how either Marengo or Deborah would have such knowledge about Boyadjian's real estate holdings. For example, Deborah states she has a "close relationship" with Boyadjian and is "responsible for everything associated with the Property" other than rent collection and paying taxes. This does not explain, however, how she would know who holds legal title to the Property. Marengo states that he has been "living apart" from Boyadjian, that they have had "separate lives" for more than 30 years, and that he has "nothing to do" with the Property. But if true, such assertions merely beg the question of how Marengo would then possess "personal knowledge" of the legal status of Boyadjian's real estate holdings and what her role might be with respect to the Property. In the absence of any factual foundation for these assertions, a fact finder reasonably might give them little or no weight.

Boyadjian, arguably, is in the best position to attest to her ownership of property, and thus her declaration might well have been entitled to greater weight. The trial court

found otherwise due to Boyadjian's failure to substantiate her "self-serving" declaration with some form of "persuasive documentary evidence" attesting to the status of the Property. This was a rational conclusion under the circumstances. It would have been easy for Boyadjian to prove the separate status of the Property by producing a deed, property tax records, or other documents showing she held sole title to the Property, but she produced no such evidence. Any fact finder confronted with the paltry evidentiary showing made by Boyadjian, reasonably might infer from her failure to produce the obvious and far more persuasive documentary evidence of title that such evidence did not exist, or would be adverse to her claim. Of course, it was Boyadjian's choice to produce whatever evidence she deemed appropriate to meet her burden of proof. But in failing to provide what would have been the most clear and conclusive proof of her sole ownership of the Property, she took the risk that the trial court would find the merits of her claim lacking. (Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."].)

It is no answer to argue, as Boyadjian does, that the declarations were not directly contradicted by any of Chu's evidence on the issue of whether the Property is separate or community property. "[A] trial judge has an inherent right to disregard the testimony of any witness, or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty . . . or interest or bias of the witness." (*La Jolla Casa de Manana v. Hopkins* (1950) 98 Cal.App.2d 339, 345-346; see also *Beck Development Co.*

*v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204 [fact finder may reject uncontradicted evidence if there is a rational basis for doing so].) The trial court was well within its authority to discount Boyadjian's declarations in the absence of (1) any factual foundation for certain key statements made therein, and (2) any readily available, objective, documentary proof of her sole ownership of the Property. (See *In re Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717, quoting *Beck Development Co. v. Southern Pacific Transportation Co.*, *supra*, at p. 1204 [once trial court rejects uncontradicted evidence, it "cannot be credited on appeal unless, in view of the whole record, it is clear, positive, and of such nature that it cannot rationally be disbelieved" ].)

At this juncture, we address Boyadjian's assertion, made explicitly for the first time in her reply brief, that a 1987 deed attached to one of Chu's exhibits submitted during the levy enforcement proceeding against Alfonso's is sufficient proof that she holds title to the Property. It should be noted that Chu did not "ask[] the trial court to consider" this deed, as Boyadjian disingenuously contends. Rather, the deed was simply annexed to a letter from Alfonso's counsel that Chu had lodged as an exhibit during that earlier proceeding. Boyadjian's reliance on this document is unavailing, and indeed, improper. First, there is no indication that this deed, which references a plot of land in "La Jolla Park," was ever presented to the trial court in the exemption proceeding. It is nowhere mentioned by Boyadjian or Chu in their respective submissions to the trial court in that proceeding. It was never discussed at the hearing on Boyadjian's claim. There is no indication that the trial court even knew of its existence, as evidenced by its explicit finding that Boyadjian had failed to provide any "persuasive documentary evidence" of

the separate status of the Property. This is not surprising, because the claim of exemption proceeding occurred after the levy enforcement proceeding, and before a *different* judge.

It is reasonable to infer that if Boyadjian thought this deed conclusively established that the Property is her separate asset, it would have been the centerpiece of her evidentiary presentation to the trial court on her claim of exemption. In any event, we do not consider evidence that could have been, but was not, presented to the trial court. (See, e.g., *Doers v. Golden Gate Bridge Highway & Transportation Dist.* (1979) 23 Cal.3d. 180, 184, fn. 1.) We also generally do not consider arguments made for the first time in a reply brief. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.) For these same reasons, we decline to consider the declaration of Alfonso Fierro, the sole shareholder of Alfonso's, which Boyadjian repeatedly cites as further evidence of her sole ownership of the Property. Again, there simply is no indication this evidence was ever submitted to the judge presiding over the claim of exemption proceeding.

Second, even if we could consider this evidence, our conclusion would be the same. As was the case with Boyadjian's other declarations, no foundation is provided for third party Alfonso Fierro's statement that Boyadjian "purchased the property as her own sole and separate property." And the persuasive value of the 1987 deed is greatly diminished by the fact that it does not reference the current address of the Property, and nothing on its face enables the reader to directly link the plot referenced therein to the Property at issue here. Again, it would have been a simple matter for Boyadjian, in her sworn declaration in the exemption proceeding, to draw that link herself, or to produce

other documents that might do so. But Boyadjian never did that. Complicating Boyadjian's belated reliance on that deed is the fact that another deed was also produced during the levy enforcement proceeding. Alfonso's requested that the trial court take judicial notice of an earlier-dated deed referencing the same plot. It is unclear whether the trial court ever considered either deed; indeed, it was not necessary to do so during the enforcement proceeding, given that the evidence was not pertinent to the limited issue then before the trial court. We observe that although Boyadjian relies on the later-dated deed in her reply brief, she cited, without discussion, the earlier deed in her opening brief, while failing to mention that deed at all in her reply brief. In our view, this inconsistent, haphazard approach to the evidence only substantiates the trial court's ultimate determination that Boyadjian had failed to satisfy her burden of proof.

The *Roesch* case is instructive. There, one of the issues on appeal was whether the evidence was sufficient to support the trial court's finding that no payments had been made on usurious notes. (*Roesch, supra*, 24 Cal.2d at p. 568.) The evidence propounded by the appellants consisted of one memorandum purporting to show credited payments of principal and interest on one note, and the testimony of a witness speaking not from personal knowledge of payments or recollection of the memorandum, but from his belief that the memorandum was correct. (*Id.* at pp. 569-570.) The trial court found that there was "considerable doubt as to what if any payments were made." (*Id.* at p. 570.) The Supreme Court upheld the court's ultimate finding of no payments. (*Id.* at p. 571.) Specifically on the subject of the evidence regarding payments, the court opined that the witness's testimony, although "uncontradicted and unimpeached," was nevertheless

entitled to no weight given the witness's uncertainty and his lack of recollection and personal knowledge. (*Ibid.*) Moreover, the court explained:

"[T]he memorandum was secondary evidence concerning which the trial court might properly conclude that primary evidence of the facts of payment was within the power of these appellants to produce and that they had not done so. The officers or employees of the appellant corporations who might have made such payments did not testify and their failure to testify . . . was not explained; nor was their failure to produce the books of these corporations accounted for. From these facts the trial court was entitled to infer that the primary evidence, if produced, would have been adverse." (*Id.* at p. 571.)

The court concluded that in "view of the uncertainty and of the weakness of the memorandum as secondary evidence when primary evidence . . . was available to the plaintiffs, it may not properly be concluded that the trial court was compelled to find in favor of the plaintiffs and the defendant corporations on the issue of payment." (*Id.* at pp. 571-572.)

Similarly, it is reasonable to infer here that Boyadjian had the ability to prove the separate character of the Property with a deed or other objective, official documentary evidence. In light of her failure to do so, and particularly given what the trial court found were other "ample reasons to question the reliability" of her declarations, the trial court was not compelled, as a matter of law, to find that she had met her burden of overcoming the community property presumption with respect to the Property. For present purposes, it does not matter that we, or any court sitting as trier of fact, might have assigned Boyadjian's declarations greater weight, or that it might have been just as reasonable for the trial court to have believed those declarations. (*Lenk v. Total-Western, Inc.*, *supra*, 89 Cal.App.4th at p. 968; *Bowers v. Bernards*, *supra*, 150 Cal.App.3d at p. 874.) Consistent

with our limited authority under the applicable standard of review, we simply conclude, in light of the entire record, that the trial court did not err as a matter of law in refusing to credit this evidence and find in Boyadjian's favor. Having instead rejected that evidence as unpersuasive, the court was left with *no* evidence that the Property is Boyadjian's separate property, as Boyadjian's counsel conceded during oral argument. Accordingly, the community property presumption as to the Property itself was not overcome.

It follows, then, that the rental income from the Property is also a community asset, absent some agreement between Boyadjian and Marengo, or other legally viable means of transmuting the status of that rental income to separate property. (See *In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 732 [the character of property as separate or community "is fixed as of the time it is acquired; and the character so fixed continues until it is changed in some manner recognized by law, as by agreement of the parties"]; *In re Marriage of Dekker, supra*, 17 Cal.App.4th at p. 851 ["[I]ncome produced by an asset takes on the character of the asset from which it flows".]) Boyadjian, of course, never presented any such evidence.

In light of the foregoing conclusions, it is unnecessary for us to address Boyadjian's remaining argument, namely, that the trial court failed to apportion the rental income between separate and community property. That argument flows directly from her assertion that the underlying Property itself is separate, a contention we have concluded to be without merit. (See *In re Marriage of Dekker, supra*, 17 Cal. App.4th at p. 851 [apportionment becomes an issue where "community efforts increase the value of a separate property business".])

DISPOSITION

The trial court's order is affirmed. Respondent is to be awarded his costs on appeal.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.