Filed 4/27/15 1130 Hope Street Investment Assocs v. Haiem CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

1130 HOPE STREET INVESTMENT ASSOCIATES, LLC, Plaintiff and Respondent, v. RAY HAIEM, Defendant and Appellant, HOPE PARK LOFTS 2001-02910056, LLC et al., Defendants and Respondents.	B254143 (Los Angeles County Super. Ct. No. BC466413)

APPEAL from an order of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Affirmed.

Jeffrey G. Thomas for Defendant and Appellant.

Lisa M. Howard for Plaintiff and Respondent.

Hugh John Gibson for Defendants and Respondents Hope Park Lofts 2001-02910056, LLC and Norman Solomon.

Rosario Perry, in pro se, for Defendant and Respondent Rosario Perry.

INTRODUCTION

Ray Haiem appeals from an order denying his motion to vacate the dismissal of his cross-complaint pursuant to Code of Civil Procedure section 473, subdivisions (b) and (d).[1] He contends the motion was timely, and the trial court abused its discretion in denying him relief.[2] We affirm and impose sanctions for filing a frivolous appeal.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Parties and the Complaint*

On July 28, 2011, 1130 Hope Street Investment Associates, LLC (Hope Street Investment Associates) filed an interpleader complaint against Hope Park Lofts, LLC (now known as Hope Park Lofts 2001-02910056, LLC, Hope Park Lofts); Norman Solomon; True Harmony, Inc. (True Harmony); Turner Technical Institute, Inc.; Koke Ahankoob; Loan Lines, Inc.; Ray Haiem; Ray of Life Charitable Foundation; and Rosario Perry. The action arose out of Hope Street Investment Associates' supervision of the sale of property located at 1130 South Hope Street. After payment of expenses, approximately $1,600,000 in proceeds remained to be distributed. Hope Street Investment Associates sought to have the court resolve the defendants' competing claims to the proceeds.

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

[2] While Haiem states he is also appealing the trial court's February 1, 2013 order denying leave to file an amended cross-complaint and its May 22, 2013 order disbursing funds to other parties to the action, as we discuss below, we have dismissed the appeals of those orders, and they are not properly raised in this appeal. Accordingly, the arguments made by Haiem as to the February 1, 2013 and May 22, 2013 orders are not addressed in this opinion.

On October 6, 2011 Haiem, representing himself, filed his answer to the complaint. He also filed a cross-complaint against Hope Street Investment Associates for breach of contract. He alleges that he loaned $80,000 to Hope Street Investment Associates for payment of real estate taxes, plus an additional $100,000 through a "Member" in Hope Street Investment Associates, defendant True Harmony. Haiem alleges that Hope Street Investment Associates did not repay any of the money.

B. ***Haiem's Failure to Serve Cross-complaint and Court's Dismissal***

Haiem represented himself at a hearing held on August 1, 2012.[3] On that date, the court found that Haiem's cross-complaint had not been served on cross-defendant Hope Street Investment Associates and the Roe cross-defendants. The court ordered Haiem to serve the cross-complaint on the cross-defendants within 30 days. The court also issued an order to show cause as to why Haiem's cross-complaint should not be dismissed for failure to serve the cross-defendants, and set it for hearing on August 30, 2012.

At the August 30 hearing, Haiem advised the court that cross-defendant Hope Street Investment Associates had changed its name, and therefore he had not served the company. The court continued the matter to October 3 and warned Haiem that if he did not serve the cross-complaint by that date, it would be dismissed.

On September 24, 2012 Haiem filed an amendment to his cross-complaint, adding Hope Park Lofts as a Roe cross-defendant.

At the October 3, 2012 hearing on the order to show cause re dismissal, attorney Jeffrey G. Thomas appeared on behalf of Haiem, stated he had just substituted into the case, and requested a continuance of the trial and discovery cut-off dates. The court denied the request for a continuance. On the same date, Haiem filed a motion for leave to

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[3] The hearing was scheduled on Hope Park Lofts' petition to compel arbitration, Hope Street Investment Associates's petition to appoint a receiver, and an order to show cause re sanctions against Hope Street Investment Associates for failure to appear at a case management conference.

amend his cross-complaint (first motion to amend) and an ex parte application for an order shortening time to hear his motion. A copy of the original cross-complaint filed on October 6, 2011 was attached to the motion.

At the October 3 hearing, the court denied Haiem's ex parte application to shorten time, explaining that Haiem did not need leave of court to file his amended cross-complaint because the cross-defendants had not answered or demurred to the original cross-complaint. Accordingly, on October 3 Haiem filed his first amended cross-complaint.[4] The court continued the hearing on the order to show cause re dismissal to November 9, 2012.

Haiem's counsel failed to appear at the November 9, 2012 hearing.[5] The court found that Haiem's cross-complaint had not been served on the cross-defendants. The court ordered the cross-complaint stricken. The clerk mailed the minute order from the hearing to Thomas, which Thomas acknowledges he received.

C. *Haiem's Multiple Motions for Leave To File a First Amended Cross-complaint*

Notwithstanding the court striking his cross-complaint on November 9, 2012, on November 13, 2012 Haiem filed a second motion for leave to file an amended cross-complaint (second motion to amend) and ex parte application to shorten time for a hearing on the motion based on his attorney's "further investigation of the facts and the

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[4] The first amended cross-complaint is not included in the record on appeal. However, it is part of the superior court file, and we take judicial notice of the document. (Evid. Code, § 452, subd. (d); *People v. Hernandez* (2003) 30 Cal.4th 835, 870, fn. 3, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32; *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 234, fn. 13.)

[5] Haiem's attorney Thomas filed a declaration with his motion to vacate the court's dismissal of Haiem's cross-complaint, discussed below, in which he states he had a personal emergency that caused him to fail to appear at the November 8, 2012 hearing and that on November 8 he spoke with defendant Perry, who told Thomas that the court took the November 9 hearing off calendar.

Court's denial of the other Defendants and Cross-complainants' motion for early disbursement of the funds on November 8, 2012 . . . ." The motion states that the "Attachment" is Haiem's "First amended Cross-complaint," but the motion only attaches the original cross-complaint with strike-outs of all the language, and no new language.

On November 13, 2012 the court issued a ruling from chambers reflected in the court's November 13 minute order,[6] denying Haiem's second motion for leave to amend. The minute order reflects that Thomas was present on that date. The order states that counsel for Haiem did not appear on November 8, 2012, and further, that "counsel also failed to appear on November 9, 2012 for an OSC re dismissal of Haiem's cross-complaint for failure to show good cause for not serving the cross-complaint on cross-defendants. Accordingly, on November 9, 2012 the court dismissed the cross-complaint pursuant to that OSC. At the present moment, Haiem does not have a cross-complaint. Even if the court were to excuse Haiem's nonappearance on November 9, 2012 and his failure to serve the original cross-complaint on cross-defendants, which it would likely do, there would still be no cross-complaint as a matter of law because Haiem never sought leave of court to file one."

Just two days after the trial court denied his second motion to amend, on November 15, 2012 Haiem filed a third motion to amend and an ex parte application to shorten time for a hearing. On November 15, 2012 the court denied Haiem's ex parte application to shorten time but treated the application as a request to continue the trial date, and the court continued the trial date from January 30, 2013 to May 15, 2013.

On February 1, 2013 the court held a hearing on Haiem's third motion to amend and other discovery matters. The court denied Haiem's third motion to amend his cross-

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6 The November 13, 2012 minute order is not included in the record on appeal. Similarly, Haiem's third motion to amend and the trial court's November 15, 2012 minute order, discussed below, are not in the record on appeal. We take judicial notice of these documents in the superior court's file. (Evid. Code, § 452, subd. (d); *People v. Hernandez*, *supra*, 30 Cal.4th at p. 870, fn. 3; *City of Oakland v. Oakland Police & Fire Retirement System*, *supra*, 224 Cal.App.4th at p. 234, fn. 13.)

complaint. The court again noted that Haiem's counsel failed to appear at the November 9 order to show cause hearing, did not file the required proofs of service of his cross-complaint, "and did not explain his absence or his failure to file the required proofs of service." The court stated that it had therefore stricken Haiem's cross-complaint, and further: "Haiem has not moved to set aside the court's order dismissing the cross-complaint but has instead moved (repeatedly, ex parte) for leave to amend the cross-complaint. Since there is no active cross-complaint, the Court cannot grant Haiem leave to amend a cross complaint. Instead, the Court construes the instant motion as one for leave to file an initial cross-complaint. Haiem has already answered the complaint and the Court has already set a trial date. Therefore a Court order is needed to file the proposed cross-complaint. . . . Section 428.50[, subdivision] (c). The Court will grant the motion if it is in the interest of justice to do so."

The court concluded that allowing Haiem to file a cross-complaint would not be in the interest of justice. The court based its ruling on the fact that Haiem's cross-complaint raised claims unrelated to the underlying action, Haiem had not been diligent in pursuing his cross-complaint as shown by dismissal of his initial cross-complaint, filing of the cross-complaint would delay the action to the prejudice of the other parties, and Haiem's claims were barred by the doctrine of issue preclusion.[7] Haiem filed a motion to reconsider, which the court denied on March 29, 2013.

On February 11, 2013 Hope Street Investment Associates dismissed its complaint with prejudice as to Haiem. On May 22, 2013 the court entered an order following hearing for distribution of funds, directing the distribution of the funds held by Hope Street Investment Associates to Hope Park Lofts and Perry.

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[7] The court found that Haiem's claims were barred by the judgment entered for Hope Street Investment Associates and Perry in a related action, Los Angeles Superior Court case No. BC385560, against Haiem and others. The court in that action cancelled the deeds from True Harmony to Haiem for the property at issue here and declared "that . . . Haiem has no right to, interest in, or lien in the property at all."

D. ***Haiem's Motion To Vacate Dismissal of Cross-complaint***

On May 14, 2013 Haiem filed a motion to vacate the dismissal of his cross-complaint under section 473, subdivisions (b) and (d). In his motion, Haiem argued that the November 9, 2012 order contained a clerical mistake, "in that it assumes the truth of the order to show cause's statement that the cross-complaint was not served; however the cross-complaint obviously was served because the Plaintiff filed an answer in response to it." Haiem contended that this clerical mistake could be corrected at any time under section 473, subdivision (d).

Haiem also argued that the November 9 order was the result of his counsel's excusable neglect, mistake, or surprise in failing to appear at the hearing, entitling him to relief under subdivision (b) of section 473. He claimed that his motion under section 473, subdivision (b), was timely because it was "brought within six months of the dismissal of the cross-complaint extended by five days for the period of time for mail service of the order of dismissal," under section 1013, subdivision (a).[8]

On December 4, 2013 the court denied Haiem's motion to vacate the dismissal of his cross-complaint, stating that section 473, subdivision (b), "provides that application for relief under that provision shall be made in a time frame not exceeding six months from the date of the dismissal sought to be vacated. The dismissal Mr. Haiem seeks to vacate was entered on 11/9/2012. Mr. Haiem did not file or serve his motion to vacate that dismissal until 5/14/2013, which is more than six months from the date the dismissal was made and entered. [¶] . . . Further on 11/9/2012 the clerk of the court served Mr.

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[8] On June 4, 2013 Haiem filed a proof of service of his cross-complaint containing a statement by his attorney that he hand-delivered the cross-complaint on October 3, 2012 "as an attachment to the Declaration of Jeffrey G. Thomas in support of the Ex Parte Application to Amend the Cross-complaint." The defects in the proof of service are numerous, including that it does not attach the document purportedly served, the document served was only an "attachment" to the first motion to amend, the proof of service is dated after dismissal of the cross-complaint, and the proof of service only shows delivery to Perry and attorney Hugh John Gibson on behalf of defendants Solomon and Hope Park Lofts, not on counsel for Hope Street Investment Associates.

Haiem with written notice that the court had dismissed his cross-complaint. Mr. Haiem did not file or serve his motion to vacate until more than six months after that date. Mr. Haiem has not shown diligence in making his motion to vacate and he did not file or serve his motion within a reasonable time."

The court added that Haiem "did not serve his cross-complaint on the cross-defendants . . . at any time before his cross-complaint was dismissed on 11/9/2012, although he was ordered to do so," and "[t]he cross complaint has never been served, even as of today." The court also noted that "neither the court nor its clerk made any clerical error in reducing to the form of a written order the court's 11/9/2012 order of dismissal of Mr. Haiem's cross-complaint."

On January 31, 2014 Haiem filed a notice of appeal from orders filed on "12/4/13 and 5/22/13 (taken together)" and on "2/1/13 and 3/29/13 and 12/4/13 (taken together)." At Hope Park Lofts' request, we dismissed the appeal as to the February 1, 2013 order as untimely and the May 22, 2013 order for lack of standing. Haiem's effort to appeal all the orders "taken together" appears to be a misguided effort to circumvent this court's prior order dismissing Haiem's appeal of the trial court's May 22, 2013 order and the untimeliness of the appeal of the trial court's February 1, 2013 order. The only order properly before us in this appeal is the December 4, 2013 order denying Haiem's section 473 motion to vacate dismissal of his cross-complaint.[9]

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[9] Haiem's appeal from the March 29, 2013 order is also untimely and, further, he does not raise any points of error as to that order in his opening brief. We therefore dismiss the appeal as to that order. (Cal. Rules of Court, rule 8.104(a); *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 888, fn. 12 [dismissing appeal from order awarding costs where order not addressed in appellate briefs]; *Drum v. Superior Court* (2006) 139 Cal.App.4th 845, 847, 852 [dismissing untimely appeal for lack of jurisdiction].)

DISCUSSION

A. *Standard of Review*

"'It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.]' [Citation.]" (*Community Youth Athletic Center v. City of National City* (2009) 170 Cal.App.4th 416, 427; accord, *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432 [determination of "pure question of law" subject to de novo review on appeal].)

In this case, it is undisputed that the court ordered Haiem's cross-complaint stricken on November 9, 2012, and that Haiem filed his motion to vacate on May 14, 2013—more than six months later. We find below that Haiem's motion to vacate was untimely.

B. *Haiem's Motion To Vacate Dismissal of His Cross-complaint Was Not Timely Under Section 473, Subdivision (b)*

Section 473, subdivision (b), provides in pertinent part: "The court may, upon any 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. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." Haiem contends that the six-month period under section 473, subdivision (b), is not jurisdictional but "is a '*housekeeping*' rule subject to equitable tolling and extension for fairness and justice, not an absolute cut-off." Second, Haiem argues that the six-month time period is extended by the five-day extension for

mailing notices pursuant to section 1013, subdivision (a). Both contentions are without merit.[10]

1. *The six-month time period for filing a motion to vacate under section 473, subdivision (b), is jurisdictional.*

Our Supreme Court, this district and our colleagues in other districts have uniformly held that the six-month time period for filing a motion under section 473, subdivision (b), is jurisdictional, and the court is without power to grant relief after expiration of the period. (*Solot v. Linch* (1956) 46 Cal.2d 99, 105-106; *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42 [finding trial court was without jurisdiction to grant motion to vacate, holding that "[t]he six-month time limit for granting statutory relief is jurisdictional and the court may not consider a motion for relief made after that period has elapsed"]; *Stevenson v. Turner* (1979) 94 Cal.App.3d 315, 318 ["[t]he six-month outside time limit for granting relief is jurisdictional and the court may not consider any motion made after that period has elapsed"]; *Northridge Financial Corp. v. Hamblin* (1975) 48 Cal.App.3d 819, 826 [affirming denial of motion to vacate under "jurisdictional time period of section 473"]; *Thompson v. Vallembois* (1963) 216 Cal.App.2d 21, 24 [section 473 motion made more than six months after entry of default "was made too late, and the trial court simply lacked jurisdiction to act under it"].)

Our Supreme Court held in *Solot*, in finding a trial court's order setting aside the plaintiff's default and judgment was void: "[S]ince respondent's motion for relief was made after the prescribed period had expired, the court was without jurisdiction to act and the order setting aside his default and the judgment thereon was void." (*Solot v. Linch, supra*, 46 Cal.2d at pp. 105-106; see also *Smith v. Pelton Water Wheel Co.* (1907) 151 Cal. 394, 397 ["[t]he six months' limitation there provided is simply a limitation upon the

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[10] Because we find that Haiem's motion to vacate judgment was untimely, we do not reach the merits of whether the court should have found excusable neglect or that Haiem and his attorney acted with due diligence.

power of the court to grant any relief, regardless of any question either as to the merits of the application, or as to whether or not the application was made within what might be held to be a reasonable time under the circumstances"].) This district similarly held in *Northridge Financial Corp*.: "[Defendant] is asking this court to extend the jurisdictional time period of section 473, which is not within our province." (*Northridge Financial Corp. v. Hamblin*, *supra*, 48 Cal.App.3d at p. 826.)

Haiem fails to cite even a single case to the contrary. In *Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, this district considered *when* the six-month period should commence running on a motion for relief from an order denying fees and costs. The court held that on a request for fees and costs, the six-month period runs from the date the trial court entered its order denying fees and costs. (*Id*. at pp. 1199-1200.) Because the plaintiff had filed his motion within the six-month period, the court did not address whether a trial court has jurisdiction to consider a motion filed under section 473 after the six-month period has run.

Similarly, the only issue before the court in *Avila v. Chua* (1997) 57 Cal.App.4th 860 was whether the mandatory provisions of section 473 applied to a ruling on a summary judgment motion; the court held that section 473 applied. (*Avila*, *supra*, at pp. 869-870.) Haiem also relies on the holding in *Maynard v. Brandon* (2005) 36 Cal.4th 364, in which the court held "that section 473, subdivision (b) cannot relieve a party from the consequences of a failure to meet the 30-day deadline for seeking a trial following [a Mandatory Fee Arbitration Act] arbitration . . . ." (*Id*. at p. 377.) The holding in *Maynard* does not in any way support Haiem's contention that section 473, subdivision (b)'s six-month filing requirement is not jurisdictional.[11]

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[11] The two United States Supreme Court cases relied on by Haiem do not even discuss section 473 or otherwise support Haiem's argument that section 473 is merely a "housekeeping" provision. (See *Dolan v. United States* (2010) 560 U.S. 605, 611-612 [130 S.Ct. 2533, 177 L.Ed.2d 108] [trial court had discretion to order restitution in criminal case after 90-day deadline set by statute for ordering restitution in light of language, context and purposes of statute]; *Kontrick v. Ryan* (2004) 540 U.S. 443, 455

2. *Section 1013 does not extend the time for filing a motion to vacate under section 473, subdivision (b).*

Haiem argues in the alternative that the six-month time period in which to file his motion was extended by section 1013, subdivision (a), which provides: "In case of service by mail, . . . any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail . . . ."

Contrary to Haiem's argument, "'[t]he cases have consistently held that where a prescribed time period is commenced by some circumstance, act or occurrence other than service then . . . section 1013 will not apply. [Citations.] [¶] On the other hand, where a prescribed time period is triggered by the term "service" of a notice, document or request then section 1013 will extend the period. [Citations.]' [Citations.]" (*Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 684-685 [section 1013 does not extend 45-day time period under Labor Code for filing petition for review because the time period under the statute is triggered by "filing" of the order, not service]; accord, *Vitkievicz v. Valverde* (2012) 202 Cal.App.4th 1306, 1313-1314 [section 1013 does not extend the 90-day deadline for filing petition to review decision by Department of Motor Vehicles revoking or suspending license where statute provides that 90 days runs from "'the date the order is noticed,'" which is complete four days after deposit of notice in the mail]; *Department of Industrial Relations v. Atlantic Baking Co.* (2001) 89 Cal.App.4th 891, 894-895 [section 1013 not applicable where time limit under Labor Code runs from "'mailing'" of notice of findings by Labor Commissioner, with no reference to service].)

Haiem does not present even a colorable argument to the contrary. For example, in *Shearer v. Superior Court* (1977) 70 Cal.App.3d 424, relied on by Haiem, the court held that section 1013 applied to extend the 10-day period under section 418.10 for filing

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[124 S.Ct. 906, 157 L.Ed.2d 867] [holding that bankruptcy rule requiring creditor to file complaint within 60 days after first meeting of creditors was not jurisdictional].)

a petition to challenge a trial court's ruling quashing service of summons for lack of jurisdiction because section 418.10 required that a petition be filed "'within 10 days after service upon him of a written notice of entry of an order of the court denying his motion . . . .'" (*Shearer, supra,* at p. 426.) Haiem's other cases are likewise inapposite. (See, e.g., *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 Cal.App.4th 1042, 1046, 1049 [section 1013 does not extend 60-day deadline for court to grant motion for new trial under section 660, which grants court power to rule on a motion for a new trial within 60 days from the earlier of "mailing" of notice of entry of judgment by the clerk or service of notice by a party]; *California Accounts, Inc. v. Superior Court* (1975) 50 Cal.App.3d 483, 485 [section 1013 applies to extend deadline for filing motion for further responses to interrogatories where section 2030, subdivision (a), requires notice of the motion be given "'within 30 days from the date of service of the answers or objections'"].)

In this case, section 473, subdivision (b), provides that a motion to vacate must be filed within six months after the dismissal or other order "was taken," and does not reference service of the order. Therefore, section 1013 does not apply to extend the deadline. Accordingly, the six-month period ran from November 9, 2012, when the trial court issued its order striking Haiem's cross-complaint, and the trial court properly found Haiem's motion to vacate filed on May 14, 2013 was untimely.

C. *Hope Park Lofts is Entitled to Sanctions Against Thomas for Filing a Frivolous Appeal*

Hope Park Lofts requests in its motion for sanctions on appeal that we impose sanctions against Haiem and Thomas for filing a frivolous appeal. On March 9, 2015 we issued an order to show cause why sanctions should not be imposed, directed to Haiem and Thomas, and allowed 10 calendar days in which to file a written opposition. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276(a); see *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-651.)

Haiem did not file an opposition within the 10-day period; instead, on March 24, 2015 Thomas filed a copy of our order to show cause with a handwritten note that states: "Objection to sanctions on calendar because no court reporter present and because sanctions were originally noticed as frivolous motion not frivolous appeal." We find below that sanctions are appropriate in this case, but only award sanctions against Thomas.[12]

1. *Standard for Sanctions for Prosecuting Frivolous Appeal*

Section 907 provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." Similarly, California Rules of Court, rule 8.276(a)(i) provides for sanctions for "[t]aking a frivolous appeal or appealing solely to cause delay." Our Supreme Court held in *In re Marriage of Flaherty*, *supra*, 31 Cal.3d 637, "an appeal should be held to be 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." (*Id.* at p. 650; accord, *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 191.)

As this district held in *Personal Court Reporters*: "'The first standard [to harass or delay] is tested subjectively. The focus is on the good faith of appellant and counsel. The second [of no merit] is tested objectively. [Citation.] "While each of the above standards provides *independent* authority for a sanctions award, in practice the two

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12 Haiem cites no authority for his contention that we should not award sanctions where there was no court reporter present at a hearing. The court's ruling on the motion to vacate is set forth in a written order reviewable on appeal. Further, there was a court reporter present at the December 4, 2013 hearing on the motion to vacate. Haiem does not specify at what relevant hearing, if any, there was no court reporter. As to the sanctions, Hope Park Lofts properly moved for sanctions against Haiem and Thomas for prosecuting a frivolous appeal.

standards usually are used together 'with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay.' [Citations.]" [Citation.]' [Citation.]" (*Personal Court Reporters, Inc. v. Rand*, *supra*, 205 Cal.App.4th at p. 191, quoting *In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516.)

In *Personal Court Reporters*, this district ordered the defendants to pay the plaintiff $22,000 in attorneys fees on appeal after finding the appeal was "wholly without merit and . . . defendants pursued this appeal for the purpose of delaying this matter . . . ." (*Personal Court Reporters, Inc. v. Rand*, *supra*, 205 Cal.App.4th at p. 193; see also *Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 829-830 [imposing attorneys' fees as sanctions jointly and severally against party and his counsel, finding appeal was "'totally and completely without merit'"]; *In re Marriage of Gong & Kwong*, *supra*, 163 Cal.App.4th at p. 520 [awarding attorneys fees plus additional $15,000 in sanctions based on "objectionable" conduct on appeal]; *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1432, 1433 [award of $14,000 in attorneys' fees as sanctions jointly and severally against party and counsel where appeal "lacks all merit"]; *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29 [awarding $26,000 in sanctions for failure to follow rules of court on appeal, "ad hominem (and unsupported) attacks" on plaintiffs, and frivolous appeal].)

We next turn to the conduct of Haiem and Thomas in prosecuting this appeal.

2. *Haiem's appeal was frivolous and intended to harass Hope Park Lofts.*

As we discuss below, Thomas's approach toward this appeal and his unprofessional and at times outrageous conduct toward counsel for Hope Park Lofts show not only that this appeal was frivolous but that it was intended to harass Hope Park Lofts and to drive up its litigation costs.[13]

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13 Thomas has represented Haiem in all proceedings on appeal.

On July 22, 2013 Haiem filed a notice of appeal from the May 22, 2013 order following the hearing for distribution of funds. On October 10, 2013 we wrote to Thomas stating that because Haiem's cross-complaint had been dismissed and Hope Street Investment Associates dismissed him from the action, it appeared he had no standing to appeal. We gave Haiem an opportunity to show why the appeal was properly before us. Thomas responded by informing us of the section 473 motion to vacate the dismissal of the cross-complaint. After the trial court denied Haiem's motion on December 4, 2013, we dismissed the appeal for lack of standing.

On January 31, 2014 Haiem filed a notice of appeal from orders filed on "12/4/13 and 5/22/13 (taken together)" and on "2/1/13 and 3/29/13 and 12/4/13 (taken together)." Hope Park Lofts's attorney Gibson made numerous attempts to convince Thomas to narrow his appeal to the December 3, 2013 order because the prior appeals were untimely or had been dismissed. On February 3, 2014 Gibson wrote to Thomas requesting that he limit the appeal, stating that if Thomas failed to do so, he would have to file a motion to strike or dismiss the notice of appeal as to the other orders.

Thomas responded by email: "[I]s this a settlement offer? I'm so busy, only settlement offer will get immediate attention—or state bar letter." Gibson emailed back: "The letter I sent you is a request that, for the reasons set out in my letter to you of today's date, you limit the scope of the Notice of Appeal that you filed on behalf of Mr. Haiem. It is important that you review that letter and act promptly." Thomas replied by email: "I reject your purification efforts. [Y]our client just hangs around with the 'lessee university' crowd, there are consequences."

Gibson wrote to Thomas again on February 5 and July 1, 2014, requesting he limit the appeal to the December 4, 2013 order. Thomas ignored these requests. On August 5, 2014 Haiem filed an opening brief in which he challenged the February, May and December 2013 orders.

On August 12, 2014 Gibson filed a motion to dismiss the appeal as to the February 1 and May 22, 2013 orders. Thomas opposed the motion, stating: "The grounds for the motion are not very clear, but it seems that Respondent objects to a

combined appeal (3-in-1) of three different orders of the court rendered at three different times and spaced apart by several months. This argument is a fictive horse soon curried." We granted Hope Park Lofts' motion to dismiss on August 28, 2014.

We read Haiem's appeal of the February 1, 2013 and May 22, 2013 orders "taken together" with Haiem's December 4, 2013 appeal as an effort to circumvent our prior order dismissing his appeal of the May 22 order and his untimely appeal of the February 1 order. Compounding his refusal to limit the appeal, Thomas consistently responded to Gibson's communications with gratuitous and unprofessional comments, including that only a "settlement offer" or "state bar letter" would get his attention, that Thomas was rejecting Gibson's "purification efforts," and that there were "consequences" from Gibson's "client just hang[ing] around with the 'lessee university' crowd."

While this conduct alone would support imposition of sanctions, Thomas's conduct became even more egregious as the appeal proceeded. Gibson wrote to Thomas regarding the appellants' appendix, stating that it "appears to be unorganized" and "has many pages either out of order or missing." He requested that Thomas lend him the entire record to use to prepare a respondent's appendix pursuant to California Rules of Court rules 8.153 and 8.124(b)(2)(C).[14]

Thomas first responded on August 5, 2014 that Gibson had already received the record. Thomas later provided Gibson with the second and third appendices referenced in the brief, but not the first appendix. On August 8, when Gibson requested the first appendix, Thomas responded: "I'm not obligated to do this[] by any court rule or

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[14] Rule 8.153(a) of the California Rules of Court provides: "Within 20 days after the record is filed in the reviewing court, a party that has not purchased its own copy of the record may request another party, in writing, to lend it that party's copy of the record. The other party must then lend its copy of the record when it serves its brief." Rule 8.124(b)(2)(C) provides, "On request of the reviewing court or any party, [the party designating incorporation by reference of materials from another case on appeal] must provide a copy of the materials incorporated by reference to the court or another party or lend them for copying . . . ."

professional custom — certainly you do not exhibit collegiality to me." He called Gibson's clients "crooks, thieves[,] charlatans and should be behind bars for the rest of their lives." He stated he would give the requested documents to Gibson, "but your professional career would be better spent doing other representation for more deserving clients."

Later that evening on August 8, Thomas added: "By the way Mr. Gibson [¶] I attach the recent decision in the appellate court in Chodos v. Borman finding your skills as an attorney at law to be noncompensable. I am sending this opinion to my client Mr. Haiem with instructions to send it by certified mail to [Hope Park Lofts' managing member] Mr. Solomon. [¶] I believe that the report of Lisa Howard's malpractice also needs to be sent by certified mail to Mr. Solomon. [¶] Enjoy yourself, Mr. Gibson and don't get in a family way before midnight." (Capitalization omitted.)

Gibson responded the following morning: "Mr. Thomas, I strongly suggest that it's important to keep emotions down in this case, and act rationally." Gibson stated that Thomas had misread the *Chodos* opinion and suggested that Thomas read the Rules of Professional Conduct.[15]

Gibson also points to Thomas's response to Gibson's request that they share the cost of a reporter's transcript from the December 4, 2013 hearing. Thomas stated: "[F]rom here on out you will have to do work on this case it will increase exponentially . . . . I repeat this is very difficult work and I think it is beyond your capabilities." Thomas stated further that he "will consider this request but you can rest assured that it will be given the proper priority not the rush rush doctors waiting room

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15 *Chodos v. Borman* (2014) 227 Cal.App.4th 76 involved an action by attorneys Hillel Chodos and Gibson to recover attorneys fees from a former client. (*Id*. at pp. 83, 89-90.) According to Gibson, after the complaint was filed, the client agreed to pay him and he dismissed his claim against her. Gibson was not a party to the appeal. Further, the ruling on appeal was not that the attorneys' work on the case was "noncompensable," but that there was no support for the multiplier applied to the attorney fee award. (*Id*. at p. 82.)

shrink wrapped in southern [C]alifornia plastic attention that you give to pleadings in this case. [¶] You really ought to see a psychiatrist immediately."

Thomas's conduct, including his refusal to limit the scope of the appeal, his resistance to Gibson's effort to prepare an adequate record on appeal, his threat to communicate to Gibson's clients regarding alleged malpractice in a prior case, and his repeated gratuitous and unprofessional comments highlight the improper motives in prosecuting this appeal. Indeed, Thomas's comments that he will only respond to a "settlement offer" and that work on the case "will increase exponentially" over time reveal Thomas's intent to harass Hope Park Lofts and to drive up its litigation costs in the hope of a settlement.

In addition, this appeal "indisputably has no merit." (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 650.) Thomas fails to cite even a single authority that supports his position that his motion to vacate was timely or that the trial court had jurisdiction to act upon the motion. Neither did Thomas provide any support for his argument that section 1013 extended the time to file his motion. Indeed, Thomas consistently cites to cases that do not stand for the propositions he argues. Likewise, the notice of appeal was clearly untimely as to the trial court's February 1, 2013 order and improper as to the May 22, 2013 order. Finally, Thomas filed two reply briefs that failed to comply with the California Rules of Court, ignoring our order finding the first reply brief in violation of court rules and setting forth the requirements for the brief.

We conclude this appeal is frivolous both because it is objectively devoid of merit and because it is subjectively prosecuted for an improper motive—to harass Hope Park Lofts and increase its litigation costs. (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 650; *Personal Court Reporters, Inc. v. Rand*, *supra*, 205 Cal.App.4th at p. 191.)

3. *Significant sanctions are appropriate for this frivolous appeal.*

Hope Park Lofts has requested $73,650 in sanctions, based on 127.3 hours of Gibson's time, billed at $500 per hour, for a total of $63,650, plus an additional $10,000

"to deter future conduct of the kind they have demonstrated in the course of these appellate proceedings."[16]

In determining an appropriate amount of sanctions to be awarded, we consider "'the amount of respondent's attorney fees on appeal; . . . the degree of objective frivolousness and delay; and the need for discouragement of like conduct in the future. [Citation.]' [Citation.]" (*In re Marriage of Gong & Kwong*, *supra*, 163 Cal.App.4th at pp. 519-520 [awarding $30,000 in requested attorneys fees plus additional $15,000 in additional sanctions for "objectionable" conduct by party]; accord, *Singh v. Lipworth*, *supra*, 227 Cal.App.4th at p. 830.)

We find a high "degree of objective frivolousness," and that the appeal was prosecuted for improper motives.[17] However, we find that the claimed amount of attorneys fees is high given the lack of complexity of the issues on appeal. On the other hand, the large number of hours spent by Gibson was caused in large part by Thomas's obstructive conduct. We find that $48,650 is a reasonable amount of attorneys fees for

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16 Hope Park Lofts's request for sanctions includes compensation for the following hours spent by Gibson in attorneys fees: (1) $5,650 (11.3 hours) for time spent to limit the issues on appeal and motion to dismiss; (2) $2,650 (5.3 hours) for opposition to Haiem's request for judicial notice and motion to strike; (3) $1,550 (3.1 hours) to obtain extension of time to file respondent's brief; (4) $1,100 (2.2 hours) to obtain a loan of the record for copying; (5) $37,150 (74.3 hours) to prepare respondent's appendix and respondent's brief; (6) $3,650 (7.3 hours) to review reply brief and prepare motion to strike; (7) $9,900 (19.8 hours) to prepare motion for sanctions; and (8) $2,000 (4.0 hours) to review briefs and motions and attend oral argument.

17 While sanctions may be awarded against a party and the party's attorney, in this case all of the unprofessional and abusive conduct has been by Thomas, not Haiem. Absent evidence of Haiem's role in this frivolous appeal, we award sanctions only against Thomas.

this appeal,[18] plus an additional $10,000 in sanctions to discourage the type of inappropriate conduct displayed by Haiem and Thomas in this appeal.[19]

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[18] Thomas did not argue in his response to the order to show cause or at oral argument that the amount of attorneys fees requested by Hope Park Lofts as sanctions was unreasonable. However, we have reduced the amount of fees awarded as sanctions by 30 hours to reflect a reasonable amount of attorneys fees on appeal, as follows. The reduced amount of attorneys fees reflects a reduction of 30 hours of attorney time, including (1) 20 fewer hours for preparation of respondent's appendix (which could have been prepared by a paralegal or less experienced attorney) and respondent's brief (on issues of limited complexity); and (2) 10 fewer hours on the motion for sanctions.

[19] While courts have imposed sanctions payable to the clerk of the court (see, e.g., *Singh v. Lipworth*, *supra*, 227 Cal.App.4th at p. 830), we are not imposing sanctions payable to the court.

DISPOSITION

The December 4, 2013 order is affirmed. The appeal is dismissed as to the remaining orders. Hope Park Lofts is awarded its costs on appeal.

Thomas is ordered to pay $58,650 to Hope Park Lofts as sanctions for bringing this frivolous appeal. The sanctions are to be paid no later than 30 days after the date the remittitur is issued. The clerk of the court shall forward a copy of this opinion and a copy of the oral argument audio recording to the State Bar of California upon issuance of the remittitur. (Bus. & Prof. Code, §§ 6086.7, subd. (a), 6068, subd. (o)(3).)

FEUER, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.