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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FREDERICK IMKER,

Plaintiff and Appellant,

v.

ERIC IMKER,

Defendant and Respondent.

H037437

(Santa Cruz County

Super. Ct. Nos. PR044771, CV166612

& PR044764)

Appellant Frederick Imker sought an order enforcing a settlement agreement he said he had reached with his brother, defendant Eric Imker, during mediation of a dispute over their deceased mother's property. The trial court refused to enforce the putative settlement on the ground that it had never been solemnized as required by statutes generally declaring statements in mediation proceedings inadmissible. (Evid. Code, §§ 1115-1128.) Appellant contends that this was error for the reason, among others, that at the time enforcement was sought, his brother had partly performed the agreement by transferring some of the disputed property. He also contends that to deny relief under such circumstances would lend the statutes an absurd effect, and would implicate due process concerns. None of these contentions can be sustained on this record. We will therefore affirm the order.

BACKGROUND

Frederick and Eric¹ are the only children of decedent Marilyn Imker. On April 2, 1999, she executed a revocable trust and will which had the effect, for our purposes, of dividing her tangible personal property equally between her sons, and giving one-quarter of her other assets to Frederick, with the remaining three-quarters going to Eric, whom she named her executor and successor trustee.

Marilyn Imker died on August 3, 2008. Frederick thereafter demanded, through counsel, an accounting and inventory of trust assets. Evidently dissatisfied with Eric's response, Frederick filed a petition for an accounting on April 19, 2009. (In the Matter of Marilyn Imker Family Trust, Santa Cruz Super. Ct. No. PR044767 (the trust matter).) On the following day, Eric filed a petition to probate the will. (Estate of Marilyn Imker, Santa Cruz Super. Ct. No. PR044771 (the estate matter).)

On July 16, 2009, the court admitted the will to probate, and appointed Eric as executor. On October 22, 2009, the court denied Frederick's petition for an accounting in the trust matter. That matter received new life, however, on February 19, 2010, when Eric filed a petition "to establish trustee's right to personal property held by another." In it he alleged that decedent had made three loans of trust property to Frederick, totaling some \$147,000; that Frederick had refused to make payments on two of the loans; and that he had refused to "unequivocally acknowledge" his obligations under the third. The petition prayed for a declaration of these debts and for damages.

Also on February 19, Eric filed a complaint for damages within the limited jurisdiction of the superior court, charging Frederick with breach of contract. (Imker v. Imker, Santa Cruz Super. Ct. No. CV166612 (the contract action)). He alleged that the brothers had agreed to give \$10,000 to a named "friend and helper of their recently

¹ Intending no disrespect, we will refer to the parties by their first names.

deceased mother”; that each had agreed to pay one-half of this sum; that he, Eric, had paid the \$10,000 to the named person; and that Frederick, through counsel, had “denied any personal liability on this obligation.” On March 30, Frederick filed a cross-complaint alleging that the brothers had agreed to pay the \$10,000 from a specified bank account and to divide equally the remaining balance of about \$41,000. Eric had allegedly refused to perform the latter covenant, thereby damaging Frederick in the sum of about \$20,000 plus interest.

On September 9, 2010, at a hearing in the trust matter, the court denied a motion to consolidate the three cases but ordered them “coordinated for trial and evidentiary hearing purposes.” The minutes reflect that one or both attorneys requested “mediation and trial setting.” The court set the matter for mediation on November 8, 2010, and for an evidentiary hearing on December 13 on Eric’s petition to establish his right as trustee to personal property.

According to the court’s minutes, the parties appeared for mediation on November 8, 2010, and reached an agreement on that date. However, the agreement was neither reduced to writing nor recited into the record. Instead, according to the minutes, “[t]he Court advise[d] [that] closing papers [were] to be prepared by counsel and signed by the parties.” The court vacated the December 13 trial date, but directed counsel to file case management statements “if no dismissal has been filed by that date.”

No dismissal was filed, and on December 10, 2010, counsel for Eric filed a case management statement reporting that while the parties had seemed to reach an agreement, “subsequent correspondence revealed that was not the case.” Apparently Frederick also filed such a statement, but it does not appear in the appellate record. (See fn. 2, *post.*) At a case management hearing on December 13, it appeared that Eric had raised new “concerns with the proposed resolution.” The court expressed displeasure that after considerable efforts by all participants, one of the parties was now “say[ing], whoops, I

guess I was wrong as to what I was using as a basis for my settlement position.” At the same time, the court cautioned counsel for Frederick about seeking to compel enforcement of an unwritten agreement arrived at through mediation, noting that “[t]he mediation is not evidence for any purpose.”

Frederick’s counsel then placed on the record, over objection, a general account of the November 8 mediation proceedings. He said, “Mediation continued throughout the morning and the afternoon. Finally, through a hard effort . . . on all sides, we settled the case at approximately 6:00 P.M. By that time all the court reporters had left for the evening and, in fact, it appeared that we were the only ones left in the entire building. Because there was no court reporter available, nothing was put on the record. Also, nothing was signed by the parties. [¶] Eric did, however, pursuant to the settlement agreement, give Frederick some estate jewelry. The parties left with the understanding that we had an enforceable settlement agreement. Thereafter . . . [counsel for Eric] informed me that his client did not want to abide by the terms of the settlement agreement. I, in turn, asserted that we have a settlement agreement and set them [*sic*] forth in the settlement agreement attached as Exhibit C to the case management conference, Frederick’s case management conference.^[2] To date [counsel for Eric] has not objected to any specific terms of that settlement agreement.”

² Counsel thus indicated that the terms of the putative agreement were set forth in an exhibit to a case management conference statement he had filed preparatory to the hearing. In his notice designating the record on appeal, counsel listed a “Case Management Conf. Statement-Frederick Imker,” filed December 13, 2010, under docket number PR044771. But the clerk’s transcript contains only the case management conference statement filed by Eric on December 10. Upon informal inquiry by this court, the clerk of the trial court was unable to find the document described by counsel, even though the court’s online register contains a December 13 entry entitled “Case Management Conference Statement Filed By Frederick W[.] Imker.” (See <<http://63.197.255.150/openaccesspublic/CIVIL/civildetails.asp?courtcode=A&casenum ber=PR044771&casetype=PRS&dsn=&movetodate=Y&startdate=12%2F13%2F2010>> (as of Jan. 27, 2015)). Any deficiency in the record in this regard should have been

Further attempts to resolve the parties' differences were fruitless, and on May 4, 2011, counsel for Frederick filed the application with which this appeal is immediately concerned. As pertinent here it was entitled a "Motion To Enforce Settlement."³ It asserted that a settlement had been reached on November 8, which "[t]he parties" had "partially performed . . . in that Eric gave to [Frederick] some of their mother's jewelry." "Thereafter," the motion continued, "Eric refused to perform[,] claiming that he made a mistake based upon information solely in his possession. In short he made a unilateral mistake and he assumed all risk for this mistake. As this unilateral mistake is factually not valid grounds for Eric to renege on the settlement agreement, the settlement agreement must be enforced." (Fn. omitted.)⁴

In opposition to the motion, counsel for Eric asserted that there was no admissible evidence of a settlement agreement. He characterized Frederick's application as "a 'motion' that amounts to a memorandum . . . without any supporting declarations." In a "brief" filed July 8, 2011, counsel for Frederick countered that while he had "incorrectly labeled" the application as a motion, it was in fact "a verified petition." He asserted that he had "paid the correct filing fees for a petition." He subsequently filed a declaration of counsel reiterating the key factual assertions in the application, including that "the

addressed by motion to correct the record. On the other hand, in view of our conclusions on the merits, the contents of the missing document appear to be immaterial.

³ Frederick also moved to compel Eric to comply with a court order directing him to transfer certain items to Frederick. This aspect of the proceedings is not at issue on this appeal.

⁴ In the motion it was also asserted, apparently for the first time, that Marilyn Imker's property disposition in the 1999 trust and will reflected a "drastic[] change[]" from what had previously been a mutual intention on the part of the brothers' parents to divide their property equally between their sons. The change had been achieved, it was asserted, "[t]hrough improper influence by Eric." This charge is at best peripheral to any issue now before us, though Frederick reiterates it in his brief on appeal.

parties” had “partially performed pursuant to the settlement agreement in that Eric gave [Fredrick} some of their mother’s valuable jewelry.”

On July 15, 2011, the court denied what is called in the minute order a “Petition to Enforce the Settlement.”⁵ Notice of entry of the order was given on September 6, 2011. Frederick filed a notice of appeal on October 4, 2011.

DISCUSSION

I. Introduction

The sole question presented is whether the trial court should have enforced the settlement agreement assertedly reached by the parties at the mediation session on November 8, 2010. In refusing to do so, the court manifestly concluded that evidence of the agreement was inadmissible by virtue of the general rule excluding evidence of statements or writings made in the course of mediation. That rule is set forth in Evidence Code section 1119, which as relevant here provides, “Except as otherwise provided in this chapter: [¶] (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible [¶] (b) No writing . . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation . . . , is admissible [¶] (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential.”

An oral agreement reached before a mediator is something “said . . . pursuant to . . . mediation” (Evid. Code, § 1119, subd. (a)) as well as a “communication[.]” and part of “settlement discussions by and between” the participants (*id.*, subd. (c)). Thus, by the plain terms of the statute, such an agreement is inadmissible unless made otherwise by

⁵ The formal order, prepared by Frederick’s attorney, refers to the application as a “motion-petition to enforce the settlement.”

some other provision of law. (See *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 127, fn. 5.)

Evidence Code section 1124 makes three exceptions to the rule of inadmissibility. The first is where an oral agreement satisfies all of the requirements of Evidence Code section 1118, i.e., the agreement must be “recorded by a court reporter or reliable means of audio recording” (Evid. Code, § 1118, subd. (a)); its terms must be “recited on the record in the presence of the parties and the mediator (*id.*, subd. (b)); the parties must “express on the record that they agree to the terms recited” (*ibid.*); the parties must “state on the record that the agreement is enforceable or binding, or words to that effect” (*id.*, subd. (c)), and “[t]he recording” must be “reduced to [a] writing,” which must be “signed by the parties within 72 hours after it is recorded” (*id.*, subd. (d)). (See Evid. Code, § 1124, subd. (a).)

The second exception under section 1124 arises when all of the foregoing conditions are met except for the parties’ on-the-record recital that the agreement is enforceable; in such a case the agreement may nonetheless be admitted if the parties have “expressly agree[d], in writing or orally in accordance with section 1118, to disclosure of the agreement.” (Evid. Code, § 1124, subd. (b).) The third exception arises when all conditions except on-the-record recital are present, and “the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.” (*Id.*, subd. (c).)

Frederick does not suggest that any of the statutory exceptions applies here. Indeed it does not appear that *any* of the individual conditions for admissibility were present. The agreement was not recorded either stenographically or electronically; its terms were not recited on the record in the presence of the parties; the parties never expressed on the record any intention to be bound; the agreement was never reduced to writing, let alone signed by the parties; the parties never agreed to its disclosure; and it has not been suggested that the agreement has any tendency to show fraud, duress, or

illegality. Accordingly, so far as the language of the statutes is concerned, “[n]o evidence” of the agreement “is admissible.” (Evid. Code, § 1119, subd. (a).)

II. Part Performance

Frederick argues, however, that part performance could take the agreement out of the foregoing statutes, and that Eric rendered such performance by transferring certain jewelry to Frederick. This contention cannot be sustained under the circumstances reflected in this record.

In the first place we doubt that the present record is sufficient to sustain a finding that the transfer of jewelry constituted part performance of any agreement. Under the terms of Marilyn Imker’s will, her tangible personal property, including her jewelry, was to be equally divided between her two sons. If they were unable to agree upon its distribution, however, Eric—as executor—was vested with the power to make the division as he saw fit. Nothing before us suggests that the transfer of jewelry cited by Frederick would not have occurred in the absence of the putative agreement. For all this record shows, Eric came to the mediation session prepared to hand that jewelry to Frederick in fulfillment of the duties conferred on him by the will. The only indication to the contrary is the assertion by Frederick’s attorney that “[t]he parties . . . partially performed pursuant to the settlement agreement in that Eric gave [Frederick] some of their mother’s valuable jewelry.” The fact that this appears as a sworn averment does not alter its character as a naked conclusion of law, devoid of independent evidentiary force.

Further, even if the transfer of jewelry were shown to be a direct product of an agreement rather than an independent act by the executor, we would reject the contention that it rendered the putative agreement admissible or enforceable. The concept of part performance has arisen in many different settings in the law of contracts. It has been held to estop a defendant who signed a written contract from asserting that it is unenforceable due to the plaintiff’s failure to sign it. (1 Witkin, Summary of Cal. Law (10th ed. 2005)

Contracts, § 135, pp. 175-176, citing *Sparks v. Mauk* (1915) 170 C. 122, 123, 148 P. 926.) Where the terms of a contract are uncertain, part performance can supply evidence of the parties' intentions, in effect aiding to make the terms sufficiently definite to be enforced. (1 Witkin, Contracts, *supra*, § 139, p. 179, citing Rest.2d., Contracts, § 34.) Partial rendition of the performance requested in an offer of a unilateral contract can preclude the offering party from revoking the offer. (1 Witkin, Contracts, *supra*, § 166, p. 202, citing inter alia Rest.2d., Contracts, § 45.) Similarly, part performance can render an otherwise illusory contract enforceable. (1 Witkin, Contracts, *supra*, §§ 231-232, pp. 266-267.) Part performance may entitle a party to compensation even though further performance has been excused by impossibility. (1 Witkin, Contracts, *supra*, § 834, pp. 921-922; Rest.2d, Contracts, § 377.)

The most pertinent rule for our purposes appears to be the one under which part performance can take at least some promises out of the statute of frauds, rendering them enforceable despite the absence of the written memorandum otherwise required by that doctrine. (1 Witkin, Contracts, *supra*, §§ 402-405, pp. 441-445.) It bears noting that this rule has been codified only with respect to real estate transactions. (Code Civ. Proc., §§ 1971, 1972, subd. (a).) Its application in other contexts may be open to debate. (See 1 Witkin Contracts, *supra*, § 402, pp. 441-442; Rest.2d, Contracts, § 129.) This uncertainty may have little practical significance in most cases because partial performance sufficient to take a contract out of the statute of frauds will often also be sufficient to give rise to an estoppel, which may bar assertion of the statute in all contexts. (See 1 Witkin, Contracts, *supra*, §§ 405, 406-418, pp. 445, 445-460.)

In any event, these existing applications of the concept of partial performance can be categorized according to the two distinct rationales that underlie them. The first is that partial performance by either party can constitute *circumstantial evidence* that a contract existed, and on what terms. The second is that partial performance by one party can

essentially raise an estoppel, premised on considerations of fairness, *preventing the other party* from exercising a power, or raising a defense, that would otherwise prevent a contract's formation or preclude its enforcement.

Neither of these principles has any proper application here. First, even if Eric's transfer of jewelry were circumstantial evidence of a settlement agreement, it would still be inadmissible under the terms of Evidence Code section 1119, which does not merely provide that statements in mediation are themselves inadmissible, but declares that "[n]o evidence of anything said . . . pursuant to . . . mediation . . . is admissible." Since part performance in this view would operate as "evidence of [some]thing said"—an oral exchange of undertakings—it would be barred by this language.

It also bears noting that even if the alleged part performance were itself admissible as circumstantial evidence of a settlement agreement, it could hardly establish Frederick's entitlement to relief unless it were sufficient to establish the whole tenor of the agreement, or at least of those covenants Frederick seeks to enforce. Here, although Frederick's counsel apparently placed the asserted terms of the agreement into the trial record, he has not caused them to be included in the record on appeal. (See fn. 2, *ante*.) This makes it impossible to reach any conclusion as to whether the delivery of jewelry had any tendency to prove any of the terms he seeks to enforce. That the delivery of jewelry was not sufficient for that purpose is at least suggested by the trial court's remark that the assertion of part performance could not permit it to "get to the point that the balance of the settlement then is effectuated."

This brings us to the second generally recognized function of part performance, which is essentially to estop one party from denying the performing party's right to enforce the contract. The California Supreme Court has already held that estoppel does not furnish an exception to the statutory limitations on admissibility of putative agreements reached in mediation proceedings. (*Cassel v. Superior Court, supra*, 51

Cal.4th 113, 126, fn. omitted [“in *Simmons*, [*infra*,] we held that the judicial doctrines of equitable estoppel and implied waiver are not valid exceptions to the strict technical requirements set forth in the mediation confidentiality statutes for the disclosure and admissibility of oral settlement agreements reached in mediation”]; accord, *Rael v. Davis* (2008) 166 Cal.App.4th 1608, 1623 [“The mediation confidentiality statutes provide no exception for judicial estoppel, and the courts may not fashion one, except in the case of estoppel to contest jurisdiction”]; cf. *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584-585 [finding that conditions for estoppel were not present].)

In any event, the concept of estoppel-by-part-performance is obviously inapposite here, because estoppel is generally predicated on some injury or inequity inflicted or threatened, or deemed to be inflicted or threatened, by the conduct on which the estoppel is predicated. The party asserting the doctrine must be in a position to assert that he or she has suffered, or is exposed to, such injury or inequity by virtue of his or her own part performance coupled with the other party’s disclaimer of the contract. Here, the party asserting part performance is not claiming to have suffered any injury, or to be threatened with injury, *by virtue of the part performance*. Rather Frederick predicates his argument on the supposed partial performance *by Eric* of *Eric’s* undertakings in the putative settlement. Frederick points to no detriment incurred by him as a result of this conduct or by his entry into the putative agreement. He has not claimed, for example, that but for the agreement he would have insisted on receiving different jewelry. Such a claim, if made, would face its own obstacles, since the will granted Eric the power to decide which personal property went to whom, and there is no apparent basis for Frederick to challenge any such decision so long as he receives his allotted share of the whole. But this is all beside the point, because no claim of detriment has been made. So far as the record shows, the exclusion of the putative settlement worked no injury upon Frederick beyond

the disappointment experienced by any party who has tried but failed to secure a binding undertaking from another.

Our conclusion that the claim of part performance fails to take the matter outside the above statutes receives support from *In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1100, where a husband argued that his deeding of property to his wife was part performance of an agreement by which she had promised to transmute other assets to his separate property. The Supreme Court held this claim insufficient to overcome the statutory requirement that transmutations of marital property be explicitly declared in a writing signed by the adversely affected spouse. We note that the statute there explicitly declared an unwritten *agreement* of the type at issue *unenforceable*, whereas the statutes here declare certain *evidence* to be *inadmissible*. The Supreme Court, however, has given these statutes essentially the same effect decreed by the statute there. This reinforces our conclusion that Frederick's claim of part performance is insufficient to bar Eric from invoking the confidentiality statutes.

III. Absurd Result

This brings us to Frederick's assertion that refusal to enforce the putative agreement produces an absurd result. The Supreme Court has recognized the possibility that the statutes limiting the admissibility of statements in mediation proceedings might not be literally enforced in circumstances where the result would be absurd. (*Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14.) Frederick fails, however, to identify anything absurd about the result achieved by applying the statutes here according to their terms. He asserts that without being able to cite the putative agreement, he "cannot prove that he has title to th[e] jewelry [transferred by Eric]," and thus "cannot safely sell it." He suggests that Eric "could theoretically sue [Frederick] for conversion or even accuse [him] of theft," and Frederick in turn "could theoretically claim the jewelry as a gift."

These suggestions compel us to invoke Justice Cardozo's famous injunction against predicating outcomes on "gossamer possibilities of prejudice." (*Snyder v. Massachusetts* (1939) 291 U.S. 97, 122.) The absurdity in the posited scenarios resides not in any construction of the statutes mandating confidentiality of mediation proceedings but in the conduct of the hypothetical actors in those scenarios. As Frederick elsewhere acknowledges, nothing in the statutes bars a party from testifying about another party's nonverbal *conduct* in mediation. (See *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*, *supra*, 26 Cal.4th at pp. 13-14 [Evid. Code, § 1121 "prohibits the mediator, but not a party, from advising the court about *conduct* during mediation that might warrant sanctions"]; see *id.* at pp. 17, 18.) It would therefore be open to Frederick in any future proceeding to prove that Eric freely handed the jewels to him. An executor who accused a beneficiary of conversion under such circumstances would be inviting sanctions if not civil liability. And a recipient who attempted, based on the naked fact of transfer, to characterize the transaction as a gift rather than a distribution, would invite at least ridicule.

IV. Due Process

Frederick also alludes to the Supreme Court's recognition that statutory limitations on the admissibility of statements in mediation may be compelled to give way where their application would offend principles of due process. Specifically, the court discussed without disapproval a case in which a juvenile court was held to have erred by categorically barring disclosures by a mediator that were offered to impeach the testimony of an alleged victim in a delinquency matter. (*Foxgate Homeowners' Association, supra*, 26 Cal.4th at pp. 15-16, discussing *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155.)

This concept has no apparent application here. Minors in delinquency proceedings are entitled to heightened due process protections comparable to those in criminal

proceedings. (See *In re A.G.* (2010) 186 Cal.App.4th 1454, 1467, quoting *In re Jesse P.* (1992) 3 Cal.App.4th 1177, 1182, and citing *In re Gault* (1967) 387 U.S. 1, 30-31 [“With exceptions not pertinent here, it is ‘[w]ithout a doubt [that] a juvenile in a delinquency matter is entitled to the same constitutional guarantees of due process as those accorded an adult criminal defendant.’ ”]; *In re M.V.* (2014) 225 Cal.App.4th 1495, 1528 [“The due process right to effective assistance of counsel extends to minors in juvenile delinquency proceedings.”]; *In re Christopher F.* (2011) 194 Cal.App.4th 462, 468 [“a child subject to delinquency proceedings has a due process right to a competency hearing”].) The court in *Rinaker, supra*, 62 Cal.App.4th at pages 165 to 167, reviewed these heightened protections in depth before concluding that the juvenile’s due process interest in effective impeachment overcame the statutory exclusion of statements in mediation proceedings. As the court observed, many state rules of evidence have been held to give way in similar circumstances. (*Id.* at pp. 166-167.) That hardly means that the same rules lose their force in civil litigation. Frederick cites no case, and we are aware of none, where the due process “exception” has been applied to a garden variety civil dispute such as this one. Nor does he make any attempt to explain how the exclusion of the evidence at issue renders this proceeding so fundamentally unfair as to suggest a violation of due process. As far as we can see, his position is identical to that of any other person whose hoped-for contract is incapable of enforcement because it fails to conform to statutory requirements governing contracts of that type.

In sum, we see no indication of a due process violation that might warrant a departure from literal application of the statutes.

DISPOSITION

The order denying enforcement of the putative settlement agreement is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.