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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GREG KURZULIAN,

Plaintiff and Appellant,

v.

JEFFREY P. STRAUS,

Defendant and Respondent.

B276111

(Los Angeles County
Super. Ct. No. BC322052)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark Borenstein, Judge. Affirmed.

Law Offices of Farris Ain and Farris E. Ain for Plaintiff and Appellant.

Richards, Watson & Gershon, Lisa Bond and T. Peter Pierce for Defendant and Respondent.

Respondent Jeffrey Straus obtained a judgment against appellant Greg Kurzulian in 2007. Appellant has paid nothing on the judgment. This appeal concerns respondent's attempt to collect on the judgment by levying appellant's Individual Retirement Account (IRA) at Scottrade Inc. (Scottrade). The trial court denied appellant's claim of exemption of the account under Code of Civil Procedure section 704.115.¹ We affirm the denial.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2007, judgment was entered against appellant in favor of respondent in the amount of \$530,929.37.² In June 2015, respondent renewed the judgment, which had grown to \$960,357.59, including post-judgment interest.

Respondent attempted to garnish appellant's wages in order to collect on the judgment. A notice of hearing on appellant's claim of exemption was filed. The trial court continued the hearing from December 28, 2015 to February 2, 2016, and ordered appellant to provide proof of his income and expenses, including spousal income and all expenses appellant wished the court to consider.

Appellant filed a declaration and numerous attachments in support of his claim of exemption. Appellant asserted in his declaration

¹ Further unspecified statutory references are to the Code of Civil Procedure.

² Because this appeal concerns only post-judgment collection efforts, we do not set forth facts regarding the underlying case.

that he and his wife signed a post-nuptial agreement such that their respective incomes constituted separate property. He asserted that his gross monthly income was \$6,000, and his net income was \$4,554.90. Appellant listed his family's monthly expenses and stated that he and his wife supported their four children, who were over the age of 18 and in college or working. On February 2, 2016, the trial court granted in part and denied in part appellant's claim of exemption, ordering \$1,000 per month to be garnished from appellant's wages.

The court took under submission third party claims to four bank accounts, jointly titled in the names of appellant's children and his wife, Sylvia.³ The court found that all the money in the accounts was subject to levy because Sylvia was the owner of the accounts. The court rejected Sylvia's claim that a post-marital agreement provided that "all post marriage property was her separate property," stating that the agreement did not so provide.

Respondent obtained a writ of execution on the judgment and served on appellant and Sylvia a notice of levy on all checking accounts and savings accounts to satisfy the judgment. Appellant objected to the notice of levy on the ground that it did not provide an adequate description of the property to be levied upon, citing section 687.010, subdivision (a).

Respondent also served on Scottrade a notice of levy on appellant's accounts there. Scottrade stated in a Memorandum of Garnishee that it

³ We will refer to appellant's wife by her first name, Sylvia.

required an order to send the proceeds of an IRA account worth approximately \$32,475.18. Appellant objected to this notice of levy on the ground that this account was his IRA, citing section 704.115.⁴

Respondent filed a motion for a court order to authorize Scottrade to liquidate the IRA and deliver the proceeds to the Los Angeles County Sheriff. The trial court held a hearing on the motion on June 27, 2016, then continued the matter to July 1, 2016, allowing appellant to file further documentation in support of his claim of exemption.

Following the July 1 hearing, the court found that appellant's claim of exemption was timely filed but denied the claim for insufficiency of the evidence. The court filed an order authorizing and ordering Scottrade to liquidate all assets held in appellant's or Sylvia's name to satisfy the judgment. This appeal followed.

DISCUSSION

I.

"California's Enforcement of Judgments Law (Law), which is codified in sections 680.010 through 724.260, is a "comprehensive and precisely detailed scheme" governing enforcement of money judgments' in California. [Citation.] As a general rule, the Law authorizes a

⁴ Under section 704.115, IRAs are exempt from execution "only to the extent 'necessary to provide for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor, taking into account all resources that are likely to be available for the support of the judgment debtor when the judgment debtor retires.'" (*McMullen v. Haycock* (2007) 147 Cal.App.4th 753, 755–756 (*McMullen*).)

creditor holding a ‘money judgment’ to ‘enforce’ that judgment against ‘all property of the judgment debtor’ through a ‘writ of execution.’ (§§ 695.010, subd. (a), 699.710.) To effectuate the California Constitution’s command that ‘a certain portion of the homestead and other property of all heads of families’ be ‘protect[ed], by law, from forced sale’ (Cal. Const., art. XX, § 1.5), our Legislature exempted certain items of property from levy by creditors with money judgments; those exemptions are set forth in sections 704.010 through 704.210. [Citations.]” (*O’Brien v. AMBS Diagnostics, LLC* (2016) 246 Cal.App.4th 942, 947-948 (*O’Brien*).)

Appellant contends that his IRA is exempt under section 704.115, subdivision (b), which states: “All amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt.” (§ 704.115, subd. (b).) “However, this exemption is not an all-or-nothing affair; instead, it exempts these accounts ‘only to the extent necessary to provide for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor.’ [Citations.]” (*O’Brien, supra*, 246 Cal.App.4th at p. 950, quoting § 704.115, subd. (e).) The debtor has the burden of establishing his property qualifies for exemption. (*Id.* at p. 948; see *Schwartzman v. Wilshinsky* (1996) 50 Cal.App.4th 619, 626 (*Schwartzman*) [“Appellant’s contention that the IRA was necessary to provide for his support and the support of his dependents upon

retirement presented a factual issue to the trial court, upon which appellant had the burden of proof.”.)

“In determining whether the amounts held in the accounts are necessary for [the] debtor’s support when [he] retires, [a] court should consider various factors, including [¶] [(1)] “the debtor’s present and anticipated living expenses and income; [(2)] the age and health of the debtor and his or her dependents; [(3)] the debtor’s ability to work and earn a living; [(4)] the debtor’s training, job skills and education; [(5)] the debtor’s other assets and their liquidity; [(6)] the debtor’s ability to save for retirement; and [(7)] any special needs of the debtor and his or her dependents.” [Citation.]” (*O’Brien, supra*, 246 Cal.App.4th at pp. 950–951.) The trial court’s findings on these factors are reviewed for an abuse of discretion. (*Id.* at p. 951.) “A judgment or order of the trial court is presumed correct, and must be upheld if it is supported by substantial evidence, no matter how slight it may be. [Citation.] Further, all evidence must be viewed in the light most favorable to the prevailing party, and all conflicts in evidence or in inferences must be resolved in favor of upholding the trial court’s judgment or order. [Citation.]” (*Schwartzman, supra*, 50 Cal.App.4th at p. 626.)

Appellant’s declaration in support of his claim of exemption indicated the following monthly expenses: \$7,676.59 for mortgages, insurance, and property tax; \$2,055.33 for utilities and telephone; \$1,945.61 for health and life insurance; \$4,215.96 for transportation and auto expenses; \$695.11 for clothing; \$3,283.22 for food and house supplies; \$339 for his children’s school expenses; \$580 for gardening,

housekeeping, and pool maintenance; and \$100 for medical and dental expenses. At one point in his declaration he stated that his net monthly income was \$4,554.90, but at another point he stated that it was \$2,277.45. He reported his wife's income as \$5,232.69 every two weeks. Appellant attached to his declaration a brief spreadsheet, various bank statements, bills, and grocery store receipts.

In opposition to appellant's claim, respondent attached an exhibit showing that when appellant applied for a loan in 2014, he stated that his monthly income was \$23,750, which is much more than the income he reported in his claim of exemption. Respondent further argued that appellant had failed to list his assets, which included a home "with approximately \$1,000,000 of untapped equity." We conclude the trial court did not abuse its discretion in denying appellant's claim of exemption.

First, we note that appellant has not provided a transcript of either hearing at which the trial court considered his claim of exemption. We therefore have no way of knowing the basis for the trial court's determination that appellant failed to establish his IRA was eligible for the exemption.

"Error must be affirmatively shown. [Citation.] The party appealing has the burden of overcoming the presumption of correctness. For this purpose, it must provide an adequate appellate record demonstrating the alleged error. Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant.

[Citation.]” (*Defend Bayview Hunters Point Com. v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 859-860.)

Moreover, appellant failed to comply with the requirements of section 703.530, which provides: “If property is claimed as exempt pursuant to a provision exempting property to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor, the claim of exemption shall include a financial statement.” (§ 703.530, subd. (a).) “The financial statement shall be executed under oath by the judgment debtor and, unless the spouses are living separate and apart, by the spouse of the judgment debtor.” (§ 703.530, subd. (c).) The financial statement must include all of the following: “(1) The name of the spouse of the judgment debtor. [¶] (2) The name, age, and relationship of all persons dependent upon the judgment debtor or the spouse of the judgment debtor for support. [¶] (3) All sources and the amounts of earnings and other income of the judgment debtor and the spouse and dependents of the judgment debtor. [¶] (4) A list of the assets of the judgment debtor and the spouse and dependents of the judgment debtor and the value of such assets. [¶] (5) All outstanding obligations of the judgment debtor and the spouse and dependents of the judgment debtor.” (§ 703.530, subd. (b).)

Appellant’s brief, unverified spreadsheet and the various receipts and bills he submitted do not comply with the requirements of section 703.530. (See *Schwartzman, supra*, 50 Cal.App.4th at p. 627 [finding the appellant did not meet his burden of establishing a claim of

exemption where he “did not file a financial statement, but instead, stated some of the required facts in his declaration, and attached an unverified, very brief, balance sheet”].) He therefore failed to meet his burden of establishing his IRA is eligible for exemption.

Appellant relies extensively on decisions of the bankruptcy court. However, “[d]ecisions of lower federal courts are not binding on this court [Citation.]” (*McMullen, supra*, 147 Cal.App.4th at p. 758.) Moreover, none of the cited cases support appellant’s claim. Appellant was required to provide a verified financial statement that included “all sources and amounts of earnings and other income, a list of assets, and all outstanding obligations,” (*Schwartzman, supra*, 50 Cal.App.4th at p. 627) in order for the trial court to “assess the ‘potential disruption in earning capacity’ from the judgment’s levy and ‘the [d]ebtor’s ability to regenerate retirement funds’ prior to retirement. [Citation.]” (*O’Brien, supra*, 246 Cal.App.4th at p. 951.) The legal principles set forth in the bankruptcy cases do not add anything to this determination, which is a factual issue. (*Schwartzman, supra*, 50 Cal.App.4th at p. 626.) In fact, the cited cases merely emphasize that appellant was required to submit evidence in compliance with section 703.530 in order for the court to consider his “earning capacity, present and future financial needs, ability to ensure against future disruptions in earning capacity, and his ability to reestablish a retirement fund.” The trial court may have considered the requisite factors, but there are no transcripts of the hearings, and the court was not required to set forth its findings. (§ 703.580, subd. (d).)

Appellant's assertion that "he has no other sources than social security benefits of an anticipated \$1,800.00 per month" is not sufficient to meet his burden. Respondent's opposition to the claim of exemption included evidence that appellant had a monthly income of \$23,750. Appellant has failed to meet his burden of establishing that his IRA qualifies for exemption.

II.

Appellant contends that the trial court should have continued the hearing in order to allow him to provide more evidence of his eligibility for the exemption, citing section 703.580, subdivision (c).⁵ The statute provides: "The claim of exemption is deemed controverted by the notice of opposition to the claim of exemption and both shall be received in evidence. If no other evidence is offered, the court, if satisfied that sufficient facts are shown by the claim of exemption (including the financial statement if one is required) and the notice of opposition, may make its determination thereon. If not satisfied, the court shall order the hearing continued for the production of other evidence, oral or documentary." (§ 703.580, subd. (c).)

The trial court already had continued the hearing once, from December 28, 2015 to February 2, 2016, in order for appellant to provide evidence of his income and expenses. Appellant submitted his declaration and the numerous exhibits, but he did not comply with

⁵ Appellant contends, on the one hand, that he presented sufficient evidence for the court to make a determination and that the court should have granted his request for a continuance to present more evidence.

section 703.530. Sylvia later submitted a declaration in support of the claim for exemption and attached the same exhibits appellant had attached to his declaration. On June 14, 2016, appellant filed another declaration and exhibit opposing the levy of his Scottrade account.

The trial court subsequently continued the hearing on the levy of the Scottrade account. Appellant asserts that this continuance was granted solely to allow him to present evidence of the timeliness of his claim, not the merits of the claim. However, the minute order does not so specify, and there is no transcript in the record to substantiate this contention.

The statute states that the court shall continue the hearing for the production of other evidence if it is not satisfied that sufficient facts have been shown by the claim of exemption and the notice of opposition. (§ 703.580, subd. (c).) There is no indication here that the court was not satisfied with the facts that had been shown by appellant's claim and respondent's opposition. Although the court stated in its order that the claim of exemption was "denied for insufficiency of the evidence," this is most sensibly construed to mean the court found that appellant failed to provide sufficient evidence to establish his claim. This is particularly so because the court then ordered the levy and liquidation of the IRA, in compliance with section 703.580, subdivision (d), which states in relevant part: "At the conclusion of the hearing, the court shall determine by order whether or not the property is exempt in whole or in part. Subject to Section 703.600 [providing for appeal], the order is

determinative of the right of the judgment creditor to apply the property to the satisfaction of the judgment.”

Appellant already had been given several opportunities to establish his claim of exemption. The trial court did not abuse its discretion in denying appellant’s request to continue the hearing.

DISPOSITION

The order appealed from is affirmed. Respondent is entitled to costs on appeal.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.