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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

STEVEN MARK ROSENBERG,

Plaintiff and Appellant,

v.

ONEWEST BANK, N.A., et al.,

Defendants and Respondents.

B263242

(Los Angeles County
Super. Ct. Nos. BP109162
and BP128307)

APPEAL from an order of the Superior Court of Los Angeles County,
Maria E. Stratton, Judge. Reversed and remanded with directions.

Steven Mark Rosenberg, in pro. per., for Plaintiff and Appellant.

Fidelity National Law Group and Donald E. Leonhardt for Defendants and
Respondents.

INTRODUCTION

Steven Mark Rosenberg (Rosenberg) appeals an order dismissing, at his request, two related probate actions. He argues that the probate court erred by dismissing those actions with prejudice rather than without prejudice. We agree the probate court erred by dismissing the actions with prejudice, and remand with directions to enter an order of dismissal without prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Petition*

Rosenberg is the administrator of the estate of his father, Isadore Rosenberg, and the trustee of the Isadore Rosenberg Family Trust. In August 2009 Rosenberg, represented by counsel, filed a petition as administrator and trustee pursuant to Probate Code section 850 to determine title to real property where someone other than the decedent or trustor claims to have title to or an interest in the property.¹

The third amended petition alleged that Isadore Rosenberg had record title to property in North Hills, California, but that prior to his death “Isadore Rosenberg’s name was forged on a number of written instruments that were recorded on the” property. Rosenberg alleged that his father’s caretaker, David Curtis Harder, “took advantage of Isadore Rosenberg’s dependency, and cleaned him out of his life savings, and then began initiating a series of forged documents that resulted in the . . . property going from free and clear ownership . . . to approximately \$390,000 of loans and liens being recorded” on the property. Rosenberg further alleged that various individuals and financial institutions, including OneWest Bank and Mortgage Electronic Registration Systems, Inc., both of which Rosenberg named in his petitions, aided and abetted Harder in his

¹ Rosenberg filed petitions in both the estate and the trust actions. The petitions he filed in the trust action are not in the record.

scheme. These documents, included deeds of trust securing promissory notes and lines of credit, were allegedly forged both before and after Isadore Rosenberg's death. Rosenberg also alleged that OneWest Bank conspired with Harder to commit elder abuse.

Rosenberg's petition included causes of action for declaratory relief, cancellation, rescission, elder abuse, and determinations under Probate Code section 850, subdivisions (a)(2)(C), (a)(2)(D), (a)(3)(B), and (a)(3)(C), that Rosenberg, as administrator of the estate and trustee of the trust, held the property "free and clear of any liens or encumbrances" and owned a 100 percent undivided interest in the property.

B. *The Hearings*

After several unsuccessful settlement conferences in June 2014, at which Rosenberg was representing himself, the probate court on August 19, 2014 set a trial setting conference for December 9, 2014. Rosenberg did not appear at the December 9, 2014 hearing. Consequently, the court set an order to show cause for Rosenberg "to answer why no appearance [was] made" on December 9, 2014, why the court should not dismiss the petition, "and why [the] settlement has not been signed." The court set a hearing on the order to show cause for January 20, 2015, and issued a "citation" requiring Rosenberg to appear on that date.

Rosenberg appeared at the January 20, 2015 hearing, and asked the court to dismiss his petition pursuant to Code Civil Procedure section 583.310,² which provides: "An action shall be brought to trial within five years after the action is commenced against the defendant." This is what occurred at the hearing:

"The Court: Mr. Rosenberg, first tell me about the settlement agreement that hasn't been signed.

"Mr. Rosenberg: I wanted to go --

"The Court: Are you going to sign it or are you backing out? That's all I need to know.

² Undesignated statutory references are to the Code of Civil Procedure.

“Mr. Rosenberg: This court needs to dismiss this case immediately. The rule where claimant fails to bring an action to trial within five years, and the manner in which the delay is brought to the court’s attention is immaterial. And when the courts become aware of the facts, it must dismiss the action. I am telling you right now, it has been more than five years.

“In your respectful affidavit and the citation for me to appear -- no, I didn’t just come from Twin Towers yet -- but in the citation, it says this original petition was filed 9/16/11. That is absolutely, patently false. This . . . petition was filed back [on] August . . . 29, 2009. It’s a public policy matter for . . . cases to be dismissed after five years, mandatory. Why? Because people die who are integral to the case. People’s memories fade. In this case, one of the key witnesses has dementia. . . . It’s [Code of Civil Procedure section] 583.310. No, I’m not going to -- Mr. Fidelity lawyer, I’m not going silently into the night. . . .

“The Court: Can you stop a minute?

“Mr. Rosenberg: Yes.

“The Court: Okay. Isn’t this your petition?

“Mr. Rosenberg: I want out. It’s done. I’ll have other causes of action, a lot of other causes of action, counselor.

“[¶¶]

“The Court: Do you have any objection to his request that the petition be dismissed?”

“Mr. Leonhardt [counsel for OneWest Bank]: No, your Honor.

“The Court: All right. The petition is dismissed.

“Mr. Leonhardt: With prejudice, your Honor?

“Mr. Rosenberg: It’s under -- but I want to make sure it is under. . . .

“The Court: It’s dismissed with prejudice and the [order to show cause] is off calendar. Okay. You got what you want, Mr. Rosenberg.

“Mr. Rosenberg: It should be dismissed through -- please make sure on the record it’s dismissed under [section] 583 --

“The Court: It’s dismissed pursuant to your request. You’ve made your record.

“Mr. Rosenberg: 583, [section] 583.310.

“The Court: It’s dismissed pursuant to your request, so you’re all set.”

C. *The Appeal*

The court signed and filed a judgment of dismissal on February 3, 2015. The judgment references the two related cases and states the “entire action” is dismissed with prejudice. OneWest Bank gave notice of entry of judgment on February 11, 2015. Rosenberg timely appealed on April 6, 2015.

DISCUSSION

Rosenberg appeals from the probate court’s order granting his request to dismiss his petition. Rosenberg does not argue he was confused, did not intend to voluntarily dismiss his action, or dismissed it by mistake. Instead, Rosenberg argues that the probate court erred by dismissing his petition with prejudice. Although Rosenberg also suggests that the probate court erred by dismissing his case under the five-year statute, section 583.310, and he argues that the court should have had an evidentiary hearing, his primary contention appears to be that the court should not have dismissed the case with prejudice.³

And that contention has merit. Because trial on the petition had not commenced (indeed, the December 9, 2014 hearing was supposed to be a trial setting conference), Rosenberg had the right to voluntarily dismiss his petition with or without prejudice.

³ For example, Rosenberg argues, “To dismiss a case with prejudice regarding the five-year limitation requires [a] hearing.” There was, however, no motion or order to show cause under section 583.310, and the court did not dismiss Rosenberg’s petition under the five-year statute. Rosenberg also suggests that the court’s order deprived him of an evidentiary hearing, but he appears to be arguing that, because the dismissal with prejudice was “on the merits,” it will preclude him from having an evidentiary hearing in connection with any future claims he may bring.

(See § 581, subds. (b)(1), (c); *Bank of America, N.A. v. Mitchell* (2012) 204 Cal.App.4th 1199, 1209; *Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp.* (2009) 174 Cal.App.4th 67, 75; *Gogri v. Jack In The Box Inc.* (2008) 166 Cal.App.4th 255, 261.) The transcript of the January 20, 2015 hearing reflects that Rosenberg communicated, perhaps not as precisely as an attorney would have but nevertheless sufficiently, that he wanted his petition voluntarily dismissed without prejudice by trying to tell the court he wanted his case dismissed under section 583.310. Rosenberg apparently believed that a dismissal for failure to bring an action to trial within five years under section 583.310 is a dismissal without prejudice (see § 581, subd. (b)(4); *Ashworth v. Memorial Hospital* (1988) 206 Cal.App.3d 1046, 1053, 1063 & fn. 2), and he wanted the court to dismiss his petition pursuant to that statute. Rosenberg also made it clear that, although he wanted the court to dismiss his case, he was not finished litigating with his adversaries. He told counsel for OneWest Bank that he did not intend to go “silently into the night” and that he had many other causes of action he intended to bring. As Rosenberg puts it in his reply brief, he “did not ask for a dismissal with prejudice” and “made clear that he fully intended to continue to enforce his rights.” Whether such causes of action are barred by applicable statutes of limitations and whether they state claims will be determined if and when Rosenberg ever brings those claims.

Moreover, Rosenberg never asked the court to dismiss his petition with prejudice. It was counsel for OneWest Bank who asked, after the court had dismissed the petition, whether the dismissal could be with prejudice. Although the court stated the dismissal was “pursuant to” Rosenberg’s request, and OneWest Bank asserts on appeal Rosenberg “did not object to [its] additional request,” Rosenberg tried, in the split-second he had, to object by starting to say that was not what he wanted and that he wanted the case dismissed under section 583.310. The court, however, perhaps in its haste to resolve the proceeding involving an indecisive, self-represented litigant who apparently had backed out of a settlement, interrupted Rosenberg and stated it would dismiss the petition with prejudice. But Rosenberg was entitled, as it appears he was trying to do, to dismiss his petition without prejudice. (See *Steffens v. Rowley* (1935) 10 Cal.App.2d 628, 630 [in a

plaintiff's appeal from an order of dismissal, the trial court erred in granting a motion to dismiss by adding "with prejudice" to the order of dismissal, and, "[w]hile the oral motion to dismiss might have been denied by the court [citation], it should not have been granted with prejudice over the objections of the [plaintiff]"[.]

DISPOSITION

The order of dismissal is reversed. The matter is remanded with directions to vacate the order dismissing the petition with prejudice, and enter a new order dismissing the petition without prejudice. The request for judicial notice is denied. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

GARNETT, J. *

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.