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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

WERTHEIM, LLC, Plaintiff and Appellant, v. CURRENCY CORP., INC., Defendant and Appellant.	B270926 (Los Angeles County Super. Ct. No. BC535737)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Affirmed in part, reversed in part, and remanded.

Howard Posner; The Newell Law Firm and Felton T. Newell; The Law Offices of F. Jay Rahimi and F. Jay Rahimi, for Plaintiff and Appellant.

Diem Law and Robin L. Diem for Defendant and Appellant.

This is the second appeal from a lawsuit to recover against an appeal bond involving plaintiff and appellant Wertheim, LLC (plaintiff) and defendant and cross-appellant Currency Corp. (defendant). In the first appeal, we affirmed, with modification, an award of attorney fees to the insurer that issued the bond and deposited its proceeds with the trial court. In this appeal, we consider whether the trial court erred when it determined two issues relating to the accrual of interest on the judgment plaintiff obtained against defendant, namely, when the interest began to accrue under applicable law, and when it stopped accruing. We also review whether the trial court abused its discretion in ordering payment for the insurer's attorney fees to be made entirely from plaintiff's interest in the appeal bond funds. Finally, on defendant's cross-appeal, we are asked to decide whether the trial court erred when it did not apply a judgment lien in favor of defendant (in yet another lawsuit) to the judgment against plaintiff in this action.

I. BACKGROUND

The parties are familiar with the facts, which we generally recounted in *Wertheim, LLC v. The Bar Plan Mutual Insurance Company* (Dec. 1, 2016, B268539) [nonpub. opn.] (*Wertheim I*). We briefly recount the facts here, drawing on our opinion in *Wertheim I* and focusing on those facts that are relevant to our discussion of the issues in this appeal.

A. The Initial Judgment, the Appeal Thereof, and Initial Efforts to Collect on the Appeal Bond

Plaintiff prevailed in an earlier lawsuit (the Underlying Proceeding) and obtained a judgment of $38,554.48 against

defendant, which the trial court entered on June 16, 2009. Just over eight months later, on February 18, 2010, the trial court amended the judgment to include attorney fees and costs, bringing the total judgment to $190,718.48.

When the parties took cross-appeals from the judgment in the Underlying Proceeding, defendant obtained from The Bar Plan Mutual Insurance Company (Insurer) an "Undertaking on Appeal and to Stay Execution Under Section 917.1 C.C.P." (the Appeal Bond) in the amount of $286,078. Division One of this court later affirmed the judgment in the Underlying Proceeding, and the remittitur issued on July 25, 2012. That affirmance, however, did not resolve the final amount of the judgment because interest remained to be calculated on the award.

Over a year later, in November 2013, plaintiff submitted a written demand to Insurer requesting payment of $275,000.37, i.e., the amount it contended was necessary to satisfy the judgment. Aware of the demand, defendant wrote to Insurer and protested the release of any Appeal Bond funds on the ground that plaintiff's calculation of the amount due was "greatly exaggerated and completely incorrect." In light of the disagreement regarding the amount due, Insurer wrote to both parties to inform them it would need a court order setting forth the correct amount to be paid before it could release any funds. Insurer also told the parties it was aware they were working to come to some agreement as to the amount to be paid, and that if no agreement could be reached, it would retain counsel to "interplead the funds into the court, and let the court determine who should be paid, and how much."

Plaintiff and defendant came to no agreement. Instead, plaintiff applied ex parte to have the trial judge in the original

action enforce liability on the Appeal Bond. Defendant and Insurer opposed the application, arguing plaintiff erred in calculating the amount due on the judgment. Specifically, they opposed plaintiff's contentions that (1) interest continued to accrue after the remittitur issued from the appeal of the judgment in the Underlying Proceeding and (2) interest began accruing on the attorney fees and costs added to the judgment as of the date it was first entered rather than eight months later when the amount of fees and costs amounts were inserted in an amended judgment. Defendant and Insurer also contended the amount due plaintiff should be offset by the amount of judgments *defendant* had obtained against *plaintiff* in other cases.[1] The trial judge denied plaintiff's application, finding it was untimely under Code of Civil Procedure section 996.440,[2] which permits a party to move to enforce liability on a bond in the original action only if the motion is made within a year after any appeal is finally determined.

Importantly for our purposes, on December 17, 2013, while plaintiff's application to enforce liability on the Appeal Bond was pending, Insurer provided a check in the full amount of the Appeal Bond ($286,078) to the Clerk of the Los Angeles Superior Court for disbursement "as the Court sees fit." The clerk,

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[1] Although the application itself is not included in the appellate record, these facts are related in plaintiff's reply brief in support of its application and a declaration submitted by defendant's attorney on a later motion, both of which are included in the record.

[2] Undesignated statutory references that follow are to the Code of Civil Procedure.

however, returned the check transmitted by Insurer and advised the court "would require a Court Order 'Deposit in Lieu of Appeal Bond'" before accepting the check.

B. Plaintiff Sues to Collect the Appeal Bond Funds

With the trial court having rejected plaintiff's application to enforce liability on the Appeal Bond in the original lawsuit, plaintiff in February 2014 filed a new lawsuit against Insurer and defendant pursuant to section 996.430, which permits liability on a bond to be enforced by a civil action against the principal and the surety.

Insurer responded by filing a motion pursuant to section 386.5, which allows a defendant holding money in which it claims no interest to apply to a court for an order discharging it from liability and dismissing it from the action upon deposit of the funds (a deposit and discharge motion). Plaintiff opposed the motion, arguing the amount of the judgment (including accrued interest) exceeded the amount of the Appeal Bond and asserting Insurer was attempting to evade its full liability. The trial court ultimately granted Insurer's motion, ordered it to deposit the Appeal Bond proceeds with the trial court, discharged Insurer from liability, and dismissed it from the case.

C. The Court Awards Insurer Attorney Fees, Which We Affirmed But Modified in Wertheim I

After Insurer deposited the Appeal Bond proceeds with the court, it filed a motion to recover its attorney fees and costs pursuant to section 386.6, which gives courts discretion to award costs and attorney fees to a party who pursues the deposit and

discharge procedure. The trial court granted Insurer's motion and awarded it the sum of $83,213.05.

On appeal, we affirmed the attorney fee award to Insurer, except as to a small portion that was not compensable under the applicable statute. This resulted in a modified order of attorney fees and costs to Insurer in the amount of $73,218.219. (*Wertheim I*, *supra*, at p. 18.)

D. The Court Allocates the Attorney Fees Awarded to Insurer Entirely to Plaintiff's Share of the Appeal Bond Funds

Following the award of attorney fees to Insurer, defendant filed a motion asking the trial court to allocate the entire amount of the attorney fees paid to Insurer to plaintiff's share of the Appeal Bond funds. Defendant argued plaintiff should be responsible for Insurer's fees because plaintiff engaged in "dilatory and bad faith conduct" that necessitated and prolonged the litigation. After a hearing, the trial court granted defendant's motion, finding that allocation of the fees solely to plaintiff was warranted because plaintiff (a) did not make a timely claim on the Appeal Bond and (b) "insisted . . . on recovering an amount which the court had determined to be improper."

E. Trial and Judgment

A month later, the parties appeared to present evidence on the sole issue remaining to be decided in plaintiff's section 996.430 lawsuit against Insurer and defendant: when interest on the judgment plaintiff obtained against defendant stopped accruing. Defendant argued interest stopped running on July 25, 2012, (the date the remittitur issued on appeal from the

judgment in the Underlying Proceeding) because the existence of the Appeal Bond meant the funds were available to plaintiff and that availability was tantamount to satisfaction of the judgment. Plaintiff argued the existence of the bond was not comparable to satisfaction of the judgment because it had still not received payment.

The trial court agreed with defendant. Specifically, the court concluded: "The posting of the undertaking [i.e., the Appeal Bond] satisfies the [relevant Code of Civil Procedure] statute. This is because the funds were available on July 25, 2012, the date the remittitur issue[d] in the underlying action . . . ."

The trial court then calculated how the Appeal Bond funds should be disbursed. The court accepted defendant's calculation that the total judgment in favor of plaintiff was $239,724.80, which included attorney fees, costs, and interest consistent with the rulings the trial court had previously made on those issues. Subtracting this amount from the total $286,078 amount of the Appeal Bond, the court ordered $46,353.20 disbursed to defendant who, as the principal on the Appeal Bond, was entitled to the remainder of the deposited funds. Then, from the $239,724.80 judgment for plaintiff, the trial court (1) deducted the money the court had previously ordered paid to Insurer for its attorney fees and costs, (2) ordered plaintiff to pay $5,161.56 to defendant for two liens it held against plaintiff from judgments in other cases, and (3) ordered plaintiff to pay $14,690 to defendant to satisfy a sanctions award the court had made against plaintiff at a previous hearing. Thus, the total amount disbursed to plaintiff was $136,660.19.

II. DISCUSSION

Plaintiff asserts the trial court made two mistakes in calculating the proper amount of interest on the judgment: (1) concluding that interest on the attorney fees and costs portion of the judgment in the Underlying Proceeding began accruing only on the date the court amended the judgment to include the actual amount of attorney fees and costs awarded, and (2) determining that interest on the judgment stopped accruing on July 25, 2012, the date the remittitur issued in the appeal of the judgment in the Underlying Proceeding. We agree in full with plaintiff with regard to the first point; the law is clear that interest starts accruing as of the date a judgment is first entered, not on the date the judgment is later amended to enter the amount of the attorney fees and costs awarded. We agree only in part, however, with respect to plaintiff's second assertion of error. While we agree the judgment was not satisfied merely because the funds were "available" after July 25, 2012, that does not mean interest has continued to accrue every day since. Rather, when Insurer deposited the Appeal Bond proceeds by delivering a check to the clerk of the superior court on December 17, 2013, that stopped interest running on the judgment even though the clerk ultimately rejected the deposit.

Plaintiff also challenges the trial court's conclusion that the award of attorney fees to Insurer should be offset solely from its share of the Appeal Bond funds. The trial court's ruling on this issue was not an abuse of its discretion. The trial court rationally concluded plaintiff's failure to make a timely motion to enforce liability on the Appeal Bond in the Underlying Proceeding, which then necessitated the filing of this action, was the reason why Insurer was obligated to incur attorney fees in this action.

In its cross-appeal, defendant contends the trial court wrongly decided against offsetting the judgment amount awarded to plaintiff by another judgment lien defendant had obtained against plaintiff in a separate action. This, too, was not an abuse of discretion. Defendant failed to meet its burden of putting before the court sufficient evidence to support its offset request.

A. Post-Judgment Interest

1. Standard of review

"The date from which interest [on a judgment] should run and the interest rate 'are questions of law, which we review de novo.' [Citation.]" (*Chodos v. Borman* (2015) 239 Cal.App.4th 707, 712 [where appellate court order modified, rather than reversed, attorney fee award, interest on the fee award portion of the judgment ran from the date judgment first entered] (*Chodos*).) Our review is also de novo when deciding the date on which interest on the judgment stops accruing because our answer to that question turns on the meaning and application of a statute. (*John v. Superior Court* (2016) 63 Cal.4th 91, 95 ["We review questions of statutory construction de novo"].)

2. Interest on the attorney fees and costs began accruing when the judgment in the Underlying Proceeding was first entered

Plaintiff contends the trial court erred in not awarding it interest on the attorney fees and costs for the period from June 16, 2009, through February 18, 2010, (i.e., the period between the trial court's initial entry of judgment in the Underlying Proceeding and its subsequent entry of the amended judgment). The trial judge did not award interest on this portion of the

judgment because it believed the issue had been decided by the judge in the Underlying Proceeding. As we shall demonstrate, case law makes clear plaintiff is entitled to the interest, and the trial court was under no obligation to defer to the earlier (and incorrect) ruling.

The trial court in the Underlying Proceeding entered judgment in favor of plaintiff on June 16, 2009. The judgment included a blank space for costs, the amount of which had not yet been determined. The trial court later amended the judgment on February 18, 2010, to insert $154,164 as costs. This is consistent with standard practice in the courts. "Where costs are established by the judgment, but the amount of the award is ascertained at a later time, the court clerk enters the costs on the judgment after the amount is determined. (Cal. Rules of Court, rule 3.1700(b)(4); *Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 369[ ].) In other words, the amount of the cost award is incorporated into the judgment." (*Hernandez v. Siegel* (2014) 230 Cal.App.4th 165, 171-172.)

Section 685.020, subdivision (a) provides that "interest commences to accrue on a money judgment on the date of entry of judgment." Prior cases have held "'interest ordinarily begins to accrue on the prejudgment cost and attorney fees portion of the judgment as of the same time it begins to accrue on all monetary portions of the judgment—upon entry of judgment' (*Lucky United Properties Inv., Inc. v. Lee* [(2010) 185 Cal.App.4th, 125, 137-138 (*Lucky*)]." (*Chodos*, *supra*, 239 Cal.App.4th at p. 715; see also § 680.300 ["'Principal amount of the judgment' means the total amount of the judgment as entered or as last renewed, together with the costs thereafter added to the judgment . . . ."].)

a. plaintiff did not forfeit its contention that interest should run from an earlier date

Defendant does not dispute that precedent supports plaintiff's position on when interest begins accruing, but defendant argues plaintiff forfeited its claim for interest by failing to contest an order the trial court made in the Underlying Proceeding. As we explain, there is no merit to this argument.

The first point at which plaintiff appears to have contended interest should run from the time of the initial entry of judgment—even for the attorney fees and cost amounts included later—was when plaintiff filed its ex parte application to enforce liability on the Appeal Bond in the Underlying Proceeding. Although the application itself is not in the record, the record does include the minute order issued by the trial judge to deny plaintiff's application without prejudice. The basis of the court's denial, as summarized *ante*, was the conclusion that the application was untimely, coming more than a year after the judgment became final. But the minute order also stated: "To the extent [the application] seeks to confirm the [amount] of the judgment, it is incorrect because it seeks to compute interest [on] costs and attorneys fees back to June 19, 2009, [the date the judgment was first entered,] when those sums were awarded much later[, i.e., when the judgment was amended]."

At the time the trial judge issued this order in the Underlying Proceeding, plaintiff was under no obligation to correct (or seek to overturn) the trial judge's misstatement of the date on which interest should begin accruing. The observation the judge made concerning interest was (in addition to being incorrect) unnecessary to the disposition of the application to enforce liability on the Appeal Bond. Because the ruling was

correctly premised on the indisputable tardiness of plaintiff's motion, plaintiff's failure to challenge what amounts to dicta cannot be construed as a forfeiture of its contention that interest should begin running on the full amount of the amended judgment as of the date the judgment was initially entered.[3]

b. the prior observation by the trial judge should not be given preclusive effect

The trial court in this action treated the judge's observation regarding interest in the Underlying Proceeding minute order as a ruling that could serve as a basis for invoking the doctrine of issue preclusion. This was error, for much the same reason we have already explained.

Issue preclusion, sometimes referred to as collateral estoppel, bars a party from re-litigating an issue conclusively determined in a prior action. It applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.

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[3] Defendant also argues plaintiff waived its argument that interest should run from the date the judgment in the Underlying Proceeding was originally entered because plaintiff did not press the argument during trial. By that point, however, the trial court in this case had already made it clear that it considered itself bound by the prior judge's ruling that any interest on attorney fees and costs should run only from the date the judgment was amended. Urging the contrary at trial would have been futile, and a decision to refrain from continuing to press the point cannot be construed as a waiver of the contention. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213.)

[Citations.]" (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 825.) The prior trial judge's observation that interest should not be computed on costs and attorneys fees back to the date the judgment in the Underlying Proceeding was first entered fails to satisfy the third of these elements (and perhaps the first as well).

"[A]n issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.) From a review of the minute order issued by the trial judge, and as we have already detailed, it is obvious the judge's statement concerning the interest recoverable on attorney fees was entirely unnecessary to the disposition of plaintiff's application. That means the judge's statement in the order is not entitled to preclusive effect. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342 [an issue is necessarily decided by an earlier ruling if the issue was not "'entirely unnecessary' to the [ruling] in the initial proceeding"]; *Anne H. v. Michael B.* (2016) 1 Cal.App.5th 488, 498 [no preclusive effect warranted where prior judge's comments were entirely unnecessary to resolving the initial custody arrangements then at issue].)

The trial court in this case erred by treating as gospel the prior judge's pronouncement that plaintiff incorrectly sought interest on the full amount of the amended judgment from the date the judgment was first entered. As a matter of law, interest on the attorney fees and costs did begin accruing when judgment was first entered on June 16, 2009. There being no procedural

bar that applies to prevent us from reaching that conclusion, we so hold.[4]

3. *Interest on the judgment continued to accrue until Insurer deposited the Appeal Bond funds on December 17, 2013*

Plaintiff additionally contends that interest on the judgment in the Underlying Proceeding continues to accrue until plaintiff actually receives payment. As it has not yet received payment of the judgment, plaintiff asks us to direct the trial court to recalculate interest at the statutory rate of 10% a year (§ 685.010) for the now seven years since the $190,718.48 judgment was originally entered.

Section 685.030 governs the accrual and cessation of post-judgment interest. Under subdivision (b) of that statute, where a money judgment is satisfied in full through a means other than a writ, interest ceases to accrue on "the date the judgment is satisfied in full."

Subdivision (d) of section 685.030 defines "the date a money judgment is satisfied in full" as the earliest of the following: "(1) The date satisfaction is actually received by the judgment creditor. [¶] (2) The date satisfaction is tendered to the judgment creditor or deposited in court for the judgment creditor.

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[4] Although we have determined interest should have begun running as of the date the judgment in the Underlying Proceeding was first entered, that does not call into question our holding in *Wertheim I*. In addition to the record adequacy issues in that case, we also noted plaintiff's prayer for relief sought unspecified attorney fees and costs.

[¶] (3) The date of any other performance that has the effect of satisfaction." "A tender is an offer of performance made with the intent to extinguish the obligation (Civ. Code, § 1485)." (*Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 385; accord, *In re Marriage of Green* (2006) 143 Cal.App.4th 1312, 1323.)

We are not persuaded, as defendant argues and the trial court held, that the judgment in the Underlying Proceeding was satisfied merely because the funds were available for plaintiff to collect. Other than a scenario where the judgment creditor actually receives satisfaction of the judgment by some means (its own efforts or efforts made by others), the language of section 685.030, subdivision (d) is phrased in terms that place the burden on the judgment debtor (or someone acting on the judgment debtor's behalf) to make affirmative efforts to satisfy the judgment—the references to "tendered," "deposited," and "performance" in subdivisions (d)(2) and (d)(3) all indicate action by the debtor. Plaintiff undisputedly has not actually received satisfaction, and this court's issuance of the remittitur in the appeal from the Underlying Proceeding cannot be construed as compliance with the efforts section 685.030 requires a judgment debtor to undertake if interest on a judgment is to stop running.[5] Obtaining an appeal bond is not tender, performance, or the deposit of proceeds with a court.

Defendant, however, cites *Bell v. Farmers Insurance Exchange* (2006) 137 Cal.App.4th 835 (*Bell*) to argue the Appeal Bond is "other performance that has the effect of satisfaction"

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[5] We reject defendant's reliance on the doctrine of laches to defeat post-remittitur accrual of interest.

within the meaning of section 685.030, subdivision (d)(3). *Bell* supports no such proposition.

In *Bell*, a class of insurance claims representatives obtained a judgment against their employer, Farmers Insurance Exchange (Farmers), for unpaid overtime compensation. (*Bell*, *supra*, 137 Cal.App.4th at p. 837.) Farmers deposited funds equal to the amount of the judgment into a "damages fund" held in the names of class counsel and a court-appointed administrator. (*Ibid.*) Before the first distribution was made to class members, Farmers requested a change in the procedure due to the unforeseen payroll tax consequences of paying money into the damages fund rather than directly to class members. (*Id.* at p. 838.) Under the proposal, Farmers would make certain payments to members directly, and then be reimbursed from the damages fund. (*Ibid.*) Class counsel objected and asked the trial court to require Farmers to pay additional post-judgment interest until the class members received their payments. The trial court denied the motion, and the class members appealed.

The Court of Appeal affirmed the trial court's denial of additional post-judgment interest based on "a simple common sense application of . . . section 685.030, subdivision (d)." (*Bell*, *supra,* 137 Cal.App.4th at pp. 839-840.) The Court of Appeal concluded Farmer's deposit of funds into the damages fund triggered subdivision (d)(2) (the "date satisfaction is . . . deposited in court for the judgment creditor") because the trial court "retained full power over the claims administrator's performance of its duties." (*Id.* at p. 839.) The Court of Appeal went on to conclude that if the procedure did not technically qualify under subdivision (d)(2), it would satisfy subdivision (d)(3) ("any other

performance that has the effect of satisfaction") because it would have the same effect as a deposit with the court. (*Id.* at p. 840.)

The damages fund in *Bell* cannot be equated with the posting of the Appeal Bond. The fund in *Bell* was the functional equivalent of a court account, which made the transfer of the judgment into that fund the equivalent of a deposit with the court. (*Bell*, *supra*, 137 Cal.App.4th at p. 839 ["We do not think it should make any difference for purpose of . . . section 685.030, subdivision (d)(2) whether funds are paid directly to the superior court or to a third party appointed and supervised by the court or whether the funds are held in a public account of the county treasurer or in the name of such a third party"].) At the time the remittitur issued, Insurer maintained control over the Appeal Bond funds and Insurer was not under the direct control of the trial court, so the Appeal Bond cannot be considered the equivalent of a deposit with the court.

Although we agree with plaintiff that interest on the judgment did not stop accruing as of the date of the remittitur in the Underlying Proceeding, we disagree that interest has since continued to accrue unabated. Under section 685.030, interest stopped running on the date Insurer delivered a check to the superior court in the full amount of the Appeal Bond because that delivery qualifies as a "deposit[ ] in court" within the meaning of section 685.030, subdivision (d)(2) even though the court ultimately did not accept the deposit. Webster's defines the verb "deposit" as: "to place, cache, or entrust esp[ecially] seriously and carefully (as for safekeeping, pledging or guaranteeing performance, or recording)." (Webster's 3d New Internat. Dict. (2002) p. 605.) Insurer "deposited" the Appeal Bond proceeds with the superior court on December 17, 2013, when it entrusted

a check in the full amount of the bond to the superior court clerk—that the clerk later rejected, rather than accepted, the deposit is of no moment.[6]

To be sure, the word deposit is also at times used to mean not just the offering, but also the actual acceptance of funds. But the noscitur a sociis canon of interpretation reveals that is not the way in which section 685.030, subdivision (d)(2) uses the phrase "deposited in court." (*McDonnell v. United States* (2016) ___ U.S. ___ [136 S.Ct. 2355, 2368] ["Under the familiar interpretive canon *noscitur a sociis*, a 'word is known by the company it keeps'"].) Subdivision (d)(2), in the very same sentence it uses the word "deposited," also uses the word "tendered." As we have already explained, the word tender means an *offer* of performance made with the intent to extinguish an obligation. We conclude "deposit" should be understood similarly, and that means Insurer deposited the Appeal Bond funds with the court—and that interest therefore ceased accruing—when it delivered the check payable to the clerk of the superior court.[7]

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[6] This understanding of the word deposit, as the act of offering or conveying a check to a bank or other institution regardless of whether the money (the deposit) is later rejected or returned, accords with frequent ordinary usage—as anyone who has received a "your deposit has been accepted" notice from a bank can attest.

[7] Our conclusion that interest ceased accruing at the time when Insurer delivered the check to the court clerk is reinforced by later events. After the clerk rejected the deposit, plaintiff—the party to whom the judgment was owed—attempted to block

To briefly sum up, we conclude that interest on the judgment in the Underlying Proceeding (including the amounts awarded for attorney fees and costs) began accruing on June 16, 2009, the date the judgment was first entered, and ceased accruing on December 17, 2013, the date Insurer deposited the Appeal Bond funds with the trial court (even though that deposit was ultimately rejected).

B. The Trial Court Did Not Abuse Its Discretion in Ordering Insurer's Attorney Fees to Be Paid Solely Out of Plaintiff's Share of the Appeal Bond Funds

After the trial court awarded attorney fees to Insurer, defendant filed a motion seeking to have the award allocated from plaintiff's share of the Appeal Bond funds. The trial court granted that motion. Plaintiff now asserts the trial court erred in doing so, and that the award should come from defendant's share of the Appeal Bond.

Because the court's allocation decision has the same effect as an order awarding attorney fees against plaintiff, we review the trial court's decision for abuse of discretion. (See *Carpenter & Zuckerman v. Cohen* (2011) 195 Cal.App.4th 373, 378; see also *Gaines v. Fidelity Nat. Title Ins. Co.* (2016) 62 Cal.4th 1081, 1100 [under the abuse of discretion standard, a trial court's findings of fact are reviewed for substantial evidence and its application of law to facts is reversible if arbitrary or capricious].)

In allocating Insurer's attorney fee award from plaintiff's share of the Appeal Bond funds, the trial court explained section

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subsequent efforts that would have resulted in the court's acceptance of the funds earlier than it ultimately did.

386.6 authorized it to make such an allocation and stated its reason for doing so: "Here, the court has determined, on several occasions, that [plaintiff] did not make a timely claim on the bond, and did not demand the appropriate amount from [Insurer]. Additionally defendant was added to the [First Amended Complaint] merely because it was an indispensable party . . . . The primary purpose of the action was to recover the bond amount from [Insurer]. [Plaintiff] insisted throughout the litigation on recovering an amount which the court had determined to be improper. Given these circumstances, the court deems it proper to allocate the entirety of the fees awarded to [Insurer] to [plaintiff]." The trial court acknowledged defendant had instructed Insurer not to release funds in response to plaintiff's demand, which plaintiff argued was evidence of defendant's "bad faith," but the court concluded that did not warrant "allocating the fees to [defendant] in this action."

Plaintiff's delay in seeking to recover on the Appeal Bond is alone sufficient for us to conclude the trial court's allocation decision was not an abuse of discretion. The lawsuit in this case resulted solely from plaintiff's failure to timely file a motion in the Underlying Proceeding within a year of the remittitur issuing. Had plaintiff done so, the fees incurred by Insurer would not have been incurred (or would have been negligible) and the attorney work necessary in any such enforcement action would have been almost assuredly far less expensive.

C. The Trial Court Did Not Abuse Its Discretion in Failing to Offset from the Judgment an $8,535.14 Lien in Favor of Defendant

A judgment creditor may file a lien on a pending action to which the judgment debtor is party. (§ 708.410, subd. (a).) The court in the action against which the lien has been filed "*may* order that the judgment debtor's rights to the money or property under the judgment be applied to the satisfaction of the lien . . . ." (§ 708.470, subd. (a), emphasis added.) "The party seeking the section 708.470 order bears the burden of persuading the court that the order should be granted." (*Casa Eva I Homeowners Ass'n v. Ani Const. & Tile, Inc.* (2005) 134 Cal.App.4th 771, 781.)

"Whether a setoff is appropriate in equity is a question within the trial court's discretion. We review the court's decision under the abuse of discretion standard. (*Wm. R. Clarke Corp. v. Safeco Ins. Co. of America* (2000) 78 Cal.App.4th 355[ ].) An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice." (*Fassberg Const. Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 762-763.)

At trial, defendant submitted a list of liens it had obtained against plaintiff and asked the trial court to offset the amount it planned to disburse to plaintiff in this case by the amount of the liens. Of the six liens on the list, the trial court found three should offset the amount due plaintiff.[8] The remaining three

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[8] These three included $593.36 awarded in Los Angeles County Superior Court case BC379432, $4,568.20 awarded in Los Angeles County Superior Court case BC417798, and $14,690.00

liens, the court concluded, should not result in an offset because the judgments from whence those liens arose were at least arguably still subject to appeal or a post-judgment proceeding in the underlying case. Defendant contends in its cross-appeal that the trial court erred in failing to offset the lien for $8,535.14 from consolidated Los Angeles County Superior Court case nos. BC441026 and BC444248. Defendant does not challenge the trial court's decision as to the remaining two liens.

The "oversight" defendant claims the trial court made is attributable to defendant's own neglect. In its written brief to the trial court, submitted to explain defendant's calculation of the amounts due under the judgment, defendant included a list of six liens but did not distinguish which were subject to appeal and which had become final. When the topic was raised at trial, counsel for defendant identified as final (meaning not subject to change) only the three liens the court eventually used to offset the judgment. The attorney for defendant stated: "[W]ith respect to the sanctions award in this case, the [$14,690], that should be paid out of the interpled funds and then the two liens that you referenced that are after appeals in the amount of [$593.36] and [$4,568.20], those should be paid out of the interpled funds." Counsel did not highlight the $8,535.14 lien, but did make a proposal for "the remaining liens," requesting that funds equivalent to the value of those liens be retained by the court pending "resolution of the issues in those cases." The trial court did not adopt that proposal.

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in fee sanctions awarded to defendant at the February 19, 2016, hearing.

Later, defendant raised no objection when the trial court ordered certain liens be used to offset the judgment, although the $8,535.14 lien was not included. Indeed, defendant assisted the court with making the necessary calculations, but still did not mention the $8,535.14 lien. The court's minute order accurately reflects what occurred at trial, noting defendant identified the liens that were not subject to appeal, but the $8,535.14 lien is not included.

Twenty days after trial, defendant recognized its mistake and applied to the court ex parte to modify the disbursement order to include the $8,535.14 lien. Defendant's brief noted there "is a discrete legal issue on appeal . . . . But the ruling on this issue will not impact the lien . . . ." The trial court denied the application because defendant did not demonstrate exigent circumstances as required by California Rule of Court 3.1202(c) when proceeding by way of an ex parte application.

The trial court was well within its discretion in declining to further offset the judgment by the $8,535.14 lien. As our summary demonstrates, defendant did not provide the trial court with the facts it needed to assess the equities of defendant's lien. On top of that, when filing its after-the-fact ex parte application, defendant equivocated by stating the judgment in the relevant case was subject to appeal, although defendant contended the basis of the appeal would not affect the lien. The ex parte application did not explain why defendant had not brought the relevant facts to the attention of the court at trial. Moreover, as the trial court found, relief on the ex parte application was not appropriate because defendant did not demonstrate "irreparable harm, immediate danger or any other statutory basis for granting

relief ex parte," as required by California Rules of Court, rule 3.1202(c).

DISPOSITION

The trial court's rulings on issues other than the interest owing on the judgment in the Underlying Proceeding are affirmed. The trial court's calculation of the interest owing on the judgment is reversed, and the case is remanded to permit the trial court to recalculate the amount of interest in a manner consistent with the views expressed in this opinion. The trial court shall then enter a new judgment disbursing the interpled funds in this action in accordance with its revised interest calculation. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J. LANDIN, 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.