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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DANA PONTICELLI,

Plaintiff,

v.

RHONDA ASON et al.,

Defendants and
Appellants;

PACIFIC LIFE INSURANCE
COMPANY,

Defendant and
Respondent.

B277763

(Los Angeles County
Super. Ct. No. BP152065)

APPEAL from orders of the Superior Court of Los Angeles
County, Maria E. Stratton, Judge. Affirmed.

Law Offices of David J. Hart and David J. Hart for
Defendants and Appellants.

Dentons US, Laura L. Geist, and Kelly D. Fair for
Defendant and Respondent.

Rhonda Ason and Sonja Salinas appeal from trial court orders discharging and awarding attorney fees to Pacific Life Insurance Company (Pacific Life) after granting Pacific Life's interpleader motion in trust litigation between Ason and Salinas and their brother, Dana Ponticelli. The trial court issued two orders—one discharging Pacific Life and one granting Pacific Life's request for attorney fees as part of the interpleader motion—10 months apart. Because Ason and Salinas did not file their notice of appeal until after the second order, but challenge only the basis of the first order, Pacific Life requested that we dismiss the appeal as untimely. Finally, Pacific Life requested sanctions against Ason and Salinas, arguing that the appeal was frivolous.

We find that the notice of appeal was timely, affirm the trial court's orders, and deny Pacific Life's motion for sanctions.

BACKGROUND

Rudolph and Dolores Ponticelli created the Ponticelli Family Trust (the Trust) on September 5, 2012. The Trust designated the Ponticellis' three adult children, Dana Ponticelli, Rhonda Ason, and Sonja Salinas, successor cotrustees and beneficiaries in equal shares. Dolores Ponticelli died on March 1, 2013. Dana Ponticelli's Probate Code petition initiating the underlying litigation here alleged that as of the date of Mrs. Ponticelli's death, the Trust held \$896,985 in accounts at Bank of America, JPMorgan Chase, and Wells Fargo.

By mid-summer 2013, Rudolph Ponticelli was suffering from dementia and was unable to make financial and medical

decisions for himself. On July 31, 2013, Rudolph signed an affidavit indicating that Ason was to assist Rudolph managing his financial affairs, including “access to all of [Rudolph’s] accounts with signatory rights on [Rudolph’s] checks to pay just debts.”¹ On August 3, 2013, Rudolph gave Ason power of attorney over his finances.

Dana’s petition alleges that Ason executed a series of transactions beginning on August 6, 2013 that left the Trust’s bank account balances at \$0 by the time Rudolph passed away on February 26, 2014. The petition alleged that Ason transferred money from the Trust’s bank accounts to accounts held in Rudolph’s name. Pertinent to this appeal, Ason then used the Trust’s funds in Rudolph’s accounts to purchase \$600,000 of Pacific Life fixed annuities, which listed only Ason and Salinas as beneficiaries. The petition alleges that Pacific Life processed death benefit payments on August 13, 2014 in the amount of \$600,000 “plus any accrued income from the original contracts” payable to Ason and Salinas.

Among other allegations, Dana’s petition alleged that Pacific Life knew or should have known that Rudolph had dementia when Ason purchased the annuities for him, that it should have known of the existence of the Trust, and that Pacific Life, acting in concert with Ason and JPMorgan Securities (through whom Ason had acquired the Pacific Life annuities), had engaged in elder financial abuse against Rudolph.

Dana filed his petition on May 15, 2015. On July 30 and 31, 2015, Pacific Life filed demurrers and a motion to strike, and

¹ When we refer to Ponticelli family members by first name, it is for the reader’s benefit; we intend no disrespect.

filed a motion for interpleader and discharge pursuant to Code of Civil Procedure sections 386, subdivision (b) and 386.5.² In response, Ason and Salinas filed what they called a demurrer to Pacific Life's interpleader motion on August 21, 2015. At a hearing on September 15, 2015, the probate court sustained Pacific Life's demurrers to the petition, granted the motion to strike, and granted Pacific Life's interpleader motion and discharge, but held over the question of attorney fees on the interpleader motion for further briefing and a second hearing.³ At the second hearing, the probate court granted Pacific Life's request for attorney fees and awarded fees and costs of \$52,513.

The probate court issued its order granting Pacific Life's interpleader and discharge motion on September 28, 2015. The order granting Pacific Life's attorney fee request was entered July 11, 2016. Ason and Salinas filed their notice of appeal on September 8, 2016.

DISCUSSION

A. Timeliness of Appeal

Pacific Life contends that we lack jurisdiction to hear this appeal because the notice of appeal was untimely. Pacific Life argues that the appeal is from the probate court's September 28, 2015 order rather than the July 11, 2016 order. In support of its argument, Pacific Life points out that Ason and Salinas's opening

² Unless otherwise specified, further statutory references are to the Code of Civil Procedure.

³ Dana did not name Pacific Life in the amended petition. Although the order sustaining Pacific Life's demurrers and granting the motion to strike also granted Dana leave to amend his petition, Dana's amended petition entirely omitting Pacific Life effectively terminated all claims as to Pacific Life.

brief focuses entirely on the probate court's September 28, 2015 order. The notice of appeal purports to challenge the July 11, 2016 order on two grounds: (1) "that Pacific Life[s] . . . request for attorney[] fees [was] denied by order of the court on September 28, 2015," and (2) that Pacific Life's interpleader motion "should have been denied"—again asserting error in the probate court's September 28, 2015 order. As we will explain, we find that the notice of appeal was timely.

There is authority that *implies* the probate court's September 28, 2015 order discharging Pacific Life from the underlying litigation was an appealable order. *Southern California Gas Company v. Flannery* (2014) 232 Cal.App.4th 477 (*Flannery*) identifies an order granting discharge as appealable. (*Id.* at p. 490.) *Flannery* relies for that proposition on *Sweeney v. McClaran* (1976) 58 Cal.App.3d 824 (*Sweeney*). (*Flannery, supra*, at p. 490.)

Sweeney and its antecedents, however, specify that it is the award and order for payment of costs and attorney fees that renders a discharge order appealable. (*Sweeney, supra*, 58 Cal.App.3d 824, 828.) This rule appears to flow from the premise that an order to pay money is, at base, a " 'final judgment upon a collateral matter arising out of the action, and would be appealable by any party interested in the fund.' " (*Title Ins. & Trust Co. v. California Development Co.* (1911) 159 Cal. 484, 490.)

The question in those antecedent cases was not whether a notice of appeal was filed too *late*, but rather whether it was filed too *early*. In *Lincoln Nat. Life Ins. Co. v. Mitchell* (1974) 41 Cal.App.3d 16 (*Mitchell*), we dismissed an appeal from an order discharging an interpleader plaintiff and ordering payment of costs and attorney fees as premature, finding the order

interlocutory because it “concern[ed] the substitution of parties in a suit [and was] nonappealable until such time as a final judgment [was] entered disposing of the claims of the remaining litigants.” (*Id.* at p. 19.) *Sweeney* distinguished *Mitchell*, noting that *Mitchell* “did not discuss whether [the attorney fee award from the funds deposited with the trial court] had any effect on the appealability of the judgment of interpleader.” (*Sweeney*, *supra*, 58 Cal.App.3d at p. 827.)

We agree with the rule as framed in *Sweeney*. Discharge *and payment of attorney fees* to Pacific Life constituted a final judgment on a collateral matter arising out of the underlying petition. In this instance, the order granting payment of costs and fees delineated finality of the judgment as to the collateral matter of Pacific Life’s interpleader. The notice of appeal from the probate court’s July 11, 2016 order was therefore timely.

B. Pacific Life’s Interpleader Motion

1. Evidence

Ason and Salinas contend that Pacific Life’s interpleader motion was not supported by evidence, and the probate court should not, therefore, have discharged Pacific Life.

Section 386.5 states: “Where the only relief sought against one of the defendants is the payment of a stated amount of money alleged to be wrongfully withheld, such defendant may, upon affidavit that he is a mere stakeholder with no interest in the amount or any portion thereof and that conflicting demands have been made upon him for the amount by parties to the action, upon notice to such parties, apply to the court for an order discharging him from liability and dismissing him from the action on his depositing with the clerk of the court the amount in dispute and the court may, in its discretion, make such order.”

To prevail on an interpleader motion and obtain a discharge, the movant must produce evidence of two things: “that he is a mere stakeholder with no interest in the amount or any portion thereof and that conflicting demands have been made upon him for the amount by parties to the action.” (§ 386.5.) Pacific Life produced evidence of both.

In support of its interpleader motion, Pacific Life submitted a declaration from Lorene Gordon that attached death benefit claims from Ason and Salinas for each of Rudolph’s Pacific Life annuities. The same declaration stated: “Pacific Life disavows any interest in these death benefit proceeds and serves as a mere custodian of the funds pursuant to the original contract terms.” The record reflects no objections to Gordon’s declaration. Contrary to Ason and Salinas’s contentions, Gordon’s declaration *is* evidence in support of Pacific Life’s motion for interpleader and discharge. We find no abuse of discretion.

2. Due Process

Ason and Salinas also contend that the probate court’s order constitutes seizure of their property without due process in violation of the Fourteenth Amendment. Ason and Salinas argue that the death benefit proceeds Pacific Life held pursuant to Ason and Salinas’s claims had already been distributed pursuant to the annuities’ terms, and were, therefore, essentially funds sitting in a bank account that belonged to Ason and Salinas. According to Ason and Salinas, the funds could not be reached by interpleader, but rather the interpleader process was used as an improper prejudgment attachment.

We disagree with Ason and Salinas’s characterization of the interpleader as a prejudgment attachment. Ason and Salinas each filed claims for death benefits pursuant to each of Rudolph’s

three Pacific Life annuities. In each of those claims, Ason and Salinas elected “deferred payment” of their death benefit proceeds. Pacific Life is an insurance company, not a bank. And according to the evidence in Lorene Gordon’s declaration, “[p]ursuant to the elected deferred death benefit payment option under the annuity contracts, Pacific Life created accounts to maintain the death benefit funds, *accruing interest pursuant to the terms of the original annuity contracts.*” (Italics added.) Ason and Salinas *could have* opted for a lump sum payout, taken death benefit proceeds (on whatever terms Rudolph’s annuities provided), and put those proceeds in a bank; they did not do so. Instead, they chose to allow Pacific Life to continue to hold the death benefit proceeds to “accru[e] interest pursuant to the terms of the original annuity contracts,” according to the Gordon declaration.

But even if the interpleader *could* appropriately be characterized a prejudgment attachment, the trial court’s procedure did not deprive Ason and Salinas of due process. Ason and Salinas cite *Hobbs v. Weiss* (1999) 73 Cal.App.4th 76 for the inapposite (but correct) proposition that the prejudgment attachment statute requires an oral hearing, at which the court “may receive and consider . . . additional evidence, oral or documentary” (*Id.* at p. 81.) Ason and Salinas’s argument ignores that in this case there were *two* noticed oral hearings, and that at *each* of those *two* oral hearings, the probate court received and considered evidence and argument regarding the disposition of the funds in Pacific Life’s custody. “The essence of due process is the requirement that “a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.” ’ ” (*Today’s Fresh Start, Inc. v. Los*

Angeles County Office of Educ. (2013) 57 Cal.4th 197, 212 (*Today's Fresh Start*)). At every turn, Ason and Salinas had notice of Pacific Life's interpleader motion and the requested remedies. At every turn, Ason and Salinas had the opportunity to respond to Pacific Life's motion and to present contrary evidence. The probate court's procedure here satisfied due process.

Further, Ason and Salinas have not shown that they are entitled to the Pacific Life death benefits. The focus of Dana's probate petition is to establish ownership of those funds. "The first inquiry in every due process challenge is whether the [claimant] has been deprived of a protected interest in "property" or "liberty." ' ' ' (*Today's Fresh Start, supra*, 57 Cal.4th at p. 214.) Until (and unless) they prevail in the underlying litigation, Ason and Salinas have (and will have) no interest in the Pacific Life death benefit proceeds. Neither Pacific Life's interpleader motion nor the trial court's procedure, therefore, deprived them of any such interest.

Finally, Ason and Salinas offer no rationale for requiring Pacific Life to continue to litigate *their* family fight. Regardless of Ason and Salinas's deferred payment election or Pacific Life's status as an insurance company rather than a bank, Ason and Salinas on one hand and Dana on the other created for Pacific Life the untenable possibility of having to pay the same funds twice after Pacific Life disclaimed any interest at all in those funds.

C. Motion for Sanctions

Pacific Life moved for sanctions against Ason and Salinas under Code of Civil Procedure section 907 and California Rules of Court, rule 8.276(a)(1). We deny the motion.

Rule 8.276(a)(1) provides for sanctions for, among other things, “[t]aking a frivolous appeal or appealing solely to cause delay.” “That an appeal lacks merit does not, alone, establish that it is frivolous. [Citation.] An appeal is frivolous ‘only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.’ [Citations.] The good faith of appellant and counsel is tested subjectively. . . . Whether any reasonable attorney would agree that the appeal is without merit is tested objectively.” (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1261-1262.)

“[A]ny definition of a frivolous appeal must be read to avoid a serious chilling effect on the assertion of litigants’ rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions. [Citations.] An appeal, though unsuccessful, should not be penalized as frivolous if it presents a unique issue which is not indisputably without merit, or involves facts which are not amenable to easy analysis in terms of existing law, or makes a reasoned argument for the extension, modification, or reversal of existing law.” (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1296.)

“[S]anctions should be used sparingly to deter only the most egregious conduct.” (*Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 557.) Although Pacific Life’s request

for sanctions is convincing, we do not find that Ason and Salinas's appeal rises to a sanctionable level of frivolity.

DISPOSITION

The probate court's orders discharging Pacific Life and awarding costs and attorney fees are affirmed. Pacific Life is entitled to costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.