Filed 11/29/16 Karton v. Dougherty CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID S. KARTON, Plaintiff and Appellant, v. WILLIAM RUSSELL DOUGHERTY, Defendant and Respondent.	B268342 (Los Angeles County Super. Ct. No. BC206243)

APPEAL from an order of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Affirm.

Mintz Law Group and Marshall G. Mintz for Plaintiff and Appellant.

Musick Peeler & Garrett, Cheryl A. Orr; Law Offices of James T. Duff, and James T. Duff for Defendant and Respondent.

Appellant David Karton appeals from the trial court's denial of his motion to "set aside" our 2009 opinion in *David S. Karton, A Law Corp. v. Dougherty* (2009) 171 Cal.App.4th 133 (*Karton)* (2009 Opinion), and all subsequent orders, rulings and proceedings. Our 2009 Opinion is the law of the case, however, the doctrine providing that the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case. The 2009 Opinion is final and controlling on the trial court, which had no authority to reverse or vacate it. We, therefore, affirm the trial court's denial of Karton's motion.

BACKGROUND

The history of this long-running dispute is set forth in detail in the 2009 Opinion. In very brief summary: In 1996, William Russell Dougherty retained Karton to represent him in a marital dissolution action. (*Karton*, *supra*, 171 Cal.App.4th at p. 136.) The retainer agreement contained the following attorney fee provision: " 'In the event legal services are commenced in connection with the enforcement of this agreement or the collection of the fees and/or the costs, whether in the form of a demand, a court action, or an arbitration proceeding, the prevailing party (to the extent permitted by law) shall be entitled to legal fees for services, as well as court and/or arbitration costs.' " (*Ibid*.) In 1999, Karton filed suit against Dougherty, seeking to recover $65,246.63 in unpaid fees and costs, plus interest. (*Ibid*.) On August 11, 1999, the trial court entered a default judgment against Dougherty for a total of $86,676.88, including accrued prejudgment interest, attorney fees, and costs. (*Id*. at pp. 138–139.)

By October 4, 1999, Karton had collected approximately $56,000 in partial satisfaction of the judgment. (*Karton*, *supra*,

171 Cal.App.4th at p. 139.) Thereafter, Karton pursued further collection efforts against Dougherty in California, Pennsylvania and Tennessee, and Dougherty resisted those efforts. In addition, Karton twice returned to the superior court to request awards of attorney fees incurred in enforcing the judgment. Although both times Karton failed to give Dougherty notice that it was seeking such relief, the requests were granted in their entirety. The second such award, entered in February 2007, increased the principal amount of the judgment to more than $1.1 million. (*Id*. at pp. 135-136, 141-144.) After learning of the order granting the February 2007 fee award, Dougherty filed a motion for relief from that order and then, after the motion was denied, appealed from the denial of his motion.

In Dougherty's appellate brief, he argued that the 1999 default judgment was void on the face of the record and should be vacated for several reasons, including that it awards relief that was " 'greater than the amount specifically demanded' " in Karton's operative first amended complaint. In particular, Dougherty argued that "[t]he superior court entered the 1999 default judgment against Dougherty for the amount of $86,676.88," but "[t]his amount was not in the complaint." (Capitalization omitted.) Karton opposed this argument on the merits.

In a published opinion filed on February 17, 2009, we reversed the trial court's judgment. We concluded that it abused its discretion by denying Dougherty's motion for relief from the order granting the February 2007 fee award, because Dougherty was entitled to notice of Karton's application for that award. (*Karton*, *supra*, 171 Cal.App.4th at p. 149; see generally *id*. at pp. 145-149.) We further concluded that the original default judgment was void on the face of the record because it awarded relief that exceeded the demand in Karton's then-operative first

amended complaint. (*Id*. at pp. 149-151.) We accordingly directed the trial court "to enter an order vacating and setting aside, nunc pro tunc, the default judgment entered on August 11, 1999." (*Id*. at p. 152.)

Karton filed a petition for rehearing, arguing that Government Code[1] section 68081 required us to provide Karton notice and opportunity to brief the issue of whether the 1999 default judgment was void on its face due to an erroneous calculation. We disagreed and denied rehearing.

Karton then filed a petition for review with the Supreme Court, which was denied. On June 3, 2009, the 2009 Opinion remittitur issued and the case became final.

In August 2015, following years of litigation, Karton filed a motion in the trial court to set aside the 2009 Opinion and all subsequent orders, rulings and proceedings. Karton claimed that the 2009 Opinion exceeded the scope of the issues raised in the notice of appeal and he was, therefore, denied his rights under section 68081. The trial court denied Karton's motion, and he appealed its decision.

DISCUSSION

I. *The 2009 Opinion Is Binding On the Trial Court And That Court Properly Denied Karton's Set Aside Motion.*

It is a fundamental principle of law that courts "exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Karton

---

[1] Unless otherwise noted, all statutory references are to the Government Code.

cites no case law, and we found no law, that supports the proposition that a trial court has the power to reverse or vacate any opinion of an appellate court. The trial court, therefore, correctly denied Karton's motion.

II. *The 2009 Opinion Is Final And Conclusive As To The Issues Decided Therein*

After we rendered the 2009 Opinion, Karton, like all parties before this court, had avenues to seek review of it. First, he had a right to file a petition for rehearing. (Cal. Rules of Court, rule 8.268 [rehearing].) He also had a right to petition the Supreme Court for review of our decision. (Cal. Rules of Court, rule 8.500 [petition for review].) Karton pursued both avenues of relief. He filed a petition for rehearing, with the identical arguments he puts forth in the current appeal, which we denied. He then filed a petition for review in the Supreme Court, which was denied. On June 3, 2009, following the denial of his petition for review with the Supreme Court, the remittitur issued and the 2009 Opinion became final. (Cal. Rules of Court, rule 8.272 [remittitur].)

At that point, the 2009 Opinion became the "law of the case," a doctrine providing that " 'the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.' " (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 301, citing 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 737, pp. 705-707.) The doctrine applies to decisions of intermediate appellate courts as well as courts of last resort. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309.) The doctrine promotes finality by preventing relitigation of issues previously decided. *(Ibid.;* see also *id.* at p. 312 ["Litigants are not free to continually reinvent their

position on legal issues that have been resolved against them by an appellate court."].)

Although the doctrine is one of procedure rather than jurisdiction, it is only disregarded in exceptional circumstances, the principal ground being "an intervening or contemporaneous change in the law." (*Clemente v. State of California* (1985) 40 Cal.3d 202, 212.) Here, there was no intervening or contemporaneous change in the law.

The doctrine can also be disregarded to avoid an unjust decision. (*People v. Shuey* (1975)13 Cal.3d 835, 846, overruled on other grounds in *People v. Bennett* (1998) 17 Cal.4th 373, 389-390, fn. 5.) For the "unjust decision" exception to apply, "there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice." (*Ibid.*) Karton claims that this exception applies to him because the 2009 Opinion created a "manifest injustice" by denying him his rights under section 68081 to brief and argue the interest miscalculation issue.

Section 68081 provides that if an appellate court renders a decision "which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing." The 2009 Opinion held that the 1999 default judgment was void on the face of the record because it awarded relief that exceeded the demand in Karton's then-operative first amended complaint. (*Karton*, *supra*, 171 Cal.App.4th at pp. 149-151.) This argument was explicitly proposed and briefed in appellant Dougherty's brief, which argued that the 1999 default judgment was void on the face of the record, and therefore, should be vacated for several reasons, including that it awarded relief that was "greater than the amount specifically demanded" in Karton's operative first amended complaint. In particular, Dougherty argued that "[t]he superior

court entered the 1999 default judgment against Dougherty for the amount of $86,676.88," but "[t]his amount was not in the complaint." (Capitalization omitted.) Karton opposed this argument on the merits. Section 68081, therefore, is inapplicable.

Moreover, Karton raised this *identical issue* in his petition for rehearing six years ago, prior to the 2009 Opinion being final. We denied the petition then, before the 2009 Opinion became the law of the case, because it lacked merit. Karton now recycles the same, previously rejected argument under a more stringent standard—the narrow and rarely utilized "unjust decision" exception to the law of the case doctrine. The argument continues to lack merit, and we again reject it.

The 2009 Opinion currently under attack has been and remains the law of the case for over six years of litigation. The only argument proffered for upending it—section 68081—was argued and properly rejected seven years ago in Karton's petition for rehearing. The 2009 Opinion remains the law of the case.

DISPOSITION

The trial court's order is affirmed. Respondent shall recover his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.