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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DONALD K. BRANDT et al., Plaintiffs and Appellants, v. NATIONSTAR MORTGAGE et al., Defendants and Respondents.	B270615 (Los Angeles County Super. Ct. No. BC597864)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Tamer Law Corporation, Steven Michael Tamer for Plaintiffs and Appellants.

Akerman, Justin D. Balser, Christopher R. Fredrich and Preston K. Ascherin for Defendants and Respondents.

Appellants Donald K. Brandt and Tzipora Brandt challenge an order finding them to be vexatious litigants under Code of Civil Procedure section 391.[1] We conclude substantial evidence supports the order and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants, acting in propria persona, filed the first of four lawsuits related to the foreclosure of their home in January 2013. The suit named 10 defendants, including, as reflected in the trial court docket, Bank of America Corp., U.S. Bank National Association, MERS Inc., Specialized Loan Servicing LLC, and Recontrust Co./Recontrust N.A. The case was assigned to Judge William F. Fahey, who dismissed it with prejudice in November 2013. Judge Fahey denied appellants' motion to vacate the judgment, and they did not appeal.

In June 2014, appellants, again acting in propria persona, filed a second suit relating to the foreclosure of their home. This suit named six defendants, including, as reflected in the trial court docket, Bank of America N.A., U.S. Bank National Association, Mortgage Electronic Registration System, Specialized Loan Servicing LLC, and Nationstar Mortgage LLC. The case was assigned to Judge Fahey, who struck and denied appellants' two section 170.6 motions to disqualify him from the case. Judge Fahey sustained defendants' demurrers and dismissed the case with prejudice in October 2014. Appellants did not seek writ review of the section 170.6 rulings (see § 170.3, subd. (d)) or appeal the judgment of dismissal.

Appellants filed their third suit in propria persona in January 2015. This suit named seven defendants, including, as

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

reflected in the trial court docket, Nationstar Mortgage LLC, NBS Default Services LLC, Recontrust Company N.A., and U.S. Bank National Association. The case was assigned Judge Fahey, who again struck and denied appellants' section 170.6 disqualification motion. Appellants did not seek writ review, and Judge Fahey dismissed the suit with prejudice in August 2015. Appellants timely appealed, but abandoned the appeal in October 2015.

Appellants also filed their fourth lawsuit in propria persona in October 2015. They named four defendants, including, as reflected in the trial court docket, Nationstar Mortgage LLC, NBS Default Services LLC, and U.S. Bank National Association. Appellants filed a notice of related cases identifying their previous three lawsuits. They also filed a motion for change of venue pursuant to section 397, subdivision (b), alleging there was "reason to believe that an impartial trial cannot be had in its current venue" because of Judge Fahey's alleged bias against them. In addition to seeking change of venue to a different courthouse, appellants requested that all of Judge Fahey's rulings in their second and third cases be declared void "due to his honor's abuse of discretion in striking our two Peremptory Challenges."

On November 4, 2015, Judge Fahey found all four cases to be related and assigned them to himself for all purposes. Judge Fahey also ordered appellants "to show cause re: dismissal pursuant to CCP 391(b)(2) and CCP 391.3(b)," both of which pertain to vexatious litigation, and set a hearing date of November 20, 2015.

On November 9, five days after Judge Fahey issued the order to show cause, appellants submitted a form Request for

Dismissal to the clerk's office. The form, which sought dismissal of the entire action without prejudice, is stamped "REC'D [¶] NOV 09 2015 [¶] FILING WINDOW." A second stamp indicates the document was "FILED" on November 20, 2015, the same date the docket reflects it was filed.

Appellants allege they "believed that the case was closed" on November 9, "and that the November 20, 2015 OSC hearing was not going to be held." They did not appear at the November 20 hearing, after which Judge Fahey issued an order dismissing the case with prejudice and directing defense counsel to give notice. The order further directed, "Counsel for defendant is to submit an order deeming the parties vexatious litigants by November 30, 2015. The matter will be deemed submitted as of November 30, 2015." Defense counsel submitted a proposed order on November 25, 2015.

On January 6, 2016, Judge Fahey issued an order finding appellants to be vexatious litigants. The order stated: "On November 4, 2015, the Court issued an order finding Los Angeles County Superior Court Case Nos. BC597864, BS141385, BC547573 and BC569286 are related cases within the meaning of Los Angeles County Superior Court Local Rule 3.3(f). The Court also issued an order to show cause re: dismissal pursuant to *Code of Civil Procedure* §§ 391(b)(2) and 391.3(b) and set a hearing for November 20, 2015 at 8:30 a.m. in Department 69. [¶] On November 20, 2015 at 8:30 a.m., the Court's order to show cause was heard as scheduled. No appearance was made by plaintiffs Donald K. Brandt and Tzipora Brandt and the Court ordered the instant case (BC597864) dismissed with prejudice. [¶] Now, on the Court's own motion pursuant to *Code of Civil Procedure* § 391, et seq., the Court finds that Donald K. Brandt and Tzipora

Brandt are vexatious litigants. This is based on judicial notice of the Register of Actions of the Los Angeles County Superior Court. As provided in the PREFILING ORDER—VEXATIOUS LITIGANT attached as **Exhibit A**, for any future filings that Donald K. Brandt or Tzipora Brandt attempt in Los Angeles County Superior Court, they must first obtain a prefiling order pursuant to *Code of Civil Procedure* § 391.7." The prefiling order, an unsigned copy of which was attached to the January 6, 2016 order, was separately filed on January 22, 2016.

Appellants, through counsel, filed a notice of appeal on March 1, 2016. They identified the order appealed from as that entered on January 6, 2016—the order finding them to be vexatious litigants—and asserted it was appealable under section 904.1, subdivisions (a)(3)-(13).

DISCUSSION

I. Appealability

A threshold issue in this case is appealability. Neither party has raised the question of appealability, but "[t]he existence of an appealable judgment is a jurisdictional prerequisite to an appeal. A reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1." (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.)

"The right to appeal is statutory only, and a party may not appeal a trial court's judgment, order or ruling unless such is expressly made appealable by statute." (*People v. Loper* (2015) 60 Cal.4th 1155, 1159.) Section 904.1, the statutory provision governing the appealability of judgments and orders in unlimited civil cases, does not include orders determining a party to be a

vexatious litigant among those that are directly appealable. (See § 904.1; *Golin v. Allenby* (2010) 190 Cal.App.4th 616, 629 (*Golin*).) However, the subsequent dismissal of a case due to a vexatious litigant's failure to furnish security is an appealable order. (*Golin*, *supra*, 190 Cal.App.4th at p. 629.) Likewise, a prefiling order, like the one the trial court entered in this case on January 22, 2016, is appealable under section 904.1, subdivision (a)(6) because it meets the statutory definition of an injunction, a writ or order requiring a person to refrain from a particular act. (*Luckett v. Panos* (2008) 161 Cal.App.4th 77, 84-85, 90.)

Here, appellants' notice of appeal explicitly identifies the January 6, 2016 order designating appellants as vexatious litigants as that being appealed. That order is not appealable. However, we construe notices of appeal liberally. (Cal. Rules of Court, rule 8.100(a)(2).) The appealable prefiling order the court ultimately entered was attached to the January 6 order as an exhibit, and it is the mechanism through which the vexatious litigant determination "may actually have a real world impact." (*Luckett v. Panos*, *supra*, 161 Cal.App.4th at p. 81.) We accordingly deem the appeal to be from the January 22, 2016 prefiling order.

II. Scope of Appeal

Despite restricting their notice of appeal to the vexatious litigant order, appellants in their briefing purport to challenge many of Judge Fahey's rulings in this and their previous cases. In their opening brief, appellants ask this court: "1. to reverse the ORDER RE; VEXATIOUS LITIGANT; [¶] 2. to order the cancellation of the SOT [substitution of trustee], NOD [notice of default], NOS [notice of sale] and TDUS [trustee's deed upon sale]; [¶] 3. to order the reversion of title back to Brandt; [¶] 4. to

pay Brandt the replacement value for [their foreclosed home], in the event that the property has already been sold to a third party; [¶] 5. to grant monetary damages to recoup expenses related to this litigation (roughly estimated to be $100,000); [¶] 6. to order the return of all monies Brandt paid to phony creditors, who were not the Note Holder, and therefore, not entitled to collect monthly mortgage payments; and [¶] 7. to grant Brandt punitive damages in the amount of $20,000,000, as a means of discouraging the Respondent from engaging in future acts of seeking unjust enrichment at the expense of unfortunate citizens trapped in a nightmare, not necessarily of their own making." ~(AOB 24-25)~ In their reply brief, appellants ask us to reverse the order declaring them vexatious litigants and further claim that their "reason for non-appearance is warranted and in good faith," that they "can show judicial bias and/or prejudice," and that their "claim has merit and should be tried by a trier of fact."

Much of the relief appellants seek is not available to them at this juncture. They did not pursue appeals on their first three suits, nor did they seek writ relief in connection with the denial of their section 170.6 or section 397 motions. Their time to do so has long expired.

A petition for a writ of mandate challenging a ruling on a section 397 motion must be filed within 20 days of service of written notice of entry. (§ 400), and a petition for a writ of mandate challenging a ruling on a section 170.6 motion must be filed within 10 days of service of written notice of entry (§ 170.3, subd. (d)). Appeals of final judgments must be taken on or before the earliest of "(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment,

showing the date either was served; [¶] (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or [¶] (C) 180 days after entry of judgment." (Cal. Rules of Court, rule 8.104(a)(1).) "The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Moreover, we may not review a decision or order from which an appeal previously could have been taken but was not. (§ 906.)

Appellants did not timely appeal any ruling other than the prefiling order.[2] We therefore cannot and do not consider arguments pertaining to any rulings or orders other than the prefiling order. We address the substance of the non-appealable order declaring appellants vexatious litigants as an "intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from." (§ 906.)

III. Analysis

The vexatious litigant statutes, sections 391 through 391.7, "are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169 (*Shalant*); *In re Kinney* (2011) 201 Cal.App.4th 951, 957-958.) "'Vexatious litigant' is

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[2] To the extent they timely appealed the dismissal of their third case, appellants abandoned and cannot now resurrect that appeal.

defined in section 391, subdivision (b) as a person who has, while acting in propria persona, initiated or prosecuted numerous meritless litigations, relitigated or attempted to relitigate matters previously determined against him or her, repeatedly pursued unmeritorious or frivolous tactics in litigation, or who has previously been declared a vexatious litigant in a related action." (*Shalant*, *supra*, 51 Cal.4th at pp. 1169-1170; see also § 391, subd. (b).) As is relevant here, section 391, subdivision (b)(2) defines a vexatious litigant as a person who, after a final judgment against him or her, "repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined."

Once a person has been declared a vexatious litigant, section 391.7 authorizes the court to enter, on its own or a party's motion, a prefiling order that prohibits him or her from filing any new litigation in propria persona absent the permission of the presiding judge. (*Shalant*, *supra*, at p. 1170.) The Judicial Council maintains a registry of vexatious litigants subject to prefiling orders. (§ 391.7, subd. (f).) Court clerks receive copies of the registry and "are directed not to file litigation from a vexatious litigant subject to a prefiling order without the presiding judge's order permitting the filing. If the clerk mistakenly does file the action, any party may seek dismissal through a notice that the plaintiff is subject to a prefiling order."

(*Shalant*, 51 Cal.4th at p. 1170.)[3]

"The trial court exercises its discretion in determining whether a person is a vexatious litigant. Review of the order is accordingly limited and the court of appeal will uphold the ruling if it is supported by substantial evidence. Because the trial court is best suited to receive evidence and hold hearings on the question of a party's vexatiousness, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment." (*Golin*, *supra*, 190 Cal.App.4th at p. 636; see also *In re Marriage of Rifkin and Carty* (2015) 234 Cal.App.4th 1339, 1346.)

Appellants assert that the order declaring them vexatious litigants was not supported by substantial evidence. They argue that they did not fit the definition of vexatious litigant provided in section 391, subdivision (b)(1), and that they did not make numerous attempts to relitigate the same issues because their most recent complaint was the first to allege wrongful foreclosure. These arguments are not persuasive.

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[3] The vexatious litigant statutes also provide a second remedy against vexatious litigants. Under section 391.1, a defendant may move for an order requiring the plaintiff to furnish security pursuant to section 391.3, subdivision (a) if the court determines that he or she is a vexatious litigant and there is no reasonable probability that he or she will prevail against the moving defendant. Section 391.3, subdivision (b) further requires a court hearing a section 391.1 motion to dismiss the action if it determines it has no merit and was filed for the purposes of harassment or delay by a litigant subject to a prefiling order who was represented by counsel but became in propria persona after the withdrawal of his or her attorney. No order requiring appellants to furnish security was issued in this case, and no attorney appeared on their behalf below.

First, the trial court determined that appellants were vexatious litigants under section 391, subdivision (b)(2), not (b)(1). It is therefore irrelevant that appellants maintained only four rather than the five in propria persona litigations required by section 391, subdivision (b)(1).

Second, the record reflects that appellants satisfied the criteria of section 391, subdivision (b)(2) by repeatedly attempting to relitigate the same controversy—the foreclosure of their home—against all of the defendants named in their fourth complaint. Appellants themselves recognized the related nature of their claims in their fourth complaint and filed a notice of related cases. The same trial court presided over all of their cases and therefore was well within its discretion to conclude that they involved the same controversy. Indeed, the record indicates that the trial court determined appellants' second case was "a continuation of their dismissed first case." It also dismissed appellants' third complaint on res judicata or collateral estoppel grounds, demonstrating that it concluded that appellants' third suit involved the same causes of action or issues as its predecessor(s). (See, e.g., *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897.) In other words, substantial evidence supported the trial court's order. Litigants cannot avoid application of the vexatious litigant statutes by adding a single new cause of action or different defendant to their most recent complaint concerning a single controversy.

Appellants also contend that the vexatious litigant order should be reversed because they dismissed their last case without prejudice prior to the order's issuance. While we are somewhat troubled by the 11-day delay between the clerk's office receipt and filing of appellants' request to dismiss their fourth suit, we

are not persuaded that the irregularity compels reversal.

Section 391, subdivision (b)(2) does not define vexatious litigant in terms of a pending case. Likewise, section 391.7 ""operates beyond the pending case"" (*Shalant*, *supra*, 51 Cal.4th at p. 1170) and authorizes a trial court to act on its own motion. Thus, even if we assume appellants' request for dismissal was effective upon receipt by the clerk, that would not bar the trial court from finding appellants to be vexatious litigants and issuing a prefiling order. Moreover, it is well settled that the right to voluntarily dismiss an action is not absolute. (*Cravens v. State Board of Equalization* (1997) 52 Cal.App.4th 253, 256.) A plaintiff may not voluntarily dismiss an action "after the court has made a dispositive ruling or given some indication of the legal merits of the case, or when the procedural posture is such that it is inevitable the plaintiff will lose." (*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 877; see also *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 175-176.) Here, appellants were well aware that their three previous lawsuits had been dismissed, and that the trial court had ordered them to show cause "re: dismissal" of their fourth, when they requested voluntary dismissal without prejudice. Appellants could not avoid the court's order to show cause, likely finding of vexatiousness, and dismissal of their case with prejudice by the stratagem of filing a request for dismissal without prejudice.

DISPOSITION

The order of the trial court is affirmed. Respondents are awarded their costs.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.