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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JAVIER SOTO,

Plaintiff and Respondent,

v.

ANTONIO CUEVAS,

Defendant and Appellant.

E052698

(Super.Ct.No. CIVSS701208)

OPINION

APPEAL from the Superior Court of San Bernardino County. Janet M. Frangie, Judge. Affirmed.

Law Offices of M.T. Nehmeh, M.T. Nehmeh and Joanne C. Moore for Defendant and Appellant.

Khuong Dan Tien for Plaintiff and Respondent.

Plaintiff Javier Soto and defendant Antonio Cuevas entered into a settlement agreement, which provided, as relevant here, that: (1) Cuevas would have 180 days to buy out Soto's half-interest in certain real property; if he failed to do so, Soto would have

180 days to buy out Cuevas's half-interest; and (2) Soto would sell certain stock to Cuevas, at a price to be mutually agreed upon; if the parties could not agree, the price would be set by an appraiser to be mutually agreed upon.

Later, Soto brought a motion to enforce the settlement agreement. He claimed that he had exercised his right to buy the real property, and he had deposited the purchase price in escrow, but Cuevas was refusing to execute the necessary transfer documents. He also claimed that Cuevas was refusing to cooperate with an appraisal of the stock.

The trial court ordered Cuevas to cooperate with the sale of the real property to Soto; it set an escrow closing date of December 13, 2010 (which it later extended to December 23, 2010). It also appointed an appraiser for the stock.

Cuevas appeals. His principal contentions are that the trial court erred by:

1. Giving Soto until December 13, 2010 — much less December 23, 2010 — to close escrow.
2. Failing to ensure that the escrow did, in fact, close by December 23, 2010.
3. Appointing an appraiser for the stock.
4. Failing to determine whether the stock was community property.

We find no error. Indeed, the appeal borders on the frivolous. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2007, Soto filed this action against Cuevas, HREM, Inc. (HREM), and others. Cuevas filed a cross-complaint against Soto, HREM, and others.

On April 17, 2009, at a settlement conference, the parties entered into a settlement agreement, which was read into the record. (See Code Civ. Proc., § 664.6.) On or about June 8, 2009, they entered into a formal written settlement agreement.

Soto and Cuevas each owned a half-interest in certain real property in Colton. The settlement agreement provided that Cuevas would have up to 180 days to buy Soto's half-interest, for \$311,000. If Cuevas failed to do that, Soto would have up to 180 days to buy Cuevas's half-interest, also for \$311,000. Finally, if Soto failed to do that, the property would be sold on the open market.

The settlement agreement also provided that Soto would transfer half of his stock in HREM to Cuevas; he would transfer the other half to Cuevas's attorney, to be "held in trust . . . for . . . Soto, pending resolution of Riverside County Family Court case number 222848, entitled *Marriage of Soto/Soto*. In the event the family court rules that the remaining shares are the separate property of . . . Soto, then Soto agrees to sell such shares to Cuevas at a mutually agreed upon price. In the event the parties are unable to agree to a price, then [the] parties shall mutually agree to an appraiser who shall appraise the value of the shares as of the date of May 8, 2007."

Finally, it provided that Cuevas was to transfer all of his stock in a corporation called Hydraforce, Inc. (Hydraforce) to Hydraforce.

Pursuant to the settlement agreement, the entire action was voluntarily dismissed; the trial court retained jurisdiction to enforce the settlement agreement.

On October 15, 2010, Soto filed a motion to enforce the settlement agreement. According to the motion,¹ Cuevas had never obtained financing to buy the real property; after his time to do so had expired, Soto had obtained financing to buy the property and had deposited the funds in escrow. Cuevas, however, was refusing to sign escrow instructions and other transfer documents. In addition, according to the motion, Cuevas was refusing to produce documents that were necessary for an appraisal of the HREM stock.

¹ The motion repeatedly cited a supporting declaration by Soto's counsel. The trial court seems to have seen the declaration. Cuevas's counsel also seems to have seen it. However, it does not appear that it was ever actually filed.

Cuevas has not attempted to augment the record with the declaration. Hence, we must assume that all relevant assertions in the motion were supported by the declaration. (*In re Angel L.* (2008) 159 Cal.App.4th 1127, 1137 [“The appellant has the burden of establishing error and, lacking an adequate record, a reviewing court will presume the evidence supports the judgment.”].)

In any event, a court has discretion to accept an attorney's undisputed representations of fact as true. (*People v. Mroczko* (1983) 35 Cal.3d 86, 112, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Wolozon* (1982) 138 Cal.App.3d 456, 460, fn. 4.)

Cuevas evidently served an opposition, as Soto filed a reply to it. However, it was never filed, and it is not in the record. After Soto filed his reply, Cuevas's attorney filed a "supplemental declaration" in opposition. (Capitalization omitted.)

On November 12, 2010, at the hearing on the motion, Cuevas's counsel conceded that his client had not agreed to an appraiser for the stock, and that this violated the settlement agreement.² He argued, however, that it was inappropriate to proceed with an appraisal because "these shares don't belong to Soto. These were in dispute as . . . community property between Soto and his wife." He added, "[O]nce the status of the shares [is] determined to be Soto[']s separate property, then we will go ahead and have the appraisal done"

With respect to the real property, the trial court ordered Cuevas to cooperate with the sale and ordered that escrow close by December 13, 2010.

² The colloquy went as follows:

"THE COURT: Okay. Let's talk about the appraiser.

"[COUNSEL FOR CUEVAS]: Yes, Your Honor.

"THE COURT: Why can't you agree on an appraiser?

"[COUNSEL FOR CUEVAS]: If I may respond to the other questions first?

"THE COURT: No. First I want to talk about the appraiser.

"[COUNSEL FOR CUEVAS]: Your honor, he never asked me about an appraiser. If he asked me —

"THE COURT: He doesn't have to ask, it's in the Settlement Agreement.

"[COUNSEL FOR CUEVAS]: That's correct, Your Honor. That is correct."

With respect to the stock in HREM, it ordered that, if the parties could not agree on an appraiser within 10 days, they were each to submit the names of three appraisers to the court; the court would then select an appraiser.

The parties did, in fact, fail to agree on an appraiser. Thus, they each submitted a list of three appraisers to the court. On December 8, 2010, the trial court appointed one of Soto's choices as the appraiser.

On December 20, 2010, Soto filed an ex parte application to order Cuevas to execute the transfer documents.

At a hearing on December 21, 2010, the trial court ordered Cuevas to execute all "documents needed to close the deal." It also ordered: "[E]scrow shall be closed by December 23, 2010."

The record does not show when the escrow actually closed. However, Cuevas claims — and Soto concedes — that it did not actually close until January 3, 2011.

On January 10, 2011, Cuevas filed a notice of appeal.³

II

DISCUSSION

Under Code of Civil Procedure section 664.6, a trial court can retain jurisdiction to enforce a settlement agreement.

³ Cuevas's brief states, "This is an appeal by . . . Cuevas and HREM" Not so. Only Cuevas filed a notice of appeal.

A postjudgment motion to enforce a settlement agreement is, in substance, a request for a summary order for specific performance. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.) ““ . . . [N]othing in [Code of Civil Procedure] section 664.6 authorizes a judge to *create* the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously agreed upon.” [Citation.]’ [Citation.]” (*In re The Clergy Cases I* (2010) 188 Cal.App.4th 1224, 1236.)

“Consistent with the venerable substantial evidence standard of review, and with our policy favoring settlements, we resolve all evidentiary conflicts and draw all reasonable inferences to support the trial court’s . . . order enforcing th[e] agreement.” (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360.)

A. *Giving Soto Additional Time to Close Escrow.*

Cuevas contends that the trial court erred by giving Soto until December 13, 2010 to close escrow.

Basically, he argues that Soto’s 180 days to close escrow pursuant to the settlement agreement had already expired. Soto, however, did at least deposit the purchase money in escrow before the 180 days expired. The escrow did not close on time only because Cuevas was refusing to cooperate. This relieved Soto of the obligation to close within 180 days; Cuevas could not take advantage of his own wrong. (*Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1131; *Mad River Lbr. Sales, Inc. v. Willburn* (1962) 205 Cal.App.2d 321, 324.)

Osumi v. Sutton, supra, 151 Cal.App.4th 1355 — a case that Cuevas himself cites — is virtually on point. There, the parties entered into a settlement agreement providing that the respondent would purchase a house from the appellant and that the escrow was to close by January 31, 2006. (*Id.* at pp. 1357-1358.) Disputes arose, however, over the terms of the sale. (*Id.* at p. 1358.) After the January 31, 2006 deadline had passed, both sides filed motions to enforce the settlement agreement. The trial court resolved the dispute over terms and ordered a new closing date of April 10, 2006. (*Ibid.*)

The appellant argued that “the trial court lacked authority under [Code of Civil Procedure] section 664.6 to impose a new closing date for the real estate transaction” (*Osumi v. Sutton, supra*, 151 Cal.App.4th at p. 1359.) The appellate court disagreed: “The trial court here did not create a material term of the settlement or otherwise err when it extended the closing date for the real property transaction. Appellant’s [Code of Civil Procedure] section 664.6 motion . . . was, in effect, a request for specific performance of the settlement agreement. . . . Respondent’s [Code of Civil Procedure] section 664.6 motion sought the same relief Of course, by the time the motions came on for hearing, the closing date had passed. To grant the relief sought by both parties, the trial court had to impose a new closing date.” (*Id.* at pp. 1360-1361.)

Cuevas also argues that there could be no escrow in the absence of escrow instructions signed by both parties. Ordinarily, this might be true; however, a defaulting seller cannot defeat specific performance by refusing to sign escrow instructions. In the

course of ordering specific performance, the trial court had the power to dictate escrow terms.

In his reply brief, Cuevas argues that, at the November 12, 2010 hearing, the only evidence that Soto actually had a loan commitment from a lender was hearsay. He forfeited this contention by failing to raise it in his opening brief. (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1064, fn. 2.)

Even if not forfeited, it lacks merit. Soto’s counsel personally assured the trial court that his client could come up with the purchase money; Cuevas’s counsel did not dispute this. As already discussed,⁴ the trial court could properly rely on this representation.

In any event, the asserted error was harmless. Cuevas concedes that the escrow has since closed. Thus, obviously, Soto did have the purchase money.

B. *Failure to Enforce the Order That the Escrow Close by December 23, 2010.*

Cuevas’s next contention — according to its heading — is that “[a]n escrow holder failed to comply with the escrow instructions and the court failed to enforce the instructions or its court order.” (Capitalization & boldface omitted.)

Cuevas has forfeited any other contentions that are raised under this heading but not fairly embraced within it. “[T]he appellant must present each point separately in the opening brief under an appropriate heading, showing the nature of the question to be

⁴ See footnote 1, *ante*, page 4.

presented and the point to be made; otherwise, the point will be forfeited. [Citations.] This rule is ‘designed to lighten the labors of the appellate tribunals by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass.’ [Citation.]” (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656.)

Cuevas argues that the escrow could not close later than December 23, 2010, the date set by the trial court, but in fact it did not close until January 3, 2011. This argument does fall at least roughly under the heading. However, Cuevas forfeited it by failing to raise it in the trial court. (*Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 740.) It was on December 21, 2010 that the trial court set the closing date of December 23, 2010. When escrow failed to close on December 23, 2010, Cuevas did not return to the trial court for any relief. And when escrow did close on January 3, 2011, Cuevas *still* did not return to the trial court for any relief. “In other words, there is simply no ruling for us to review. A party on appeal cannot successfully complain because the trial court failed to do something which it was not asked to do. [Citation.]” (*Farmer Bros. Co. v. Franchise Tax Bd.* (2003) 108 Cal.App.4th 976, 993.)

Cuevas also argues that the escrow agent was illegitimate, because he did not select him and the trial court never appointed him. This argument is not fairly embraced within the heading. In any event, by failing to cooperate, Cuevas forfeited his right to

participate in the selection of the escrow agent. “A person cannot take advantage of his own act or omission to escape liability. If he prevents or makes impossible the performance or happening of a condition precedent, the condition is excused.

[Citations.]’ [Citations.]” (*Exchequer Acceptance Corp. v. Alexander* (1969) 271

Cal.App.2d 1, 14.) By ordering Cuevas to close escrow on December 13 (later extended to December 23), the trial court implicitly but necessarily selected the existing escrow agent.

Finally, Cuevas complains that the trial court supposedly ordered him not to speak “as to when escrow was to close.” This argument, too, is not fairly embraced within the heading. In any event, it lacks support in the record. During the hearing on December 21, 2010, after hearing argument from Cuevas’s counsel, the trial court ordered Cuevas to come up to the counsel table. It told him, “I don’t want you to say anything. I just want you to come up here and listen to what I have to order you to do.” Immediately after that, however, the trial court “asked the parties when they wanted escrow to close by and the parties agreed to . . . December 23, 2010.” Thus, obviously, Cuevas *did* have an opportunity to address when the escrow should close.

In his reply brief, Cuevas argues, for the first time, that, by telling him not to speak, the trial court committed judicial misconduct and violated due process. He forfeited this contention by failing to raise it in his opening brief. (See part II.A, *ante*.) In any event, it lacks merit. His counsel was not prevented from speaking on his behalf. Moreover, while the trial court ordered Cuevas not to speak while he listened to what it

was trying to tell him, it does not appear that he was prevented from speaking either before or after. The trial court was simply exercising its “broad power to control [its] courtroom[] and maintain order and security. [Citations.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1057.)

C. *Appointment of an Appraiser.*

Cuevas contends that the trial court erred by appointing an appraiser, because the settlement agreement required the parties to agree on an appraiser.

Cuevas’s counsel conceded that his client had not agreed to an appraiser, in violation of the settlement agreement. As with the escrow agent, Cuevas forfeited his right to participate in the selection of an appraiser. Thus, the trial court properly appointed an appraiser selected by Soto.

D. *Failure to Determine the Community Property Status of the HREM Stock.*

Cuevas contends that the trial court erred by failing to determine whether the stock in HREM was community property.

He argues that the community property status of a closely held corporation may affect the market value of stock in the corporation. As we read the settlement agreement, however, Soto was to transfer half of the stock immediately, for no separate consideration (i.e., other than Cuevas’s other obligations under the settlement agreement). Then, if and when the family law court determined that the stock was his separate property, he was to transfer the other half, at a price to be set by an appraiser. Thus, the stock needed to be appraised only if it was separate property; if it was community property, an appraisal was

unnecessary. The appraiser could appraise the stock immediately on the *assumption* that it *was* separate property.

Somewhat bizarrely, however, both Cuevas *and* Soto have briefed this issue as if the trial court ordered the stock *transferred*, not just *appraised*. Thus, Cuevas argues that he would be “at . . . risk” if he purchased stock that turned out to be community property. Also, in his reply brief, he argues (for the first time) that the family law court had exclusive jurisdiction over the stock. Similarly, Soto argues that, even if the stock was community property, he could convey it to a third party free and clear of his wife’s claims. He also asserts (with no evidentiary support whatsoever) that “the record, as a whole, suggests th[at] Soto wanted to sell the shares and Cuevas wanted to buy the shares notwithstanding the family law court’s determination of the status of the shares.” On this record, we see no need to reach any of these contentions.

At one point, Cuevas asserts that the trial court erred by failing to determine whether the stock in *Hydraforce* was community property. This is so lacking in merit that we can only conclude that it is a typographical error. Cuevas was supposed to transfer the Hydraforce stock to Hydraforce — again, for no separate consideration.⁵ The settlement agreement did not require a valuation of the Hydraforce stock. Moreover, the parties did not raise any issue below, and the trial court did not enter any order, regarding the Hydraforce stock.

⁵ According to Soto’s motion, the parties’ intention was that Soto was exchanging half of his HREM stock for all of Cuevas’s Hydraforce stock.

Finally, Cuevas claims the trial court erred by failing to determine whether the *real property* was community property. He forfeited this issue by failing to raise it below. He also forfeited it by failing to present it in any heading in his opening brief. (See parts II.A and II.B, *ante*.)

III

DISPOSITION

The orders appealed from are affirmed. Soto is awarded costs on appeal against Cuevas.

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RICHLI
Acting P.J.

We concur:

MILLER
J.

CODRINGTON
J.