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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BELEN ESCOBAR DE-ORTEZ,

Plaintiff and Respondent,

v.

SALVADOR ORTIZ ACUNA et al.,

Defendants and Appellants.

B237484

(Los Angeles County Super. Ct.
No. BC434034)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Alarcon, Judge. Affirmed.

Marvin E. Vallejo for Defendants and Appellants.

Bruce J. Guttman for Plaintiff and Respondent.

Plaintiff and respondent Belen Escobar De-Ortez filed a complaint against defendants and appellants Salvador Ortiz Acuna and Angelica Veronica Bugarel seeking, inter alia, to quiet title and transfer legal title to her on properties on Short Avenue and Bullis Road in Compton. Following a court trial based on disputed evidence, judgment was entered transferring title to both properties to plaintiff and awarding damages against Acuna, plaintiff's former husband, in the amount of \$189,212. A motion to vacate the judgment based upon extrinsic fraud was denied. Sanctions were imposed upon defendants' attorney in the amount of \$4,480 pursuant to Code of Civil Procedure section 128.7¹ for filing a frivolous motion. Defendants filed a notice of appeal from the judgment, the order denying the motion to vacate the judgment, and the order imposing sanctions.

Plaintiff filed a motion to dismiss defendants' appeal in its entirety on June 22, 2012. After receiving defendants' response and plaintiff's reply to the response, this court on July 17, 2012, granted the motion to dismiss the appeal from the judgment as untimely.² We permitted the appeal to proceed as to the orders denying the motion to vacate the judgment and imposing sanctions.

One day after the order dismissing the appeal from the judgment was filed, and perhaps before receiving notice of our order, defendants filed an opening brief raising nine issues. The first seven issues pertain to the judgment and therefore are not properly before this court.³ We have jurisdiction to consider the two final issues, which involve

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

² The partial order of dismissal referred only to Acuna. As there is no difference in the positions of Acuna and Bugarel regarding the timeliness of the appeal, the order of dismissal applies with equal weight as to Bugarel.

³ Those issues include the following: (1) plaintiff's action is barred by the statute of limitations; (2) plaintiff lacks standing to sue; (3) plaintiff did not have the right to the Short Avenue property because she was not a owner of that property; (4) plaintiff did not have the right to sue regarding the Short Avenue property because it was Acuna's

defendants' claims that the trial court erred in denying the motion to vacate the judgment and sanctions were improperly imposed.

We hold the trial court did not abuse its discretion in denying the motion to vacate the judgment, and because the motion was totally devoid of merit, the court did not abuse its discretion by imposing sanctions. We therefore affirm the judgment.

STATEMENT OF FACTS

Relationship of the Parties and Background Information

Plaintiff and Acuna were married in Mexico in 1969. Acuna moved to the United States in approximately 1975, and plaintiff arrived several years later. Acuna had a mistress in the United States—Rosario Maldonado—with whom he had a daughter, Bugarel. Plaintiff and Acuna separated in 2009.

The Short Avenue Property

In 1990, while plaintiff and Acuna were married, the Short Avenue property was transferred to Acuna, as a single man, and to a daughter of Maldonado (not Bugarel). Plaintiff's position at trial was that the property was purchased during her marriage to Acuna and was therefore community property. Acuna's position at trial was that the property belonged to Maldonado, who had used money from the settlement of a lawsuit as a down payment in 1980. Acuna and others originally took title as a favor to Maldonado. According to Acuna, Maldonado made all the mortgage payments and paid for all the other expenses on the Short Avenue Property. After a series of transfers, title

separate property; (5) there was no evidence that Bugarel wrongfully acquired title to the Short Avenue Property; (6) there is no evidence that Acuna fraudulently removed plaintiff from the title to the Bullis Road property; and (7) the award of damages in favor of plaintiff was excessive and erroneous.

in the property was vested in Acuna and Bugarel. In 2008, Acuna transferred his interest to Bugarel, who had sole legal ownership at the time of trial.

The Bullis Road Property

Plaintiff and Acuna purchased the Bullis Road property as community property in the 1990's. An inter-spousal transfer deed was recorded in 2005 at the time of a refinancing of the property, purporting to transfer plaintiff's interest to Acuna. Plaintiff did not sign the deed and her name as shown on the deed was incorrect (showing her second name as Escobedo instead of Escobar).

Testimony by a handwriting analyst established plaintiff's signature was probably a forgery and there were other irregularities in the document. The notary public who purportedly witnessed plaintiff's signature was unable to produce her register book to substantiate the authenticity of the signature.

Statement of Decision and Judgment of the Trial Court

The trial court applied the presumption that the property acquired during marriage is community property and finding no credible evidence that anyone other than Acuna owned the Short Avenue property, ruled the property was a community asset. The transfers of title, ultimately to Bugarel, were fraudulently made with the intent to conceal Acuna's ownership interest. The trial court found that the 2005 interspousal transfer deed, purporting to transfer plaintiff's interest to Acuna in the Bullis Road property, was a forgery. Damages to plaintiff were awarded in the amount of \$189,212, after calculating the gross amount of lost rent and offsetting that total by the present value of the properties. Plaintiff's allegation of intentional infliction of emotional distress was rejected, and the court found no basis for an award of punitive damages.

The judgment filed on June 9, 2011, awarded plaintiff (1) Acuna's interest in the Bullis Road property, and (2) all rights and title of Acuna and Bugarel to the Short Avenue Property. Damages were awarded to plaintiff in the sum of \$189,212.

Defendants' Motion to Vacate the Judgment

Represented by new counsel on August 9, 2011, defendants filed a motion to vacate the judgment based upon extrinsic fraud. The motion was supported by declarations from Maldonado, Acuna, and Bugarel.

Maldonado did not testify at trial, but had she been called, she would have testified to the following facts as stated in her declaration. She purchased the Short Avenue property in 1980 but had others take title in order to hide her interest while protecting her receipt of public assistance and child and spousal support, which she did not want to jeopardize. She paid for the purchase of the property, as well as its maintenance and upkeep. Maldonado "was hospitalized and about to undergo surgery" at the time of trial.

Acuna declared he never used community funds for the benefit of the Short Avenue property. He was separated from plaintiff in 1980 or 1981 when he acquired legal title to the property. In 2005, plaintiff transferred title to the Bullis Road property to Acuna in order to enable a refinancing. The proceeds were used to pay some of plaintiff's debts, make repairs and improvements to the property, and obtain cash. Plaintiff signed the deed in front of Acuna and a notary public. Acuna denied forging any documents removing plaintiff from title to the Bullis Road property. Acuna provided this information to his trial attorney, "but he did not seem willing or able to present this evidence to the court, although it was readily available for him to obtain and develop."

Bugarel stated in her declaration that she lawfully obtained title to the Short Avenue property. She lawfully acquired a 50 percent interest in the property which she shares with Acuna. She also acquired her 100 percent undivided interest in the Bullis Road property lawfully. She lives on the property with her family and her mother, and

they have no place to go if evicted. She told her previous attorney this information, but he was not willing or able to present it to the trial court.

In their points and authorities in support of the motion, defendants argued the judgment was obtained by extrinsic fraud in two respects. First, extrinsic fraud existed because plaintiff misled the trial court by testifying she did not sign the interspousal transfer deed. The argument was supported by counsel's representations as to what a person identified as Bryan Sandoval, "a purported real estate broker," would testify to regarding the deed, although no declaration from Sandoval was provided because he "refused to come forward for fear of incriminating himself in unlawful business practices."

Second, defendants argued extrinsic fraud was established because their attorney failed to establish the falsity of plaintiff's testimony through the testimony of Maldonado and Sandoval. According to defendants, extrinsic fraud exists where a party, without his or her own negligence, is fraudulently prevented from fully participating in the proceeding.

Plaintiff's Opposition to the Motion to Vacate and Plaintiff's Motion for Sanctions

Plaintiff argued the motion for new trial was nothing more than a reiteration of defendants' unsuccessful ex parte application seeking to set aside the judgment. In rejecting the ex parte application, the trial court had advised defendants' counsel the issues had been litigated and the defense theory was not credible.

Plaintiff further contended the motion to vacate the judgment was untimely under section 663. In addition, the assertion of fraud on the part of plaintiff was frivolous and not supported by the facts relied upon by defendants. Maldonado could have been called as a witness at trial. Her claims were discussed at trial. Her reluctance to put the property in her name was a criminal act. The reference to what Sandoval purportedly would have testified to was pointless, as he was on the witness list for trial, did not testify, and apparently remained unwilling to do so.

Plaintiff filed a separate motion for sanctions under section 128.7, requesting \$4,680 against counsel for defendants. After detailing the procedural history of the case, the outcome of the trial, and the ex parte applications that were denied, counsel for plaintiff stated he wrote a three-page letter to counsel for defendants, requesting that the motion to vacate be taken off calendar. The motion to vacate was filed for the improper purpose of delaying enforcement of the judgment and driving up plaintiff's legal costs. The arguments asserting extrinsic fraud were frivolous because they lack evidentiary support.

Defendants' Reply to the Opposition to the Motion to Vacate and Opposition to Sanctions

In addition to responding to the opposition to the motion to vacate based on extrinsic fraud, defendants raised new issues in their reply, including a statute of limitations bar to the action and a challenge to plaintiff's standing.⁴ As to the request for sanctions, defendants' counsel argued the motion to vacate was properly brought and there was a right to seek a stay of enforcement of the judgment through ex parte applications. Counsel also argued the sanctions motion was brought in bad faith, and the motion warranted sanctions in favor of defendants.

⁴ The trial court correctly ruled these new grounds, raised for the first time in the reply to the opposition, could not serve as the basis for granting the motion to vacate the judgment, as they were not referenced or discussed in the motion to vacate. (Cal. Rules of Court, rule 3.1110(a) [a notice of motion must state in the opening paragraph the grounds for issuance of the order sought]; *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1126-1127.) Having failed to raise the issues in a proper manner in the trial court, the issues are forfeited for purposes of this appeal.

Ruling on the Motions to Vacate the Judgment and for Sanctions

After consideration of argument from both sides, the trial court denied the motion to vacate the judgment. The court also granted plaintiff's motion for sanctions in the amount of \$4,480.

DISCUSSION

I. Review of Denial of the Motion to Vacate the Judgment

Defendants argue the trial court erred in denying their motion to vacate the judgment for extrinsic fraud. Defendants contend a motion to vacate for extrinsic fraud may be brought at any time and is not subject to the time constraints of sections 473 and 663. Defendants repeat the arguments made in the trial court that plaintiff materially misled the court when she testified she did not sign the interspousal transfer deed, and their own trial lawyer denied them a fair trial, "which is a recognized grounds for a motion to vacate judgment for extrinsic fraud." Because neither ground asserted constitutes extrinsic fraud, the trial court did not err in denying the motion to vacate.

A. Standard of Review and Controlling Principles

"[E]ven where relief is no longer available under statutory provisions, a trial court generally retains the inherent power to vacate a default judgment or order on equitable grounds where a party establishes that the judgment . . . resulted from extrinsic fraud or mistake (*In re Marriage of Melton* (1994) 28 Cal.App.4th 931, 937)." (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1228-1229.) "We review the court's denial of a motion for equitable relief to vacate a default judgment or order for an abuse of discretion, determining whether that decision exceeded the bounds of reason in light of

the circumstances before the court. (*Rappleyea v. Campbell* (1994) 8 Cal.4th [975,] 981.)” (*County of San Diego v. Gorhams, supra*, at p. 1230.)

“‘To be entitled to relief from a judgment on the ground of extrinsic fraud, a party must show he or she had a meritorious defense, which would have been raised but for the other party’s wrongful conduct [citations], and also must establish all of the elements of fraud [citations], which include an intentional or reckless misrepresentation and justifiable reliance on the misrepresentation by the aggrieved party.’ (*In re David H.* (1995) 33 Cal.App.4th 368, 381-382.)” (*Kimball Avenue v. Franco* (2008) 162 Cal.App.4th 1224, 1229.) “The clearest examples of extrinsic fraud are cases in which the aggrieved party is kept in ignorance of the proceeding or is in some other way induced not to appear. [Citation.] In both situations the party is ‘fraudulently prevented from presenting his claim or defense.’ [Citations.]” (*Estate of Sanders* (1985) 40 Cal.3d 607, 614-615.)

Our Supreme Court has long held “that a judgment will not be vacated because it was obtained by false or perjured testimony (*Pico v. Cohn* [(1891)] 91 Cal. 129), and the fact that the bringing of the action and the introduction of the perjured evidence may have resulted from conspiracy does not change it from intrinsic to extrinsic fraud. (*Tracy v. Muir* (1907) 151 Cal. 363).” (*La Salle v. Peterson* (1934) 220 Cal. 739, 740.) “The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy.” (*Pico v. Cohn, supra*, at p. 133; *Pour Le Bebe, Inc. v. Guess? Inc.* (2003) 112 Cal.App.4th 810, 829.)

“Relief will be granted when the default is the result of excusable mistake or neglect on the part of a party’s attorney or the attorney’s total failure to represent the client. (*Westinghouse Credit Corp. v. Wolfer* (1970) 10 Cal.App.3d 63, 69.) If the

attorney has not totally failed to represent the client, but has been guilty of inexcusable neglect, relief will not be granted. (*Vartanian v. Croll* (1953) 117 Cal.App.2d 639, 644-646.)” (*Lopez v. Superior Court* (1986) 178 Cal.App.3d 925, 935; *County of San Diego v. Department of Health Services* (1991) 1 Cal.App.4th 656, 665.) “‘Positive misconduct is found where there is a total failure on the part of counsel to represent his client.’ (*Aldrich v. San Fernando Valley Lumber Co.* [(1985)] 170 Cal.App.3d [725,] 738-739.)” (*People v. One Parcel of Land* (1991) 235 Cal.App.3d 579, 584.)

B. Analysis

The trial court did not abuse its discretion in denying the motion to vacate the judgment, because neither of the grounds asserted constitutes extrinsic fraud. The first basis for the motion—that plaintiff committed perjury when she denied in her testimony that she signed the interspousal deed—is plainly not extrinsic fraud. (*La Salle v. Peterson* (1934) 220 Cal. 739, 740; *Pico v. Cohn*, *supra*, 91 Cal. at p. 133; *Pour Le Bebe, Inc. v. Guess? Inc.*, *supra*, 112 Cal.App.4th at p. 829.) Moreover, the trial court heard the evidence and could reasonably conclude plaintiff’s testimony was not false, as it was corroborated by both a handwriting analysis and evidence of tampering with the deed.

Defendants’ second ground of extrinsic fraud—that their attorney at trial did an inadequate job—fares no better than his first argument. Trial counsel for defendant participated fully in the proceedings. He made an opening statement, cross-examined witnesses, called witnesses, and made a closing argument. This is not a case involving an attorney’s total failure to represent the client that could by any stretch be deemed positive misconduct warranting relief. (*County of San Diego v. Department of Health Services*, *supra*, 1 Cal.App.4th at pp. 664-665; *People v. One Parcel of Land*, *supra*, 235 Cal.App.3d at p. 584; *Westinghouse Credit Corp. v. Wolfer*, *supra*, 10 Cal.App.3d at p. 69.)

II. Review of the Order Awarding Sanctions

Defendants' second contention is that the trial court erred in awarding sanctions under section 128.7. Defendants reason that they had the right to seek to stay the enforcement of judgment through an ex parte application, and they presented valid grounds to vacate the judgment for extrinsic fraud. They argue there is no evidence they took these steps for an improper purpose.

A. *Standard of Review and Controlling Principles*

"To the extent that we are called upon to interpret the statutes relied on by the trial court to impose sanctions, we apply a de novo standard of review. (See *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 992.) We review any findings of fact that formed the basis for the award of sanctions under a substantial evidence standard of review. (*In re Marriage of Rossi* (2001) 90 Cal.App.4th 34, 40.)" (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1479.)

"Code of Civil Procedure section 128.7 (section 128.7) authorizes trial courts to impose sanctions to check abuses in the filing of pleadings, petitions, written notices of motions or similar papers." (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 514.) "By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." (§ 128.7, subds. (b)(1)-(2).)

“The purpose of section 128.7 is to deter frivolous filings, not to punish parties. [Citation.] This purpose is forwarded by allowing the offending party to avoid sanctions altogether by appropriately correcting the sanctionable conduct after being alerted to the violation.” (*Barnes v. Department of Corrections* (1999) 74 Cal.App.4th 126, 133.)

“Section 128.7, subdivision (c)(1) requires that the party seeking sanctions ‘follow a two-step procedure. First, the party must serve a notice of motion for sanctions on the offending party at least 30 days before filing the motion with the court, which specifically describes the sanctionable conduct. [(§ 128.7, subd. (d)(1).)] Service of the motion on the offending party begins a 30-day safe harbor period during which the sanctions motion may not be filed with the court. (*Ibid.*) If the pleading is withdrawn [or dismissed], the motion for sanctions may not be filed with the court. [Citation.] If the pleading is not withdrawn, the motion for sanctions may then be filed. (*Ibid.*)’ (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 637.)” (*Banks v. Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 Cal.App.4th 949, 952-953; *Day v. Collingwood* (2006) 144 Cal.App.4th 1116, 1126-1127.)

B. Analysis

The trial court did not abuse its discretion by imposing sanctions against defense counsel for filing the motion to vacate the judgment for extrinsic fraud. Under no stretch of the law can the two grounds asserted in support of the motion to vacate be deemed extrinsic fraud. Any reasonable attorney “would agree that the [motion] is totally and completely without merit. (See *Estate of Walters, supra*, 99 Cal.App.2d at pp. 558-559.)” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 [defining “frivolous” for purposes of imposing sanctions on appeal].) Plaintiff’s counsel set forth in detail the lack of merit in the motion while requesting that the motion be withdrawn in the statutorily required safe harbor letter to defendants’ counsel. Given the settled state of the law, counsel for defendants could not certify that the “claims, defenses, and other legal contentions” in the motion to vacate were “warranted by existing law or by a nonfrivolous argument for the

extension, modification, or reversal of existing law or the establishment of new law.”
(§ 128.7, subd. (b)(2).)

DISPOSITION

The judgment is affirmed. Costs are awarded on appeal to plaintiff Belen Escobar De-Ortez.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.