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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

COUNTY OF SAN LUIS
OBISPO,

Plaintiff and Respondent,

v.

GREG JAQUEZ BAIL BONDS,
INC.,

Defendant and Appellant.

2d Civ. No. B280017
(Super. Ct. Nos. 15F-05624,
16CV-0554)
(San Luis Obispo County)

Greg Jaquez Bail Bonds, Inc. (Bail Agent) appeals the trial court's order denying its motion to vacate the forfeiture of a \$100,000 bail bond posted by Bankers Insurance Company (Surety) to secure the release of a criminal defendant.

When the defendant failed to appear in court, the trial court ordered the bail forfeited. Following expiration of the 180-day appearance period in which to challenge the forfeiture, the Surety requested that the court retroactively toll the appearance

period under Penal Code section 1305, subdivision (e)¹ [hereafter section 1305(e)], to allow it to submit evidence establishing the right to exoneration of the bond under section 1305, subdivision (d) [hereafter section 1305(d)]. The court denied the tolling request.

Section 1305(d) does not provide for tolling of the appearance period, and the tolling provision in section 1305(e) applies only when the defendant is temporarily disabled from appearing in court. Here, it is alleged that the defendant has been deported and is permanently disabled from appearing. (See § 1305(d).) Accordingly, the Bail Agent has not demonstrated that tolling of the appearance period is available under section 1305(e).

Even if we assume section 1305(e)'s tolling provision does apply, that section "does not require the trial court to act on its own motion, nor does it provide for tolling by operation by law." (*People v. Accredited Surety & Casualty Co., Inc.* (2012) 203 Cal.App.4th 1490, 1496 (*Accredited*).) Thus, to obtain tolling under section 1305(e), the Bail Agent or the Surety "was required to file a motion pursuant to subdivision (e) before the expiration of the [appearance] period." (*Id.* at p. 1502.) Because no motion was filed within that period, neither the Bail Agent nor the Surety was entitled to relief under section 1305(e). (*Accredited*, at p. 1502.) In the absence of such relief, the request to vacate the forfeiture and exonerate the bond was untimely. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The San Luis Obispo County District Attorney charged Darwin Alexis Mendoza with five felony counts of grand theft

¹ All further statutory references are to the Penal Code unless otherwise stated.

(§ 487, subdivision (a)) and five felony counts of second degree burglary. (§ 459.) Mendoza, an undocumented Honduran national, pled not guilty to all counts, and bail was set at \$100,000.

The Surety, through its Bail Agent, posted a \$100,000 bond for Mendoza's release from custody. On April 7, 2016, Mendoza failed to appear for a pre-preliminary hearing, and the trial court ordered the bail forfeited. The court mailed the notice of forfeiture to the Bail Agent and the Surety on April 13, 2016.

On May 2, 2016, the Bail Agent moved to vacate the forfeiture and to exonerate the bond under section 1305, subdivision (f) [hereafter section 1305(f)] on the basis that Mendoza was in the custody of U.S. Immigration and Customs Enforcement (ICE) pending removal proceedings.² The motion did not include a declaration, but the Bail Agent attached documents purporting to show that "DARWIN GONZALEZ-GONZALEZ,"³ was in ICE's custody at the James A. Musick Facility in California. The Bail Agent represented that it "has diligently made efforts to obtain all documentation from the ICE authorities and will update those efforts before the hearing." Specifically, the Bail Agent was seeking to obtain evidence that

² Section 1305(f) provides: "In all cases where a defendant is in custody beyond the jurisdiction of the court that ordered the bail forfeited, and the prosecuting agency elects not to seek extradition after being informed of the location of the defendant, the court shall vacate the forfeiture and exonerate the bond on terms that are just and do not exceed the terms imposed in similar situations with respect to other forms of pretrial release."

³ Although it is not entirely clear from the motion, it appears that Darwin Gonzalez-Gonzalez is Mendoza's alias.

Mendoza was deported to Honduras, or that the District Attorney's office would not extradite him.

The County of San Luis Obispo (County) opposed the motion on May 10, 2016, arguing that the Bail Agent had failed to establish by competent evidence that it is entitled to relief from forfeiture and exoneration of the bond. The matter was scheduled for hearing on June 9, 2016. At the Bail Agent's request, the trial court continued the hearing to August 2, 2016, to allow the Bail Agent time to provide a declaration and proof of Mendoza's ICE detention. The Bail Agent did not request a tolling of the appearance period for seeking relief under section 1305.

By August 2, 2016, the Bail Agent and the Surety were still trying to obtain documentation to support the motion to vacate the forfeiture. At the Bail Agent's request, the trial court continued the hearing to November 1, 2016. Once again, no tolling request was made.

On October 15, 2016, the appearance period on the forfeiture expired. The trial court had previously advised the Bail Agent and the Surety that the forfeiture would become absolute on that date.

Twelve days later, on October 27, 2016, the Surety filed a reply to the County's opposition to the motion to vacate the forfeiture and to exonerate the bond. Even though the Bail Agent, and not the Surety, filed the original motion, the Surety argued that it was entitled to a retroactive tolling of the 180-day forfeiture period under section 1305(e). It further argued that it was entitled to relief from forfeiture under section 1305(d), instead of under section 1305(f). The Surety claimed that Mendoza was permanently disabled from appearing in court due to his deportation by ICE and the prohibition that he not re-enter

the United States for a period of 20 years. To establish Mendoza's deportation status, the Surety's counsel submitted a declaration providing a "copy of the ICE 'Warning to Alien Ordered Removed or Deported' dated April 2, 2016." Counsel also provided a document stating that "DARWIN GONZALEZ-GONZALEZ" was in ICE's custody at the Theo Lacy Facility in California.

On November 1, 2016, the trial court denied the motion to vacate the forfeiture and to exonerate the bond. It found that the Surety had not presented grounds to toll the forfeiture appearance period. The court also found that the Surety, and presumably the Bail Agent, had not established a basis for vacating the forfeiture. It entered summary judgment on the bond forfeiture in the amount of \$100,435 against both the Bail Agent and the Surety. The Bail Agent appeals the court's November 1, 2016 order. The Surety did not file a notice of appeal or submit an appellate brief.⁴

DISCUSSION

Resolution of this appeal is complicated by the fact that the Bail Agent is the sole appellant. The record reveals that the Bail Agent moved to vacate the forfeiture and to exonerate the bond, while the Surety responded to the County's opposition to the motion. It was the Surety, and not the Bail Agent, that claimed entitlement to a tolling of the appearance period under section

⁴ On December 21, 2016, the Bail Agent and the Surety filed a joint motion under Code of Civil Procedure section 473, subdivision (b) to set aside the summary judgment and to toll time on the forfeiture appearance period. The trial court stayed proceedings on the motion pending resolution of this appeal. We express no opinion on the merits of that motion.

1305(e), as well as to relief under section 1305(d). Because it is undisputed that the Bail Agent is the Surety's agent, we shall presume, as does the County, that the Bail Agent joined in the Surety's response to the County's opposition.

Standard of Review

“Ordinarily, appellate courts review an order denying a motion to vacate the forfeiture of a bail bond under an abuse of discretion standard.” (*People v. International Fidelity Ins. Co.* (2012) 204 Cal.App.4th 588, 592.) When the appellate court is deciding only legal issues, however, it conducts an independent review. (*Ibid.*) “[W]hen there are factual disputes, the trial court's findings of fact will be upheld under the abuse of discretion standard when those findings are supported by substantial evidence.” (*Accredited, supra*, 230 Cal.App.4th at p. 555.)

“The law traditionally disfavors forfeitures and this disfavor extends to forfeiture of bail. [Citations.] Thus, . . . sections 1305 and 1306 dealing with forfeiture of bail bonds must be strictly construed in favor of the surety to avoid the harsh results of a forfeiture.’ [¶] The standard of review, therefore, compels us to protect the surety, and more importantly the individual citizens who pledge to the surety their property on behalf of persons seeking release from custody, in order to obtain the corporate bond. . . . [¶] [Nonetheless,] [i]t is well established in the case law that . . . sections 1305 and 1306 are subject to precise and strict construction. . . . “[W]here a statute requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or [be] subject to certain limitations, an act beyond those limitations is in excess of its jurisdiction.” [Citations.]” (*County of Los Angeles v. Surety Ins. Co.* (1984) 162 Cal.App.3d 58, 62; see *People v. Indiana Lumbermens*

Mutual Ins. Co. (2010) 49 Cal.4th 301, 308 [“The policy disfavoring forfeiture cannot overcome the plainly intended meaning of the statute”].)

Request to Toll the Appearance Period

Once a bail bond is forfeited, the bail agent or surety has 180 days (plus five days for mailing) to move to vacate the forfeiture. (§ 1305, subds. (b), (c), (d), (j).) This is known as the “appearance period.” (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 658.) The bail agent or surety “is entitled to have the trial court vacate the bond’s forfeiture and exonerate the bond if, prior to the expiration of the [appearance] period and any extension thereof, it makes one of five different showings” under section 1305. (*People v. Financial Casualty & Surety, Inc.* (2017) 10 Cal.App.5th 369, 377.) The pertinent showing here involves section 1305(d), which governs situations in which the defendant has been deported. (See *County of Los Angeles v. Financial Casualty & Surety Inc.* (2015) 236 Cal.App.4th 37, 45.)

It is undisputed that the Bail Agent’s original motion, dated May 2, 2016, was filed within the 180-day appearance period. That motion, however, did not include the evidence necessary to establish the Bail Agent’s entitlement to relief from the forfeiture under either section 1305(d) or section 1305(f). The Bail Agent maintains, however, that the evidence presented in the motion was sufficient to justify a tolling of the appearance period under section 1305(e) for the purpose of giving the Bail Agent and the Surety additional time to obtain competent evidence to support the motion.

Section 1305(e)(1) states: “*In the case of a temporary disability*, the court shall order the tolling of the 180-day period provided in this section during the period of temporary disability,

provided that it appears to the satisfaction of the court that the following conditions are met: [¶] (A) The defendant is temporarily disabled by reason of illness, insanity, or detention by military or civil authorities. [¶] (B) Based upon the temporary disability, the defendant is unable to appear in court during the remainder of the 180-day period. [¶] (C) The absence of the defendant is without the connivance of the bail.” (Italics added.)

Section 1305(d) provides: “*In the case of a permanent disability*, the court shall direct the order of forfeiture to be vacated and the bail or money or property deposited as bail exonerated if, within 180 days of the date of forfeiture or within 180 days of the date of mailing of the notice, if notice is required under subdivision (b), it is made apparent to the satisfaction of the court that both of the following conditions are met: [¶] (1) The defendant is deceased or otherwise permanently unable to appear in the court due to illness, insanity, or detention by military or civil authorities. [¶] (2) The absence of the defendant is without the connivance of the bail.” (Italics added.)

Here, the Bail Agent sought and was granted two continuances in a futile effort to obtain the necessary paperwork to demonstrate that Mendoza had been taken by ICE and deported to Honduras. Neither the Bail Agent nor the Surety requested a tolling of the appearance period at the time the continuances were granted. Thus, by the time the Surety filed its response to the County’s opposition and requested a tolling of the 180-day appearance period, the period had expired.

The trial court denied the Bail Agent’s request for retroactive tolling of the appearance period. The court stated: “It [is] pretty clear . . . the surety cited in this matter has not done what they are supposed to do in order to get relief in a timely manner. They have been sitting on their hands for some

time, waiting for a lightning bolt to strike. But as to doing the right thing, they haven't done it."

The Bail Agent appears to concede that because the evidence purporting to support the motion to vacate the forfeiture under section 1305(d) was filed after the appearance period had expired, the period must be tolled before the motion may be considered. This is because absent tolling, the motion is untimely. (*Ibid.*; see *People v. Financial Casualty & Surety, Inc.*, *supra*, 10 Cal.App.5th at p. 377.)

The Bail Agent argues that the trial court erred by refusing to toll the appearance period under section 1305(e), but this argument is unpersuasive because section 1305(e) provides for tolling based on a *temporary disability*. The Bail Agent does not appear to claim that Mendoza is subject to a temporary disability. Its position is that he has been deported and thus is *permanently disabled* from appearing within the meaning of section 1305(d). The Bail Agent provides no authority suggesting that the 180-day appearance period set forth in section 1305(d) may be tolled under section 1305(e) or any other statute.

Even if we assume the Bail Agent is claiming a temporary disability, it has failed to cite any authority indicating that the appearance period may be tolled retroactively. To the contrary, decisional authority clarifies that a trial court has no sua sponte duty to toll the appearance period under section 1305(e), and that any tolling request must be made within the appearance period. (*Accredited, supra*, 203 Cal.App.4th at pp. 1501-1502.) Moreover, where, as here, "the statutory period within which an act may be performed is jurisdictional, the statute cannot be defeated by the simple device of a *nunc pro tunc* order." (*People v. Surety Insurance Co.* (1973) 30 Cal.App.3d 75, 80.)

In *Accredited*, *supra*, 203 Cal.App.4th 1490, the defendant failed to appear at a scheduled hearing in Stanislaus County and the court forfeited his bail. Shortly thereafter, the defendant was arrested in Merced County and the Stanislaus County court signed an order requiring the defendant's transfer to its jurisdiction. (*Id.* at pp. 1493-1494.) The surety, however, did not move to vacate the bail forfeiture within the appearance period and the trial court entered summary judgment against it. (*Id.* at p. 1494.) On appeal, the surety relied, in part, on section 1305(e) to argue the Stanislaus County court's knowledge of the defendant's incarceration in Merced County required it to toll the appearance period. (*Accredited*, at pp. 1494-1495.)

The Court of Appeal “conclude[d] the surety must make a motion to toll the [appearance] period if the defendant is temporarily disabled within the meaning of [section 1305(e)].” (*Accredited*, *supra*, 203 Cal.App.4th at p. 1501.) It explained that “[s]ubdivision (c)(1) and (2) [of section 1305] unequivocally establish that the Legislature knows how to require the trial court to act on its own motion and how to craft appropriate relief if the trial court fails to act. The Legislature's omission of this language in subdivision (e) precludes us from adding such a requirement. [Citation.]” (*Ibid.*)

The court further observed that in 1999, the Legislature amended section 1305 in response to *County of Los Angeles v. National Automobile & Casualty Ins. Co.* (1998) 67 Cal.App.4th 271, 279-280, which held that motions to toll the appearance period under section 1305(e) must be filed and heard before the expiration of the appearance period. (*Accredited*, *supra*, 203 Cal.App.4th at p. 1501.) The Legislature's response was to add language permitting a motion filed within the appearance period to be heard within 30 days of expiration of the appearance period.

(*Ibid.*) “Since [that] change, subdivision (e) motions to toll that are filed within the [appearance] period can be heard within 30 days of expiration.” (*Ibid.*)

The *Accredited* court was persuaded that “[i]f the Legislature intended to require the [appearance] period be tolled as a matter of law when a defendant was temporarily disabled, the 1999 amendment would not have been necessary. Moreover, since the 1999 amendment was in response to a case holding that a motion to toll the [appearance] period must be filed and heard within the [appearance] period, the Legislature’s failure to add a provision requiring tolling by operation of law is conclusive evidence that there was no such intent.” (*Accredited, supra*, 203 Cal.App.4th at p. 1502.) For these reasons, the court held that a motion or request pursuant to section 1305(e) must be brought before the expiration of the appearance period. (*Accredited*, at p. 1502.)

The Bail Agent’s brief ignores *Accredited*, relying instead on *People v. Lexington National Ins. Corp.* (2010) 181 Cal.App.4th 1485 (*Lexington*). In that case, the surety moved during the appearance period to vacate a bail bond forfeiture based on evidence of the defendant’s incarceration in another state. The court determined it was “undisputed” that the defendant was incarcerated in Virginia and that his incarceration created a statutory disability. (*Id.* at p. 1492.) The only issue, therefore, “was the appropriate relief based on the law and undisputed facts -- either exoneration or tolling.” (*Ibid.*)

The *Lexington* court rejected the claim that the surety’s request to toll the running of the 180-day appearance period was untimely and not properly noticed. (*Lexington, supra*, 181 Cal.App.4th at p. 1493.) The court noted that “[t]he written motion before the court was made on the grounds that the

defendant was in custody in Virginia. As such, section 1305 required the court to consider the relief that might be appropriate in the circumstances -- exoneration if the disability was permanent, or tolling if the disability was temporary.” (*Ibid.*)

Accredited distinguished *Lexington* on two grounds. First, unlike in *Accredited*, the surety in *Lexington* had made a timely motion under section 1305. (*Accredited, supra*, 203 Cal.App.4th at p. 1503.) Second, *Accredited* did not interpret *Lexington* to “stand[] for the proposition that relief pursuant to [section 1305(e)] must be granted as a matter of law.” (*Ibid.*) To the extent *Lexington* could be read that broadly, *Accredited* disagreed with the holding. (*Ibid.*)

We agree with *Accredited*’s analysis and likewise distinguish *Lexington*. Although the Bail Agent in this case made a timely motion under section 1305, the motion was made under section 1305(f) and was not supported by credible, authenticated evidence that Mendoza was in ICE’s custody. Thus, unlike in *Lexington*, it was not “undisputed” that the defendant was incarcerated elsewhere. (*Lexington, supra*, 181 Cal.App.4th at p. 1492.) In addition, the Bail Agent’s motion did not provide evidence of a “permanent disability,” as contemplated by section 1305(d). That evidence was not presented until after the expiration of the appearance period. As previously stated, the bail agent or surety “is entitled to have the trial court vacate the bond’s forfeiture and exonerate the bond if, *prior to the expiration of the [appearance] period* and any extension thereof, it makes one of five different showings” under section 1305. (*People v. Financial Casualty & Surety, Inc., supra*, 10 Cal.App.5th at p. 377, italics added.) The Bail Agent and the Surety did not satisfy this requirement because (1) they did not attempt to make any showing under section 1305(d) until after the expiration of the

180-day appearance period, and (2) their attempt to make a showing under section 1305(f) was inadequate from an evidentiary standpoint.

The evidentiary void in the Bail Agent's motion also distinguishes this case from another cited case, *People v. Resolute Ins. Co.* (1975) 46 Cal.App.3d 249. Although the notice of motion in that case did not state grounds to support exoneration of the bond, the motion did include a declaration and documents supporting the trial court's grant of a temporary disability. (*Id.* at pp. 254-255.) In contrast, the instant case did not involve a simple failure to label the motion properly; rather, there was no competent evidence presented to support granting any type of relief under section 1305.

In sum, we conclude that a party may not invoke section 1305(e) to toll the time for bringing a motion to exonerate the bond under section 1305(d). We further conclude that even if tolling were available, the Bail Agent still would not prevail. It is undisputed that the Bail Agent and the Surety's request to toll the appearance period under section 1305(e) was brought after the period had expired on October 15, 2016. Since neither the Bail Agent nor the Surety sought tolling of the appearance period before that date, the trial court properly denied the tolling request. (See *Accredited, supra*, 203 Cal.App.4th at p. 1502.)

Finally, in the absence of tolling, we need not reach the Bail Agent's contention that the trial court erred by declining to vacate the forfeiture and exonerate the bond under section 1305(d). That statute applies only where there is a "permanent disability," i.e., "[t]he defendant is deceased or otherwise permanently unable to appear in the court due to illness, insanity, or detention by military or civil authorities." (§ 1305(d).) The evidence purporting to support Mendoza's

“permanent disability” was not filed until after the expiration of the appearance period. As previously discussed, the Bail Agent has failed to demonstrate that the request to vacate the forfeiture under section 1305(d) was properly before the court at the time of the hearing. (See *County of Los Angeles v. Surety Ins. Co.*, *supra*, 162 Cal.App.3d at p. 62.)

DISPOSITION

The order denying the motion to vacate the forfeiture and exonerate the bond is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Hugh F. Mullin III, Judge
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