DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARIELLA HART, a single woman, Plaintiff/Appellant, v. LIESELOTTE HART, an incapacitated person, DANIEL G. STUBBS, Conservator for the Estate of Lieselotte Hart, Defendants/Appellees.	1 CA-CV 09-0618 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. CV-2008-7128

The Honorable Randolph A. Bartlett, Judge

REVERSED AND REMANDED

Harvey R. Jackson Attorney for Plaintiff/Appellant	Lake Havasu City, AZ
Bruno, Brooks & Goldberg, P.C. By Robert H. Brooks Attorneys for Defendants/Appellees	Kingman, AZ

K E S S L E R, Judge

¶1 Appellant, Mariella Hart ("Daughter"), appeals from a grant of summary judgment for the defendants and the denial of a motion for reconsideration or new hearing. On appeal, Daughter argues that her claims are not barred by the statute of frauds, statute of limitations, and/or the doctrine of laches, as the defendants assert. We hold that the Appellant's claims are not barred as a matter of law by the statute of limitations or laches. We further hold that the court erred in granting summary judgment when the evidence could reasonably support the imposition of a constructive trust and an exception to the statute of frauds. Accordingly, we reverse the grant of summary judgment and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 In 1981, Appellee Lieselotte Hart ("Mother"), and her husband, Jacob Hart (Daughter's "Parents") purchased a residence in Lake Havasu City, Arizona, taking title by joint deed. Daughter contributed to her parents $7,000.00 or $8,000.00 she received from a car accident settlement toward the purchase price of that property. Daughter stated in her affidavit that her parents told her that she would ultimately own the house

[1] We view the evidence in the light most favorable to Daughter, who opposed the defendants' motion for summary judgment. *Unique Equip. Co., Inc. v. TRW Vehicle Safety Sys., Inc*., 197 Ariz. 50, 52-53, ¶ 5, 3 P.3d 970, 972-73 (App. 1999).

although her name would not be on the deed. Daughter claims that her father stated something to the effect of "Don't worry, it will go to you anyway."

¶3 In 1989, Daughter received lottery winnings in the approximate amount of $137,741.00 and loaned $55,000.00 to her parents to invest in a company, a company that ultimately went into bankruptcy or receivership. Daughter asserts that her parents received $55,000.00 back in the bankruptcy, but did not reimburse her. She claims that her father told her reimbursement would be "taken care of" because she would eventually inherit or own the Lake Havasu property.

¶4 In 2005, Jacob Hart died, and Mother became less able to care for her affairs. Daughter contacted an attorney seeking to be Mother's registered caregiver. During that consultation, Mother indicated she wanted the Lake Havasu property to go to Daughter; however, the attorney opined that Mother was likely not competent to change the terms of an existing trust.[2] Daughter claims the first time she realized that she may not inherit the house was in 2006.

¶5 In 2007, Mother was declared incompetent, and Daughter filed a Petition for Substituted Judgment in the Conservatorship.[3] According to Daughter, this created a

[2] No trust or will is in the record on appeal.
[3] There is no explanation of this document in the record.

potential conflict of interest since Daughter was seeking interest in the Lake Havasu Property. Thus, Daniel G. Stubbs ("Stubbs") was appointed as conservator of Mother's estate. In May 2008, Daughter made the first demand upon Stubbs for the property, but her demands were not successful.

¶6 In June 2008, Daughter filed a complaint against her mother and Stubbs. The complaint consisted of five counts: constructive trust (Count I); quiet title (Count II); estoppel (Count III); breach of contract (Count IV); and specific performance (Count V). As to all counts, Daughter demanded the conveyance of the property. As to Count I, Daughter alternatively demanded the imposition of a constructive trust, and as to Count IV, Daughter alternatively demanded the sums of $8,000.00 and $55,000.00.

¶7 It is undisputed that Daughter had been using the property and paying the property taxes as far back as 2006 under the assumption that the property would become hers. Daughter also submitted declarations of five individuals, friends and acquaintances of Mother's, which claim Mother communicated to them that her intention was for Daughter to receive the property.

¶8 Defendants moved for summary judgment, arguing several claims were barred by the statute of limitations, others barred by the statute of frauds, and all barred by the doctrine

of laches. The superior court granted the motion without explanation. The court subsequently denied Daughter's motion for reconsideration. Daughter timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 12-2101(A) and (B) (2003).

ANALYSIS

¶9 On appeal, Daughter argues that the court erroneously granted summary judgment because the uncontroverted facts in Daughter's affidavit, when construed most favorably to her, are sufficient to justify a trial.

¶10 Summary judgment is appropriate when the evidence presents no genuine issue of material fact, and the movant is entitled to a judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990); Ariz. R. Civ. P. 56(c)(1). We decline to grant summary judgment if "either the facts are in dispute (or there is the slightest doubt that they are) or the evidence presented could lead 'reasonable minds' to draw different inferences therefrom." *Id.* at 306, 802 P.2d at 1005.

> When the moving party argues it is entitled to summary judgment because the non-moving party lacks evidence to support its claim or defense, the moving party must do more than make bald assertions that the non-moving party cannot meet its burden of proof at trial or has no evidence supporting its claim or defense. . . . When a moving party meets its initial burden of production . . . the burden then shifts to the non-moving party to present sufficient evidence

> demonstrating the existence of a genuine factual dispute as to a material fact.

Nat'l Bank of Ariz. v. Thruston, 218 Ariz. 112, 118-19, ¶ 23, 26 180 P.3d 977, 983-84 (App. 2008). Appellate courts review summary judgments *de novo*, applying the same standard as that used by the trial court. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990).

I. Statute of Frauds

¶11 Appellees argue that the claims of breach of contract (Count IV) and specific performance (Count V) are barred by the statute of frauds. Appellees rely on A.R.S. §44-101(6) (2003) which provides:

> No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereunto lawfully authorized: . . . Upon an agreement for leasing for a longer period than one year, or for the sale of real property or an interest therein.

¶12 Daughter first argues that her agreement with her parents was not to lease or sell the property; rather, it was to will or otherwise devise or deed the property. However, the Arizona Supreme Court has held that the statute of frauds "enacts a clear legislative prohibition against enforcement of an oral agreement for the conveyance of land." *Owens v. M.E. Schepp Ltd. P'ship*, 218 Ariz. 222, 228, ¶ 24, 182 P.3d 664, 670 (2008); *See also Tenney v. Luplow*, 103 Ariz. 363, 368, 442 P.2d

107, 112 (1968) (holding "[p]arol gifts of land are within the Statute of Frauds . . . ."). Thus, absent an exception, A.R.S. § 44-101 (6) applies to these claims.

¶13 Daughter next argues her conduct, as it relates to the breach of contract and specific performance claims, constituted part performance of the oral contract, which is a recognized exception to the statute of frauds. *See Owens*, 218 Ariz. at 226-27, ¶ 14, 182 P.3d at 667-68 ("The statute of frauds is by its terms absolute, ... Arizona courts, however, have long recognized limited exceptions to the statute," including part performance.). The relevant acts that constitute part performance need not be required by the agreement, but must be undertaken in reliance on the agreement. *Id.* at ¶ 15, 182 P.3d at 668. The acts of part performance serve as an exception to the statute of frauds when they cannot be explained in the absence of the agreement. *Id.* at ¶ 16, 182 P.3d at 668. *See also Gene Hancock Const. Co. v. Kempton & Snedigar Dairy*, 20 Ariz. App. 122, 125, 510 P.2d 752, 755 (1973) (disavowed on other grounds by *Gibson v. Parker Trust*, 22 Ariz. App. 342, 527 P.2d 301 (1974)) (holding "a party may be estopped to assert the defense of the statue of frauds when he has induced or permitted another to change his position to his detriment in reliance upon an oral agreement within its operation."). The acts must be "'unequivocally referable'" to the agreement; "'[i]t is not

enough that what is promised may give significance to what is done.'" *Owens*, 218 Ariz. at 226, ¶ 16, 182 P.3d at 668 (citing *Burns v. McCormick*, 223 N.Y. 230, 135 N.E. 273 (1922)).

¶14 In *Owens*, the court held that the plaintiff's act, the payment to a contractor for tree removal on two of the three lots of a parcel of land owned by both parties, was more evident of their co-tenancy than of a condition to an agreement of partition, as the plaintiff alleged. *Id.* at 227, ¶ 20, 182 P.3d at 669. The court held that acts of part performance must be "'of such a character as not to be reasonably explicable on other grounds.'" *Id.* at ¶ 19 (citation omitted). Furthermore, the court disagreed with the plaintiff's argument that because his affidavit must be taken as true for purposes of summary judgment, his explanations for the acts also must be accepted. *Id.* at 227-28, ¶ 22, 182 P.3d at 669-670. The court held that the explanation of the relevant acts were immaterial because the alleged "part performance must be 'alone and without the aid of words of promise . . .'; [a] need to explain why the acts were undertaken suggests that each act does not, . . . 'itself supply the key to what is promised.'" *Id.* at 228, ¶ 23, 182 P.3d at 670 (citing *Burns*, 233 N.Y. at 230, 135 N.E. at 273).

¶15 In the present case, there is a genuine dispute of material fact as to the $8,000.00. It is undisputed that Daughter gave $8,000.00 to her parents to be used as a down

payment for the purchase of the property, and she gave $55,000.00 to her parents to be used as an investment in a company on the agreement that she would be reimbursed by the future conveyance of the property. The part performance exception applies, based on principles of estoppel, "if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement." *Owens,* 218 Ariz. at 226-27, ¶ 18, 182 P.3d at 668-69 (quoting Restatement (Second) of Contracts § 129 (1981)). Here, Daughter's loan of $8,000.00 which was used to purchase the property is "unequivocally referable" to the agreement that the property would be conveyed to her in the future. However, the loan of $55,000.00 given to the parents to invest in a company, without further explanation, is not an act, which in and of itself, "supplies the key to what is promised." *Owens*, 218 at 226, ¶ 16, 182 P.3d at 668 (citing *Burns*, 233 N.Y. at 230, 135 N.E. at 273).

¶16 Accordingly, the claims for specific performance and breach of contract as to the $8,000.00 are not barred by the statute of frauds. The claim for specific performance based on the $55,000.00 is barred. The claim for breach of contract for

$55,000.00 is not barred to the extent Daughter wants reimbursement, and not the house itself.[4]

II. Constructive Trust

¶17 Daughter requests the imposition of a constructive trust, and argues that the statute of frauds does not apply to a constructive trust. The statute of frauds does not apply to a constructive trust, even in real property interests. *See Turley v. Ethington*, 213 Ariz. 640, 643, ¶ 8, 146 P.3d 1282, 1285 (App. 2006); *Condos v. Felder*, 92 Ariz. 366, 370, 377 P.2d 305, 308 (1963). However, the Appellees do not raise the statute of frauds as an affirmative defense for Count I (Constructive Trust). Instead, the Appellees contend that a constructive trust is not a substantive right used to prevent unjust enrichment. We agree with Daughter.

¶18 "A constructive trust is an equitable doctrine that prevents one person from being unjustly enriched at the expense of another . . . . It 'arises by operation of law and not by agreement or intention.'" *Turley*, 213 Ariz. at 643, ¶ 9, 146 P.3d at 1285 (citation omitted). "Even where actual fraud does not exist in the acquisition of property, a constructive trust

[4] Daughter also argues that the possibility of performance within one year is an exception to the statute of frauds under A.R.S. § 44-101(5), which bars an action unless the agreement is in writing "[u]pon an agreement which is not to be performed within one year from the making thereof." We need not address this argument to the extent the claims for breach of contract and specific performance are barred under A.R.S. § 44-101(6).

will arise whenever the circumstances make it inequitable that the property should be retained by the one who holds the legal title." *Linder v. Lewis, Roca, Scoville & Beauchamp*, 85 Ariz. 118, 123, 333 P.2d 286, 290 (1958). The finding of an establishment of a constructive trust requires clear and convincing evidence. *Harmon v. Harmon*, 126 Ariz. 242, 244, 613 P.2d 1298, 1300 (App. 1980) (citation omitted).

¶19 "[W]hen a confidential relationship is shown to exist between two parties, even though no active fraud . . . be shown, the mere existence of such confidential relationship, when coupled with a promise to reconvey, creates a constructive trust." *Murillo v. Hernandez*, 79 Ariz. 1, 7, 281 P.2d 786, 790 (1955); see also *MacRae v. MacRae*, 37 Ariz. 307, 313, 294 P. 280, 282 (1930). In *Murillo*, the adopted daughter of the decedent signed a quit-claim deed which conveyed property to her father; she relied on her father's promise that he would look after her property and interest and would give her deed back whenever she asked. *Murillo,* 79 Ariz. at 4, 281 P.2d at 788. Plaintiff filed suit against father's widow, claiming constructive trust because she relied on her father's promise; she stated that she had the utmost confidence and trust in him. *Id.* The court reasoned:

> [W]hile the mere relationship of parent and child does not necessarily warrant the conclusion of the existence of a confidential relationship requiring the

> court to raise an implied trust on the basis of an oral agreement . . . it is nevertheless an important circumstance bearing upon the existence of a confidential relation; . . . .

Id. at 8, 281 P.2d at 790 (citation omitted). The court ultimately found that a confidential relationship when coupled with a promise to reconvey would support a constructive trust. 79 Ariz. at 7-8, 281 P.2d at 790-91. The court further explained that in finding a confidential relationship between parent and child, there should be facts such as age and infirmity, actual dominance on the part of the grantee or other "similar facts making it inequitable to allow the grantee to prevail." *Id.* at 8, 281 P.2d at 791. The court found sufficient evidence to support a constructive trust. *Id.* at 9, 281 P.2d at 791.

¶20 Like the plaintiff in *Murillo*, Daughter entrusted her parents to fulfill their promise to convey the property to her. The parent/child relationship, coupled with that event, created a factual basis for a confidential relationship. When coupled with the alleged promise to the daughter, it is reasonable that a fact finder could impose a constructive trust. Appellees claim that Daughter's interest is nothing more than a claim for general damages which does not give rise to a constructive trust. We disagree; Daughter's claim for the imposition of a constructive trust does not fail as a matter of law.

III. Statute of Limitations

¶21 The Appellees argued in the trial court and on appeal that Daughter's claims of estoppel based on reliance of oral representations (Count III), breach of contract (Count IV), and specific performance (Count V) are all barred by the statute of limitations. Appellees rely on A.R.S. § 12-543(3) (2003), which provides:

> There shall be commenced and prosecuted within three years after the cause of action accrues, and not afterward, the following actions: . . . 3. for relief on the ground of fraud or mistake, which cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Daughter argues that she was not aware, nor did she have any reason to believe, that her parents had not provided for her by trust, will, or beneficiary deed until the death of her father and the incompetency of her mother, which occurred in 2007. Thus, the cause of action should not be deemed to have accrued until this discovery.

¶22 "The statutes of limitations for both negligent and intentional misrepresentation begin to run when the plaintiff knew or by reasonable diligence should have known of the misrepresentation." *Bank of the West v. Estate of Leo*, 231 F.R.D. 386, 390 (2005); *see also Coronado Dev. Corp. v. Super. Court*, 139 Ariz. 350, 352, 678 P.2d 535, 537 (App. 1984) ("The

statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry.") (citing *Nat'l Auto. and Cas. Ins. Co. v. Payne*, 261 Cal.App. 2d 403 (1968)).

¶23 Appellees rely on *Kersten v. Continental Bank*, 129 Ariz. 44, 628 P.2d 592 (App. 1981) arguing that the estoppel claim (Count III) was time barred. This case was decided under A.R.S. § 12-543(1), which provides that the statute of limitations is three years for an action for debt where the indebtedness is not evidenced by a contract in writing. The claim is not one for general estoppel. Although the claim could have been better worded, we read the claim in the light most favorable to the Appellant, not as one of general estoppel, but as one of oral misrepresentation or fraud.[5] Thus, the estoppel claim is not one of indebtedness not evidenced by writing. Daughter is not attempting to collect a debt; rather, she is seeking relief from her parents' failure to fulfill the agreement, whether it be by fraud or mistake.

¶24 On this record, Daughter was not aware of her parents' failure to arrange for the conveyance of the property until the death of her father and the incompetency of her mother. She trusted her parents, and would not have had any knowledge of

[5] This claim could also be read as one of promissory estoppel, but it is unclear from the wording of the complaint.

facts to put her on inquiry. Therefore, there is a genuine dispute of material fact as to whether the statute of limitations began at the time Daughter was aware of the fraud or mistake, which was in 2007. Furthermore, prior to the incompetency of her mother, Daughter would not have had any cause of action because at any time Mother could have performed by providing for her by will, trust or other instrument.[6] Thus, Counts III, IV, and V are not barred as a matter of law by the statute of limitations under A.R.S. § 12-543(3).

¶25 Appellees argue that Daughter's claim for quiet title (Count II) is also barred by the statute of limitations because her parents held open, notorious, adverse, peaceable possession and use of the property, under color of title and pursuant to a recorded deed, for more than twenty-seven years without an adverse claim brought by Daughter. Appellees rely on A.R.S. § 12-523(A) (2003), which provides:

> An action to recover real property from a person in peaceable and adverse possession under title or color of title shall be commenced within three years after the cause of action accrues, and not afterward.

¶26 Before the statute of limitations pertaining to adverse possession could bar Daughter's claim to quiet title, Appellees, as the adverse claimants, would have to prove all the

[6] Given the paucity of the record, it is unclear why Daughter would not inherit the property on the death of her mother under principles of intestacy.

elements of adverse possession. *Long v. City of Glendale*, 208 Ariz. 319, 327, ¶ 19, 93 P.3d 519, 527 (App. 2004); *see also Combs v. DuBois*, 135 Ariz. 465, 468, 662 P.2d 140, 143 (App. 1982) ("The burden of proof is upon the person claiming title by adverse possession."). The evidence must show that the property was possessed by a right contrary to the right of a person holding the paper title, and the possession must be hostile. *Id.* Possession is not adverse if the possession is permissive. *Id.*

¶27 In this case, Appellees have not shown hostile, non-permissive possession. Daughter clearly understood that her parents would occupy the house during their lifetime, and at some point in the future, the house would be conveyed to her. Appellees have offered no evidence to demonstrate the occupancy was hostile. Furthermore, Daughter's parents hold the paper title; their names are on the deed. Count II is, therefore, not barred by the statute of limitations under A.R.S. § 12-523(A).

IV. Laches

¶28 Appellees assert that all of Daughter's claims are barred by the doctrine of laches. "The general rule is that a plaintiff must exercise diligence and avoid unreasonable delay in prosecuting an action." *Meyer v. Warner*, 104 Ariz. 44, 47, 448 P.2d 394, 397 (1968). A claim will be barred by the doctrine of laches only if the lack of diligence prejudices the defendant. *Id.*

¶29 Appellees rely on *Fin. Assoc., Inc. v R & R Realty Co.*, 25 Ariz. App. 530, 544 P.2d 1131 (1976), in which the court applied the doctrine of laches to bar a claim that was delayed by five years. In that case, the plaintiffs claimed that the defendant had wrongfully recorded a deed and issued a title insurance policy. *Id.* at 530, 544 P.2d at 1131. The plaintiffs waited almost three years after the deed was filed and more than two years after the property was resold to institute action. *Id.* at 531, 544 P.2d at 1132. The court held that the long delay in bringing suit prejudiced the defendants, and the claim was, therefore, barred by the doctrine of laches. *Id.*

¶30 The facts of *Financial Assoc*. are not analogous to the present case. Unlike the plaintiffs in *Financial Assoc*., on this record Daughter did not have notice of Mother's failure to fulfill the agreement until 2007. Therefore, there was no cause of action until the death of her father and the incompetency of her mother in 2007, which prevented performance of the agreement.

¶31 Appellees claim that Daughter was required to show due diligence by ascertaining whether her claim to the property had been provided for. However, there was no reason for Daughter to ascertain this information since the alleged agreement did not require Mother to arrange for the conveyance of the property at any particular time. Daughter filed an affidavit in support of

these facts, and the Appellees never disputed it. Daughter timely filed this lawsuit upon learning that conveyance of the property had not been provided for and her mother allegedly could no longer make such a provision. Thus, the doctrine of laches does not apply as a matter of law.

Conclusion

¶32 The motion for summary judgment was improperly granted. For the foregoing reasons, we reverse the judgment and remand for further proceedings consistent with this decision.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
PATRICK IRVINE, Presiding Judge

/S/
MICHAEL J. BROWN, Judge