Filed 7/26/12 Corlin v. MacInnis CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ADAM CORLIN, Plaintiff and Appellant, v. CARL MACINNIS, Defendant and Appellant.	B232763 (Los Angeles County Super. Ct. No. SC101662)

APPEAL from a judgment of the Superior Court of Los Angeles County. Linda K. Lefkowitz, Judge. Affirmed.

Law Offices of Alan J. Carnegie and Alan J. Carnegie for Plaintiff and Appellant.

Law Office of Martin L. Horwitz, Martin L. Horwitz and Bradley A. Keyes for Defendant and Appellant.

Carl MacInnis (MacInnis) appeals from a final judgment entered on respondent and cross-appellant Adam Corlin's (Corlin) complaint against MacInnis for (1) imposition of equitable lien and constructive trust, (2) unjust enrichment, (3) common count for money due and owing, (4) common count for quantum meruit, (5) declaratory relief, and (6) partition. The trial court entered judgment for Corlin after a bench trial on the second, third, and fourth causes of action (the common counts).

MacInnis appeals from the judgment against him. Corlin cross-appeals on the ground that the trial court erroneously reduced his award by 50 percent. We affirm the judgment in full.

CONTENTIONS

MacInnis's appeal

MacInnis contends that the trial court applied the wrong statute of limitations to Corlin's common counts. Specifically, despite its finding that the first, fifth, and sixth causes of action were barred by the two-year statute of limitations found in Code of Civil Procedure section 339,[1] MacInnis argues, the trial court erroneously applied the three-year statute found in section 338 to the second, third, and fourth causes of action.

McInnis further argues that, even if the three-year statute of limitations found in section 338 did apply, the court erred in determining that the second, third, and fourth causes of action did not begin to run until August 2006.

Finally, McInnis argues that the trial court erroneously based its statute of limitations decision on the theory of mistake.

Corlin's cross-appeal

In his cross-appeal, Corlin argues that the trial court erred in reducing the final judgment by half in consideration of his former wife's community property interest.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

FACTUAL BACKGROUND

At all times pertinent to this appeal, Corlin was married to MacInnis's daughter, Rosalie Corlin (Rosalie).[2] Rosalie Corlin's mother, Irene MacInnis, owned and resided in the property located at 3030 Steiner Avenue, Santa Monica, which consisted of a small single-family bungalow with a small guest house (the Steiner property). Upon Irene MacInnis's death, the property passed to MacInnis.

Rosalie is MacInnis's only living child. In late 2002 or early 2003 MacInnis made an oral gift of the Steiner home to Corlin and Rosalie. The couple moved in and spent more than $164,000 improving the residence and grounds. Having viewed photographs showing the improvements to the home, the court found the change "astonishing," comparing the change as that of a "'frog' of a house" being transformed into a '"prince.'" The court explained:

> "The exterior of the residence is now surrounded by a stylish wood and stucco wall, despite the clearly 'pocket' size of the lot, the landscaping accommodates a children's play area, an isolated area for Rosalie's yoga needs, a variety of cement, decomposed granite and lawn areas, trellised patio covers, a stunning blue-tiled exterior shower outside the rear building now occupied by [MacInnis]. The interior has entirely new windows, paint, air conditioning, new and high-grade appliances, wood flooring, a stylish wooden bench for seating in the dining area. The rear building, originally without any kitchen facilities, now has a fully operable 'kitchenette' and exterior fully tiled shower. Frankly, looking at the visual changes measured against the available descriptions of the residence prior at the outset, it requires no great real estate expertise to opine that this property has been greatly improved in value."

It was undisputed that in 2002, Corlin demanded that MacInnis convey title to the property and was refused. However, between 2002 and 2005, Corlin and Rosalie continued to discuss the transfer of title approximately 5 to 10 times. It is also undisputed that Corlin expressly raised the issue of transfer of title in 2005 because he needed to refinance the property in order to make improvements. MacInnis refused to

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[2] Rosalie Corlin will be referred to by her first name to avoid confusion. No disrespect is intended. Corlin and Rosalie are sometimes referred to as "the Corlins."

transfer title at that time. Corlin testified that he believed MacInnis's refusal to transfer title to him in 2005 meant that he was "'going back on his offer to gift the property.'"

In April 2008, due to a marital dispute, Corlin was locked out of the property. At that time the marriage effectively ended, and Corlin and Rosalie are now in the process of dissolving their marriage. While there was no evidence that the Steiner property was ever transferred to the Corlins, nor evidence of any legal obligation to do so, from the outset of their entry onto the property up until April 2008, both Corlin and Rosalie had an expectation that they would remain as residents and that the property would become Rosalie's upon MacInnis's death. Thus, the trial court concluded that Corlin had a reasonable expectation that the Steiner home would be occupied by his family and eventually become the property of his spouse.

Rosalie now resides at the Steiner property with the couple's two minor children, while MacInnis occupies the guest house.

According to a spreadsheet submitted by Corlin, he spent a total of $164,171.71 on improvements to the Steiner property between 2002 and 2007. The last entry charged to the Steiner property was a plumbing expenditure dated January 23, 2007. However, the court found that this expenditure was "more consistent with regularized and routine repair than remodeling." The court considered three items for landscaping dated August 7, 2006, to be the last expenditures consistent with Corlin's testimony regarding his property enrichment efforts and thus the last entry for purposes of measuring accrual of the statute of limitations.

The trial court found that it was clear from photographs of McInnis's visits with his grandchildren, and comments regarding his observations of the improvements, that MacInnis was aware of the ongoing construction and improvements to the home and did "virtually nothing to stop it."

PROCEDURAL HISTORY

Corlin filed this lawsuit against MacInnis and Rosalie on February 6, 2009. He alleged causes of action for (1) imposition of equitable lien and constructive trust over

real property, (2) unjust enrichment, (3) money due and owing, (4) quantum meruit, (5) declaratory relief, and (6) partition.

Before trial, MacInnis moved for summary judgment or, in the alternative, summary adjudication. The court granted summary adjudication in favor of MacInnis on the first cause of action for imposition of constructive trust; the fifth cause of action for declaratory relief; and the sixth cause of action for partition and sale of real property. The court first explained that the applicable statute of limitations for a cause of action is determined by the nature of the right sued upon or the principal purpose of the action. The court then indicated that there are "various 'primary interests'" at stake in this lawsuit depending on the cause of action alleged. While the causes of action for unjust enrichment and money due and owing appeared to rest primarily on Corlin's primary interest in the return of moneys expended, in other respects the allegations were based on oral contract. Because the "gravamen" of these causes of action was an oral contract, the court found that the two-year statute of limitations found in section 339 was applicable.

The trial court reasoned that "the date of the alleged gift of the property [was] some time in March, 2002, shortly after the death of Rosalie's mother Irene." Further, Corlin himself testified that "by 2005 he believed that [MacInnis] was 'going back' on his 'offer.'" Because the instant action was filed on February 6, 2009, the court concluded "[t]he two-year statute of limitations thus ran on [Corlin's] causes of action to impose a trust, . . . the Fifth Cause of Action seeking declaratory relief on that basis and partition, Sixth Cause of Action."[3] The court allowed the common count causes of action for unjust enrichment, money due and owing, and quantum meruit to proceed to trial.[4]

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[3] The court also granted summary adjudication as to the second cause of action for unjust enrichment "as pleaded" because it alleged a constructive trust. In its order granting summary adjudication, the trial court specified that MacInnis's motion for summary adjudication of the second cause of action for unjust enrichment was granted only to the extent that it sought a constructive trust over the property. The cause of action for unjust enrichment was otherwise permitted to proceed to trial.

[4] There was no direct claim against Rosalie for the common counts remaining in the action. Therefore these claims proceeded solely against MacInnis.

The matter was tried to the court. The court awarded judgment in favor of Corlin against MacInnis in the sum of $52,416.

As to the statute of limitations for the three causes of action, the court noted that there is a three-year statute of limitations for unjust enrichment causes of action grounded in fraud or mistake. (§ 338; *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 346 (*Dintino*).) The court explained its conclusion that "from the outset of Rosalie and [Corlin's] entry on the property and up to April, 2008, when [Corlin] was 'locked out' as the marriage effectively ended, there was an expectation by both [Corlin] and Rosalie that they could remain as residents and that the property would become Rosalie's upon [MacInnis's] death." Thus, until April 2008, Corlin had the reasonable expectation that the Steiner property would be occupied by his family and eventually become the property of his spouse. The court concluded that "[t]his expectation, while ultimately mistaken . . . was reasonable in terms of the benefits he conferred upon the property."[5]

The court found that the matter fell within the three-year statute of limitations found in section 338, which includes "[a]n action for relief on the ground of fraud or mistake." (§ 338, subd. (d).) Where a cause of action is grounded on mistake, it "is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the . . . mistake." (*Ibid.*)

The court concluded that the last items which appeared consistent with the improvement efforts were dated August 7, 2006. Using this as the "last entry" for the purposes of measuring accrual of a three-year limitations period on a "mistake" theory, and using the "lockout date" of April 2008, the court concluded that "even a two-year limitations period is sufficient to permit the action to proceed."

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5 The court later noted that MacInnis never required the Corlins to pay rent at the Steiner property. The court found that although MacInnis never "gave" the property to the Corlins, his statements over time "may have reasonably, albeit mistakenly, led [Corlin] to believe that [MacInnis] had no intent to require the Corlins to move from the property."

After finding that the common counts were not barred, the court found that the value of the property had been substantially improved through Corlin's investment. The court further held that MacInnis was aware of the substantial improvements and did nothing to stop Corlin. After making some deductions from Corlin's statement of expenses, the court found him entitled to $104,832 on his claims.

However, despite Corlin's claims that he used his own separate property funds from an inheritance, the court found that Corlin was only entitled to his community property share of the money expended, and awarded him $52,416.

Notice of entry of judgment was filed and served on March 11, 2011. MacInnis filed his notice of appeal on April 29, 2011. Corlin filed his notice of cross-appeal on May 11, 2011.

DISCUSSION

I. MacInnis's appeal

MacInnis challenges the trial court's application of a three-year statute of limitations to the common count causes of action in Corlin's complaint. He further argues that the court erred in determining the commencement of the statute of limitations. Finally, he argues that the court erred in relying on the theory of "mistake" in determining that a three-year statute of limitation applied.

We discuss each of MacInnis's contentions separately below, and conclude that no error occurred.

A. Standard of review

Questions concerning whether an action is barred by the applicable statute of limitations are typically questions of fact. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.) But when "the relevant facts are not in dispute, the application of the statute of limitations may be decided as a question of law. [Citation.]" (*International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611-612.) The question of whether a trial court applied the correct statute under the facts before it is subject to de novo review. (*Board of Retirement v. Lewis* (1990) 217 Cal.App.3d 956, 964 ["The

construction of a statute and its application to a particular case are questions of law . . . subject to independent review on appeal"].)

B. The court did not err in applying a three-year statute of limitations

MacInnis argues that the trial court should have applied the two-year statute of limitations found in section 339 to Corlin's common counts. Section 339 applies generally to "[a]n action upon a contract, obligation or liability not founded upon an instrument of writing." MacInnis argues that Corlin testified at trial that MacInnis's obligation was not in writing. MacInnis points out that the trial court held that the two-year statute of limitations applied to Corlin's first, fifth, and sixth causes of action. MacInnis further argues that the trial court held that the "gravamen" of Corlin's claims is an oral contract, for which the applicable statute of limitations is two years. MacInnis contends that the trial court erred in failing to apply the two-year statute of limitations to the common counts, which were all premised on the alleged oral contract between MacInnis and the Corlins.

The trial court correctly noted that "'What is significant for statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct.' Rylaarsdam, supra, [Civil Procedure Before Trial, Statutes of Limitations (The Rutter Group)] at section 2:2, citing *Barton v. New United Motor Mfg., Inc.* (1996) 43 Cal.App.4th 1200, 1207." The court found that there were various primary interests at stake in this matter, depending on the particular cause of action alleged. As to the common counts, the court found that Corlin's primary interest was "return of moneys expended."

However, for the causes of action seeking an equitable lien, constructive trust, declaratory relief, and partition, the court noted that Corlin was focused on an oral agreement for the transfer of real property. In its discussion of these causes of action, the court noted that the "gravamen" of these claims was an alleged oral contract. The court found that alleged "gift" of the Steiner property was effected in March 2002, shortly after the death of Irene MacInnis. The causes of action based on the alleged March 2002 gift accrued in 2005, when Corlin believed that MacInnis was "going back" on his offer.

As to the common counts, the court recognized that claims founded upon a theory of unjust enrichment may proceed even in the absence of any enforceable contract theory. Thus, although the claims primarily based on an imminent transfer of title were barred under section 339, the remaining equitable claims were based on a theory that Corlin "'conferred a benefit upon [MacInnis] that [MacInnis] . . . knowingly accepted under circumstances that make it inequitable for [MacInnis] to retain the benefit without payment.'" The court found that "from the outset of Rosalie and [Corlin]'s entry on the property and up to April, 2008, when [Corlin] was 'locked out' as the marriage effectively ended, there was an expectation by both [Corlin] and Rosalie that they could remain as residents and that the property would become Rosalie's upon [MacInnis's] death." In other words, the court found the equitable claims based not on an oral promise to convey title right away, but on a reasonable expectation that the property would eventually belong to the Corlins simply because of the relationships among the parties.[6] The alleged oral gift made in 2002 never came to fruition, but nevertheless "there was no evidence that [Corlin] had any expectation other than that the Steiner home would be occupied by his family and eventually become the property of his spouse. This expectation, while ultimately mistaken, . . . was reasonable in terms of the benefits he conferred upon the property."

With this factual backdrop, the court found that the action did not accrue until April 2008, when the lockout occurred. At that time, the marriage "effectively ended" and Corlin lost any expectation that the Steiner property would ever be his. Corlin filed this action less than one year later, on February 6, 2009.

The trial court cited *Dintino* as support for its conclusion that section 338 provides a "three-year limitations period in unjust enrichment cases grounded in fraud or mistake." *Dintino* involved the mistaken reconveyance of an unpaid trust deed upon the borrower's house. The borrower sold the house, stopped making payments on the note, and was sued by the bank for breach of contract, unjust enrichment, and money lent. The trial court

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6 MacInnis's testimony confirmed that he intended to leave the Steiner property to Rosalie upon his death: "everything I have will go to [Rosalie] when I pass away."

granted the borrower's motion for summary adjudication on the bank's breach of contract cause of action, but denied his motion for summary adjudication on the bank's causes of action for unjust enrichment and money lent. (*Dintino, supra*, 167 Cal.App.4th at p. 338.) On appeal, Dintino contended that the trial court erred in applying a four-year statute of limitations based on written contract, and instead should have applied the three-year statute of limitations found in section 338.

The Court of Appeal agreed that the bank's cause of action for unjust enrichment was "a common law obligation implied by law based on the equities of a particular case and not on any contractual obligation. [Citation.]" (*Dintino, supra*, 167 Cal.App.4th at p. 346.) The bank's cause of action for unjust enrichment was based on its mistaken request for recordation of a reconveyance and did not arise out of a written contract. Accordingly, the four-year statute of limitations regarding actions based on written contracts did not apply. (*Id.* at p. 347.) The court agreed with Dintino, finding that: "[T]he applicable statute of limitations is section 338, subdivision (d), which provides a three-year limitations period for '[a]n action for relief on the ground of fraud or *mistake*.' (Italics added.) That subdivision further provides: 'The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' (§ 338, subd. (d).)" (*Ibid*.)

Here, Corlin's mistake was his expectation that the Steiner property would eventually be his, at least in part, based on his relationship with Rosalie. This mistake led Corlin to invest substantially in the Steiner property, leading to the unjust enrichment of MacInnis.

A claim for unjust enrichment is subject to the delayed discovery rule. (See, e.g., *Dintino, supra*, 167 Cal.App.4th at p. 350 ["We must determine when Bank actually, or reasonably should have, discovered its mistake that resulted in the unjust enrichment of Dintino"].) Under this rule, "[a] limitations period . . . accrues no later than the time the plaintiff learns the facts essential to a particular cause of action. [Citations.]" (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 941.) An essential fact in Corlin's unjust enrichment claim was that, contrary to his previous understanding, he would not

be able to reside in the Steiner property long-term. This error was one that Corlin operated under until April 2008. Because of this mistake, the trial court found section 338, subdivision (d), to be the applicable statute of limitations.[7] We find no error in the trial court's factual findings or legal reasoning.

C. The two-year statute does not apply under the theories advanced by MacInnis

MacInnis argues that *all* of Corlin's causes of action were dependent upon MacInnis's oral promise in 2002 to gift the property to the Corlins. MacInnis cites *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394-395 (*McBride*) for the proposition that "[a]common count is not a specific cause of action . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness . . . . When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable. [Citations.]"

The quote from *McBride* is inapplicable under the circumstances. The causes of action that the trial court determined were based on the alleged oral promise were those that sought title to, or constructive ownership of, the Steiner property.[8] The common counts, in contrast, sought a different remedy; specifically, "the amount expended to

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[7] *Century Indemnity Co. v. Superior Court* (1996) 50 Cal.App.4th 1115, cited by MacInnis for the proposition that "an action brought on equitable principles implied in the law . . . is . . . governed by the two-year statute of limitations prescribed in section 339" is distinguishable. (*Id.* at p. 1124.) In that case, there were no facts supporting a finding of mistake.

[8] Through his first and fifth causes of action, Corlin sought an equitable lien on the property and a judicial decree declaring that the defendants held title to the property as constructive trustees for his benefit. Through his sixth cause of action for partition and sale of real property, Corlin sought partition and disposition of the property based on defendants' refusal to honor "the agreement as alleged herein."

improve the Property."[9] Because the common counts were not used "as an alternative way of seeking the same recovery" (*McBride, supra*, 123 Cal.App.4th at pp. 394-395), *McBride* is inapplicable.

MacInnis cites law regarding the doctrine of quantum meruit. We also find this law inapplicable because the trial court did not make its award under a quantum meruit theory. Instead, throughout its statement of decision, the trial court focused on the theory of unjust enrichment grounded in fraud or mistake. The trial court found that Corlin and Rosalie were operating under the "expectation . . . that they could remain as residents and that the property would become Rosalie's upon [MacInnis's] death." The trial court further found that Corlin's investment in the Steiner property "greatly improved" the value of the property. Because the Corlins are in the process of dissolving their marriage and Corlin will not remain a resident of the Steiner property as he expected, MacInnis, who still owns the home and lives in the back house, has been unjustly enriched by Corlin's expenditures.

MacInnis also raises law applicable to a cause of action for open book account. He argues that a cause of action for open book account is subject to the two-year statute of limitations because the gravamen of the action is a breach of oral contract. As explained above, Corlin's common counts are not premised on the breach of MacInnis's alleged 2002 promise to give the house to the Corlins. Further, as the trial court specifically stated, "[t]here was no 'open book' account pleaded within the First Amended Complaint." Therefore we find this discussion irrelevant.[10]

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9 To the extent Corlin's second cause of action for unjust enrichment sought a constructive trust, it was summarily adjudicated against Corlin.

10 MacInnis also includes discussions of the law of "money had and received" as well as that of "account stated." Neither discussion is relevant here for the same reasons explained above regarding open book account. The trial court relied on a theory of unjust enrichment, concluding that Corlin made substantial improvements to the Steiner property based on his reasonable assumption that he would continue to occupy the Steiner property and that it would eventually become the property of his spouse.

The trial court's decision was based on unjust enrichment, not the 2002 oral gift of the property. Through the common counts, Corlin sought repayment of money that he put into the property -- not title to the property. A claim for unjust enrichment lies where, even in the absence of an oral contract, the plaintiff has "nonetheless . . . conferred a benefit on the defendant which the defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value. [Citation.]" (*Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 938.) Unjust enrichment is not subject to strict pleading requirements, but instead describes "'"a failure to make restitution under circumstances where it is equitable to do so."'" (*Id.* at p. 939.) The spirit behind the law of unjust enrichment "'is to apply the law "outside of the box" and fill in the cracks where common civil law and statutes fail to achieve "justice."' [Citation.]" (*Ibid.*) We find that the trial court correctly granted Corlin an award based on the theory of unjust enrichment, and applied the correct statute of limitations based on the facts of this case.

D. Any error was harmless as the action was brought within two years of the April 2008 "lockout"

We further find that even if the trial court erred in applying a three-year, rather than a two-year, statute of limitations, any such error was harmless because the action was brought within two years of the April 2008 lockout.

MacInnis insists that section 339 is the applicable statute of limitations. Section 339 imposes a two-year limitations period for "[a]n action upon a contract, obligation or liability not founded upon an instrument of writing . . . ." If Corlin, MacInnis and Rosalie were operating under an unwritten agreement that Corlin would be permitted to continue to reside in the Steiner property until MacInnis's death, and thereafter would continue to reside there as Rosalie's husband, that unwritten agreement was breached in April 2008 when Rosalie locked Corlin out of the property. The lawsuit was filed less than two years later, in February 2009. Thus, even applying a two-year statute of limitations under an oral contract theory, Corlin's complaint was timely as to the common count causes of action.

E. The court did not err in calculating the commencement of the statute of limitations

MacInnis argues that the trial court erroneously applied the "last entry" theory as the commencement date of the statute of limitations on all common count causes of action applying an August 2006 date as the last date that Corlin spent money to improve the property. MacInnis again argues that all causes of action, including the common counts, accrued in 2005 when MacInnis refused to transfer title of the property and Corlin knew that he was "going back on his offer to gift the property."

As set forth above, the trial court did not err in declining to find that the common counts accrued at the time that Corlin realized that MacInnis was not going to gift the property to the Corlins during MacInnis's lifetime. Instead, the court's decision was based on its factual finding that Corlin was operating under a reasonable expectation that he would continue to reside in the Steiner property and that his wife would inherit the property after MacInnis's death. Based on this factual finding, the court concluded that the common counts accrued at one of two different times. First, the court found that under a "more traditional unjust enrichment claim analysis," the last relevant expenditure was made on August 7, 2006. Further, the court found that, "using the 'lockout date' of April, 2008, even a two-year limitations period is sufficient to permit the action to proceed." Substantial evidence supports these factual findings regarding accrual of the statute of limitations.

F. The court did not err in concluding that Corlin's common counts were based on "mistake"

MacInnis argues that the theory of mistake was not an issue in the action below. Corlin never argued a theory of mistake -- in fact, MacInnis argues, Corlin specifically disavowed the theory of mistake, claiming instead that his common count causes of action were equitable claims.

MacInnis points out that he filed a motion to vacate the judgment, challenging the trial court's decision that a three-year statute of limitations applied on the ground of mistaken belief. MacInnis argued that "if there was a mistake, it should have been

discovered in 2005." The trial court denied MacInnis's motion. It acknowledged that MacInnis declined to turn over the house in 2005, but clarified that "I think his actions thereafter belied that view." The trial court also stated: "I have in the last go-around corrected the word 'mistake' because I did not mean it in its legal sense."

MacInnis poses the following question: if Corlin did not advance a theory of mistake, and the court did not use the term in its legal sense, how could the concept of mistake be used to determine that a three-year statute of limitations applied?

First, we note that the trial court found that the common counts could proceed even under a two-year statute of limitations. Second, at the time that the court expressed uncertainty about its use of the term "mistake" in its legal sense, the court described a factual scenario that would still allow the action to proceed under section 338, subdivision (d). The trial court stated: "I think everything that [Corlin] did toward that property was basically countenance by [MacInnis] and, in fact, encouraged by him. And I think to the extent that that conduct continued and he basically put hundreds of thousands of dollars into that house, he had some expectation that that was going to be a permanent place for him until, of course, the marriage itself collapsed."

In other words, the trial court found that through his actions, MacInnis encouraged Corlin to invest in the home and misled Corlin into believing that, despite the 2005 breach, MacInnis would ultimately make good on his promise. An intentional misrepresentation such as this would still permit application of section 338, which applies to "fraud or mistake." (§ 338, subd. (d).) The trial court summed up its finding as follows: "However you look at it, in my view, principles of quantum meruit and fairness require that [Corlin] get some of that money back."

The trial court's rulings and explanations allow for two factual scenarios: either the parties were operating under a mistaken belief about Corlin's future right to the property, or MacInnis was intentionally misleading Corlin into believing that MacInnis would eventually make good on his promise to gift the Corlins the property. Either way, section 338, subdivision (d) applies. No error occurred.

II. Corlin's cross-appeal

Corlin points out that the trial court specifically stated that the issues being litigated by Corlin and Rosalie in their separate, concurrent dissolution proceedings were not the subject of the present matter. The trial court stated: "Just so you understand, I have no intention of allocating money between the two of them." In its tentative decision, the trial court found that the sum of $104,832 represented the value of the benefits Corlin conferred on the Steiner property. Corlin argues that it was improper for the trial court to reduce that number by half based on Rosalie's community property interest.

The court ruled: "Despite [Corlin's] claims that separate property funds from an inheritance were utilized for his efforts, there was testimony that he deposited the sum of $191,000 into a joint bank account during the period of his marriage. It is also clear that Rosalie approved various expenditures and paid for them. Accordingly, and in light of the fact that Rosalie has been named as a party defendant, and that the two are in the process of dissolving their marriage, the Court finds that [Corlin] is only entitled to recovery of his community property share of moneys expended, and awards judgment to him in the sum of $52,416.00."

Corlin argues that there was no legal or factual basis for cutting the judgment amount in half, which, he claims, conferred a windfall on MacInnis at Corlin's expense. Further, Corlin argues, Rosalie may assert a one-half interest in the judgment, further diluting Corlin's recovery. Corlin cites no legal authority in support of his position.

We find that Corlin has forfeited this argument. Corlin did not object to the statement of decision, nor did he seek to have it amended or corrected. Corlin cites to no portion of the record where he raised this issue before the trial court. "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal. [Citations.]" (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST