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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SCOTT ERIC ROSENSTIEL,

Plaintiff and Appellant,

v.

ALPHA BETA GAMMA TRUST,

Defendant and Respondent.

B286688

(Los Angeles County
Super. Ct. No. BC615215)

APPEAL from an order of the Superior Court of
Los Angeles County, Gregory W. Alarcon, Judge. Appeal
dismissed.

Law Office of Robert L. Bachman and Robert L. Bachman
for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Scott Eric Rosenstiel appeals from an order after entry of default judgment against Alpha Beta Gamma Trust. We dismiss the appeal for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

1. Rosenstiel's and the Zielkes' Actions

On January 27, 2016 Rosenstiel filed a derivative action (L.A. No. BC608565) on behalf of Federal Homeowners Relief Foundation, a trust, seeking, among other relief, to quiet title to real property located in Sunland.¹ His operative first amended complaint, filed July 15, 2016, named as defendants Gunter Zielke and his wife, Prapapun Zielke; Sunland Financial Services; Marsha Stern, Rosenstiel's grandmother, as managing trustee of Federal Homeowners Relief Foundation; and Maximilian Joachim Sandor.²

On March 29, 2016 Rosenstiel filed another action (L.A. No. BC615215) to quiet title to the Sunland property—this time as Federal Homeowners Relief Foundation's lessee to protect his leasehold interest—and to assert additional causes of action. Alpha Beta Gamma Trust was the sole defendant.

On July 28, 2016 the Zielkes filed their own action (L.A. No. BC628570) to quiet title to the Sunland property, as

¹ The factual and procedural background of this matter is based in part on the record in Rosenstiel's prior appeal of the trial court's orders in L.A. No. BC608565. (*Rosenstiel v. Sunland Financial Services* (Aug. 21, 2019, B286483), mod. Sept. 10, 2019 [nonpub. opn.] (*Sunland*).) Pursuant to California Rules of Court, rule 8.155(a), we augment the record to include those materials.

² We refer to Gunter and Prapapun by their first names when considered severally. Subsequent filings indicate Sandor's first name is spelled Maximilion, not Maximilian.

well as to bring other claims. The Zielkes named as defendants Rosenstiel, Stern in her individual capacity and as trustee of Federal Homeowners Relief Foundation, Randall Alan Alford and Andrew J. Stern.

2. Entries of Default and Default Judgment Against Alpha Beta Gamma Trust

On August 5, 2016, in L.A. No. BC615215, Rosenstiel filed a request for entry of default against Alpha Beta Gamma Trust, and the court clerk entered its default on the same day. On September 22, 2016 the trial court held a default prove-up hearing and heard Rosenstiel's testimony. Alpha Beta Gamma Trust did not appear. After taking the matter under submission, the court, on September 26, 2016, entered a default judgment against Alpha Beta Gamma Trust. The court's findings included that Gunter was the settlor-beneficiary of Alpha Beta Gamma Trust and Prapapun its trustee.

3. The Zielkes' Motion To Relate and Consolidate Cases; Sandor's Motion To Set Aside the Default and Default Judgment Against Alpha Beta Gamma Trust; and Gunter's Motion To Dismiss

On February 17, 2017, in L.A. No. BC608565, the Zielkes moved to relate eight cases³ and to consolidate several of them, all involving Rosenstiel or Stern and ownership of the Sunland property. The Zielkes subsequently identified eight additional cases as related to Rosenstiel's case.

³ The Zielkes requested the following eight cases be deemed related: (1) L.A. No. BC608565; (2) L.A. No. BC615215; (3) L.A. No. BC628570; and (4) five cases (L.A. Nos. LS029058, LS029059, LS929090, LS929091 and LS029128) filed in Stern's name by Rosenstiel.

On March 21, 2017 the trial court heard the Zielkes' motion to relate and consolidate cases. The court granted the Zielkes' motion to relate cases and ordered all 16 cases, including L.A. No. BC615215, be deemed related and reassigned to its department. It also granted the motion to consolidate and ordered Rosenstiel's case, L.A. No. BC608565, "to be the lead case number and case caption." The parties were also "ordered to file all future documents as to any of the above cases using that case number and caption."

On April 25, 2017 Sandor, in both his individual capacity and as trustee of the Alpha Beta Gamma Trust, moved, pursuant to Code of Civil Procedure section 473, subdivision (b),⁴ to set aside the September 26, 2016 default judgment that had been entered in L.A. No. BC615215 against Alpha Beta Gamma Trust.⁵ Among other reasons, he asserted, although he was Alpha Beta Gamma Trust's trustee, he had not been named a defendant or served with the summons and complaint.

⁴ Statutory references are to this code.

⁵ As indicated by Sandor in his notice of motion, Sandor had in March 2017 filed the same motion to set aside the default judgment in L.A. No. BC615215, but re-filed the motion on April 25, 2017 using L.A. No. BC608565 as the case number (and stating, "Orig. case no.: (BC615215)") after the trial court on March 21, 2017 ordered the parties to file future documents using L.A. No. BC608565 as the case number and caption. (Indeed, the register of actions for L.A. No. BC615215 shows a motion for relief for default had been filed on March 21, 2017; Rosenstiel, however, failed to include the March 21, 2017 filing in the record.) Sandor re-filed his motion yet again on May 4, 2017 to include the hearing date on the caption page.

Rosenstiel filed an opposition in L.A. No. BC615215 to Sandor's motion to set aside the default and default judgment against Alpha Beta Gamma Trust; his arguments included the motion was untimely filed on April 25, 2017. He also filed a motion to strike Sandor's motion on the ground Alpha Beta Gamma Trust was a business trust and could not appear in any California court until it paid all outstanding franchise taxes.

On September 1, 2017 Gunter moved to dismiss L.A. No. BC608565 for delay in prosecution and to allow the Zielkes' case, L.A. No. BC628570, to become the lead case.

4. *The Trial Court's November 1, 2017 Order and the Instant Appeal*

On November 1, 2017 the trial court heard Gunter's motion to dismiss for failure to prosecute; Sandor's motion to set aside the September 26, 2016 default judgment entered against Alpha Beta Gamma Trust pursuant to section 473, subdivision (b); Rosenstiel's motion to strike the motion to set aside the default judgment against Alpha Beta Gamma Trust; and other matters, including an order to show cause as to the propriety of a section 170.6 peremptory challenge by Stern. Rosenstiel did not appear. As indicated by the November 1, 2017 minute order, the trial court ruled as follows: "Motion to dismiss is GRANTED"; "Motion to set aside default and default judgment, if entered, is GRANTED pursuant to CRC 3.110(h) for failure to proceed/prosecute"; "The Court orders the CCP 170.6 Peremptory Challenge stri[c]ken this date. . . ."; "Pursuant to the above rulings, all other matters set for hearing today are placed off calendar as moot"; and "Ms. Murphy [counsel for the Zielkes and for Sandor, in his individual capacity and as trustee of Alpha Beta Gamma Trust] to give notice."

On November 8, 2017, in L.A. No. BC608565, the attorney for the Zielkes and for Sandor filed a notice of ruling for the November 1, 2017 hearing. According to the notice of ruling, Gunter “made an oral motion to dismiss Plaintiff’s request for Default against any and all parties in the instant case pursuant to California Rule of Court 3.110h”; Gunter’s motion was “granted by the Court and Plaintiff Eric Rosenstiel’s default against any and all parties was dismissed by the Court.”⁶ The notice continued, “The request for default being dismissed, the motion by Maximilion Sandor as Trustee of the Alpha Beta Gamma Trust, pursuant to California Code of Civil Procedure § 473(b) to set aside the default judgment entered against Alpha Beta Gam[m]a Trust became moot.” It also stated, “Defendant Gunter Zielke’s Motion to Dismiss for Failure to Prosecute was granted and the case dismissed.”

Rosenstiel filed in L.A. No. BC615215 a notice of appeal of an order after judgment, which attached a copy of the court’s November 1, 2017 minute order.

⁶ California Rules of Court, rule 3.110(h) provides, when a default is entered, a default judgment must be obtained within 45 days after entry of default, absent an extension of time by the court. Rosenstiel, in L.A. No. BC608565, had requested and obtained entries of default against the Zielkes and other defendants in that action.

Although Rosenstiel failed to include the November 8, 2017 notice of ruling in the record of this appeal, it was included in the record of Rosenstiel’s prior appeal of the trial court’s orders in L.A. No. BC608565 (addressed in our nonpublished opinion *Sunland, supra*, B286483).

DISCUSSION

1. *We Have No Jurisdiction To Consider Rosenstiel's Appeal of the Trial Court's Order Relating to Sandor's Section 473, Subdivision (b), Motion To Set Aside Default*

On appeal Rosenstiel urges us to reverse the trial court's order granting Sandor's motion to set aside the default judgment entered against Alpha Beta Gamma Trust because the motion was filed outside the six-month "limitation period" set forth in section 473, subdivision (b), and was not timely served. He also challenges Sandor's assertion the default judgment should be set aside because he, as Alpha Beta Gamma Trust's trustee, had not been named a defendant or served with the summons and complaint. Rosenstiel contends Alpha Beta Gamma Trust is a business trust, which can sue and be sued independently of its trustee.

Because Rosenstiel's appeal is not based on an appealable order after judgment, we lack jurisdiction to consider the appeal. (See *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 21 ["a reviewing court lacks jurisdiction on direct appeal in the absence of an appealable order or judgment"]; accord, *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.)

Rosenstiel's arguments on appeal incorrectly assume the trial court granted Sandor's section 473, subdivision (b), motion to set aside the default judgment against Alpha Beta Gamma Trust, which would be an appealable order under section 904.1, subdivision (a)(2). (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1143.) As established by the record, however, the trial court did not grant Sandor's section 473, subdivision (b), motion; it placed it off calendar as moot. A postjudgment order placing a

motion off calendar is not appealable. (See *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652 [to be appealable, a postjudgment order “must either affect the judgment or relate to it by enforcing it or staying its execution”]; *Guardianship of Walters* (1951) 37 Cal.2d 239, 244 “[a]n off-calendar order . . . does not divest the court of the jurisdiction which it has acquired”]; *M.G. Chamberlain & Co. v. Simpson* (1959) 173 Cal.App.2d 263, 281 & fn. 1 [concluding order made after entry of judgment and placing motion off calendar is nonappealable]; see also *Barnes v. Litton Systems, Inc.* (1994) 28 Cal.App.4th 681, 685 [“an essential element of an appealable postjudgment order is one which is not preliminary to later proceedings”]; *R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188, 1193-1194 [off calendar “is not synonymous with “dismissal”” and “merely means a postponement”].)⁷

2. *The Trial Court’s November 1, 2017 Order Did Not Dismiss Rosenstiel’s Case Against Alpha Beta Gamma Trust*

In addition to challenging the nonexistent ruling granting Sandor’s section 473, subdivision (b), motion to set aside the default judgment entered against Alpha Beta Gamma Trust, Rosenstiel argues the court erred in dismissing his action against

⁷ Because he erroneously assumed the trial court granted Sandor’s section 473, subdivision (b), motion, Rosenstiel has also failed to establish, as he must, that he was aggrieved by the order placing Sandor’s motion off calendar. (See § 902 [providing for appeal in a civil action by “[a]ny party aggrieved”]; *In re Marriage of Burwell* (2013) 221 Cal.App.4th 1, 13 “[t]o have appellate standing, one must (1) be a party and (2) be aggrieved”].)

the trust pursuant to California Rules of Court, rule 3.110(h). No such dismissal of L.A. No. BC615215 occurred. As discussed, the trial court on November 1 granted Gunter’s motion to dismiss, which requested dismissal only of L.A. No. BC608565, not all the cases related to and/or consolidated with it (including L.A. No. BC615215).⁸ Indeed, the Los Angeles Superior Court case summary included in the clerk’s transcript on appeal shows the status of L.A. No. BC615215 as of July 9, 2018—eight months after the court’s November 1, 2017 order—as “Default Judgment after Prove-up 09/26/2016.” Once again, Rosenstiel has failed to establish an appealable postjudgment order.

DISPOSITION

The appeal is dismissed for lack of jurisdiction.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.

⁸ As shown by the record, and as we concluded in *Sunland, supra*, B286483, the trial court consolidated the various cases for trial, not for all purposes; and, when it granted Gunter’s motion to dismiss, it dismissed only the *Sunland* case (L.A. No. BC608565). (See *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1147; *Committee for Responsible Planning v. City of Indian Wells* (1990) 225 Cal.App.3d 191, 196-197 [“[t]here are two types of consolidation: a complete consolidation resulting in a single action, and a consolidation of separate actions for trial”].)