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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DNN CAPITAL, INC., Plaintiff and Appellant, v. ABRAHAM INY, Defendant and Respondent.	B231755 (Los Angeles County Super. Ct. No. SC099953)

APPEAL from an order of the Superior Court of Los Angeles County, John Segal, Judge. Reversed.

Breman Law Offices, Teresa K. Breman; O'Laverty Law Offices and Cheri S. O'Laverty for Plaintiff and Appellant.

Beitchman & Zekian and David P. Beitchman for Defendant and Respondent.

DNN Capital, Inc. appeals from the trial court's order staying execution of its monetary judgment against Abraham Iny. We reverse because the trial court had no statutory authority to order the stay.

BACKGROUND

Yaron Levy (Levy) and his wife, Yael Levy, made several business investments in 2003 with Abraham Iny and Benjamin Iny (Iny brothers). The parties are all extended family members.[1] Over the course of about four years, Levy, Yael Levy, and DNN Capital, Inc. (DNN), of which Levy is a shareholder, made several business investments in the Iny brothers' business entities, and later made loans to the entities. Depending on the structure of the various investment agreements, Levy, Yael Levy, or DNN were entitled to reimbursement or contribution from the Iny brothers or their companies for repayment of the loans. The total amount of the loans exceeded $1 million. Beginning in 2005, the Iny brothers and their businesses began to default on the loans, and the individuals and entities filed several lawsuits against each other.

In a lawsuit relevant to this appeal, the trial court entered a $230,000 money judgment in favor of DNN and against Abraham Iny,[2] on September 30, 2009. Notice of the entry of the money judgment was properly served on Abraham on October 19, 2009. Abraham did not file an appeal.

In a declaration filed in the trial court in this case, Levy states that some time before February 3, 2010, he met with his father-in-law Yoel Iny and Abraham, and "hammered out a tentative settlement." Benjamin was not present, but Abraham assured Yoel Iny and Levy that Benjamin was "on board." Abraham told Levy that Benjamin would sign a formal release to be drafted by Abraham's and Benjamin's attorneys.

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[1] The Iny brothers are the uncles of Levy's wife, and the brothers of Yael Levy's father Yoel Iny.

[2] For ease of reference and clarity, we refer to Benjamin Iny as Benjamin, and Abraham Iny as Abraham. No disrespect is intended.

A "Release Agreement" dated February 9, 2010 (February 9 release), states that the "Levy Parties" (Levy, Yael Levy, DNN, and the Levy Family Trust) and the "Iny Parties" (Abraham, his wife Rivka Iny, Benjamin, and two of the Iny brothers' companies, Landmark View, Inc. and Valley View Management) "wish to resolve any claims that each may have against the other or any of the others and to provide for complete and final resolution of all claims that have been made, could be made, or might be made in connection with any pending actions or arbitrations between them[] [o]r any of them, as well as arising out of any partnerships, joint ventures or LLC in which the Parties or any of them have any interests and with respect to claims between the Parties and/or any of them for monies owed for or on account of any reason whatsoever." The release provides that the parties "fully and completely release" each other from any "obligations or claims of any kind or character whatsoever," including judgments, "whether known or unknown." The release is signed by Levy and Yael Levy in their personal capacities, by Levy for the Levy Family Trust, by DNN (its president), and by Abraham in his personal capacity and as president of Landmark View, Inc.[3] No signature block or signature appear for Rivka Iny. Signature blocks for two of the Iny Parties, Benjamin and Valley View Management, remain blank. An attached list entitled "LAWSUITS BETWEEN LEVY & INY" includes the lawsuit which resulted in DNN's September 30, 2009 judgment against Abraham.

Subsequently, on September 13, 2010, Benjamin filed a civil action in the Superior Court of Los Angeles County against Levy and Yael Levy. Benjamin's complaint sought indemnity from the Levys for a $7.4 million judgment in favor of Cathay Bank, related to a real estate loan, in default, to a partnership between (among others) the Levy family trust (one of the Levy parties signatory to the February 9 release) and Landmark View (one of the Iny parties signatory to the February 9 release).

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[3] DNN's opposition to Abraham's ex parte application states that "it was not until the hearing on [Abraham]'s Ex Parte Application that [Levy] first saw [Abraham]'s signature on" the February 9 release.

Levy, Yael Levy, and DNN filed a cross-complaint against Benjamin, Abraham, Abraham's wife Rivka Iny, and Landmark View on November 2, 2010. The cross-complaint alleged intentional and negligent misrepresentation, breach of fiduciary duty, conspiracy to commit fraud, and other claims, and sought additional money damages. DNN's cross-complaint also sought rescission of written documents signed by Levy and Abraham and dated February 2, 2010 (February 2 release), following a meeting "[i]n or about January 2010 . . . [¶] . . . [¶] . . . to resolve all pending differences between Cross-Complainants and Cross-Defendants," and in which, among other things, Levy and Abraham agreed to dismiss all ongoing lawsuits and not to file any future lawsuits.[4] Abraham told Levy (among other representations) that he had the authority to act on behalf of all the cross-defendants (including Benjamin), and would obtain Benjamin's signature on all necessary documents. The cross-complaint alleged that in reliance on the agreements at the meeting and the February 2 release, Levy and DNN had dismissed all lawsuits and collection efforts against the cross-defendants. The cross-complaint alleged that Abraham knew his representations were false, and intended to deceive Levy and induce him to sign the February 2 release.[5] The February 9 release is not mentioned in the cross-complaint.

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[4] The record contains a "draft letter" dated February 2, 2010, providing that Levy, Abraham, and Joel Iny agreed that Levy would purchase Abraham's interest in another LLC, by crediting Abraham $220,000 for money owed to Levy, paying $30,000 to Landmark View, and paying $10,000 to Joel Cooper. The date by Abraham's signature appears to be February 20, 2010. The record also contains a "Full Release and Settlement Agreement" dated February 2, 2010, signed by Abraham and Levy on February 2, 2010 and purporting to mutually release Abraham and Levy from "all lawsuits the Parties now have or may hereafter have against each other" and related claims arising out of projects "involving Abe Iny, Ben Iny, Landmark View, Inc., Jerry Levy, DNN Capital, Inc., 11550 National I, LLC, Valley View Management and Joel Cooper."

[5] Although the cross-complaint is in the appellant's appendix filed by DNN, the pages after page 30 are missing, and no exhibits are attached.

I. Application for order to appear for debtor examination

The dispute that gave rise to this appeal began on December 16, 2010, when DNN attempted to enforce its September 30, 2009 judgment against Abraham, by filing an application for order for Abraham to appear for his debtor examination. An order issued on December 16, 2010 compelling Abraham to appear on January 18, 2011, and was served on Abraham January 6, 2011. Abraham's counsel responded with a letter to DNN's counsel dated January 14, 2011, demanding that DNN file an acknowledgement of satisfaction of judgment, pursuant to "an undisputed Full Release and Settlement Agreement between the parties dated February 2, 2010."

On January 18, 2011, Abraham filed an ex parte application seeking to set aside the September 30, 2009 judgment or, in the alternative, to stay DNN's judgment enforcement proceedings, including debtor examinations. Abraham argued that pursuant to Code of Civil Procedure section 724.050,[6] DNN was required to file an acknowledgement of satisfaction of judgment. Abraham asked the court to stay DNN's enforcement proceedings, including the debtor's examination, until the cross-complaint was resolved. Abraham contended that the February 9 release released him from any and all liability to DNN, and attached a copy of the February 9 release as an exhibit.

DNN opposed the ex parte application, arguing that the time to file a motion to set aside the September 30, 2009 judgment was long past, and the time for filing the motion to stay enforcement had also expired, citing section 918. DNN also argued that the letter dated February 2, 2010 evidenced the parties' intent that everyone, including Benjamin, would sign a formal release. The February 9 release was therefore ineffective, because it was not fully executed, was ambiguous on its face, was the subject of a rescission action (DNN's cross-complaint), and "cannot be enforced since it was procured through fraud or mistake."

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

In reply, Abraham argued that the February 9 release was enforceable, pointing out that it listed the lawsuit resulting in the September 30, 2009 judgment as one of the lawsuits governed by its terms. Abraham then filed a supplemental declaration stating that he "came across" the February 2 release in going through documents, and attached as exhibits the February 2 release and the draft letter of the same date. Abraham argued that since Benjamin was not an intended signatory to the February 2 release, and since the February 2 release predated the February 9 release, the parties did not intend Benjamin to be a party to either the February 2 release or the February 9 release.

At the February 7, 2011 hearing on Abraham's ex parte application, the trial court denied both Abraham's request to set aside the judgment and his request for an evidentiary prove-up hearing. The court, however, also stated: "We'll just stay enforcements and then, if you [DNN] prevail in the rescision [DNN's cross-complaint against Benjamin], then the stay will be vacated, and you can enforce." The court added: "Looks to me like you've released this claim in judgment. . . . [¶] . . . [¶] . . . The missing signature doesn't bother me unless there's something—I looked—something in the settlement agreement that says it's not effective until everyone signs. You got one of those in there? I didn't see that." DNN's counsel countered that "the Iny Parties are defined in that, you know, purported release, and not all the Iny Parties did sign," making the release unenforceable. Abraham's counsel argued that the judgment had been satisfied by the releases, but the court stated: "I don't think the judgment was satisfied. . . . [¶] . . . [¶] . . . [A] satisfied judgment means when they get the money. This is different. This is a settlement agreement which releases claims and judgments [¶] . . . [¶] . . . [as] consideration for the mutual releases. [¶] . . . [¶] I don't think it's something that requires someone to file one of those satisfaction[s] of judgments."[7]

On February 7, 2011, the trial court entered a written order in favor of Abraham, staying DNN's judgment enforcement proceedings and stating: "It appears that [DNN]

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[7] It is not clear whether the trial court and the parties were referring to the February 2 release or the February 9 release.

has released its claims and judgments against judgment debtor [Abraham], including the claims and judgment in this action. If [DNN] prevails in [its pending cross-complaint against Abraham], then [DNN] may move to vacate the stay of enforcement of the judgment in this action. Judgment Debtor [Abraham]'s application for an order setting aside the judgment in this matter, and his request for 'an evidentiary prove-up hearing' and order to show cause, are denied."

DNN timely appealed the trial court's order staying its judgment enforcement proceedings against Abraham.

DISCUSSION

DNN contends that the trial court's order staying enforcement of its money judgment against Abraham "exceeded its authority under all California Statutes." We agree.

Our review of the trial court's decision to stay enforcement of a money judgment is de novo, as it is based on statutory interpretation. (*Medrano v. Workers' Comp. Appeals Bd*. (2008) 167 Cal.App.4th 56, 64.) Hence, "we do not defer to the trial court's ruling or the reasons for its ruling. Instead, we decide the matter anew." (*Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 116.)

The California Supreme Court has long recognized that the superior court does not have general power to stay execution of a money judgment. The superior court's power to do so is limited by statutory authority. (See *Mannix v. Superior Court* (1910) 157 Cal. 730, 731.) "The rights of the parties cannot be interfered with except through procedure authorized by statute. [¶] . . . [¶] The power of the court to stay execution is limited by statute." (*Del Riccio v. Superior Court* (1952) 115 Cal.App.2d 29, 31; *California Commerce Bank v. Superior Court* (1992) 8 Cal.App.4th 582, 584.)

I. The trial court lacked authority under section 917.1.

Ordinarily, the perfecting of an appeal and the posting of a sufficient undertaking are required to stay enforcement of a superior court money judgment. Section 917.1, subdivision (a)(1) states: "(a) Unless an undertaking is given, the perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or

order is for . . . [¶] (1) Money or the payment of money, . . . whether payable by the appellant or another party to the action." (§ 917.1, subd. (a)(1).) "The purpose of the undertaking requirement is 'to protect the judgment won in the trial court from becoming uncollectible while the judgment is subjected to appellate review. [Citation.] A successful litigant will have an assured source of funds to meet the amount of the money judgment, costs and post-judgment interest after postponing enjoyment of a trial court victory.'" (*Leung v. Verdugo Hills Hospital* (2008) 168 Cal.App.4th 205, 211–212.)

The trial court had no authority under section 917.1 to stay enforcement of the money judgment owed by Abraham to DNN, because Abraham did not appeal the September 30, 2009 judgment, nor did he post an undertaking.

II. The trial court lacked authority under section 918.

Section 918 provides, "(a) Subject to subdivision (b), the trial court may stay the enforcement of any judgment or order. [¶] (b) If the enforcement of the judgment or order would be stayed on appeal only by the giving of an undertaking, a trial court shall not have power, without the consent of the adverse party, to stay the enforcement thereof pursuant to this section for a period which extends for more than 10 days beyond the last date on which a notice of appeal could be filed. [¶] (c) This section applies whether or not an appeal will be taken from the judgment or order and whether or not a notice of appeal has been filed." (§ 918, subds. (a)–(c).)

Here, the September 9, 2009 money judgment against Abraham would be stayed on appeal only by the giving of an undertaking; therefore, without DNN's consent, the trial court did not have authority to stay enforcement for more than 10 days before the last date for filing a notice of appeal. That time was long past in January 2011, when Abraham filed his ex parte motion for a stay of enforcement.

III. The trial court lacked authority under section 918.5.

Under section 918.5, subdivision (a), the trial court has the discretion to "stay the enforcement of a judgment or order if the judgment debtor has another action pending on a disputed claim against the judgment creditor." However, in exercising this discretion, section 918.5, subdivision (b) states: "[T]he court shall consider all of the following:

[¶] (1) the likelihood of the judgment debtor prevailing in the other action. [¶] (2) The amount of the judgment of the judgment creditor as compared to the amount of the probable recovery of the judgment debtor in the action on the disputed claim. [¶] (3) The financial ability of the judgment creditor to satisfy the judgment if a judgment is rendered against the judgment creditor in the action on the disputed claim." (§ 918.5, subd. (b).)

Section 918.5 codifies a judicially developed rule. (See *Erlich v. Superior Court* (1965) 63 Cal.2d 551, 555 (*Erlich*); *Airfloor Co. of California, Inc. v. Regents of University of California* (1979) 97 Cal.App.3d 739 (*Airfloor*).) That statute is founded in the theory of equitable setoff, conferring trial courts authority to grant stays in limited circumstances where the judgment debtor has another action pending on a disputed claim against the judgment creditor. (*Erlich*, at p. 556.) The court is to consider whether certain factors demonstrate a risk that the judgment debtor would be left without a remedy if it were to prevail in the disputed claim: "[I]n determining whether to enjoin collection of the judgment pending decision of the validity of the disputed claim, the court should consider the likelihood that the judgment debtor will recover upon his claim, the probability and comparative amount of recovery, and the ability of the judgment creditor to respond should a judgment be rendered against him in the action on the disputed claim. The fact that the judgment creditor may have an immediate need for the funds due to him upon his judgment is not a basis for denial of relief where the foregoing considerations otherwise compel relief," and "[t]he mere fact that a judgment debtor asserts a claim against the creditor"—standing alone—"does not of itself mean that he is entitled to enjoin collection of the judgment . . . ." (*Ibid*.) "[T]he court must consider the likelihood of the judgment debtor prevailing in the other action and the financial ability of the judgment creditor to satisfy a judgment on the disputed claim if such should be rendered." (*Airfloor*, at p. 741.) These factors "shall" be considered under section 918.5, subdivision (b).[8]

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[8] The record lacks any indication that the trial court considered these factors as required by section 918.5. The trial court expressly denied Abraham's request for an

The threshold requirements of section 918.5 are not met in this case. First, Benjamin's complaint against DNN is not another action by the judgment *debtor* on a disputed claim so as to confer the trial court with the power to stay enforcement, because Abraham, not his brother Benjamin, is the judgment debtor. Second, DNN's cross-complaint naming Abraham as one of the defendants does not permit the trial court to order the stay of DNN's judgment enforcement proceedings against Abraham, because DNN is the judgment creditor, not the debtor. The trial court did not have the statutory authority under section 918.5 to exercise discretion to stay enforcement of DNN's monetary judgment.

IV. The trial court lacked authority under section 724.050.

Abraham argues, as he did in the trial court, that DNN should have filed an acknowledgment of satisfaction of judgment pursuant to the February 9 release, and that the trial court had the authority to order the stay under section 724.050, subdivision (a), which states: "(a) If a money judgment has been satisfied, the judgment debtor . . . may serve . . . on the judgment creditor a demand in writing that the judgment creditor do one or both of the following: [¶] (1) File an acknowledgment of satisfaction of judgment with the court. [¶] (2) Execute, acknowledge, and deliver an acknowledgment of satisfaction of judgment to the person who made the demand." (§ 724.050, subd. (a)(1)-(2).) Abraham then specifically refers to subdivision (d), which, in pertinent part, provides that "[i]f the court determines that the judgment has been satisfied and that the judgment creditor has not complied with the demand, the court shall either (1) order the judgment creditor to comply with the demand or (2) order the court clerk to enter satisfaction of the judgment." (§ 724.050, subd. (d).)

"[A] judgment debtor, like [Abraham], who wishes to enforce an alleged agreement to satisfy a judgment, whether for full payment or something less than that, is not without a remedy. . . . Section 724.050, subdivision (d), specifically provides a

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evidentiary prove-up hearing to ascertain the meanings of the disputed February 2 and February 9 releases.

noticed motion procedure to compel a judgment creditor to furnish an acknowledgment of satisfaction of judgment through which a trial court may determine whether an agreement for full satisfaction has been reached. . . . [An] alleged settlement agreement is just the kind of agreement for which section 724.050, subdivision (d) is available—to compel the judgment creditor to furnish an acknowledgment of satisfaction of judgment based on an agreement to satisfy the judgment by payment for less than the full face amount." (*Walton v. Mueller* (2009) 180 Cal.App.4th 161, 174.)

Abraham did not file a noticed motion pursuant to section 724.050, subdivision (d). Further, section 724.050 "has been interpreted to require the trial court to first determine whether the judgment has been satisfied in fact before ordering entry of satisfaction of judgment. [Citation.]" (*Schumacher v. Ayerve* (1992) 9 Cal.App.4th 1860, 1863.) "Although section 724.050 does not expressly state satisfaction of the judgment must be shown 'in fact' we conclude a reasonable reading of the section requires the trial court find actual satisfaction of the judgment." (*Pierson v. Honda* (1987) 194 Cal.App.3d 1411, 1414, fn. 4.) Here, the trial court did not determine that the judgment was satisfied. In fact, the record shows that the trial court clearly did not believe that DNN's judgment had been satisfied. The court stated: "I don't think the judgment was satisfied. [¶] . . . [¶] . . . [A] satisfied judgment means when they get the money," and "I don't think it's something that requires someone to file one of those satisfaction[s] of judgments."

The trial court lacked the statutory authority to stay DNN's monetary judgment enforcement proceedings against Abraham. In light of our disposition based on DNN's first argument, we need not consider its remaining contentions.

DISPOSITION

The order is reversed and the stay is vacated. Appellant shall recover costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.