Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-019476 05/07/2008

HON. EDWARD O. BURKE

CLERK OF THE COURT
L. Nixon
Deputy

MICHAEL S DRECKMAN MARC C CAVNESS

v.

SARAH IRWIN, et al. LISA J COUNTERS

MINUTE ENTRY

The court has had this matter under advisement and issues the following ruling.

The court finds the following facts.

1. Plaintiff, Michael S. Dreckman ("Mike") and Defendant-counterclaimant, Sarah Irwin ("Sarah") had a romantic relationship and lived together from December, 2001, until June, 2006.
2. In June, 2002, Mike and Sarah entered into a contract to purchase real property located at 75th Avenue and Medlock in Glendale, Arizona, which consisted of a residence (the "House") on slightly more than an acre of land for $184,000.00 (the "Property"). (Exhibit 2).
3. Mike conducted the negotiations for the Property through his brother-in-law, Troy Theall, a real estate agent.
4. When escrow closed title was taken in Sarah's name alone because she was able to qualify for a lower interest rate mortgage. (Exhibit 10). $9000.00 of the down payment on the purchase price was paid from money received from Mike's stepfather as a part of his subsequent purchase of a house to be built on Lot Z, which Mike agreed to build for him at cost.

5. Taking title in Sarah's name also allowed Mike to subdivide the property into three additional lots without declaring a formal subdivision and incurring the substantial cost of creating a subdivision.
6. Mike and Sarah agreed to divide the Property into four parcels, with the House on the western-most parcel ("Lot W") and three quarter acre lots to the east known for purposes of this litigation as "Lots X, Y, and Z."
7. No agreements concerning the Property were put into writing.
8. After improvements on the House increased its value so a new mortgage could be obtained encumbering only the westerly half of the original property, Sarah conveyed the easterly half of the original property to Mike by quit claim deeds, free of the mortgage lien. (Exhibits 15 and 16). Mike and Sarah both moved into and referred to the House on Lot W as "our house."
9. Sarah's grandfather originally was a co-mortgagor on the new mortgage that has since been discharged by another new mortgage in Sarah's name on Lot W only. Sarah and Mike both contributed to the mortgage payments during the time that they lived together.
10. Sarah also quit-claimed Lot X to Mike free of the mortgage lien. (Exhibit 20).
11. Mike constructed houses on Lots X, Y, and Z.
12. The value of Lots X, Y, and Z was at least $30,000.00 each at the times they were quit-claimed to Mike.
13. Lot X and the house on it were sold to Horatio Skeete and his wife, Teresa Sims for a profit of $56,851.92, which Mike retained for himself.
14. The house on Lot Y remains in Mike's name and is leased under Section 8 through the City of Glendale. The monthly rent exceeds the mortgage encumbering the property. Sarah claims that Mike has earned $22,000.00 from Lot Y since the parties' separation.
15. Mike constructed a house on Lot Z for his stepfather. He claims not to have made any profit on the sale of the house on Lot Z but he did receive $33,000.00 for the lot from his stepfather. If there was a "profit" on the sale of Lot Z, or the recoupment of overhead of Mike's construction company, Mike and/or his construction company kept it.
16. While the parties lived together they pooled most of their income and Sarah assisted Mike in his construction business, known as "Fast Forward", by doing its accounting and providing financing for it primarily through the use of her credit cards which were backed up by the $124,918.44 personal injury settlement she received on July 29, 2003. (Exhibit 24).
17. Sarah testified that had she and Mike married his name would have been added to the title to Lot W. Sarah also testified that she assumed that upon marriage her name would have been added to the title to Lot Y. Mike testified that he did not have that understanding.

18. The parties separated in June of 2006 and have not resumed their personal relationship. At that time Lot W was encumbered with a first mortgage in the sum of $172,156.00 (Exhibit 36) in Sarah's name only.
19. An appraisal of Lot W ordered by Mike opines that as of June 27, 2006, it had a value of $445,000.00. (Exhibit 35). Sarah testified that she believes Lot W is worth only $235,000.00
20. After the parties' relationship dissolved they disagreed about the ownership of Lot W.
21. On July 5, 2006, Mike's attorney, Noel J. Hebets sent Sarah a letter in which he said that the agreement between the parties was that they would own what became Lots W, X, and Z on a 50-50 basis and that Mike would own Lot Y. (Exhibit 78).
22. Mike now claims that in exchange for renovating the House he was to receive one-half of Lot W and Lots X, Y, and Z free and clear to develop.
23. Sarah claims that she was to be the sole owner of Lot W and, in exchange for financing the purchase of the original property and the free and clear conveyance of Lots X, Y, and Z to Mike, he was to renovate the House which was to remain her sole property.
24. Mike and Sarah have each tendered quit-claim deeds to the other for Lot W pursuant to A.R.S. § 12-1103(B). The deed Sarah tendered to Mike is for all of Lot W. The deed Mike tendered to Sarah is for an undivided one-half of Lot W.
25. Mike sued Sarah for breach of contract, the imposition of a constructive trust on Lot W, attorneys' fees under A.R.S. § 12-1103(B), partition of Lot W, and unjust enrichment.
26. Sarah denied the material allegations of Mike's complaint and counter-claimed for breach of contract on credit card debt, breach of contract for failure to complete the renovation of the House, quiet title to Lot W, attorneys' fees under A.R.S. § 12-1103(B), and unjust enrichment.
27. Sarah claims that Mike owes her $26,394.03 for credit card debt. Mike admits that he owes Sarah $10,790.00 for credit card debt.
28. Sarah claims that Mike owes her $10,643.67 for the cost of the completion of the renovations on the House. (Exhibit 109).
29. Mike claims that he put materials with a value of at least $35,075.35 into the House (Exhibit 31) and that the actual retail value of the renovations he made to the House is $138,000.00 (Exhibit 63). The court does not accept Mike's testimony that the value of the improvements he made to the House was $138,000.00. Evidence of the extent and value of his labor and any materials in excess of $35,075.35 is totally lacking.

RULING

1. While there is no written agreement or specific oral agreement between the parties, the court finds that there is an implied contract in fact between the parties which Sarah has proven by a

preponderance of the evidence. The court finds that the contract between the parties was that Sarah would finance the purchase of the Property, help Mike divide the Property into Lots W, X, Y, and Z, convey Lots X, Y, and Z to Mike free and clear of any mortgage and, in exchange, Sarah would have title to the House and Lot W and Mike would remodel the House. Mike breached the contract by not fully remodeling the House before moving out, but Sarah did not prove her damages caused by this breach by a preponderance of the evidence. Sarah is the sole owner of Lot W.

There is no implied-in-law contract based on the reasoning of Ponderosa Plaza v. Siplast, 181 Ariz. 128, 888 P.2d 1315, (App.1993).

An implied-in-fact contract may be proved by circumstantial evidence. USLife Title Co. of Arizona v. Gutkin, 152 Ariz. 349, 732 P.2d 579 (App. 1986). Sarah's testimony and the way the parties handled the business end of their relationship leaves no doubt in the court's mind that her version of the agreement is more plausible and constitutes a contract implied in fact for at least the following reasons:

A. Title to the Property was taken in Sarah's name alone.
B. Mike testified that Sarah's credit was better than his and it was easier to subdivide the Property into three additional lots if he was not on the title (by a "minor lot division").
C. Sarah is the only party who was ever at risk on any of the mortgages on the Property.
D. Sarah re-financed the mortgage on the Property twice so Mike could have title to Lots X, Y, and Z free and clear to develop in conjunction with his construction business.
E. Mike paid Sarah nothing for Lots X, Y, and Z.
F. Sarah substantially assisted Mike finance his construction business.
G. Mike alone had the right to receive the profits from the sale of the houses on Lots X, Y, and Z, which Sarah testified was in exchange for the "remodel of my home."
H. Mike received $33,000.00 upon the sale of Lot Z and $56,851.92 upon the sale of Lot X.
I. Mike testified that the house on Lot Y is his "own home" and he retains sole title to the house on Lot Y, which is leased to a tenant. Mike receives the rent from the tenant on Lot Y.
J. The House remodel was not complete when Mike moved out.
K. Sarah testified that had they married, title to the House and Lot would have been placed in both of their names. This agreement would not have been necessary if Mike was already a one-half owner of Lot W.

L. Prior to their separation Mike never asked to be placed on the title to Lot W, even after the minor lot division had been accomplished.
M. If the House was to be "our home", as Mike testified, he did not necessarily have to move out upon the parties' separation.
N. There was no evidence that Mike ever objected to Sarah's encumbering Lot W further with the $60,000.00 home equity loan to consolidate her debts after Mike moved out. A substantial portion of Sarah's debt was incurred to help Mike's construction business.
O. Sarah's testimony concerning the parties' agreement has been consistent throughout their relationship and in this litigation while Mike's position has varied materially.

2. Sarah has not been unjustly enriched.

> "Unjust enrichment occurs whenever a person has and retains money or benefits which in justice and equity belong to another…. Recovery under the theory of unjust enrichment requires five elements: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of justification for the enrichment and (5) an absence of a remedy provided by law." City of Sierra Vista v. Cochise Enterprises, Inc., 144 Ariz. 375, 381, 697 P.2d 1125 (App. 1984).

Mike was not impoverished because he received three building lots worth at least $90,000.00 from Sarah in exchange for his labor and materials in remodeling the House. He also lived in the House during the parties' relationship and therefore he was not impoverished by having made some of the mortgage payments while he lived there. Sarah was not enriched because she "paid" for the remodeling of the House by conveying the three lots to Mike free and clear while at the same time she is liable for the payment of the balance of their purchase price. She incurred a substantial amount of debt in financing Mike's business.

3. Lot W is not subject to a constructive trust.

> "A constructive trust is an equitable doctrine that prevents one person from being unjustly enriched at the expense of another. Chirekos v. Chirekos, 24 Ariz.App. 223, 224, 537 P.2d 608, 609 (1975). It "arises by operation of law and not by agreement or intention." Harmon v. Harmon, 126 Ariz. 242, 244, 613 P.2d 1298, 1300 (App.1980).
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> Because imposition of a constructive trust is an equitable remedy, "[t]here is no set or unyielding formula" courts use to impose them. Chirekos, 24 Ariz.App. at 224, 537 P.2d at 609. A court may impose a constructive trust "whenever title to property has been obtained

through actual fraud, misrepresentation, concealment, undue influence, duress or through any other means which render it unconscionable for the holder of legal title to continue to retain and enjoy its beneficial interest." Harmon, 126 Ariz. at 244, 613 P.2d at 1300.[FN2] Additionally, courts will impose constructive trusts if there has been a breach of fiduciary duty. French, 125 Ariz. at 15, 606 P.2d at 833; Raestle v. Whitson, 119 Ariz. 524, 528, 582 P.2d 170, 174 (1978); Restatement of Restitution § 160 cmt. d (1937)." Turley v. Ethington, 213 Ariz. 640, 643, 146 P.3d 1282 (App. 2006).

Because the court has found a contract implied in fact based on the parties' conduct, Sarah did not obtain title to the Property by any means that renders it unconscionable for her to retain it, and Sarah has not been unjustly enriched, there can be no constructive or resulting trust.

4. Mike is liable to Sarah for $10,790 in credit card debt based on his admissions at trial. Sarah is not liable to Mike for any sum.

5. Mike is liable to Sarah for her attorneys' fees under A.R. S. § 12-341.01 because the court has found a contract implied in fact and under A.R.S. § 12-1103(B).

Sarah shall submit a form of judgment confirming title to Lot W in her name alone and for damages in the sum of $10,790.00, and an application for attorneys' fees.