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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHARLES HOLDREN et al.,

Plaintiffs and Respondents,

v.

CHARLES RABER et al.,

Defendants and Appellants.

E054805

(Super.Ct.No. RIC494565)

OPINION

APPEAL from the Superior Court of Riverside County. Sylvia L. Husing, Judge.
(Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Charles W. Raber and Dianne L. Raber, in pro. per., for Defendants and Appellants.

Law Offices of Raul B. Garcia and Raul B. Garcia for Plaintiffs and Respondents.

On March 3, 2008, plaintiffs and respondents Charles Holdren and Raymarie Holdren filed a civil complaint against defendants and appellants Charles Raber, Dianne L. Raber, and others.. The case was tried by the trial court on June 3, 2011. Trial was

held on three causes of action: (1) breach of contract; (2) fraud; and (3) constructive trust. The trial court found for plaintiffs on all causes of action and awarded them damages of \$25,000. A new trial motion was denied on September 16, 2011, and judgment was entered against defendants on October 18, 2011. Defendants appeal.

I

THE APPELLATE RECORD

Defendants have elected to appeal without a reporter's transcript. The appellate form (APP-3) notified them that "without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in determining whether an error was made in the superior court proceedings."

The same form instructed defendants that certain required documents would be included in the clerk's transcript. In designating additional documents to be included in the clerk's transcript, defendants designated (1) the trial court's ruling; (2) a motion in limine; and (3) the ruling granting the motion in limine. They did not designate their complaint or any other documents.¹

¹ On July 19, 2012, defendants filed a request to augment the record with three additional documents: (1) a real estate offer to purchase; (2) a note secured by deed of trust; and (3) supplemental escrow instructions. The request was granted by our order filed July 25, 2012.

II

THE TRIAL COURT'S RULING

Since the record is limited, we obtain the facts of the case from the trial court's ruling. According to the trial court, the issues were: (1) "Was there a verbal agreement to rescind the escrow if the Plaintiffs could not obtain the construction financing?" (2) "Did the defendants commit fraud by agreeing to take back the property if the construction loan was not obtained and then refusing to honor that agreement?" (3) "Did the Defendants hold the funds as constructive trustees of the Plaintiffs?"

As noted above, the trial court found for plaintiffs on all issues and awarded plaintiffs general damages of \$25,000.

III

ISSUES ON APPEAL

The primary issue on appeal arises from the fact that, at the beginning of trial, the trial court *granted* defendants' motion in limine to *exclude* evidence of an oral agreement. The motion in limine requested "an order excluding any and all evidence, references to evidence, testimony or argument relating to any purported oral agreement between the Plaintiffs and [defendants]." Despite the granting of the motion in limine, the trial court, on the same day, did admit evidence of an oral agreement. In fact, the primary issue at trial was whether there was an oral agreement or not. After hearing evidence of an oral agreement, the trial court found there was such an agreement and decided the case accordingly.

Defendants contend the admission of evidence of an oral agreement was prejudicial to them, because they relied on the court's ruling and assumed that evidence of an oral agreement would not be admitted. As noted above, they filed a motion for new trial on this basis. The motion argues that the trial court's actions constituted an irregularity in the proceedings within the meaning of Code of Civil Procedure section 657. That section states, in relevant part: "The verdict may be vacated and any other decision may be modified or vacated in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial."

Defendants renew the contention on appeal.

IV

DISCUSSION

A motion in limine is a nonstatutory motion that requests the trial court to limit or exclude certain evidence or testimony. In this case, defendants' motion, made pursuant to Evidence Code section 352, was an objection to the admission of parol evidence at trial on the grounds that the written agreements between the parties constituted a fully integrated agreement. (Code Civ. Proc., § 1856, subd. (a); Civil Code, § 1625.) Following this well-established principle, the trial court granted the motion at the beginning of the trial.

However, “the trial court’s *in limine* ruling is necessarily tentative because the court retains discretion to make a different ruling as the evidence unfolds.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1174; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 608-609.) “*In limine* rulings are not binding []’ [citation] and are ‘subject to reconsideration upon full information at trial.’ [Citations.]” (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 90, fn. 6.)

At some time during the trial, the trial court decided the main issue in the case was whether there was a verbal agreement to rescind the escrow if plaintiffs could not obtain the construction loan financing. It therefore decided that, for some reason, parol evidence was admissible despite the written contracts.

Although *in limine* motions can serve a variety of functions, such as demurrers, motions for judgment on the pleadings, or nonsuit, we review evidentiary rulings *de novo*. (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1465.) Since there is no transcript of oral proceedings, we cannot do so in this case.

Even assuming the trial court’s decision to admit parol evidence was legally wrong, there is no trial record to demonstrate that defendants objected to such evidence at trial, or that the admission of such evidence led to a miscarriage of justice.

For example, the *in limine* motion was made under Evidence Code section 352. That section provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” Obviously, the question of whether the

trial court abused its discretion in weighing these factors cannot be weighed on appeal without a trial record: “[A] reviewing court should not disturb the exercise of a trial court’s discretion unless it appears that there has been a miscarriage of justice.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) “An abuse of discretion is never presumed but must be affirmatively established by the party complaining of the provisions of the order. [Citations.] The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power. [Citations.]” (*Berry v. Chaplin* (1946) 74 Cal.App.2d 669, 672-673.)

Plaintiffs argue that the parol evidence was admissible on the fraud cause of action.² They argue theories of estoppel, part performance, and promissory fraud. We cannot evaluate the validity of these arguments without a record of the trial court proceedings. More importantly, we cannot evaluate defendants’ argument that the fraud exception to the parol evidence rule is inapplicable.

The trial court’s decision on the constructive trust cause of action is clear, even in the absence of the trial testimony. The trial court found defendants had a fiduciary

² Plaintiffs fail to follow California Rules of Court, rule 8.204(a)(1)(C), which requires: “Each brief must: [¶] . . . [¶] (C) Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” We have disregarded factual statements in the parties’ briefs that are unsubstantiated.

relationship with plaintiffs with regard to the \$25,000 deposit, and that defendants were constructive trustees of the \$25,000.

Plaintiffs rely on Civil Code sections 2223 and 2224. Civil Code section 2223 states: “One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.” Civil Code section 2224 provides: “One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.”

Acting under these sections, the trial court may impose a constructive trust as an equitable remedy to prevent unjust enrichment and to enforce restitution. (*Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co.* (1978) 78 Cal.App.3d 371, 375.) Fraud need not be proven: “All that must be shown is that the acquisition of the property was wrongful and that the keeping of the property by the defendant would constitute unjust enrichment. [Citations.]” (*Calistoga Civic Club v. City of Calistoga* (1983) 143 Cal.App.3d 111, 116.)

After hearing the evidence the court found for plaintiffs and imposed a constructive trust as an equitable remedy. Defendants have not met their burden of demonstrating that the trial court abused its discretion in so doing. Accordingly, they have not shown that the trial court erred.

V

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

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RICHLI
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.