Filed 4/26/18 Buffalobyrd, LLC v. Ridder CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BUFFALOBYRD, LLC, Plaintiff and Respondent, v. JUDITH RIDDER, Defendant and Respondent; KENNETH STERN, Movant and Appellant.	B281924 (Los Angeles County Super. Ct. No. BC633297)

APPEAL from orders of the Superior Court of Los Angeles County. David Sotelo, Judge. Affirmed.

Kenneth Stern, in pro. per., for Movant and Appellant.

Makarem & Associates, Ronald W. Makarem and Jared V. Walder for Plaintiff and Respondent.

Judith Ridder, in pro. per., for Defendant and Respondent.

* * * * * *

An LLC sued one of its members to reform its operating agreement due to an "inadvertent error" made by the attorney who drafted the agreement. The LLC and the member stipulated to a judgment reforming the agreement. Both before and after judgment was entered, however, the attorney moved to intervene, claiming that his reputation was being sullied and that the stipulated judgment reflected collusion. The trial court denied both motions. Because the judgment made no express or implicit findings regarding the attorney's competence and for the additional reasons set forth below, the trial court's rulings were correct, and we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

At some point before April 2015, Richard Rabis (husband) inherited a 25 percent interest in a property in Santa Monica, California; his interest was worth about $250,000. Husband wanted to vest ownership of the property in an LLC, so he contacted Kenneth Stern (Stern) to draft an operating agreement and the documents necessary to transfer the property to the LLC. Stern drafted: (1) an Operating Agreement for Buffalobyrd, LLC (the LLC), which named husband and his wife Judith Ridder (wife) as the LLC's two members; and (2) two grant deeds transferring the property (a) from husband to husband and wife, and then (b) from husband and wife to the LLC. Husband and wife executed all three documents, and they were filed or recorded.

II. Procedural Background

A. *Reformation Action*

In September 2016, the LLC sued wife seeking "an order reforming *ab initio*, that is, as of April 24, 2015, the Operating

Agreement, so that [husband] is shown as the sole member of [the LLC]." In its complaint, the LLC alleged that Stern had "inadvertently committed an error" by not following husband's instructions and "includ[ing] [wife] as a [second] member" of the LLC rather than husband as the sole member.

In November 2016, the LLC and wife filed a Stipulation for Entry of Judgment, in which both parties agreed to reform the operating agreement. The trial court entered judgment the very same day.

B. *Stern's Motions*

1. *Motion to Intervene*

One month before judgment was entered, Stern, proceeding pro se, filed a motion to intervene in the LLC's reformation action. Along with his motion were 17 exhibits. Stern also filed two supplemental filings with another 11 exhibits, as well as two further replies. In these filings, Stern offered three reasons why he should be permitted to intervene: (1) the LLC sullied his reputation by accusing him of malpractice; (2) the lawsuit was a "frivolous sham" because the LLC's allegations that he made a mistake were lies, as husband had told him to make wife a member of the LLC; and (3) the lawsuit was aimed at reducing the LLC's tax liability for the property, and thus served a fraudulent purpose.

The LLC opposed Stern's intervention.

Following oral argument and months after judgment was entered, the trial court denied Stern's motion. The court recognized its authority to allow intervention upon a showing that (1) the proposed intervener had a direct and immediate interest in the lawsuit, (2) intervention would not enlarge the issues in the case, and (3) the reasons for intervention outweigh

the parties' reasons for opposing intervention. However, the court concluded that Stern had "fail[ed] to satisfy" the first two requirements. The court ruled that Stern did not have a direct and immediate interest in the lawsuit because he had no ownership interest in the LLC or the property, and thus would not "gain or lose anything" if the operating agreement were reformed or if the property's tax liability consequently changed. The court also ruled that the issues Stern sought to raise—such as whether he committed malpractice and whether the property's tax liability would be reduced—"would enlarge the scope of" "this settled matter."

2. *Motion to Set Aside Judgment*

Nine days after the trial court denied his first motion, Stern filed a motion to set aside the judgment for the same reasons set forth in his motion to intervene. He attached four exhibits.

The trial court denied the motion to set aside. The court concluded that the motion was procedurally improper because it was nothing more than a "disguised, improper motion for reconsideration." The court nevertheless went on to reach the merits, concluding that Stern "still fails to demonstrate that he has an interest in this closed action."

C. *Appeal*

Stern filed a timely notice of appeal.

DISCUSSION

Stern argues that the trial court erred in denying both of his motions. We review an order denying a motion for permissive intervention as well as a motion to set aside a judgment for an abuse of discretion. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1036 (*City and County*)

[motion to intervene]; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980 [motion to set aside default judgment].) As explained below, the trial court did not abuse its discretion.

I. Motion to Intervene

Where, as here, an outsider to a lawsuit has no "unconditional right to intervene," a court has the discretion to allow the nonparty to intervene if (1) "the nonparty has a direct and immediate interest in the action," (2) "the intervention will not enlarge the issues in the litigation," and (3) "the reasons for the intervention outweigh any opposition by the parties presently in the action." (Code Civ. Proc., § 387; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 51.)[1] This determination necessarily turns on the facts of each specific case. (*City and County*, *supra*, 128 Cal.App.4th at p. 1036.)

The trial court did not abuse its discretion in denying intervention in this case because the first two prerequisites to permissive intervention are missing—that is, (1) Stern did not have a direct interest in the reformation lawsuit, and (2) his intervention would have enlarged the issues in the lawsuit.

A. *Direct Interest*

A nonparty has a "direct and immediate" interest in a lawsuit if he "will either gain or lose by the direct effect of the judgment therein." (*Jersey Maid Milk Products Co. v. Brock* (1939) 13 Cal.2d 661, 663-665.) A "consequential" interest—that

---

1 Code of Civil Procedure section 387 was amended while this appeal was pending. (Stats. 2017, ch. 131, § 1.) However, the amendment did not alter the rights to intervening parties (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1693 (2017-2018 Reg. Sess.) Mar. 31, 2017, p. 3), so decisions applying the prior version of the statute remain relevant.

is, when the lawsuit "may indirectly benefit or harm" the nonparty—is not enough. (*Continental Vinyl Products Corp. v. Mead Corp.* (1972) 27 Cal.App.3d 543, 550 (*Continental Vinyl*).) Whether a nonparty's interest is "direct and immediate" on the one hand, or "consequential" on the other, does not turn exclusively on whether the nonparty has "a specific legal or equitable interest in the subject matter of the litigation" or some other "pecuniary interest in the litigation." (*People ex rel. Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655, 661.) The nonparty must nevertheless have a real stake in the outcome of the litigation. Applying these standards, courts have found a direct and immediate interest when the nonparty is: (1) the federal government intervening to ensure the proper application of its tax laws (*County of San Bernardino v. Harsh California Corp.* (1959) 52 Cal.2d 341, 346); (2) an environmental conservation group intervening to stop the transfer of a public park to private land use (*Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192, 1200-1201); (3) the sponsor of a voter initiative intervening to defend the initiative from a constitutional challenge (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1147); or (4) a public agency charged with policing doctors intervening to prevent a court's issuance of a protective order, pursuant to a settlement between a doctor and a patient, that would preclude the agency from investigating medical misconduct (*Mary R. v. B. & R. Corp.* (1983) 149 Cal.App.3d 308, 315-317 (*Mary R.*)).

Under this law, Stern does not have any direct and immediate interest in the LLC's reformation action. He does not have any interest in the LLC. And he does not have any interest in the property.

Stern nonetheless proffers three interests that, in his view, are direct and immediate.

First, he asserts that he has an interest in his professional reputation and that the LLC's lawsuit sullies that reputation. Admittedly, a person has a legally cognizable interest in his or her reputation, and the tort of defamation is designed to protect that interest. (*Botos v. Los Angeles County Bar Assn.* (1984) 151 Cal.App.3d 1083, 1088-1089 [attorney has interest in professional reputation]; *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 495 [franchisor has interest in its franchise's reputation]; see generally Civ. Code, §§ 44-46 [defining defamation].)

But the LLC's lawsuit does not sully Stern's reputation in any legally cognizable way. The *judgment* does not make any findings about Stern's professional reputation or competence and, indeed, does not mention him at all. Nor, as Stern suggests, does the judgment *implicitly* make any such finding. Reformation may be granted to correct a mutual mistake (*Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 663; *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524; Civ. Code, §§ 1640, 3399; cf. *Estate of Dye* (2001) 92 Cal.App.4th 966, 980 [reformation not available for "'post-execution change of mind"']), including one due to a drafting error (*Mills v. Schulba* (1950) 95 Cal.App.2d 559, 565; *Alameda County Flood Control & Water Conservation Dist. v. Department of Water Resources* (2013) 213 Cal.App.4th 1163, 1195, fn. 31). No finding of fault is required. Because the issue before the trial court was *whether* there was a mutual mistake—not *why* it was made—the judgment did not rest on any implicit finding of malpractice. Stern points to the allegations in the verified complaint, but those allegations at most indicate that

Stern made an "inadvertent[] . . . error" by not following directions and, in any event, are likely covered by the litigation privilege and hence not actionable (Civ. Code, § 47; *Manguso v. Oceanside Unified School Dist.* (1984) 153 Cal.App.3d 574, 580-581).

Second, Stern contends that he has an interest in preventing the LLC, husband, and wife from committing a fraud upon the court when they falsely maintained that the drafting mistake was his, not theirs.[2] But if an interest in the integrity of the judicial process were sufficient to confer standing to intervene, any taxpayer or lawyer could intervene in any case. That is not the law.

Lastly, Stern argues that he has an interest in preventing the LLC, husband, and wife from securing a judgment they intend to use to get a tax benefit that Stern characterizes as fraudulent. Again, however, Stern has no greater interest in preventing a possible tax fraud that may be effectuated by the LLC's reformation lawsuit than any other taxpayer.

B. *Enlargement of Issues*

Stern sought intervention to defend his professional reputation, to expose the parties' lies, and to prevent them from committing tax fraud. Getting to the bottom of these issues

---

2 Stern has asked us to take judicial notice of communications he had with counsel for the LLC, husband, and wife in trying to settle husband's and wife's separate lawsuit against Stern for professional malpractice. The communications invoke the mediation privilege, however, so for that reason alone are not competent evidence. (Evid. Code, § 1115 et seq.; *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 132.) We accordingly deny the request for judicial notice.

would entail examining all of the communications between the parties to ascertain what directions Stern was given and examining whether the tax benefits the parties sought would flow from the reformation and were legally appropriate to seek. These issues go far beyond what is necessary to resolve the LLC's reformation action.

C. *Stern's Further Arguments*

Stern raises what can be distilled down into three further objections to the trial court's rulings.

First, he argues that the trial court applied the incorrect standard for permissive intervention because the court (1) ignored that a lawsuit's consequential effect on a nonparty can sometimes be enough to justify intervention, and (2) simply accepted the facts alleged in the LLC's complaint as true. Neither argument has merit. Although a nonparty's interest that is merely "consequential" may "become a direct interest" if the parties to the lawsuit act in "bad faith," "collusion," or "similar circumstances render [the] strict definition of direct interest likely to result in injustice" (*Continental Vinyl*, *supra*, 27 Cal.App.3d at p. 551), this corollary at most establishes the first requirement of intervention but "does not of itself establish the right to intervene" (*id.* at p. 552). It in no way obviates the trial court's finding that Stern's intervention would expand the lawsuit; indeed, the only way to prove the "bad faith" and "collusion" in this case is to expand the lawsuit. The trial court also did not accept the facts alleged in the LLC's complaint as true; it did not even need to do so, as it could reform the contract without any finding of fault.

Second, Stern asserts that the trial court's analysis of the various factors was incorrect. As explained above, it was not.

Lastly, Stern contends that the LLC's lawsuit for reformation was never a justiciable controversy because the LLC and wife—the two parties—were never really adverse to one another, as proven by their stipulated judgment. This contention rests on the premise that a so-called "friendly" lawsuit can never present a justiciable controversy. That premise is false. As our Supreme Court held decades ago, "[a] suit is not condemned by law merely because it is friendly." (*City and County of S. F. v. Boyd* (1943) 22 Cal.2d 685, 693-694.) And an intervener cannot keep a lawsuit alive when the parties have amicably resolved it. (See *Meadow v. Superior Court* (1963) 59 Cal.2d 610, 615-617 [attorney cannot intervene to keep a divorce action alive when the spouses seek to settle].) Stern cites a number of cases where courts have ruled that a controversy is not justiciable, but they are distinguishable because they involved (1) a lawsuit that was either not ripe or moot (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573), (2) a lawsuit that was "brought [solely] for the purpose of securing a determination of a point of law" divorced from any actual controversy (*Golden Gate Bridge & Highway Dist. v. Felt* (1931) 214 Cal. 308, 316; *Fiske v. Gillespie* (1988) 200 Cal.App.3d 1243, 1246-1247; *Auberry Union School Dist. v. Rafferty* (1964) 226 Cal.App.2d 599, 601-602 (*Auberry*); *Maxwell v. Brougher* (1950) 99 Cal.App.2d 824, 826-828 (*Maxwell*)), or (3) a lawsuit to enforce a settlement that was never litigated (*Housing Group v. United Nat. Ins. Co.* (2001) 90 Cal.App.4th 1106, 1111-1112).

Stern also cites language from a few of those cases, which provides that "there . . . can be no controversy and there is nothing to be determined by the court" when "the defendant does not actually oppose the position taken by the plaintiff." (*Auberry*,

supra, 226 Cal.App.2d at p. 603; *Maxwell*, *supra*, 99 Cal.App.2d at p. 828.) This language is both overbroad (because our Supreme Court has not condemned all "friendly" lawsuits) and irrelevant (because it was made in cases arising in a different context).

Here, the LLC sued because its operating agreement did not accurately reflect the signing parties' intent; that the party the LLC sued happened to agree that the agreement was wrong does not render the LLC's lawsuit to change the agreement unripe, moot, or hypothetical.

II. Motion to Set Aside Judgment

A nonparty to a lawsuit may move to set aside a judgment if (1) he has "a right, claim or interest, accruing before the issuance of the [judgment] which is prejudiced or injuriously affected by its enforcement," and (2) the judgment itself was "predicated on fraud, collusion, mistake, or lack of jurisdiction." (*Mary R.*, *supra*, 149 Cal.App.3d at p. 315; *Villarruel v. Arreola* (1977) 66 Cal.App.3d 309, 317-318.)

The trial court did not abuse its discretion in denying Stern's motion to set aside the judgment because Stern lacked a sufficient "right, claim or interest" to upset the judgment for the same reasons he lacked a sufficient interest to intervene. Presumably because the cases involving motions to set aside a judgment do not recite the same factors as cases involving motions to intervene, Stern posits that it is easier for a nonparty to set aside a judgment than it is for him to intervene in an ongoing lawsuit. But this position has it backwards because it would make judgments *less* sacrosanct than ongoing lawsuits, which is at odds with "the state's weighty interest in the finality of judgments." (E.g., *In re Harris* (1993) 5 Cal.4th 813, 830.)

Because Stern lacks a sufficient interest in the judgment to bring a motion to set it aside, we have no occasion to reach the LLC's argument that the denial of this motion is not the proper subject of an appeal or Stern's argument that the trial court erred in treating the motion as a motion for reconsideration.

DISPOSITION

The orders are affirmed. The LLC and wife are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ