Not Reported in Cal.Rptr.3d, 2007 WL 3138615 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 3138615 (Cal.App. 4 Dist.))

Court of Appeal, Fourth District, Division 3, California.
Soony C. SANDORE, as Trustee etc., Plaintiff and Appellant,
v.
Craig C. FERGUSON, Defendant and Appellant.

Nos. G037379, G037922.
(Super.Ct.No. 04CC10384).
Oct. 29, 2007.

Appeals from a judgment of the Superior Court of Orange County, Corey S. Cramin, Judge. Affirmed.
Dunn **Koes**, Pamela E. Dunn, Daniel J. **Koes**, Mayo L. Makarczyk; Lowe & Baik, Jeffre T. Lowe, and John A.S. Baik for Plaintiff and Appellant.

Songstad & Randall, William D. Coffee and Janet E. Humphrey for Defendant and Appellant.

OPINION

ARONSON, J.

***1** Defendant Craig Ferguson (Ferguson) challenges the trial court's rulings (1) ordering partition by sale of the commercial property he jointly owned with plaintiff Soony C. Sandore,[FN1] instead of partition in kind, and (2) determining Ferguson had ousted Sandore from the property. Ferguson contends the evidence supported partition in kind; therefore, the trial court should have followed the presumption against partition by sale. He also contends the notice required for ouster was invalid because Ferguson was not in possession of the property at the time he received the notice, and Sandore sent the notice as trustee of the property owner, but sued as owner in her individual capacity. In her cross-appeal, Sandore challenges the trial court's finding that Ferguson and his wife, defendant Diane Ferguson, did not breach their agreement to lease the property, and contends the court's attorney fee award was arbitrary and an abuse of discretion.

FN1. The complaint was filed by Soony C. Sandore, successor trustee of the Andrew Renard Sandore Trust dated June 21, 1984. At the time of trial, Soony Choi, an individual, was substituted as plaintiff. Because the plaintiff refers to herself as "Soony Sandore" and "Sandore" in her briefs, we do the same here for ease of reference.

We reject each of the foregoing contentions. Substantial evidence supported the trial court's determination that a partition by sale was more equitable than a partition in kind. Moreover, Ferguson's contention that Sandore's ouster notice was ineffective finds no support in any legal authority. We also conclude substantial evidence supports the trial court's breach of contract determination, and that the trial court's attorney fee award was based on the trial court's proper exercise of discretion. Accordingly, we affirm the judgment in its entirety.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 1988, Andrew Renard Sandore (Renard), [FN2] Soony Sandore's deceased husband, and his business partner, Louis Reda, leased their Garden Grove commercial property to the Fergusons, doing business as (dba) the Ferguson Auto Center. The lease set the rent at $7,800 per month the first year, $9,000 per month the second year, with cost of living increases each year thereafter. The lease term was five years with an option allowing the Fergusons to extend for another five years. The lease provided for a month-to-month tenancy upon its expiration. The following year, Ferguson incorporated Ferguson Auto Center, which then operated at the

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property in place of the dba.

> FN2. Andrew Renard Sandore used Renard as his first name in his correspondence relating to the subject property. We refer to him as Renard for clarity and ease of reference, and intend no disrespect. (See *In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

Although the monthly rent increased to $9,000 in 1990, Ferguson continued to pay $7,800 per month, which the lessor accepted. Effective February 1994, the parties agreed to a lease addendum that reduced the monthly rent to $5,000 until May 31, 1995, increasing to $7,800 from June 1, 1995 until December 31, 1999. The addendum provided that the lease renewal would expire on January 31, 1999. Ferguson, however, kept paying $5,000 per month until 1997, when, according to Ferguson, he and Renard verbally agreed to increase monthly rent to $5,500.

Ferguson paid the monthly rent to Renard from the beginning of the lease until June 2000, when he began paying one-half of the rent directly to Reda, so that each owner received $2,750. In February 2004, Ferguson purchased Reda's one-half interest in the property, and continued paying Renard $2,750 per month.

***2** In September 1999, Sandore sent Ferguson a letter accusing him of underpaying rent on the property from 1991 to 1994, and from 1997 to the date of the letter. The letter referenced the lease addendum's monthly rent of $7,800, and asserted the total unpaid rent approached $150,000. In March 2001, Renard sent Ferguson a letter stating: "Due to my ongoing health problems for ... many years, I was not able to pay attention to your lease as much as I wish[ed]. However, it does not change any terms and conditions in our original lease agreement, which has been expired. Since then you have been a 'month-to-month rental base.' And original lease terms and conditions remain the same. Such as month rental payment (per para. 4, Rent), property taxes (per para. 6) and others." Renard Sandore sent Ferguson a second letter in April 2001, virtually identical to the March 2001 letter.

In July 2004, Sandore wrote Ferguson demanding he deliver concurrent possession of the property within 60 days, and warned she would deem his failure to do so an ouster. Ferguson did not deliver concurrent possession, and Sandore sued the Fergusons for partition, waste, ouster, and breach of contract. Sandore later withdrew the waste cause of action. At trial, the Fergusons did not contest partition, but sought partition through a physical division of the property, rather than a sale of the property and division of proceeds. In support, the Fergusons called an engineer, Peter Toghia, who testified how the property could be separated by building a wall down the middle of the existing building. To effect this separation, Toghia testified the Fergusons would have to seek parcel map approval by the city. Although Toghia cautioned project approval was not certain, Toghia believed approval could be obtained and construction completed within "a matter of months." He noted, however, that "you are really at the mercy of the building department."

On December 8, 2005, the bench trial on the complaint concluded. The court ruled in Sandore's favor on her ouster claim, awarding damages of $60,357.20 plus $6,600 per month until completion of partition. The court ruled against Sandore on her breach of contract claim, noting "I can assign this either by there was an agreement by the parties, whether it's laches, whether it's estoppel, whether it's acknowledgement, the parties clearly operated under an understanding that the $5,500 per month was the amount of rent...." In light of the attorney fee clause in the 1988 lease, the court awarded the Fergusons attorney fees incurred for the breach of contract claim. Although the Fergusons originally sought $57,870 in fees, the trial court awarded $19,290.

On the partition claim, the Fergusons' attorney requested the court issue an interlocutory judgment ordering the property physically partitioned, with

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the court retaining jurisdiction to order a partition by sale if the physical partition proved unattainable. Reluctant to issue an open-ended interlocutory judgment, the court pressed for a time estimate for the physical partition. The Fergusons' attorney requested six months, explaining the city commented favorably on the partition request when Toghia informally presented the plan, and that the "actual review by the full planning commission" was set for December 15, 2006. To save the parties money, the court did not appoint a referee to oversee the partition, noting that "Ferguson has motivation to get that partition as soon as possible and I'm hoping with that motivation, you'll work with the plaintiffs...." The court set a status conference for April 3, 2006.

***3** At a hearing on March 10, 2006, the court informally requested an update on the plan for physical partition. The Fergusons' attorney stated: "I spoke to Craig Ferguson yesterday, and he said that Peter Toghia was proceeding with the city relative to filing the approved plan for partition." The court commented, "Well, I'm not going to force you guys to do anything, you're going to partition this as quickly as you can, and I guess Mr. Ferguson's motivation is to get it moving, it's his money." The court continued the April 3 hearing to April 7, 2006.

At the April 7 hearing, Sandore's counsel submitted a declaration stating that the city's planning and building department informed him that no application had ever been filed seeking a permit to divide the property. The Fergusons' attorney admitted he was not involved in the process, but expressed his understanding that the city rejected the division proposal in December because the plans lacked drainage detail. He believed the property had been surveyed, as required before plan submittal, and the plans were "still with civil engineering." The trial court ordered the parties back on May 12, 2006, for an update on partition status, noting "I may have to reevaluate the interlocutory judgment if we find out it's just not working or if there's some other reason...."

At the May 12 hearing, the court considered the declaration of Karl Hill, the city's planning division manager. Hill stated he personally reviewed the records of the city's planning department and found no one had filed an application for division of the property within the past year. Based on his 20 years of experience with the city's planning department, Hill concluded there was "almost no chance" the city would approve the division. The Fergusons' attorneys did not dispute Hill's declaration, but stated they lacked authority to agree to partition by sale. In light of Hill's declaration, the court reopened the trial on partition and scheduled the matter for May 19, 2006.

At the May 19 trial, Hill testified the planning department would not approve an application for the proposed property division. He explained the city council could approve the project despite the planning department's disapproval, but the city council followed the department's recommendations 90 to 95 percent of the time. Ferguson testified he had not submitted an application to the city due to financial problems, but had hired consultants who could file an application by morning of the next business day. Following argument, the court ordered partition by private sale, and appointed a referee to oversee the sale.

Both sides separately appealed the judgment, with Ferguson challenging the court's ruling on partition and ouster, and Sandore challenging the breach of contract and attorney fee rulings. We consolidated the appeals, treating Sandore's challenges as a cross-appeal.

II
DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion by Ordering Partition by Sale Instead of Partition in Kind*

***4** Ferguson contends the trial court abused its discretion when, after first ordering partition in kind, it ordered the property partitioned by sale. We

disagree.

The law favors partition in kind, and absent proof to the contrary, the presumption in favor of the physical division of jointly-owned property should prevail. (*Butte Creek Island Ranch v. Crim* (1982) 136 Cal.App.3d 360, 365 (*Butte Creek*) Nonetheless, Code of Civil Procedure section 872.820, subdivision (b), provides that the court *shall* order the sale of partnership property and division of the proceeds if doing so would be "more equitable" than a physical division of the property.

Code of Civil Procedure section 872.820, enacted in 1976, represents a change in the former law. "The former sections provided for division by sale only where physical division would cause 'great prejudice' to the parties. The new provisions provide for a presumption in favor of physical division which will control in the absence of proof that under the circumstances sale would be 'more equitable' than division. In proposing this change the Law Revision Commission explained that the presumption in favor of physical division should continue but that '[in] many modern transactions, sale of the property is preferable to physical division since the value of the divided parcels frequently will not equal the value of the whole parcel before division. Moreover, physical division may be impossible due to zoning restrictions or may be highly impractical, particularly in the case of urban property. [¶] The Commission recommends that partition by physical division be required unless sale would be 'more equitable.' This new standard would in effect preserve the traditional preference for physical division while broadening the use of partition by sale. [Citation.]" (*Butte Creek, supra,* 136 Cal.App.3d at p. 365.)

Thus, a court ordering partition must consider not only the relative value of the divided property, but also the state and local laws governing the division of land. Indeed, after reviewing the partition laws, the California Attorney General concluded, "Where a court orders the physical division of real property in a partition action, the division must comply with the requirements of the Subdivision Map Act, local ordinances adopted thereunder, zoning ordinances, and the general plan for the area in which the property is located." (64 Ops.Cal.Atty.Gen. 762 (1981).) [FN3]

> FN3. " 'Opinions of the Attorney General, while not binding, are entitled to great weight. [Citations.] In the absence of controlling authority, these opinions are persuasive "since the Legislature is presumed to be cognizant of that construction of the statute." ' [Citation.]" (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.)

On appeal, the reviewing court may set aside a judgment of partition only for abuse of discretion. (See *Richmond v. Dofflemyer* (1980) 105 Cal.App.3d 745.758.) Determining whether partition by sale would be more equitable than physical division is a factual question for the trial court, and we will not disturb that determination on appeal where the evidence, even though conflicting, permits the court reasonably to conclude that partition by sale would be more equitable. (See *Romanchek v. Romanchek* (1967) 248 Cal.App.2d 337, 344; *Formosa Corp. v. Rogers* (1951) 108 Cal.App.2d 397, 411-412 [applying abuse of discretion standard under prior law].)

***5** Although the court initially determined Sandore failed to establish a sale would be more equitable, Sandore produced substantial evidence at the later hearing supporting the court's ultimate determination. This evidence included the testimony of Hill, who reviewed Toghia's preliminary layout for division of the property and concluded the planning division would recommend denial of the plan if placed before them, explaining: "Our concern is that when you take a piece of property and split it into two with two separate property owners, we could wind up with problems down the road that would be headaches for the city to deal with and ultimately property owners to deal with." Hill noted his department did not make the ultimate decision,

but the city council typically followed his department's recommendations "90 to 95 percent of the time...."

Ferguson challenges Hill's testimony as speculative and lacking in foundation. But Ferguson never objected to Hill's testimony on these grounds at the hearing. Although Hill could not state unequivocally the city council would reject the plan, his testimony regarding the high probability of failure coupled with Ferguson's failure to submit any formal plan to the city for approval provided a reasonable basis for the trial court's determination that the equities favored a partition by sale.

Ferguson complains that the court never gave a deadline for filing an application with the city, and failed to provide notice of its intention to change its interim ruling. We disagree. At the first trial, the court pushed the Fergusons' attorney to provide a time estimate, and expressed its hope the parties would act speedily to gain approval for partition. At the March 10 hearing, the court again urged the parties to move forward quickly on the partition. At the April 7 hearing, the court stated it might reevaluate the interim ruling if progress on the partition was not made. At the May 12 hearing, the court announced it would reopen the trial on the matter to consider ordering sale of the property. The Fergusons' attorneys did not object to the reopening of the evidence or the May 19 hearing date. Given the court's earlier comments, the Fergusons should not have been surprised the trial court reconsidered its prior ruling. Despite being on notice of the court's intentions, Ferguson failed to file a formal request with the city, even though he testified he could do so by the next business day. Accordingly, we do not disturb the trial court's order for sale of the property.

B. *Trial Court's Ouster Ruling Was Not Erroneous*

Civil Code section 843, subdivision (b), provides: "A tenant out of possession may serve on a tenant in possession a written demand for concurrent possession of the property. The written demand shall make specific reference to this section and to the time within which concurrent possession must be offered under this section. Service of the written demand shall be made in the same manner as service of summons in a civil action. An ouster is established 60 days after service is complete if, within that time, the tenant in possession does not offer and provide unconditional concurrent possession of the property to the tenant out of possession."

***6** Ferguson challenges the trial court's ouster determination, claiming he did not qualify as a tenant in possession. Specifically, Ferguson notes that the only tenants of the building during the time in question were his corporation, Ferguson Auto Center, and a lessee, JB Auto. But Ferguson Auto Center is wholly owned and controlled by Ferguson. Ferguson has cited no authority suggesting that a cotenant operating a business from jointly owned property is not considered in possession of the property merely because that business is operated as a corporation. Similarly, Ferguson's sublease of a portion of the property to JB Auto does not change the result. Sandore never consented to Ferguson's sublease, although the 1988 lease required Sandore's consent, and Ferguson received all of the benefits of the lease.

The law of ouster recognizes that each cotenant of jointly owned property is entitled to share in the possession of the entire property and that one cotenant may not exclude the other from any part of it. (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 548.) "The ouster must be proved by acts of an adverse character, such as claiming the whole for himself, denying the title of his companion, or refusing to permit him to enter." (*Ibid.*) At the time Sandore sent the ouster letter, Ferguson occupied part of the property to operate his business and derived income from a sublessee who occupied the remainder of the property with Ferguson's permission. Thus, Ferguson used all of the property for his exclusive benefit. When Ferguson failed to timely provide Sandore with equal possession of the property following her demand for possession, she became entitled to her share of the value of the use and occupation

of the land from the time of the ouster. (See *ibid* .)

Ferguson also contends Sandore's ouster claim fails because she sent the ouster letter as trustee of the trust that owned the property, and quitclaimed the property to herself individually before trial. This argument is meritless. Under the ouster statute, the ouster is established if, within 60 days of the ouster notice's service, the tenant in possession fails to offer and provide unconditional concurrent possession of the property to the other cotentant. Because the ouster notice was served in July 2004 and the transfer was not accomplished until November 2004, Sandore established ouster well before the transfer took place. Ferguson has provided no authority that an action for ouster may not be transferred or assigned to a new cotenant. We therefore affirm the trial court's ouster holding.

C. *Substantial Evidence Supports the Trial Court's Breach of Contract Ruling*

Sandore contends the trial court erred when it determined she had failed to establish her breach of contract cause of action. She further asserts the undisputed evidence at trial leads only to one conclusion, and thus we review the trial court's breach of contract ruling solely as an issue of law. Ferguson, however, contends the breach of contract issue turned on disputed evidence and that we review the trial court's ruling under the abuse of discretion standard. We conclude Ferguson is correct.

*7 Sandore relies primarily on the letter she sent to Ferguson in September 1999, and the letter Renard sent to Ferguson in March 2001. Sandore argues these letters constitute notices of rent increases under Civil Code section 827 [FN4] as a matter of law. Sandore, however, never made this argument to the trial court. Instead of arguing these letters changed the amount of rent due, Sandore argued at trial that they provided proof of the rental amounts due during the time period in which they were written.

> FN4. Civil Code section 827 provides: "Except as provided in subdivision (b), in all leases of lands or tenements, or of any interest therein, from week to week, month to month, or other period less than a month, the landlord may, upon giving notice in writing to the tenant, in the manner prescribed by Section 1162 of the Code of Civil Procedure, change the terms of the lease to take effect, as to tenancies for less than one month, upon the expiration of a period at least as long as the term of the hiring itself, and, as to tenancies from month to month, to take effect at the expiration of not less than 30 days, but if that change takes effect within a rental term, the rent accruing from the first day of the term to the date of that change shall be computed at the rental rate obtained immediately prior to that change; provided, however, that it shall be competent for the parties to provide by an agreement in writing that a notice changing the terms thereof may be given at any time not less than seven days before the expiration of a term, to be effective upon the expiration of the term. [¶] The notice, when served upon the tenant, shall in and of itself operate and be effectual to create and establish, as a part of the lease, the terms, rents, and conditions specified in the notice, if the tenant shall continue to hold the premises after the notice takes effect."

"It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and the opposing litigant." (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.) True, we retain discretion to consider a theory on appeal if it is purely a matter of applying the law to undisputed facts. (*Ibid.*) In the present case, however, the evidence is conflicting, and the legal effect of the two letters Sandore relies upon is far from clear.

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Specifically, neither of the letters purported on their face to change the amount of monthly rent, but simply expressed the authors' view as to the amount of the current rent owed. For example, the September 1999 letter asserts that the current rent was the $7,800 figure provided in the 1994 addendum. The March 2001 letter does not state a specific rent amount, but merely referenced the rent provision in the original 1988 lease. Neither purported to notify Ferguson of an *increase* in the amount of rent. Accordingly, we consider these letters merely as part of the conflicting evidence regarding the parties' understanding of the amount of rent due.

At trial, Ferguson testified that he reached an agreement with Renard in 1994 to reduce the monthly rent to $5,000, and further agreed in 1997 to set the monthly rent at $5,500. Other evidence supported his testimony. When Ferguson purchased Reda's interest in the property in January 2004, the trustee of Reda's trust represented on a statement used to prorate rents through escrow that Ferguson's monthly rent obligation to Reda was $2,750, i.e., one-half of $5,500. Similarly, Ferguson presented documentary evidence that in April 2003, Renard refunded $1,242 to Ferguson as excess rent based on 14 days' rent paid after a specified termination date.[FN5] Finally, even without applying the equitable principles of laches, estoppel or waiver, the fact Sandore took no action for years against Ferguson to collect the unpaid rent now claimed due also provides substantial support for Ferguson's position that an oral rent agreement existed. Because substantial evidence supports the trial court's finding the parties had an ongoing agreement that Ferguson's monthly rent was $5,500 per month since 1997, we do not disturb it.

> FN5. Dividing $1,242 by 14 days, and multiplying the result by the full 31 days in that month, yields $2,750.14, or approximately one-half of the $5,500 rent amount claimed by Ferguson.

D. *The Trial Court Did Not Abuse Its Discretion in Issuing Its Attorney Fee Award*

***8** Upon determining Sandore failed to establish the Fergusons breached the 1988 lease agreement, the court awarded the Fergusons attorney fees under a provision of the lease.

Shortly thereafter, the Fergusons filed a motion seeking $57,870, based on 197.35 hours by Attorney Richard E. Holmes at $200 per hour, and 184 hours by Attorney Kathleen M. Hateley at $100 per hour. These fees represented substantially all of the fees the two attorneys had incurred in connection with the case, not just defense of the breach of contract issue. The Fergusons argued apportionment was not required where doing so would be virtually impossible because the claims are so intertwined. Disagreeing, the trial court remarked at the March 10 hearing: "I couldn't segregate or proportion or apportion the fees that were attributable to the breach of contract versus the other causes of action, [but] I'm not convinced that they're so intertwined that it would be impractical to do that." The trial court requested the Fergusons to provide additional evidence, including "billings" and "amended billing statement[s]," demonstrating the reasonable value of the fees incurred in defending Sandore's breach of contract claim.

On March 23, 2006, the Fergusons' attorneys submitted a supplemental declaration that removed a number of hours from the previous submission that pertained solely to claims other than Sandore's breach of contract claim. As a result, the original request of $57,870 was reduced to $54,490. After reviewing the new information, the court remarked: "The problem is I can't determine truly from your records that you provided exactly-you know, this is supposed to be scientific and I can actually figure this out and count this out. And I gave you another chance, and your calculations don't carry-I just don't think a sufficient enough effort was made. And if it wasn't made, I have to figure out why. Maybe you just didn't want to spend more time on it." After hearing additional argument, the trial court awarded $19,290, which is the original $57,870 divided by three.

Sandore contends the trial court's attorney fee award was arbitrary and an abuse of discretion, requiring reversal. We disagree.

" 'It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court.... [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.] The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' [Citation.]" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084.)

***9** The record demonstrates that the trial court did not act arbitrarily. During extensive oral argument on the matter, the court conceded it could not tell exactly how much time the Fergusons' attorney spent on pretrial preparation as to each issue, but observed that two-thirds of the trial appeared devoted to the partition and ouster claims, and that one-third was spent on the breach of contract claim. Because the trial court based its award on the attorneys' billing records, reduced by its own observations of the trial, it did not act arbitrarily. We therefore affirm the attorney fee award.

III
DISPOSITION

The judgment is affirmed. In the interests of justice, each party is responsible for its own costs on appeal.

WE CONCUR: O'LEARY, Acting P.J., and MOORE, J.

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