Filed 5/7/18 Marriage of Metzger CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Marriage of TAMMY and RAPHAEL METZGER.	B277651
TAMMY METZGER, Respondent, v. RAPHAEL METZGER, Appellant.	(Los Angeles County Super. Ct. No. ND062399)

APPEAL from an order of the Superior Court of Los Angeles County, John Chemeleski, Commissioner. Affirmed.

Raphael Metzger, in pro. per., for Appellant.

No appearance for Respondent.

INTRODUCTION

Appellant Raphael Metzger (Raphael), former husband of Tammy Metzger (Tammy),[1] appeals from the trial court's denial of his motion under Code of Civil Procedure section 473[2] to set aside an order entered on the parties' stipulation that Raphael pay $500,000 in attorney's fees to Tammy's counsel and $75,000 to counsel for the couple's daughter out of his 401(k) and law firm's profit sharing plans. We conclude that the trial court did not abuse its discretion in denying the motion because Raphael failed to demonstrate mistake or that the trial court coerced him into entering into the stipulation. Accordingly, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Background of this divorce proceeding*

Tammy and Raphael were married on November 2, 2003 and their daughter was born the following year. Tammy filed a petition to dissolve her marriage with Raphael on July 30, 2009.

Trial began in early January 2012 before a commissioner. In late March 2012, after dissolving the marital status, the commissioner transferred the case to the family law court for trial of outstanding matters. In January 2013, the trial court bifurcated the attorney fees question from the remainder of the issues.

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[1] For simplicity and clarity, we refer to the parties by their first names and intend no disrespect thereby.

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

The trial court appointed Eve Lopez as counsel to represent the child. In Raphael's appeal, we affirmed that order. (*In re Marriage of Metzger* (2014) 224 Cal.App.4th 1441, review den. June. 11, 2014; cert. den. (2014) __ U.S. __ [135 S.CT 679, 190 L.Ed.2d 390].)[3] After our remittitur issued in June 2014, numerous matters proceeded, including a hearing to restore trial dates, several requests for orders about child safety issues, multiple status conferences, a request to appoint a child evaluator, motions in limine, and motions to appoint a child interviewer, among other things.

2. *The pertinent attorney fee request*

Tammy moved the trial court in February 2015 for $500,000 to pay fees to her attorneys Brandmeyer Gilligan & Dockstader. She explained that her ongoing legal fees and costs averaged in excess of $40,000 per month. Lopez also requested $17,621.09 in ordered-but-unpaid attorney fees, plus an advance of attorney fees of up to $120,475. Raphael vigorously opposed the requests.

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[3] In our published opinion, we determined that the trial court acted within its discretion in appointing counsel (Lopez) for the child and in requiring Tammy and Raphael as parents to advance $100,000 from their community property funds to pay for that attorney in this highly contested trial on child custody issues. We also concluded that appointment of the child's attorney did not violate any constitutional right of Raphael to decide with whom the child could associate. The order was justified by a compelling state interest in protecting the child's best interest in the custody dispute.

In April 2015, the trial court tentatively ordered Raphael, by June 30, 2015, to make an attorney fee payment as an advance against community property in equal shares for both himself and Tammy. The court noted that Raphael's law corporation, Metzger Law Group (MLG), had not been joined in the case. Hence, although Raphael had exclusive control over that corporation, the court was prevented by the lack of jurisdiction from ordering that the attorney fees be paid by MLG. Instead, the court signaled its intent to order Raphael to obtain the funds to pay the ordered fees from his separate property residence. The court enjoined Raphael from further encumbering the residence.

3. *Raphael files for bankruptcy protection and the trial court provisionally appoints a receiver over MLG.*

Two weeks later, on May 6, 2015, Raphael filed for Chapter 11 bankruptcy protection and obtained an automatic stay of all claims against his property. (11 U.S.C. § 362.) Raphael admitted to the trial court that his residence, which he was enjoined from encumbering, was now protected by the bankruptcy filing. He clarified, while his income from MLG was part of the bankruptcy estate, that the firm itself, a separate entity, was not part of the estate.

No longer able to order the payment of fees out of Raphael's residence, on August 7, 2015, the court "provisionally" appointed a receiver to take control of MLG's assets to pay the attorney fees to be charged against Raphael's and Tammy's community property estate. The court stated, "there is no dispute that Mr. Metzger is the sole owner of that law practice. No dispute."

The trial court also requested briefing on whether Raphael's residence was indeed an asset of the bankruptcy estate. "*If it is not*, then I'm *going to* actuate the *provisional appointment* and have the receiver immediately take possession and control of the *residence*." (Italics added.) The court ordered Raphael not to transfer any ownership interest in MLG.

After remarking that "this case has not moved forward" because of delay tactics on both sides, the court declared a mistrial of the financial issues, but set a date for the custody trial. The court clarified that its orders were "effective now *except for . . . the actual appointment of the receiver to take possession and control over those items*." (Italics added.) That is, *as Raphael acknowledged*, the trial court *stayed* the provisional appointment of the receiver.

Raphael attempted to disqualify the trial judge. (§ 170.1.) The court struck Raphael's statement of disqualification. Raphael filed petitions for writ of mandate challenging the section 170.1 ruling and a writ of prohibition seeking to overturn the provisional appointment of a receiver. We denied both petitions.

The bankruptcy court ruled in August 2015 that MLG's stock was property of the bankruptcy estate. However, MLG was a separate legal entity created by Raphael and MLG's assets were not part of the bankruptcy estate. Therefore, the bankruptcy court ruled, the automatic stay did not apply to the assets of MLG and the state court could enter any orders it deemed appropriate concerning MLG's assets.

4. *The parties stipulate to the payment of attorney fees and the trial court enters the stipulation as an order of the court.*

In July 2015, Tammy pressed her attorney fee request. With respect to her need, Tammy explained she had no money with which to pay her attorneys. Raphael had obtained a reduction of spousal support to zero and her personal monthly income was $1,250, plus $4,722 per month in child support. Tammy was $1,622,206 in debt. As for Raphael's ability to pay (Fam. Code, § 2030), Tammy explained that his income at MLG from settlements in toxic tort litigation averaged over $10 million per year since 2009. Raphael vigorously opposed the motion.

At Raphael's suggestion, the parties and their counsel attended a two-day mediation to resolve the issues in this proceeding. On October 20, 2015 at the close of mediation, Raphael and Tammy executed two documents: (1) a stipulation and order for payment of attorney fees to Tammy's attorneys and Lopez, and (2) a deal memo resolving the property division, support, and child custody issues.

In the signed stipulation for attorney fees, Raphael agreed either (a) to instruct his bankruptcy attorneys to file a motion to approve the liquidation of assets to allow him to dismiss the bankruptcy action, or (b) to obtain an exception to the bankruptcy proceeding, whichever process would allow for a faster liquidation of Raphael's 401(k) and profit sharing plans, so that he could "promptly pay" from the proceeds of these plans $500,000 to Tammy's attorneys and $75,000 to Lopez, by April 20, 2016. The trial court entered the attorney fee stipulation as an order (the stipulation and order) on November 15, 2015.

The second document executed on October 20, 2015, the deal memo, was drafted by the mediator. Paragraph (1)(f) of the

deal memo provided that Raphael's 401(k) and profit sharing plans were dealt with in the separate stipulation and order. Paragraph (11) stated "Each party shall pay the balance of his or her attorney fees, accounting fees, expert fees and costs through Judgment and indemnify and hold the other party free and harmless therefrom. (*Payment of fees to* [*Tammy's attorneys*] *are set forth in a separate Stipulation and Order*.)" (Italics added.) Just over the parties' signatures, the deal memo provided in capital letters that the parties agreed that the document was an enforceable contract pursuant to section 664.6.

As the deal memo required Tammy's attorneys to prepare a judgment incorporating its terms for custody, support, and property division, her counsel eventually drafted a proposed judgment. Raphael re-wrote several provisions, only some of which changes Tammy accepted. The parties turned to the mediator for help in resolving the judgment's language and to add certain boilerplate provisions, but she declined to become re-involved until Raphael paid her the remaining $2,100 in outstanding fees. Consequently, there were two competing versions of the judgment. Tammy then moved the trial court to enter judgment on the deal memo pursuant to section 664.6.

At the January 27, 2016 hearing on Tammy's section 664.6 motion, Raphael argued that Tammy's attorneys had not prepared a judgment reflecting the deal memo's terms. Although he insisted he wanted judgment entered, Raphael balked when the court asked him to prepare the document for Tammy's approval. The court ordered the parties to resolve the language of the judgment, but if by May 2, 2016 no resolution was reached, that Tammy could file another section 664.6 motion to enforce it or to set it aside.

5. *Raphael moves to lift the provisional receivership order.*

At the same January 27, 2016 hearing, Raphael requested that the provisional appointment of a receiver be lifted. The court replied that the appointment was stayed. The court explained, "it's simply an order placing a person there, but they have done nothing and probably will do nothing."

Raphael then moved to vacate the order appointing the receiver. He argued that the receiver was preventing MLG from obtaining credit necessary to fund its operations. Tammy noted that Raphael had not provided any evidence showing he needed but was unable to obtain credit, and otherwise Raphael was in contempt of the signed stipulation and order. She also argued her attorneys would suffer prejudice if the receivership order were lifted because the purpose of the receiver was to assure that Raphael paid the attorney fees. Raphael admitted he had neither liquidated his profit sharing and 401(k) plans nor paid the ordered attorney fees. His reason was that the attorneys to whom he was to pay the fees had not finalized judgment on the deal memo. He admitted he was withholding the fees to force Tammy and her attorneys to sign the judgment.

The trial court denied Raphael's request to vacate the receiver's provisional appointment because (1) there was no actual receiver presently in place; (2) Raphael's motion was unsupported by substantive evidence; (3) although he was in control of his 401(k) and profit sharing funds, Raphael had not liquidated them yet and so he was not in compliance with the stipulation and order; and (4) Raphael was perfectly capable of moving under section 664.6 to get his version of the judgment entered and to meet his support obligations. The court then

ordered that, upon entry of the judgment, the receivership would be dissolved.

6. *Raphael's section 473 motion*

Raphael moved under section 473 to set aside the stipulation and order, entered as an order approximately five months earlier, on the grounds of mistake, extrinsic fraud, and duress.[4] He argued "[t]he essence of [his] claim is that [the trial judge] coerced [him] into settling the case under whatever terms [Tammy] and her attorneys demanded by appointing a receiver to liquidate the assets of [Raphael's] wholly owned law firm . . . over which [the trial court] acknowledged that [it] had no jurisdiction." Tammy countered by moving to lift the stay and appoint a receiver. Tammy's attorneys also asked for permission to withdraw from the case because they had not been paid. The court relieved Tammy's attorneys and so Tammy has been representing herself ever since.

The commissioner denied Raphael's section 473 motion to vacate the stipulation and order finding Raphael had faced no more duress than that experienced by many litigants in divorce proceedings. The commissioner stayed enforcement of the stipulation and order for 30 days and denied the motion to enter judgment on the deal memo (§ 664.6) until a judgment in final form was submitted. Raphael filed his timely appeal.

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[4] Raphael claimed to have also filed an entirely new lawsuit against Tammy's attorneys and attorney Lopez to set aside the attorney fee stipulation.

CONTENTIONS

Raphael contends that the trial court erred in denying his motion to set aside the stipulation and order.

DISCUSSION

1. *Appealability*

Raphael challenges the order of November 15, 2015, entered on the parties' stipulation that he pay Tammy's and Lopez's attorney fees.[5] Generally, orders denying motions to vacate are not appealable. However, an order denying a statutory motion under section 473 to vacate is appealable as an order after final judgment. (*Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 294, fn. 4.) An order granting attorney fees in a marriage dissolution case is directly appealable under the collateral order doctrine. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368–369.) "When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken. [Citations.] This constitutes a necessary exception to the one final judgment rule. Such a determination is substantially the same as a final judgment in an independent proceeding. [Citations.]" (*Id.* at p. 368; accord *Apex LLC v.*

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[5] Raphael also purports to appeal from the trial court's order that denied Tammy's motion to enter judgment on the deal memo. As of the date of the ruling challenged here, the trial court had not entered judgment on the deal memo and so it was not yet a final judgment. We may not address the trial court's rulings concerning that memo because we do not issue advisory opinions.

Korusfood.com (2013) 222 Cal.App.4th 1010, 1015–1016.) Therefore, the order denying Raphael's statutory motion under section 473 to vacate the collateral, final, attorney-fee stipulation and order is appealable.

2. *Section 473 and the standard of review*

"The standard for appellate review of an order denying a motion to set aside under section 473 is quite limited. A ruling on such a motion rests within the sound discretion of the trial court, and will not be disturbed on appeal in the absence of a clear showing of abuse of discretion, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice. Where a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the correct result for the decision of the trial court. [Citations.] ' " 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' " [Citations.]' [Citation.] The burden is on the complaining party to establish abuse of discretion, and the showing on appeal is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion. [Citation.]" (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118, fn. omitted.)

3. *No abuse of discretion in denying Raphael's section 473 motion.*

a. *no cognizable mistake*

Raphael's first ground for vacating the stipulation and order was mistake. "A 'mistake' justifying relief may be either a

mistake of fact or a mistake of law. 'A mistake of fact exists when a person understands the facts to be other than they are.' " (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.) "An honest mistake of law is a valid ground for relief when the legal problem posed ' "is complex and debatable." ' [Citations.]" (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611.)

Raphael contends that he entered into the stipulation and order mistakenly believing that the trial court would then vacate the receiver's appointment because the "*settlement* mooted any need for attorney fee advances . . . ." (Italics added.) Raphael has not articulated a mistake that merits a section 473 set aside.

If by "settlement," Raphael refers to the deal memo, there was no mistake. His obligations under the stipulation and order are independent of the deal memo. The deal memo stated: "*Payment of fees to* [*Tammy's attorneys*] *are set forth in a separate Stipulation and Order*." (Italics added.) The interpretation of a contract is one of law. (*ITV Gurney Holding Inc. v. Gurney* (2017) 18 Cal.App.5th 22, 29.) There is nothing complex or debatable about this quoted provision. It provided no basis for Raphael to reasonably believe that the deal memo "mooted any need for attorney fee advances . . . ." that were ordered in the separate stipulation and order.

If by "settlement," Raphael means the stipulation and order to pay attorney fees, Raphael has identified no valid mistake of fact as nothing has occurred to moot that order. The purpose of the receiver was to ensure that Raphael pay the attorney fees identified in the stipulation and order to Tammy's counsel and Lopez. There is no indication that Raphael has paid those fees. Nowhere in the record did the trial court suggest it would vacate

the order for a receiver *before* this case was closed and Raphael had paid the attorney fees, particularly as the court has watched Raphael make every possible litigation maneuver – from bankruptcy to challenging the court under section 170.1 – to avoid his payment obligations. "A judgment will not ordinarily be vacated at the demand of a defendant who . . . changed his mind after the judgment." (*Baratti v. Baratti* (1952) 109 Cal.App.2d 917, 921.) The denial of Raphael's section 473 motion for asserted mistake was not an abuse of discretion.

b. *no coercion or duress*

The essence of Raphael's section 473 motion and contentions on appeal is that the trial court's provisional and stayed appointment of a receiver over the assets of his law firm constituted fraud and coerced him into entering into the stipulation and order for fear that the receiver would ruin his law practice.

The order appointing a receiver was lawful. The trial court has discretion to appoint a receiver to prevent dissipation of property during a divorce. (*In re Marriage of Economou* (1990) 224 Cal.App.3d 1466, 1471, 1484; Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2017) Enforcement Remedies and Procedures, § 18:620, p. 18-186.) Although, as Raphael observes, the trial court did not have jurisdiction over MLG at the time it provisionally appointed the receiver, the court always had the authority to join the law corporation, which was wholly owned by Raphael, to obtain jurisdiction. (*Schnabel v. Superior Court* (1994) 30 Cal.App.4th 758, 762–763; see Fam. Code, § 2021, subd. (a) [a third party who has an interest in a family law proceeding may be joined as a party]; Cal. Rules of Court, rule 5.24.) In fact, we denied

Raphael's writ petition challenging the receiver's appointment. That Raphael may have disagreed with the appointment of a receiver, or found it burdensome, did not make the provisional order fraudulent, improper, or void.

Raphael notes that the commissioner found that he signed the stipulation and order under "duress." Actually, the commissioner found that Raphael faced *no more* "duress" than that often experienced by couples in divorce court, which did not rise to the level requiring the order be set aside.[6] While "the existence of duress always depends upon the circumstances" (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1078), "[t]he coercion which results from a prosecution in court, in good faith, with full right of appeal, does not constitute *legal* duress." (*Blumenthal v. United States* (S.D.Cal. 1925) 4 F.2d 808, 809, italics added.)

Raphael relies on *In re Marriage of Baltins* (1989) 212 Cal.App.3d 66 (*Baltins*) that duress " ' "which includes whatever destroys one's free agency and constrains [him] to do what is against [his] will, may be exercised by threats, importunity or any species of mental coercion [citation] . . . ." ' [Citation.] It is shown where a party 'intentionally used threats or pressure to induce action or nonaction to the other party's detriment. [Citation.]' [Citations.] The coercion must induce the

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[6] Specifically, the court stated it had "no doubt that there was duress to some extent, but not to the extent beyond that that many litigants would experience in agreeing to a resolution of a case involving the dissolution . . . of marriage." "I'm finding the duress suffered by [Raphael] in this case does not rise to the level that would justify" setting aside the order.

assent of the coerced party, who has no reasonable alternative to succumbing. [Citation.]" (*Id.* at p. 84, fn. omitted.)

Baltins is distinguishable. The *Baltins* court held that the wife "was effectively deprived of independent counsel; she was in a distraught and weakened condition emotionally and unable to confront [the h]usband; he undermined her psychologically by repeatedly telling her she had not contributed as much as he to the marriage and was not an equal partner; he made threats and misrepresentations and pressured her into taking immediate action; she agreed to an unconscionable contract; and she had no reasonable alternative." (*Baltins, supra,* 212 Cal.App.3d. at p. 87.)

Here, Raphael, who is an attorney, has shown himself to be perfectly capable of confronting the trial court. He was not in such a weakened emotional state that he was unable to challenge the provisional order appointing a receiver; he did so repeatedly. Moreover, Raphael had a reasonable alternative: he could have paid the attorney fees out of his 401(k) and profit sharing plans. Or, he could have paid the money out of his separate property residence, as the trial court had intended he do. Instead, Raphael forced the appointment of a receiver over MLG by filing in bankruptcy and shielding his residence. Rather than being in a vulnerable position, Raphael admitted to the court he withheld the attorney fees ordered in the stipulation and order to pressure Tammy to agree to the version of the judgment he wanted. Furthermore, Raphael executed the stipulation before an independent mediator, in mediation held at his suggestion, during which he was represented by two attorneys. The only inference that can reasonably be deduced from the facts (*In re Marriage of Eben-King & King*, *supra*, 80 Cal.App.4th at p. 118)

is that *the trial court* did not coerce *Raphael* into executing the stipulation and order. Therefore, it was not an abuse of discretion to deny Raphael's section 473 motion.

Raphael dedicates a considerable portion of his brief to analogizing this case to *Hayward v. Superior Court* (2016) 2 Cal.App.5th 10 (*Hayward*). We are unpersuaded. In that divorce, an attorney serving as temporary judge was disqualified for violating a canon of the Code of Judicial Ethics by failing to disclose her professional relationships with counsel for the husband and wife. (*Id*. at p. 16.) The appellate court held that the temporary judge's rulings were void because of the disqualification and had to be set aside (*id*. at p. 35), and that the memorandum of agreement (MOA) that the parties entered into to resolve their divorce could not be enforced under section 664.6 because it was tainted by the temporary judge's void rulings. (*Id*. at pp. 56-59.)

Raphael focuses on the *Hayward* wife's argument in the trial court opposing the husband's effort to enforce the MOA. She had argued that she signed the MOA under economic duress because, after the temporary judge issued a series of orders the wife believed were favorable to the husband, he moved for appointment of a receiver to take over her business. (*Hayward*, *supra*, 2 Cal.App.5th at pp. 24–25.)

But, the appellate court in *Hayward* did not decide the case on the basis of this economic-duress argument. The *Hayward* court stated, "the legal correctness of the [temporary judge's] void rulings *is irrelevant*, *as is the question whether* [*the wife*] *signed the MOA under economic duress as she originally claimed*. The relevant inquiry is whether [the temporary judge's] *void* rulings influenced the parties' assessment of the strengths of their

respective cases and therefore their willingness to accept terms of the settlement." (*Hayward*, *supra*, 2 Cal.App.5th at p. 58, italics added.) Continuing, the *Hayward* court clarified, "[t]he disqualification of [the temporary judge] dramatically changed the focus of the motion to enforce the MOA: *The question was no longer whether* [*the wife*] *signed the MOA under duress* but whether [the temporary judge's] void orders so influenced the MOA that it is tainted and unenforceable." (*Id.* at p. 57.)

Raphael nonetheless argues that the order appointing a receiver here was *void*, not for violation of any canon of the Code of Judicial Ethics as in *Hayward*, but for lack of jurisdiction. He argues that the order "totally deprived him of free will" and that the order "could not have been more coercive than had [the court] pointed a gun to [Raphael's] head and ordered him to settle the case." The argument is unavailing. It bears repeating that the trial court's order provisionally appointing a receiver and staying that appointment, was lawful and *not void* or *coercive*.[7]

The order denying Raphael's section 473 motion to vacate and set aside the stipulation and order was not an abuse of discretion.

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[7] As the result of our conclusion that the provisional order appointing the receiver was lawful and not coercive or void, we reject Raphael's further contention that the order violated his right to due process under the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

DISPOSITION

The order is affirmed. Each party to bear his or her own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

WE CONCUR:

EDMON, P. J.

EGERTON, 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.