NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Marriage of LAWRENCE KAUFMAN and VIRGINIA KING SUPPLE. LAWRENCE KAUFMAN, Appellant, v. VIRGINIA KING SUPPLE, Respondent.	B109039 (Super. Ct. No. WED052764) (consolidated with No. SC038079) COURT OF APPEAL - SECOND DIST. FILED DEC 22 1998 JOSEPH ... Clerk Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Bobbi Tillmon, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Modified, and as modified, affirmed.

Bruce Adelstein, for Appellant.

Lance S. Spiegel, for Respondent.

Lawrence J. Kaufman (Lawrence) appeals the judgment of dissolution of his marriage to Virginia King Supple (Virginia). [1]

The essential issue presented is whether the trial court properly calculated the value of Lawrence's 60 percent interest in the family residence.

As explained below, under the parties' agreement, Lawrence is entitled to 60 percent of the $285,000 fair market value of the property, or $171,000, rather than 60 percent of the $150,000 equity in the property, which amounted to $90,000. The judgment shall be modified accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

Lawrence and Virginia were married on February 29, 1988. At the time, Lawrence was employed by TRW as a computer specialist.

In October 1988, Lawrence purchased the subject real property, a five-bedroom house in Culver City, for $398,000. Lawrence sold other real property he owned before his marriage and used about $243,000 of his separate property funds for the down payment. Lawrence, Virginia, his two children from a previous marriage, and her two children from a previous marriage, moved into the house.

By 1989, marital problems developed and in mid-1989, Virginia concluded the marriage had broken down irretrievably. In November 1989, the parties began sleeping in separate bedrooms. They continued living together for financial reasons and to avoid unsettling their families. They shared the common household expenses, such as utilities, but otherwise maintained separate finances.

On February 23, 1990, Virginia filed a petition for dissolution of marriage. In the petition, Virginia listed November 9, 1989, the date they started sleeping in separate bedrooms, as the date of separation.

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1 We refer to the parties by their first names for purposes of clarity and not out of disrespect. (See *In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1; *Askew* v. *Askew* (1994) 22 Cal.App.4th 942, 947, fn. 6.)

On January 1, 1992, Lawrence was laid off from his job at TRW. Virginia continued to be employed at UCLA At the time of trial, Virginia's annual salary was $49,500 and she also received an average of $10,000 a year from a family trust.

1. The 75/25 agreement.

Lawrence's unemployment required him to reduce his expenses. On December 19, 1991, shortly before the effective date of Lawrence's layoff, he and Virginia drafted and executed a two-page agreement (the 75/25 agreement) pertaining to the subject real property. [2]

In this agreement, the parties stipulated the current value of the house was $420,000, that the balance owing on the home loan was $162,000, and that title to the property was in Lawrence's name. Under the agreement, Lawrence sold Virginia a 25 percent interest in the $420,000 property in exchange for her assuming $105,000 of the $162,000 loan balance.

The 75/25 agreement provided that if the house were sold, Lawrence and Virginia would share in the profit, defined as "the selling price less the closing costs," in the percentages of 75 percent and 25 percent, respectively, and "[e]ach party will use his/her profit to pay off his/her respective share of the loan balance."

On January 2, 1992, in accordance with the 75/25 agreement, Lawrence executed a grant deed to the subject property, conveying "to LAWRENCE . . . , as to an undivided 75% interest, and VIRGINIA . . . , as to an undivided 25% interest; Husband and Wife as Tenants in common."

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[2] Because the copy of the 75/25 agreement which was presented to the trial court as exhibit 3 was unsigned, the trial court indicated it would not admit the document into evidence, although it would hear testimony regarding said agreement. However, the parties later stipulated the 75/25 agreement had in fact been signed on December 19, 1991.

2. <u>The 60/40 agreement.</u>

Lawrence remained unemployed and in November 1992, the parties negotiated a new agreement, hereafter the 60/40 agreement, which superseded the 75/25 agreement. The new agreement stated in relevant part: "Currently the house is titled to [Lawrence] (75%) and [Virginia] (25%) and this agreement will give [Virginia] 40% interest in the house (with the remaining 60% to Larry). The value of the house is, by agreement, $420,000. *The 40/60 split is based on [Virginia] assuming the balance of the loan on the house, effective January 1, 1992.* The loan is for $161,614.79. Furthermore, we applied for a new loan which was approved on January 8, 1992. The new loan has a much better interest rate. That new loan has the added cost of $5,475.42 . . . . Although this agreement is being signed in November 1992, the effective date is January 1, 1992. We are legally separated as we filed the divorce papers on Feb. 23, 1990 . . . ." (Italics added.)

The 60/40 agreement provided if the property were sold, the profit or loss, defined as the selling price of the home less closing costs, would be split between Lawrence and Virginia on a 60 percent/40 percent basis, respectively. "If both [Lawrence] and [Virginia] still own the house when it is sold, then the profit/loss will be split on a 40%/[Virginia] - 60%/[Lawrence] rate. The profit/loss is equal to the selling price less the closing costs (such as realtors fees, inspection fees, etc.)"

The parties executed the new agreement and had it notarized on November 21, 1992.

Pursuant to the 60/40 agreement, the parties executed and recorded an interspousal transfer deed conveying an undivided 60 percent interest to Lawrence and an undivided 40 percent interest to Virginia, as tenants in common. In addition, pursuant to the agreement, Virginia made the mortgage payments.

On March 29, 1994, Virginia filed an amended petition for dissolution. In November of that year, Virginia stopped making loan payments, and the following month she moved out of the house.

3. Lawrence's breach of contract action.

In September 1995, Lawrence filed an action against Virginia for breach of the 60/40 agreement, alleging, inter alia, Virginia failed to make the loan payments required by the contract.

By stipulation, the contract action was consolidated with the marital dissolution proceeding.

4. Evidence re interpretation of the 60/40 agreement.

By the time of trial, the value of the property had declined from $420,000 to $285,000, the property had fallen into foreclosure, and the loan balance was approximately $135,000.

Various issues were litigated at trial, including the date of separation and Lawrence's claim for spousal support. With respect to the interpretation of the 60/40 agreement, the evidence is summarized below.

a. Lawrence's interpretation: Virginia was entitled to 40 percent of the sales price and she was obligated to pay the entire loan balance.

Lawrence testified his understanding of the 60/40 agreement was that he would receive 60 percent of the total sales price, Virginia would receive 40 percent of the total sales price, and because she had assumed the obligation to make all the payments on the loan, she would be solely responsible for paying off the loan. Lawrence relied on the following language in the agreement: "The 40/60 split is based on [Virginia] assuming the balance of the loan on the house, effective [January] 1, 1992."

Lawrence explained, "If the house depreciated in value, Virginia was going to share in the loss; and if it appreciated, she was going to be sharing in the profit of the house."

Thus, hypothetically, if the house would have been sold for $420,000 (its value at the time the parties executed the 60/40 agreement), and assuming there were no closing costs, Lawrence would have received 60 percent of the sales price, or $252,000 (just slightly more than his $243,000 separate property contribution to the down payment). Virginia, in turn, would have received 40 percent of the sales price, or $168,000, of which $167,000 would have gone to pay off the mortgage, leaving Virginia with the net sum of $1,000. Thus, Lawrence explained, Virginia wasn't paying anything for her 40 percent interest in the $420,000 property, other than the assumption of the obligation on the loan.

Had the property appreciated in value, as the parties contemplated, Virginia would have shared in the appreciation. Had the value risen to $500,000, Lawrence's 60 percent share under the agreement would have given him $300,000. Virginia, in turn, would have received 40 percent of the sales price, or $200,000, and after paying the $140,000 loan balance, she would have netted $60,000.

On the other hand, if the house were to sell for $285,000, Lawrence's 60 percent share of the sales price would entitle him to $171,000. As for Virginia, her 40 percent share would entitle her to $114,000, and she would still be obligated to come up with additional monies to pay off the $140,000 loan balance. (Under this scenario, Virginia's loss would amount to $26,000, while Lawrence would lose $72,000 of his $243,000 separate property contribution.)

Lawrence further testified he was unaware that unless a party has made a written waiver of the right to reimbursement, the party is entitled to reimbursement for the party's contributions to the acquisition of the property to the extent the party traces the contribution to a separate property source. [3]

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3 Family Code section 2640 provides in relevant part: "(b) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party

b. <u>Virginia did not urge a contrary interpretation of the 60/40 agreement and simply argued the agreement was unenforceable.</u>

Virginia did not testify to an alternative interpretation of the agreement.

Instead, Virginia took the position the agreement was unenforceable under various theories. Her counsel argued, inter alia, the 60/40 agreement was invalid for lack of consideration, and also due to mutual mistake of law, because at the time the parties entered into the 60/40 agreement, they both were unaware of the right to reimbursement for separate property monies used to acquire community property.

The trial court inquired into Virginia's expectations with respect to the division of proceeds in the event the property were sold. Virginia's counsel took the position that because of Lawrence's statutory right to be reimbursed for his separate property contribution toward the acquisition, "she will receive none of the proceeds. [¶] [T]he proceeds are based upon the present fair market value. [¶] [T]he proceeds will not allow her to receive anything. [T]hey will be 100 percent used to reimburse the separate property interest. [¶] It is our position what we are going to request that the court appoint a receiver to have the property sold. Because I don't believe that [Lawrence] will cooperate. [¶] We need it sold because . . . it is economically in the interest for everybody to avoid having the house go into foreclosure. And [Lawrence's] testimony is that he is not going to do that on his own."

Thereafter, Virginia's counsel stipulated "if the court finds that there has not been a waiver [by Lawrence] of right of reimbursement of the separate property interest . . . as of the date the purported agreement was entered into in 1992 and as of the present time, [Virginia] will have no right to any portion of the proceeds from the house whether

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shall be reimbursed for the party's contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source."

valued at . . . the time of the agreement, [$]420,000 or the $285,000 figure that has been referred to today."

5. Trial court's ruling.

The trial court rejected Virginia's contention the contract was unenforceable and it held the 60/40 agreement was valid and binding.

In an extensive statement of decision, the trial court found Virginia had acquired a 40 percent in the subject property "pursuant to their agreement, by assuming the entire mortgage on this property which has been refinanced in approximately January of 1992." The trial court further found the property was worth approximately $285,000 at the time of trial and the balance on the loan was approximately $135,000. Thus, the equity in the property was $150,000.

The trial court found Virginia's 40 interest in the equity was $60,000 and Lawrence's share 60 percent share was $90,000. Thus, the trial court interpreted the contract to mean the $150,000 *equity* in the property was to be divided on a 60/40 basis, contrary to Lawrence's contention that the $285,000 value of the property was to be divided on a 60/40 basis with Virginia responsible for paying off the entire loan out of her 40 percent share. The trial court's rationale, which no one had argued, was that "[s]ince the property was encumbered by a deed of trust to the mortgage lender for which they were each liable, the reasonable interpretation is that each party owned his or her respective interest subject to the mortgage lien *and their relative interests were their share of the equity*." (Italics added.)

The trial court awarded possession and ownership of the property to Virginia. In this regard, the judgment states: "The Court awards the possession and ownership of said real property to [Virginia] and orders [Virginia] to pay the mortgage payments."

To buy out Lawrence's interest, the trial court ordered Virginia to pay Lawrence $90,000 for his 60 percent share of the $150,000 equity in the property. The trial court also directed Virginia to pay Lawrence $25,856, representing the sum he paid on behalf of Virginia's mortgage obligation. Thus, the judgment of dissolution, filed November 12, 1996, directs Virginia to pay Lawrence the total sum of $115,856.

Lawrence filed a timely notice of appeal from the judgment.

CONTENTIONS

Lawrence contends: the trial court miscalculated the value of his interest in the property; under the unambiguous contract, Virginia assumed the sole responsibility for paying off the loan; and even assuming the contract is ambiguous, all extrinsic evidence shows that Virginia assumed the sole responsibility for paying off the loan. Therefore, according to Lawrence, he is entitled to $171,000, not $90,000, for his 60 percent share of the $285,000 property.

DISCUSSION

1. Standard of appellate review.

Our review is governed by well-settled principles.

"The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, 'An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], *where there is no conflict in the evidence* [citations] or a determination has been made upon incompetent evidence [citation].' [Citations, fn. omitted.]" (*Parsons* v. *Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866, italics added.)

2. Trial court properly received extrinsic evidence to interpret the contract.

As a preliminary matter, we observe the 60/40 agreement is not a model of clarity. The earlier 75/25 agreement specifically provided that if the house were sold, Lawrence and Virginia "will use his/her profit to pay off his/her respective share of the loan balance." In contrast, the 60/40 agreement did not specify how the loan balance would be paid in the event of sale.

Lawrence takes the position it was unnecessary to include such a provision in the 60/40 agreement because in said agreement, Virginia became entirely responsible for the loan, and therefore there was no need to specify how the loan would be repaid. While Lawrence's position is arguable, we cannot say as a matter of law the 60/40 agreement is clear on its face. Therefore, the trial court properly received extrinsic evidence to interpret the 60/40 agreement.

3. Because the extrinsic evidence is not in conflict, the question is one of law.

As set forth in some detail above, Lawrence testified his understanding of the 60/40 agreement was that he would receive 60 percent of the total sales price, Virginia would receive 40 percent of the total sales price, and because she had assumed the obligation to make all the payments on the loan, she would be solely responsible for paying off the loan. Lawrence relied on the following language in the agreement: "The 40/60 split is based on [Virginia] assuming the balance of the loan on the house, effective [January] 1, 1992."

Lawrence explained, "If the house depreciated in value, [Virginia] was going to share in the loss; and if it appreciated, she was going to be sharing in the profit of the house."

Thus, hypothetically, if the house would have been sold for $420,000, Lawrence would have received 60 percent of the sales price, or $252,000, and Virginia, in turn, would have received 40 percent of the sales price, or $168,000, from which she would be responsible to pay off the balance on the loan. However, the property's value had fallen to $285,000. Thus, Lawrence's 60 percent share of the sales price would entitle him to $171,000, and Virginia's 40 percent share would entitle her to $114,000. Therefore, Lawrence explained she would have to come up with additional monies to pay off the loan balance.

As indicated, Virginia did not testify to an alternative interpretation of the agreement. Instead, Virginia took the position the agreement was unenforceable, and because Lawrence had a right to be reimbursed for his separate property contribution toward the acquisition of the property, "she [would] receive none of the proceeds." Virginia merely sought the appointment of a receiver to have the property sold in order to avoid a foreclosure.

In sum, Virginia did not present any extrinsic evidence to controvert Lawrence's interpretation of the 60/40 agreement. Because "there is no conflict in the extrinsic evidence in the present case we must make an independent determination of the meaning of the contract." (*Parsons, supra*, 62 Cal.2d at p. 866.)

4. <u>Trial court erred in interpreting the 60/40 agreement as giving Virginia a 40 percent share in the equity in the property.</u>

As indicated, Lawrence's interpretation of the 60/40 agreement was that he would receive 60 percent of the total sales price, Virginia would receive 40 percent of the total sales price, and because she had assumed the obligation to make all the payments on the loan, she would be solely responsible for paying off the loan.

Virginia did not testify to an alternative interpretation of the 60/40 agreement.

Because the extrinsic evidence was not in conflict, there is no substantial evidence to support the trial court's interpretation of the 60/40 agreement, namely, that Lawrence and Virginia would share in the *equity* in the property on a 60/40 basis, after the loan had been paid off.

The trial court's rationale, which neither party had argued, was that "[s]ince the property was encumbered by a deed of trust to the mortgage lender for which they were each liable, the reasonable interpretation is that each party owned his or her respective interest subject to the mortgage lien *and their relative interests were their share of the equity*." (Italics added.) This was an irrelevant consideration. Irrespective of both parties being liable to the lender on the loan, Lawrence and Virginia had agreed that as between themselves, their respective interests in the property were 60 percent and 40 percent, and that Virginia would be solely responsible for the loan obligation.

5. The correct amount to which Lawrence is entitled pursuant to the 60/40 agreement.

As indicated, the trial court awarded possession and ownership of the property to Virginia. In this regard, the judgment states: "The Court awards the possession and ownership of said real property to [Virginia] and orders [Virginia] to pay the mortgage payments." At that juncture, the property had a value of $285,000 and the balance on the loan was $135,000, so that there was $150,000 in equity in the property. To buy out Lawrence's interest, the trial court ordered Virginia to pay Lawrence $90,000 for his 60 percent share of the $150,000 *equity* in the property.

However, as discussed, under the 60/40 agreement Lawrence is entitled to 60 percent of the property's value of $285,000, which amounts to $171,000. The judgment shall be modified accordingly.

DISPOSITION

With respect to the amount payable to Lawrence, paragraph 6 of the judgment is modified to provide as follows: "To equalize the division of property, Virginia shall pay to Lawrence the sum of $171,000, representing 60 percent of the $285,000 fair market value of the subject property at the time of judgment. In addition, Virginia owes

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Lawrence $25,856 for mortgage payments she failed to make. Thus, the sum Virginia is obligated to pay Lawrence under the judgment is $196,856." As modified, the judgment is affirmed.

Each party to bear respective costs on appeal.

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KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.

Exhibit 16