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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

DANNY R. FULLER, Plaintiff and Respondent, v. MARIA S. FULLER, Defendant and Appellant; WILMINGTON SAVINGS FUND SOCIETY, FSB, Defendant, Cross-complainant and Respondent.	B285067 (Los Angeles County Super. Ct. No. BD399378)

APPEAL from orders of the Superior Court of the County of Los Angeles, Timothy Patrick Dillon, Judge. Dismissed in part and affirmed in part.

Law Offices of David S. Karton, David S. Karton for Appellant.

Fidelity National Law Group, Teresa Y. Hillery for Defendant, Cross-Complainant, and Respondent Wilmington Savings Fund Society, FSB, dba Christiana Trust as Trustee of the Residential Credit Opportunities Trust Series 2015-1.

INTRODUCTION

In this family law case, Danny Fuller (Danny) filed a dissolution action against his wife Susanna Maria Fuller (Susanna).[1] Subsequently, Susanna filed a quiet title action against a predecessor company of Wilmington Savings Fund Society, FSB, dba Christiana Trust as Trustee of the Residential Credit Opportunities Trust Series 2015-1 (Wilmington) to rescind and declare void a deed of trust that secured a $315,000 loan made to Danny and Susanna by Wilmington's predecessor company. The deed of trust securing the loan was recorded against the marital home. Wilmington's predecessor company filed a cross-complaint against Danny and Susanna for imposition of an equitable lien on the marital home. Proceeding under its equity jurisdiction, the trial court ruled the deed of trust was null and void because Susanna's signature was forged. The court also awarded Wilmington an equitable lien against the marital home in the amount of $345,501.30. Susanna moved for a new trial and/or to set aside and vacate the judgment under

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1 Because Danny and Susanna share a last name, we refer to them using their first names; we do not intend any disrespect. Danny is not a party to the appeal.

Code of Civil Procedure section 663.[2] The court denied the motions, ruling they were untimely and lacked merit. We dismiss Susanna's appeal from the denial of her motion for a new trial and affirm the order denying her motion to vacate the judgment under section 663.

BACKGROUND

In December 2003, Danny filed a dissolution action against Susanna. The dissolution action has not been resolved and remains pending in the superior court.

In August 2008, Susanna filed a quiet title complaint in the dissolution action against Wilmington's predecessor company to rescind and declare void a deed of trust that secured a $315,000 loan made to Danny and Susanna by Wilmington's predecessor company. The deed of trust securing the loan was recorded against the marital home. Susanna sought to obtain legal title to the marital home free and clear of any lien asserted by Wilmington's predecessor company including its deed of trust.

In June 2015, Wilmington's predecessor company filed a cross-complaint against Danny and Susanna for imposition of an equitable lien on the marital home.

Following a two-day non-jury trial, the court issued a statement of decision. The court explained it was "not making . . . any findings regarding the determination, allocation, or characterization of assets or liabilities between Susanna and Danny" and was "not adjudicating any claims, matters, or

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2 Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

liabilities Danny or Susanna may possess or assert between them. These issues will be later resolved or adjudicated in the dissolution proceeding."

The court found Danny had obtained the loan from Wilmington's predecessor company without Susanna's knowledge or consent and Susanna's signatures on the loan documents were forged. Danny used the loan proceeds to pay off three existing liens on the marital home totaling $211,513 and other obligations. He kept the remaining $42,421.

Wilmington conceded its deed of trust was null and void because Susanna's signature was forged, but it asked the court to impose an equitable lien on the marital home in the amount of the previous liens extinguished with the loan funds. Susanna argued an equitable lien was not appropriate because the underwriting of the loan transaction did not meet the industry standard of care.

The court ruled the deed of trust was null and void because Susanna's signature was forged. The court also concluded that, under principles of equitable subrogation, Wilmington was "substituted in the place of the[ ] [prior] lien holders under [their] deeds of trust and succeeds to their rights against [the marital home]" because Wilmington's predecessor company paid off the three prior liens at Danny's request. Moreover, Wilmington's predecessor company was not a volunteer, Wilmington was not chargeable with culpable and excusable neglect in making and underwriting the loan, and Wilmington had "superior equities to Susanna's equities . . . ." With interest, the equitable lien amount was $345,501.30.

The court entered judgment on May 18, 2017 on a Judicial Council family law form (FL-180) submitted by Wilmington's

counsel. Also on May 18, on another Judicial Council family law form submitted by Wilmington's counsel (FL-190), the court clerk mailed notice of entry of the judgment to counsel for Danny, Susanna, and Wilmington.

On June 5, 2017, Susanna filed a notice of intent to move for new trial and/or to set aside and vacate the judgment under section 663. Attached to the notice of intent, Susanna's counsel submitted a declaration stating the notice of entry of judgment "shows a mailing date of May 18, 2017" but "the postmark on the envelope is dated March 31, 2017 . . . ." (Emphasis omitted.) Counsel also stated his address on the notice of entry of judgment was incorrect. He asserted that, as a result, "the presumption that service occurred on May 18, 2017, is rebutted and the 15 day time to file the instant notices commences on the day after I received the conformed judgment." Counsel stated he received the judgment on May 23, 2017.

Wilmington filed an objection to Susanna's notice of intent, arguing it was untimely. In a reply, Susanna asserted the May 18, 2017 mailing date on the notice of entry of judgment was presumed invalid under section 1013a, subdivision (3) because "the postmark shows a date of March 31, 2017." Susanna also filed points and authorities supporting her motion. Wilmington filed a response.

On July 12, 2017, the court held a hearing on the motion for a new trial and/or to vacate the judgment under section 663 and took the matter under submission. On July 17, 2017, the court issued a decision denying the motion on the ground it was untimely and lacked substantive merit.

On September 13, 2017, Susanna filed a notice of appeal from the July 17 order denying the motion for a new trial and/or to vacate the judgment under section 663.

DISCUSSION

I. Motion to dismiss the appeal.

Wilmington has moved to dismiss Susanna's appeal, arguing it is untimely because (1) Susanna did not file her September 13, 2017 notice of appeal within 60 days of the clerk's May 18, 2017 mailing of notice of entry of the judgment and (2) Susanna's June 5, 2017 notice of intent to move for a new trial and/or to vacate the judgment did not extend the time to file a notice of appeal from the May 18, 2017 judgment because the notice of intent was filed beyond the 15-day deadline.

Susanna responds that she is not appealing from the May 18, 2017 judgment, but is instead appealing from the trial court's July 17, 2017 post-judgment order denying her motion for a new trial and/or to vacate the judgment under section 663. Although normally an order denying a motion for new trial is not appealable, Susanna argues the appeal from the order denying a new trial should be treated as an appeal of the underlying judgment because it is clear she intended to appeal from the underlying judgment and Wilmington would suffer no prejudice. Susanna further argues that, due to defects in the notice of entry of judgment, she had more than fifteen days to file a section 663

motion and up to 180 days to file a notice of appeal from the judgment.[3]

A. Susanna's appeal from the denial of her motion to vacate the judgment.

On July 17, 2017, the trial court denied Susanna's motion to vacate the judgment under section 663. An order denying a motion to vacate brought under section 663 is appealable. (*Ryan v. Rosenfeld* (2017) 3 Cal.5th 124, 135.) Susanna filed a notice of appeal from the July 17 order on September 13, 2017, within the 60-day deadline of rule 8.104(a) of the California Rules of Court. Therefore, we deny the motion to dismiss Susanna's appeal from the order denying her motion to vacate the judgment under section 663.

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3 In support of its motion to dismiss the appeal, Wilmington asks us to take judicial notice of (1) the Notice of Entry of Judgment, including the Clerk's Certificate of Mailing, date-stamped May 18, 2017; (2) Susanna's "Notice of Intent to Move for New Trial [C.C.P. §657, §659] and/or Set Aside and Vacate Judgment [C.C.P. § 663]," date-stamped June 5, 2017; (3) the July 17, 2017 order denying Susanna's motions for new trial and to vacate the judgment; and (4) Susanna's September 13, 2017 notice of appeal. Susanna joins the judicial notice request. We deny the request because these documents are included in the record on appeal.

B. Susanna's appeal from the denial of her motion for new trial.

Citing *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15 (*Walker*), Susanna argues we should treat her purported appeal from the denial of her motion for a new trial as an appeal from the underlying judgment because it is reasonably clear that she was trying to appeal from the judgment and no prejudice would accrue to Wilmington. *Walker* does not apply here.

In *Walker*, the plaintiff sued her former employer for wrongful termination in violation of public policy and violation of Labor Code section 1102.5, the whistleblower statute. (*Walker*, *supra*, 35 Cal.4th at p. 18.) The jury returned a defense verdict and the court entered judgment and notice of entry of judgment. (*Ibid*.) The plaintiff moved for a new trial and for judgment notwithstanding the verdict. (*Ibid*.) The court denied both motions. (*Ibid*.) The plaintiff filed a notice of appeal which stated she was appealing the order denying her motion for a new trial. (*Ibid*.) The Court of Appeal dismissed the appeal on the ground that the denial of a motion for a new trial is not an appealable order. (*Id*. at p. 19.)

The Supreme Court reversed. The court recognized "it has long been settled that an order denying a motion for new trial is not independently appealable and may be reviewed only on appeal from the underlying judgment." (*Walker*, *supra*, 35 Cal.4th at p. 19, emphasis omitted.) But "[w]here . . . the sole notice of appeal is from the order denying a new trial, most courts have allowed the appeal to go forward by construing the notice to encompass the underlying judgment." (*Ibid*.) The court

contrasted this practice to the approach taken when "the appealing party . . . filed both a notice of appeal from the order denying a new trial and a timely notice of appeal from the underlying judgment." (*Id.* at p. 20, emphasis omitted.) "'When a party appeals from both appealable and nonappealable orders, courts in this state regularly dismiss the appeal from the latter order. [Citation.]'" (*Ibid.*)

In *Walker*, the plaintiff filed only one notice of appeal, and "dismissal would have the effect of completely denying [her] an appeal." (*Walker*, *supra*, 35 Cal.4th at p. 20.) In addition, the plaintiff "presented a colorable argument that she intended to appeal from the underlying judgment and that [the former employer] . . . would not be prejudiced by allowing the appeal to go forward." (*Id.* at p. 21.) Therefore, "[t]he Court of Appeal . . . erred in dismissing the appeal without considering whether, on these facts, the notice might be construed to encompass the underlying judgment." (*Ibid.*)

Susanna, unlike the plaintiff in *Walker*, *supra*, 35 Cal.4th 15, appealed from both appealable and nonappealable orders. Even if we dismiss her appeal from the nonappealable order denying her motion for a new trial, Susanna can proceed with her appeal of the denial of her motion to vacate under section 663. We therefore dismiss Susanna's purported appeal from the order denying her motion for a new trial.

II. The appeal.

A. Standard of review.

"We are interpreting and applying . . . statute[s] to an essentially undisputed factual circumstance. This presents an issue of law which is subject to de novo review." (*Goodstein v. Superior Court* (1996) 42 Cal.App.4th 1635, 1641.)

B. Susanna's section 663 motion was untimely.

The trial court concluded Susanna's motion to vacate the judgment under section 663, filed June 5, 2017, was untimely because it was filed more than fifteen days after the clerk mailed notice of entry of the judgment on May 18, 2017.[4] The court acknowledged that the notice of entry of judgment "contained an outdated address" for Susanna's counsel, but explained that the

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4 "A party intending to make a motion to set aside and vacate a judgment, as described in Section 663, shall file with the clerk and serve upon the adverse party a notice of his or her intention, designating the grounds upon which the motion will be made, and specifying the particulars in which the legal basis for the decision is not consistent with or supported by the facts, or in which the judgment or decree is not consistent with the special verdict, either: [¶] (1) After the decision is rendered and before the entry of judgment [or] [¶] (2) Within 15 days of the date of mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him or her by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest." (§ 663a, subd. (a).)

clerk "handwrote [counsel's] correct updated address" on the envelope used to mail the notice of entry of judgment. The court also observed Susanna "admits receiving the Notice of Entry on May 23, 2017." Under these circumstances, the court concluded the fifteen-day period to file a section 663 motion began when the clerk mailed the notice of entry of judgment on May 18, 2017, making the motion filed on June 5, 2017 untimely.

In challenging the trial court's ruling, Susanna argues the clerk's May 18, 2017 mailing of the notice of entry of judgment did not limit her time to file a section 663 motion to fifteen days because (1) her counsel's address was stated incorrectly on the notice of entry of judgment, (2) the "postmark" on the envelope used to mail the notice of entry of judgment was more than one day different from the date of mailing shown on the notice of entry of judgment, and (3) the notice of entry of judgment did not contain language stating the clerk mailed it on order of the court or under section 664.5. These arguments are not persuasive.

1. Counsel's incorrect address on the notice of entry of judgment.

Section 1013a, subdivision (4) authorizes proof of service by mail "by the clerk of a court of record" and requires "a certificate by that clerk setting forth [among other things] . . . the name and address of the person served *as shown on the envelope* . . . ." (§ 1013a, subd. (4), emphasis added.)

Here, the clerk's certificate of mailing in the notice of entry of judgment contained an incorrect address for Susanna's counsel, but the envelope used to mail the notice of entry of judgment contained the correct address. Accordingly, the clerk's

mailing of notice of entry of judgment did not comply with the statutory requirement that the clerk's certificate set forth "the address of the person served as shown on the envelope." (§ 1013a, subd. (4).) But Susanna cannot show any harm resulting from the lack of compliance because the clerk mailed the envelope containing the notice of entry of judgment to the correct address on May 18, 2017.

Susanna nonetheless argues the technical violation of section 1013a, subdivision (4) invalidated the mailing of the notice of entry of judgment for purposes of commencing the fifteen-day period to file her motion to vacate the judgment under section 663, giving her instead 180 days to file the motion. (§ 663a, subd. (a).) Susanna relies on case authority holding "[a] successful service by mail requires strict compliance with [section 1013a]." (*Valley Vista Land Co. v. Nipomo Water & Sewer Co.* (1967) 255 Cal.App.2d 172, 174 [denying motion to dismiss appeal where notice of appeal was filed more than 60 days after clerk's mailing of notice of entry of judgment because envelope containing clerk's notice of entry of judgment was misaddressed].)

Courts have applied the strict compliance requirement to avoid restrictions on the right to appeal. In *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894 (*Alan*), the Supreme Court explained that "when courts are called upon to resolve ambiguities in rules that limit the right to appeal, such as rule 8.104(a)(1)," they follow "'the well-established policy, based on the remedial character of the right of appeal, of according that right in doubtful cases "when such can be accomplished without doing violence to applicable rules."'" (*Id.* at pp. 901-902.) This policy "has led courts interpreting rule 8.104(a)(1) and its predecessors to hold that documents mailed by the clerk do not trigger the 60-

day period for filing a notice of appeal unless the documents strictly comply with the rule." (*Id*. at p. 901.) "Thus, courts have consistently held that the required 'document entitled "Notice of Entry"' [citation] must bear precisely that title, and that the 'file-stamped copy of the judgment' [citation] must truly be file-stamped. [Citations.]" (*Id*. at p. 903.)

"For the same reason, the older rule that technical defects in a notice of entry of judgment are excusable unless they are so egregious as to preclude actual notice of entry [citation] has not been applied to rule 8.104(a)(1) or its identically worded, immediate predecessor, former rule 2(a)(1) (as adopted, eff. Jan. 1, 2002)." (*Alan*, *supra*, 40 Cal.4th at p. 903, citing *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 114 (*Marriage of Eben-King*); see also *Thiara v. Pacific Coast Khalsa Diwan Society* (2010) 182 Cal.App.4th 51, 57 ["a notice of entry or file-stamped copy of a judgment served by a party will not trigger the 60-day period [to file a notice of appeal] unless it strictly complies with the provisions of rule 8.104(a)(2), including the requirement that it be accompanied by proof of service"]; *Bi-Coastal Payroll Services, Inc. v. California Ins. Guarantee Assn*. (2009) 174 Cal.App.4th 579, 581, 587, 589 [service of minute order which did not strictly comply with rule 8.104(a)(1) did not commence the 60-day period to file notice of appeal].)

While the "older rule" excusing technical defects in the notice of entry of judgment that do not preclude actual notice no longer applies when it would limit the right to appeal (*Alan*, *supra*, 40 Cal.4th at p. 903), we could find no published decision disapproving the "older rule's" application in other contexts. Indeed, the Supreme Court observed in *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265 (*Palmer*) that "[w]e have

long held that no particular form of notice [of entry of judgment] is required" to start the time to file motions for new trial and for judgment notwithstanding the verdict under sections 629, 659, and 660. (*Palmer*, *supra*, 30 Cal.4th at p. 1277.)

To support this statement, the court in *Palmer* cited its earlier decision in *McCordic v. Crawford* (1943) 23 Cal.2d 1 (*McCordic*). (*Palmer*, *supra*, 30 Cal.4th at p. 1277.) In *McCordic*, the prevailing plaintiff served a notice of entry of judgment on the defendant which erroneously stated the date of the judgment. (*McCordic*, *supra*, 23 Cal.2d at p. 4.) The defendant moved for a new trial, which the court granted more than 60 days after the service of notice of entry of judgment. (*Ibid.*) Thus, "[i]f the notice of entry of judgment was valid, the motion for new trial was automatically denied upon the expiration of the 60-day period." (*Ibid.*) On appeal, the defendant "contended that the notice of entry of judgment was invalid and did not start the 60-day period running because it contained an inaccurate date of entry of the judgment." (*Ibid.*) The Supreme Court rejected the defendant's argument, observing "the date of entry of the judgment itself is of no significance" to the right to move for a new trial or the 60-day period in which the court has power to grant the motion. (*Ibid.*) "An error in the date is not significant when the date itself is not. An error in an unessential detail cannot defeat the very purpose of the notice authorized by section 660. What is essential is that the notice identify the judgment and advise the opposing party that it has been entered." (*Id.* at p. 5.)

Here, the inclusion of an incorrect address for Susanna's counsel on the notice of entry of judgment did not interfere with Susanna's ability to appeal the denial of her motion to vacate the

judgment under section 663. She filed her notice of appeal within 60 days of the order denying the motion. And the use of an incorrect address in the notice of entry of judgment was not "so egregious as to preclude actual notice of entry" of the judgment (*Alan*, *supra*, 40 Cal.4th at p. 903), because the clerk mailed the notice of entry in an envelope sent to counsel's correct address. Therefore, the use of an incorrect address for Susanna's counsel on the notice of entry of judgment does not require reversal of the order denying the section 663 motion as untimely.

2. The date on the envelope used to mail the notice of entry of judgment.

Susanna also argues the "postmark" on the envelope used to mail the notice of entry of judgment to her attorney was more than one day different from the date of mailing shown on the notice of entry of judgment in violation of section 1013a, subdivision (4). The statute provides that "[s]ervice made pursuant to this paragraph, upon motion of a party served and a finding of good cause by the court, shall be deemed to have occurred on the date of postage cancellation or postage meter imprint as shown on the envelope if that date is more than one day *after* the date of deposit for mailing contained in the certificate." (§ 1013a, subd. (4), emphasis added.)

Here, the notice of entry of judgment was mailed to Susanna's counsel in a pre-addressed envelope prepared by Wilmington's counsel for the court's use. The pre-addressed envelope contained a postage meter stamp dated March 31, 2017 (not a "postmark" as Susanna asserts), which was several weeks *before* the May 18, 2017 date of deposit contained in the clerk's

certificate of mailing. Therefore, section 1013a, subdivision (4) does not apply.

3. Compliance with section 664.5

Last, Susanna argues the notice of entry of judgment did not contain language stating the clerk mailed it "[u]pon order of the [c]ourt" or under section 664.5. (See *Van Beurden Ins. Servs. v. Customized Worldwide Weather Ins. Agency* (1997) 15 Cal.4th 51, 64-65 ["subject to the specified exceptions under [§] 664.5, subdivisions (a) and (b), which make notice by the clerk mandatory," "to qualify as a notice of entry of judgment under [§] 664.5, the clerk's mailed notice must affirmatively state that it was given 'upon order of the court' or 'under section 664.5'"].) As a result, Susanna contends, she had 180 days following entry of the judgment to file her notice of intent to file a motion under section 663.

Susanna did not raise this argument in the trial court. Indeed, Susanna previously took the position that section 664.5 does not apply in this case. "It is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court" and "generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.] [Citations.]" (*Simplon Ballpark, LLC v. Scull* (2015) 235 Cal.App.4th 660, 669-670, internal quotation marks omitted.) Because Susanna did not assert lack of compliance with section 664.5 in the trial court and has not given any reason for raising the issue for the first time on appeal, we deem the issue waived.

4. The section 663 motion was untimely

The clerk mailed notice of entry of the judgment on May 18, 2017. Susanna did not file her notice of intent to file a motion to vacate the judgment under section 663 until June 5, 2017, more than fifteen days later. Because the motion was filed after the fifteen-day deadline of section 663a, we affirm the trial court's order denying the motion as untimely. (See *Conservatorship of Townsend* (2015) 231 Cal.App.4th 691, 702 [time period to file a motion to vacate under section 663 is jurisdictional].)

DISPOSITION

We dismiss the appeal from the order denying the motion for a new trial. We affirm the order denying the motion to vacate the judgment under section 663.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JASKOL, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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