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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JEFF SCHNEIDEREIT and ADELE SCHNEIDEREIT, Plaintiffs and Appellants, v. RABOBANK N.A., et al., Defendants and Respondents.	2d Civil No. B233774 (Super. Ct. No. CV100666A) (San Luis Obispo County)

Jeff and Adele Schneidereit appeal from the judgment entered after the trial court granted respondent Rabobank, N.A.'s motion to enforce a settlement pursuant to Code of Civil Procedure section 664.6.[1] Substantial evidence supports the trial court's factual finding that the settlement placed on the record by respondent's counsel at the January 11, 2011 hearing was based on the forbearance-workout agreement drafted by respondent, not the version drafted by appellants. Substantial evidence also supports the trial court's factual findings that appellants understood this at the hearing, accepted the agreement drafted by respondent with the modifications placed on the record by respondent's counsel, and knowingly and voluntarily agreed to dismiss their complaint at that time. Nevertheless, the record is clear that appellants

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

dismissed their complaint before a written settlement agreement was executed, and that the parties did not request the trial court retain jurisdiction over this matter for the purpose of enforcing their settlement. As a consequence, the trial court lacked jurisdiction to hear respondents' section 664.6 motion. We are compelled to reverse.

Facts

In 2007, appellants borrowed $544,500 from respondent to purchase and remodel a residence in Pismo Beach, California, secured by a deed of trust on the property. Appellants also obtained from respondent a revolving line of credit (RLOC) for Jeff Schneidereit's architecture business, which both appellants personally guaranteed. In May 2008, appellants made a principal payment of $250,000 on the real estate loan, reducing the balance of the real estate loan to just over $300,000.

The architecture firm was hard hit by the recession. Appellants stopped making payments on the real estate loan in February 2009. Respondent negotiated with appellants in an effort to avoid foreclosure. In a February 27, 2009 e-mail to appellants, one of respondent's employees told appellants that she could "put your loan on 'zero accrual' which means that it will stop accruing interest until such time that you can resume payments." Appellants made no payments on either the real estate loan or the line of credit after February 2009.

On August 31, 2010, the parties signed a letter agreement regarding appellants' outstanding loans. A trustee's sale of the property was then scheduled for September 6, 2010. Respondent agreed to postpone the sale until "sometime after January 15th, 2011[,]" if appellants began "making monthly payments on both of the above-referenced loans starting on November 15, [2010] and continuing thereafter on the 15th of each month up to an including making payments on both loans on January 15th, 2011. . . ." Payments on the real estate loan would be both principal and interest; payments on the RLOC would be interest only. "If [appellants] miss or are untimely in the making of any of these payments [respondent] will be allowed to proceed with

the foreclosure sale . . . ." If appellants made timely payments, respondent would "cancel the foreclosure sale and restructure the loans as set forth below."

Respondent also agreed to "set aside all accrued interest, late charges, and foreclosure and trustee's fees and costs on the loan incurred to date and not charge interest on them so long as there is not a default. And provided a default does not occur under this agreement this part of the debt would not be due until the maturity date of the loan, which would be May 18th, 2018." The maturity date of the RLOC would also be extended. Appellants agreed to "sign a General Release, as part of the Forbearance-Restructure Agreement, that will release [respondent] from any and all claims, of every kind and nature, that the Schneidereits have or think they have up to and including the date of execution of this Agreement." Finally, the parties agreed that "this entire agreement will be documented in a more formal Forbearance-Restructure Agreement, done using [respondent's] standard format, that will be signed by the parties on or before November 15, 2010. In the event the agreement is not signed by November 15, 2010, then the Bank will be allowed to complete its foreclosure sale on the Dolliver Street Property."

When appellants received the formal "Forbearance-Workout Agreement," they refused to sign it, claiming that it contained new provisions they hadn't previously agreed to, including a general release. They prepared an alternative version of the agreement which included several "factual" recitals summarizing appellants' version of the dispute and deleted the terms they deemed unacceptable. After more negotiations, respondent agreed to remove many of the objectionable terms, but rejected appellants' "factual" recitals and insisted the agreement include a general release. Appellants refused. Respondent scheduled another foreclosure sale. Appellants filed this action to stop the sale.

At the January 11, 2011 hearing on appellants' motion for a temporary restraining order against the pending foreclosure sale, the trial court suggested the parties try to resolve their dispute. They returned to the courtroom that same day to

place a settlement on the record. Respondent's counsel informed the trial court, "The parties have agreed that [appellants] will execute the December 15th version of the formal forbearance contract, which I have a copy of it, I don't know if you need to make it part of the record." The trial court responded, "We can if you like." Respondent's counsel explained the parties had also agreed to modify the forbearance contract to waive late charges on both the real estate loan and the RLOC, to reduce accrued interest on both loans by 50 percent, and to waive foreclosure and appraisal fees on the real estate loan. The parties also agreed: "The credits just recited will be offset by the attorney's fees incurred by outside counsel by [respondent] in connection with these proceedings . . . [,]" and that the first payments under both loans would be due on February 15, 2011.

Appellants indicated their agreement to these terms. The trial court asked, "[I]s this case being dismissed?" Appellants answered, "Yes." Respondent's counsel inquired whether he could submit the December 15th agreement, so that it would be part of the record. The trial court agreed, explaining "What he's submitting is a copy of the December 15th agreement that he has just indicated the changes are going to be made [to], so this is an unmodified copy of the agreement." Appellants said they understood. The trial court stated it would dismiss the case "by minute order," and the hearing concluded.

It is not clear whether respondent's counsel physically handed a copy of the December 15th agreement to the trial court at the January 11 hearing. Whether he did or not, the document no longer exists in the trial court's file. Neither party requested that the trial court retain jurisdiction over this matter, to enforce the settlement agreement. Neither version of the written agreement mentions the trial court retaining jurisdiction to enforce its terms. Similarly, neither party mentioned whether the dismissal would be with prejudice, or without prejudice.

The trial court's original minute order, filed on January 11, 2011, stated: "Parties mediate this date and stipulate to the 12-15-10 version of the Forbearance-

Workout Agreement with modifications as stated on the record. Plaintiffs request case be dismissed and all future dates vacated." On February 16, 2011, it filed another minute order which stated: "The minute order dated January 11, 2011 is amended Nunc Pro Tunc to reflect the following: [¶] Parties have a discussion and an agreement is reached. [¶] Defendant's counsel recites the agreement onto the record and submits a copy of the unmodified Forbearance-Workout Agreement to the Court. [¶] Plaintiff's oral motion to dismiss the case is granted and all future dates are vacated." Appellants did not object to the minute orders or seek relief from the dismissal until after respondents filed their motion to enforce the settlement agreement.

On March 21, 2011, respondent filed an ex parte application for an order shortening time for hearing on its motion to enforce the settlement pursuant to section 664.6. Respondent's counsel informed the court that appellants refused to sign the forbearance agreement, claiming they had been confused at the January 11 hearing about which version of the agreement respondent's counsel presented to the trial court. Respondent stated it needed to have the motion heard on shortened time so that the bank could properly credit payments received from appellants.

Appellants opposed both the motion to shorten time and the motion to enforce the settlement agreement. They contended that respondents did a "bait and switch" maneuver at the January 11 hearing, allowing appellants to believe that their version of the December 15 agreement would be used, while representing to the court that the parties had agreed to respondent's version. Appellants argued the case was never settled because they never agreed to the terms of the forbearance agreement drafted by respondent. As a consequence, they contended the trial court lacked jurisdiction to dismiss their complaint or enter the nunc pro tunc minute order. Appellants also contended they agreed to dismiss their complaint as a result of fraud or mistake, because they misunderstood which written forbearance agreement would

govern their settlement with respondent. As a consequence, they asked the court to grant them relief from the order dismissing their complaint pursuant to section 473.

The trial court granted respondent's motion to enforce the settlement agreement, finding that the version of the Forbearance Workout Agreement drafted by respondents was the operative agreement. In making that finding of fact, the trial court relied on its own recollection and on a comparison between the competing drafts of the agreement and the modifications recited by respondent's counsel during the hearing. The modifications described by counsel at the hearing were more consistent with the terms of the agreement drafted by respondent than with those included the appellants' draft. For example, at the hearing counsel stated that respondent agreed to waive late charges in the amount of $2,233.44. That same figure appears on page 6 of respondent's agreement, as the late charge being waived. Appellants' agreement lists the late charge was $330.88. The trial court listed three other examples in which respondent's version of the agreement was consistent with the statements made in open court, while appellants' version was not. It concluded that "the parties agreed to settle this matter pursuant to the December 15, 2010 forbearance agreement" drafted by respondent. Finally, the trial court ordered that appellants "shall have an additional 30 days to comply with the agreement and bring the payments current before [respondent] can pursue any foreclosure remedies."

Standard of Review

When the trial court decides a motion to enforce a settlement under section 664.6, it acts as the trier of fact, determining whether the parties have entered into a binding settlement. (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360.) We review its findings of fact under the substantial evidence standard of review, resolving all evidentiary conflicts and drawing all reasonable inferences to support the trial court's findings. (*Id.*; see also *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1454.) "In instances involving questions of law, the construction and application of the statute, the trial court's decision is not entitled to deference and will be subject to

independent review." (*Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1253; see also *Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 437.)

Discussion

Appellants first contend the trial court lacked jurisdiction to consider respondent's motion because it had already dismissed the complaint without reserving jurisdiction to enforce the settlement. They next contend the trial court erred both in dismissing their complaint and in granting the section 664.6 motion, because the parties never reached an agreement on which version of the forbearance agreement would control. Finally, appellants contend the forbearance agreement contains illegal terms that cannot be enforced. Because we agree the trial court lacked jurisdiction to hear the section 664.6 motion, we need not and do not address appellants' second and third contentions.

Section 664.6 provides, "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

The statute establishes a " 'summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit.' " (*Critzer v. Enos, supra,* 187 Cal.App.4th at p. 1252, quoting *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809-810.) It allows the trial court to retain jurisdiction to enforce a settlement "even after a dismissal, but only if the parties requested such a retention of jurisdiction before the dismissal." (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182.) A request for retention of jurisdiction must "be made prior to a dismissal of the suit. Moreover, like the settlement agreement itself, the request must be made orally before the court or in a signed writing . . . . If, after a suit has been dismissed, a party brings a section 664.6 motion for a judgment on a settlement agreement but cannot

present to the court a request for retention of jurisdiction that meets all of these requirements, then enforcement of the agreement must be left to a separate lawsuit." (*Wackeen v. Malis, supra,* 97 Cal.App.4th at p. 433.)

When the parties voluntarily dismiss an entire action, "the court's jurisdiction over the parties and the subject matter terminates." (*Id.* at p. 437.) Thus, if an action has been voluntarily dismissed and the parties have not requested that the trial court retain enforcement jurisdiction, "the summary procedure provided by section 664.6 is unavailable" and the parties "must seek relief by means of a timely separate action." (*Id.* at p. 441.)

Wackeen v. Malis, supra, controls the result here. Appellants voluntarily dismissed their action at the January 11, 2011 hearing. Neither party requested the trial court retain enforcement jurisdiction before that dismissal occurred. As a consequence, the trial court lacked jurisdiction to decide the section 664.6 motion, even though its factual findings appear to have been supported by substantial evidence. No matter how meritorious respondent's position may be concerning the terms of the settlement to which appellants agreed, the parties did not request that the trial court retain enforcement jurisdiction. The statute's summary enforcement procedure was not, therefore, available to respondent. It may enforce the settlement only by means of a timely separate action.

Section 473

Respondent did not ask for section 473 relief. It contends, however, the trial court could have reached the merits of the section 664.6 motion because appellants sought relief under section 473 from the order dismissing their action. We are not persuaded.

Section 473, subdivision (b) provides that the trial court may, "on such terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect." In opposing respondent's

section 664.6 motion, appellants argued they had never reached an enforceable settlement because the parties did not agree to adopt the same version of the forbearance agreement. Appellants asked the trial court to grant them relief under section 473 from the minute order dismissing their action because that order was based on their "mistake" (or respondent's fraud) concerning which version of the forbearance agreement the parties had incorporated into their settlement. The trial court impliedly rejected that claim and denied appellants' request for relief under section 473 because it made the factual finding that appellants knew they had agreed to sign respondent's version of the forbearance agreement, with the modifications noted orally, on the record at the January 11, 2011 hearing. That factual finding was supported by substantial evidence, but it did not create jurisdiction for the trial court to decide respondent's section 664.6 motion. The parties may have reached a meeting of the minds concerning the substantive terms of their settlement, but they did not request that the trial court retain jurisdiction to enforce that settlement.

If we assume, alternatively, that the trial court intended to grant relief to appellants under section 473, then it should have denied respondent's section 664.6 motion. Appellants sought relief from the order dismissing their action because, they contended, there was no enforceable settlement. The trial court could have granted relief under section 473 only if it agreed with that factual claim and found that the parties actually disagreed about which version of the forbearance agreement they had adopted. Under that scenario, the parties never had a settlement agreement to enforce under section 664.6 and respondent's motion should still have been denied.

Conclusion

The trial court lacked jurisdiction to hear the respondent's section 664.6 motion because the parties did not request that it retain enforcement jurisdiction before the action was dismissed at appellants' request. We emphasize that this failure to comply with the statutory procedure does not render the settlement unenforceable. As the court noted in *Wackeen,* respondent may still seek to enforce the settlement by

means of a timely filed separate action. "The dismissal of this suit by [appellants] did not adversely affect the settlement agreement itself or [respondent's] right to have it enforced." (*Wackeen v. Malis, supra*, 97 Cal.App.4th at p. 433.)

The judgment and order granting respondent's motion to enforce the settlement are reversed and the cause is remanded for further proceedings consistent with the view expressed herein. All parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Dodie Harman, Judge

Superior Court County of San Luis Obispo

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Adele Schneiderett, in pro per, for Appellants.

Scott J. Ivy; Lang, Richert & Patch, for Rabobank, Respondent.

Hanno T. Powell; Powell & Pool, for WT Capital Lender Services, Respondent.