

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Estate of MONROE F. MARSH, Deceased.

STEPHEN D. MARSH, as Executors, etc.,
et al.,

Petitioners and Respondents,

v.

JANE L. MARSH et al.,

Objectors and Appellants.

G046446

(Super. Ct. Nos. 30-2009-00331535,
30-2010-00384291 & 30-2010-
00426209)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier and Mary Fingal Schulte, Judges. Affirmed in part and reversed in part.

Law Office Michael A. Weiss and Michael A. Weiss for Objectors and Appellants.

Law Offices of Stephen M. Magro and Stephen M. Magro for Petitioners and Respondents.

* * *

This is the latest in a series of appeals arising out of the litigation following the death of Monroe Marsh in 2009. In the current proceedings, petitioners Stephen D. and Damon Marsh (plaintiffs), executors of decedent's estate, obtained summary judgment on their petition to determine title to certain real property located on Lakefront in Irvine (property) and void objector Jane L. Marsh's affidavit of surviving spouse and grant deed to objector Michael Weiss, her son and attorney.

Jane and Michael (defendants) contend this was error because plaintiffs were equitably estopped to deny validity of the grant deed and decedent had irrevocably divested himself of his title and control over the property by executing a trust deed transferring his separate property to Jane. They also challenge the court's order awarding sanctions against Jane for failing to appear at a mandatory settlement conference (MSC), claiming Jane was deprived of due process because the order to show cause was issued to Michael, not her. Plaintiffs agree the sanctions order was improper, as do we, and we reverse the order. In all other respects, the judgment is affirmed.

FACTS

In 1990, decedent and his first wife, Marjorie R. Marsh, owned the property as community property. When Marjorie died in 2002, she left a will bequeathing most of her estate, including her community property interest in the property, to decedent and the property became decedent's separate property after he filed an affidavit of surviving spouse succeeding title to community property under Probate Code section 13540, subdivision (b) (all further statutory references are to this code unless otherwise indicated).

Decedent married Jane in 2003. That year, decedent took out a reverse mortgage on the property, secured by a deed of trust. During his lifetime, decedent withdrew about \$620,000 on the reverse mortgage but made no payments.

Decedent died testate in 2009. Other than a lifetime right of occupancy in the property for Jane, decedent's will provided the remaining estate assets, as well as the remainder interest in the property following Jane's death, shall pass to his son (Stephen) and grandchildren.

After decedent's death, Jane paid the full balance on the reverse mortgage with her separate property and a loan from Michael. Thereafter she filed a section 13540 affidavit of surviving spouse stating she had done so and signed a grant deed for the property to Michael, who paid her approximately \$230,000 despite the property being appraised at \$835,000.

Following Jane's payment, the reverse mortgage lender, Mortgage Electronic Registration Systems, Inc. (MERS), which had substituted itself as the trustee on the deed of trust in place of decedent, issued a document "reconvey[ing] without warranty to the persons legally entitled thereto all [e]state now held by it under said [d]eed of [t]rust." The document directed that upon being recorded it was to be sent to decedent at the address of the property and identified decedent as the trustor.

Plaintiffs, as executors of decedent's estate and in their individual capacities, filed a petition under section 850 to determine title to the property seeking, among other things, an order determining the property belonged solely to decedent's estate and canceling Jane's affidavit of surviving spouse and grant deed to Michael. They also filed a petition in intervention to determine title to real property.

The court scheduled an MSC on the petitions for July 2011. Jane did not appear and Michael did not have written settlement authority from her. The court issued an order to show cause (OSC) why sanctions should not be imposed against Michael for his failure to have Jane present at the MSC or have her written settlement authority. It subsequently ordered Jane to pay plaintiffs \$3,025 as a sanction for her absence and Michael's failure to have her at the MSC.

Plaintiffs moved for summary judgment of their petitions to determine title. The court granted the motion, finding the undisputed material facts showed the property belonged entirely to decedent and his estate and Jane owned no interest in the property. It canceled Jane's affidavit of surviving spouse and grant deed to Michael, declaring them void, and overruled their evidentiary objections.

DISCUSSION

1. Nature of the Appeal

Defendants' opening brief does not contain a statement of appealability, in violation of California Rules of Court, rule 8.204(a)(2)(B) (all further rule references are to these rules). Thus, we must independently ascertain the scope of our appellate jurisdiction. (*Olson v. Cory* (1983) 35 Cal.3d 390, 398 [“since the question of appealability goes to our jurisdiction, we are dutybound to consider it on our motion”].)

The notice of appeal in this proceeding specifies the appeal is taken from (1) the judgment following the grant of summary judgment on the section 850 petition against defendants, and the orders (2) granting summary judgment, (3) denying defendants' Code of Civil Procedure section 663 motion to set aside the summary judgment, (4) imposing sanctions against Jane, (5) denying Jane's motion to abate the section 850 petition, and (6) overruling Jane's demurrer to the section 850 petition.

Defendants concede all but the judgment and sanctions order are not appealable and assert they appeal only from “the final judgment granting the [summary judgment on the] 850 petition and the order imposing sanctions.” Nevertheless, they subsequently make a cursory argument the court erred in overruling Jane's demurrer.

The summary judgment “is an appealable judgment.” (Code Civ. Proc., § 437c, subd. (m)(1).) Additionally, although orders overruling the demurrer and awarding sanctions for an amount less than \$5,000 are not directly appealable, both are

reviewable on appeal after entry of final judgment (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182 [demurrer]; Code Civ. Pro., § 904.1, subds. (a)(12) [sanctions under \$5,000], (b).)

2. Summary Judgment

a. De Novo Review

“[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If the moving party carries its initial burden, the opposing party then has the “burden of production . . . to make a prima facie burden showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]” (*Id.* at pp. 850-851.) In satisfying its burden of production, the party opposing summary judgment “may not rely upon the mere allegations or denials of its pleadings,” but rather “shall set forth the specific facts showing that a triable issue of material fact exists.” (Code Civ. Proc., § 437c, subd. (p)(1).)

We review the trial court’s ruling de novo (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 860), considering all the evidence and reasonably supported inferences presented by the parties in connection with the motion, except evidence properly excluded by the court. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where the moving party demonstrates that no triable issue of material fact exists and that it is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

The basis of plaintiffs’ motion for summary judgment was that decedent owned the property as his separate property at the time of his death and defendants had no legal basis to transfer it into their names. In their undisputed statement of facts,

plaintiffs established decedent and his first wife Marjorie owned the property as community property and when Marjorie died in 2002, her will bequeathed her community property interest in the property to decedent and the property became his separate property. This evidence satisfied plaintiffs' burden of establishing the absence of a triable issue of material fact the property was and remained decedent's separate property at the time of his death.

To defeat summary judgment, defendants had to “make an independent showing by a proper declaration or by reference to a deposition or another discovery product that there is sufficient proof of the matters alleged to raise a triable question of fact. . . . [Citations.]’ [Citation.]” (*Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, 635.) An opposition that “is essentially conclusionary, argumentative or based on conjecture and speculation” is insufficient. (*Ibid.*)

Although defendants filed evidentiary objections to several of plaintiffs' statements of undisputed fact, the court overruled them and defendants do not challenge the rulings on appeal, forfeiting any claim of error (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1196-1198; *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1113-1114) and leaving plaintiffs' facts undisputed. Defendants also failed to present any evidence of a written transmutation of property from decedent's separate property to community property, as required by Family Code section 852, subdivision (a) [“A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected”].) Defendants concede a written transmutation is required “when changing from separate to community property.”

Jane relied on her affidavit of surviving spouse under section 13540, which permits a surviving spouse to dispose of community property. But the statute's plain terms demonstrate it does not apply to separate property. (See § 13540, subd. (a) [“surviving spouse . . . has full power to sell, convey, lease, mortgage, or otherwise deal

with and dispose of the community or quasi-community real property, and the right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be free of rights of the estate of the deceased spouse or of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse”].) Nor was Michael entitled to protection as a bona fide transferee under that statute because the property was never validly transferred to Jane in the first place under section 13540, subdivision (a). Based on these undisputed material facts, plaintiffs were entitled to summary judgment.

b. Equitable Estoppel

Defendants contend summary judgment should not have been granted because the delivery of the reconveyance deed by MERS to Jane after she paid the reverse mortgage and filed her section 13540 affidavit created a legal presumption she owned “the whole beneficial interest” and that plaintiffs could not rebut that presumption “due to estoppel in pais” (equitable estoppel). But defendants’ failure to cite authority supporting their claim the above facts give rise to a legal presumption waives the issue. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

Defendants also never raised the doctrine of equitable estoppel in their opposition to the summary judgment motion. Although they suggest they pleaded the issue in their answer, the portion of the record to which they refer reflects only the defense of fraud. At the hearing on the motion, defendants did argue Jane obtained an equitable title in the property and had “a right under her marriage contract not to be defrauded and embezzled.” But that is not the same as asserting plaintiffs should be equitably estopped from obtaining judgment on their section 850 petitions. That claim is forfeited because it was not first presented to the trial court. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226 (*Kaufman*).)

Even if the issue had been raised, it lacks merit. “The required elements for an equitable estoppel are: (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his or her injury.’ [Citations]” (*Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1567.)

Defendants argue they satisfied these elements because neither decedent nor MERS disclosed the reverse mortgage to Jane, decedent allegedly told Michael “his earnings were used to pay off the reverse mortgage,” Jane relied on that statement to borrow money from Michael and pay the entire debt, and had Michael known decedent had not paid off the reverse mortgage, Michael would have done so “with community earnings so his mother could acquire a pro tanto interest.” But regardless of the hearsay nature of the alleged statement by decedent, defendants failed to present any evidence or argument that decedent or MERS intended them to act upon decedent’s statement, defeating any claim of equitable estoppel. Nor would defendants’ reliance have changed the character of the property or given Jane an interest therein as undisputed facts established the property was decedent’s separate property at the time of his death.

Defendants claim they “also invoke the estoppel in pais doctrine in regards to the power of attorney found in the trust deed” because they “relied to their detriment upon trustee MERS[’s] exercise of that power.” They cite cases dating back to 1879, 1886 and 1904 dealing with “innocent third parties” and quote section 18100, which “protects third persons who deal with a trustee in good faith from claims the trustee has exceeded his or her powers under the trust.” (*Wood v. Jamison* (2008) 167 Cal.App.4th 156, 163.) But the issue has been forfeited by defendants’ failure to raise it in the trial court. (*Kaufman, supra*, 136 Cal.App.4th at p. 226.)

Even if not forfeited, the contention lacks merit. The power of attorney to which defendants refer is the statement in the trust deed that “[t]he [t]rustee will reconvey the [p]roperty without warranty, at the charge agreed to in the [a]greement, to the person or persons legally entitled to it.” To the extent they relied on this to believe the delivery of the reconveyance document to them granted them legal title, such reliance was unreasonable because both the trust deed and the reconveyance document expressly indicate MERS’s interest in the property would be reconveyed to the legally entitled person. (*Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1227 [reliance must be reasonable to invoke equitable estoppel].) The person legally entitled to reconveyance was decedent under the plain terms of the reconveyance document identifying him as the trustor and directing it to be mailed to him after recording.

Despite the trust deed, decedent never lost legal title because “[e]xcept as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title. [Citation.] The legal estate thus left in the trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership in regard to the property, subject always, of course, to the execution of the trust.’ [Citations].” (*Hamel v. Gootkin* (1962) 202 Cal.App.2d 27, 29-30, quoting *MacLeod v. Moran* (1908) 153 Cal. 97, 100.)

“In practical effect, if not in legal parlance, a deed of trust is a lien on the property. [¶] . . . The “deed of trust conveys ‘title’ to the trustee ‘only so far as may be necessary to the execution of the trust.’ [Citation.]” (*Monterey S.P. Partnership v. W.L. Bangham, Inc.* (1989) 49 Cal.3d 454, 460.) A “trustee . . . [has] only two duties with respect to the property.” (*Ibid.*) If debt is satisfied, the trustee must “reconvey its interest in the property to [the trustor]. [Citation.]” (*Ibid.*) If a trustee defaults, a trustee is “required on proper request from the beneficiaries to exercise the power of sale contained

in the deed of trust.” (*Ibid.*) Here, decedent defaulted but no beneficiary requested the trustee to foreclose the deed of trust. Rather, Jane paid off the debt and, as required, MERS reconveyed its interest in the property back to decedent, the named trustor, and his successors upon his death. Because this reconveyance “[i]n practical effect . . . is nothing more than the release of the lien of the deed of trust” to the trustor (*ibid.*), defendants had no reasonable basis upon which to rely on the trust deed’s statement of reconveyance as granting them legal title, defeating their equitable estoppel claim. Although plaintiffs acknowledge Jane has a claim in equity for the amount she paid, which she did without their knowledge or request, defendants conceded during oral argument she has never sought reimbursement.

c. Trust Deed

Defendants maintain summary judgment was improper because decedent “divested himself of all control over the . . . property[and] had no power to revoke or modify the trust” because in the trust deed he stated, “I irrevocably grant and convey to [t]rustee, in trust, with power of sale, the [subject property.]” According to them, that created a trust in favor of Jane, which decedent “could not by his last will revoke . . . because it was irrevocable.” We disagree.

The case does not involve an irrevocable trust and as just explained, the reconveyance document reconveyed MERS’s interest back to decedent and his successors. The numerous statutes and cases cited by defendants are inapposite because none involve a trust deed or its reconveyance. (See *Stephens, Partain & Cunningham v. Hollis* (1987) 196 Cal.App.3d 948, 955 [“Just as a panda is not an ordinary bear, a trustee of a deed of trust is not an ordinary trustee”]; accord, *Monterey S. P. Partnership v. W. L. Bangham, Inc.*, *supra*, 49 Cal.3d at p. 462 [“The similarities between a trustee of an express trust and a trustee under a deed of trust end with the name”]; see also § 82, subd. (b)(10) [“[t]rust” as used in the Probate Code, excludes “security arrangements”].)

Defendants argue the trust deed gave the trustee a power of appointment authorizing it “to select the person to reconvey to” and that MERS chose Jane because it delivered the reconveyance document to her. But the undisputed terms of the reconveyance document named decedent as the trustor and directed it be mailed to decedent at the address of the property. That Jane may have also lived at that address and opened the letter attaching the reconveyance document does not mean MERS “select[ed]” Jane as the person “legally entitled thereto all [e]state now held by it under said [d]eed of [t]rust.” Rather, for the reasons discussed in the prior section, the document served to reconvey MERS’s interest in the property back to decedent and his successors and release the lien on the property. That was all MERS, as the trustee under the deed of trust, was required or authorized to do. (*Monterey S.P. Partnership v. W.L. Banham, Inc.*, *supra*, 49 Cal.3d at p. 460.)

3. Other Contentions

Despite claiming not to appeal from the order overruling Jane’s demurrer to the section 850 petitions, defendants assert it “should have been granted for the reasons stated therein.” The contention lacks merit. First, defendants fail to make this argument “under a separate heading or subheading summarizing the point” or support it with argument and authority, in violation of rule 8.204(a)(B). Second, they have not met their burden of demonstrating trial court error.

Even where review is de novo, as when an order overruling a demurrer is challenged on appeal from the final judgment (*Casterson v. Superior Court*, *supra*, 101 Cal.App.4th at p. 182), that does not mean we engage in an independent analysis of the demurrer because the appealing party still has the burden of showing reversible error. (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 369). “[A]n appellate court [is not] required to consider alleged error where the appellant merely complains of it without pertinent argument. [Citation.]” (*Plotnik v. Meihaus* (2012) 208

Cal.App.4th 1590, 1615; see also *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 [court will not develop arguments on appellant's behalf].) Here, rather than brief the grounds on which they believe Jane's demurrer should have been sustained, defendants merely refer us to the demurrer. That does not comply with the rules of this court (*Estate of Wiedemann* (1964) 228 Cal.App.2d 362, 370-371; *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 721) and we need not consider those arguments (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334).

Defendants next cite *Firato v. Tuttle* (1957) 48 Cal.2d 136, 140 for the proposition they were innocent purchasers for value and plaintiffs had the burden of pleading they were not in order to state a cause of action and avoid a demurrer. According to defendants, the section 850 petitions did not allege "Michael was not a bona fide purchaser relying on [the] MERS reconveyance deed to Jane." On the contrary, the petitions specifically allege Michael knew "[d]ecedent was the holder of record title to the . . . [p]roperty" when he accepted the grant deed from Jane. Moreover, plaintiffs presented undisputed material facts Michael was not a bona fide purchaser, as the property was never validly transferred to Jane and he paid only about \$230,000 although the property was appraised at \$835,000.

Defendants argue "Michael paid over the appraised value," referencing 145 pages of the record on appeal. We decline to scour the record to find support for this claim, as it is not our duty. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Regarding defendants' contention the court erred in opining the property's appraised value rather than its liquidation or plain value was required to establish a bona fide purchaser, their failure to cite authority for that proposition forfeits it. (*Cahill v. San Diego Gas & Electric Co.*, *supra*, 194 Cal.App.4th at p. 956.)

By not raising it in the trial court defendants have also forfeited their arguments plaintiffs should have invoked the arbitration clause in the trust deed instead

of petitioning the court for probate and that the Federal Arbitration Act preempted the court's subject matter jurisdiction. (*Kaufman, supra*, 136 Cal.App.4th at p. 226.) Nor, in any event, have they shown plaintiffs would have been able to invoke the arbitration provision given its express statement it applies only to "controvers[ies] or claim[s] arising out of or relating to [the trust deed]" between decedent and the mortgage company.

Defendants further challenge the prior opinions in this case, asserting they were incorrectly decided and that the remittiturs were issued a day early and should be recalled, otherwise they will petition the Supreme Court for review. According to defendants, we had no jurisdiction to issue remittiturs in *Estate of Marsh* (Feb. 7, 2012, G044938) (nonpub. opn.) and *Estate of Marsh* (Feb. 7, 2012, G045474) (nonpub. opn.), on April 9, 2012, because Jane "had until the close of business [that day] to file in the Supreme Court a Petition for Review." Not so.

Under rule 8.500(e)(1) and (2), "[a] petition for review must be served and filed within 10 days after the Court of Appeal decision is final in that court. For purposes of this rule, the date of finality is not extended if it falls on a day on which the clerk's office is closed. [¶] . . . The time to file a petition for review may not be extended, but the Chief Justice may relieve a party from a failure to file a timely petition for review if the time for the court to order review on its own motion has not expired." Here, defendants admit Jane did not file petitions for review in the Supreme Court at any time, much less within the mandatory 10-day period after our opinions in G044938 and G045474 became final on March 8, 2012; nor did she request relief from that failure.

Rather, defendants seek to avail themselves of rule 8.512(c)(1), which they assert "allows the Supreme Court itself to review when no party files a petition within 30 days after the appeals court decision became final; and if that day [falls] on a holiday then the next day (. . . April 9, 2012)." The April 9th date is apparently based on defendants' assumption the opinions in the prior appeals did not become final until 30 days after we denied defendants' petitions for rehearing on March 8, 2012. But as defendants

acknowledge, “a Court of Appeal decision in a civil appeal . . . is final in that court 30 days after filing.” (Rule 8.264(b)(1).) The finality date is not extended by petitions for rehearing where, as here, they do not result in any change to the appellate judgment. (Rule 8.264(c)(2).) Consequently, the prior opinions are final and outside the scope of the instant appeal.

For that reason, and because arguments raised for the first time in a reply brief are deemed forfeited (*Martin v. PacifiCare of California* (2011) 198 Cal.App.4th 1390, 1410, fn. 12), we reject defendants’ claims we have authority to “grant writ relief annulling or arresting the consolidation order and all other orders thereafter grounded upon it,” including the order denying Jane’s motion to abate the section 850 petition, which defendants contend would eliminate the trial court’s subject matter jurisdiction to grant summary judgment in this case and order sanctions. We decline to treat the appeal as a writ proceeding as defendants’ request because they had an adequate remedy by appeal. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 112-113.)

4. Sanctions Order

Defendants contend the court erred in imposing monetary sanctions on Jane for failing to appear at the MSC because, among other things, “no OSC was ever issued to Jane” The record confirms that although the court ordered Michael to show cause why sanctions should not be imposed against him, not Jane, for his failure to have Jane present at the MSC, it imposed sanctions against Jane. Plaintiffs agree, as do we, this was reversible error. “Due process . . . requires that a person against whom . . . sanctions may be imposed be given adequate notice that such sanctions are being considered” [Citation.]” (*People v. Hundal* (2008) 168 Cal.App.4th 965, 970.) Because Jane was not provided with such notice prior to sanctions being imposed, her due process rights were violated.

DISPOSITION

The order imposing \$3,025 in monetary sanctions against objector Jane L. Marsh is reversed. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.