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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GRACE ROBINSON, Plaintiff and Respondent, v. MONTANA BAIL BONDS, INC., Defendant and Appellant.	B233010 (Los Angeles County Super. Ct. No. GC044161)

APPEAL from a judgment of the Superior Court of Los Angeles County. C. Edward Simpson, Judge. Reversed.

Law Offices of G. Marshall Hann and G. Marshall Hann for Defendant and Appellant.

Pasadena Law Center and E. Samuel Johnson III, for Plaintiff and Respondent.

Montana Bail Bonds, Inc., defendant in the court below and appellant here (appellant), appeals from a judgment of contempt for its willful violation of a preliminary

injunction. Appellant contends that it cannot be held in contempt because (1) the preliminary injunction was void for failure of plaintiff in the court below and respondent here, Grace Robinson (respondent), to post an injunction bond, (2) appellant was never served with, and lacked notice of, the preliminary injunction, and (3) the contempt judgment is procedurally flawed because the order to show cause for its issuance was based on a legally and factually deficient affidavit, and (4) the trial court refused to allow live testimony or cross-examination of witnesses at the contempt hearing, depriving appellant of its constitutional rights.

Respondent contends that appellant could not simply ignore and violate even a void injunction but was required to first challenge it in the trial court. She also contends that, in any event, appellant waived the injunction bond requirement.

We reverse.

PROCEDURAL BACKGROUND

Issuance of preliminary injunction

On November 25, 2009, the trial court issued a temporary restraining order, restraining appellant and Reliable Trust and Deed Services (Reliable), and their employees, agents and others acting on their behalf from conducting a foreclosure sale of, or transferring any interest in, the property located at 1527 Navarro Avenue, Pasadena, California (the Property). Included with the temporary restraining order was an order to show cause why a preliminary injunction should not be issued.

At the December 9, 2009 preliminary injunction hearing, counsel for appellant, Marshall Hann (Hann) and respondent's counsel, Samuel Johnson (Johnson) were present.[1] The argument focused on whether or not appellant had actually posted a $400,000 bail bond, the security for which was the Property. The trial court found no admissible evidence that the bond had been posted. Appellant claimed that it had a

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1 Reliable's counsel, Daniel Pearson (Pearson), did not appear, a week earlier having filed a declaration of "Non-Monetary Status."

"receipt" reflecting that it had been. Unconvinced, the trial court granted the preliminary injunction. During the hearing, neither party raised the issue of a preliminary injunction bond pursuant to Code of Civil Procedure section 529, subdivision (a).[2]

The following day, the trial court filed the written preliminary injunction which makes no reference to any injunction bond.[3] A proof of service reflected that it was served by mail on Hann and Pearson on December 14, 2009.

Violation of preliminary injunction

On January 11, 2010, Hann wrote an "opinion letter" to Reliable stating that Reliable could conduct the trustee sale of the Property despite the preliminary injunction. According to Hann, even though the superior court "orally granted a Preliminary Injunction," the preliminary injunction was not "operative" because respondent failed to post an injunction bond as required by section 529, subdivision (a). The letter also noted that service of a signed order had not been effected.

The next day, Reliable proceeded with the sale.

The first contempt proceedings

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2 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Section 529, subdivision (a) provides in part: "On granting an injunction, the court or judge *must* require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." (Italics added.)

3 The preliminary injunction states: "IT IS ORDERED THAT Plaintiff's application for a preliminary injunction is granted. Defendants and its employees, agents, and persons acting with them or on their behalf, are enjoined and restrained from transferring any ownership interest in the parcel of real estate located at 1527 Navarro Avenue, Pasadena, California 91103-2139 pending trial in this action or further order of this court. [¶] The court reserves jurisdiction to modify or dissolve the injunction as may be required in the interests of justice."

On February 18, 2010, respondent filed a "Motion for Sanctions; Imposition of a Constructive Trust; [and] the Setting Aside of Private Foreclosure Sale" (sanction motion), claiming that the Property had been sold in violation of the trial court's preliminary injunction. The memorandum recited how respondent came to learn of the sale and obtain a copy of the "Trustee's Deed Upon Sale."

On February 25, 2010, appellant filed an opposition to the sanction motion. It claimed that the preliminary injunction was void due to respondent's failure to post a preliminary injunction bond, and, though the proof of service of the preliminary injunction indicated service on Hann and Pearson on December 14, 2009, both counsel denied receiving a served copy.

At the March 12, 2010 hearing on the sanction motion, instead of ruling on it, the trial court issued an "Order to Show Cause Re Contempt" as to appellant and Reliable for willfully disobeying the preliminary injunction. It set the matter for hearing on April 22, 2010.

At the contempt hearing, the trial court found that appellant had actual notice of the preliminary injunction, that appellant had waived or forfeited the bond requirement by failing to mention it in its opposition to the petition for preliminary injunction and during the hearing on the preliminary injunction, and that appellant willfully disobeyed the preliminary injunction. Based upon these findings, the trial court found appellant in contempt and ordered it to pay $30,000, which it characterized as "monetary sanctions" for "contempt of court" and as "damages for the plaintiff [respondent]."[4]

The trial court's minute order was consistent with its oral pronouncements, but added that the preliminary injunction was valid and that appellant had the ability to comply with it, but nonetheless willfully directed that the foreclosure sale proceed. In conflict with its statement at the hearing, the trial court stated that the $30,000 fine was

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[4] The trial court found that Reliable did not willfully disobey the preliminary injunction order, and thus the contempt order was limited to Montana.

not for "damages," but was for "attorney fees and costs" and "as a sanction for defendant's contempt."

On June 11, 2010, appellant petitioned this court for a writ of mandate and/or prohibition challenging the contempt order. On June 29, 2010, we issued an order indicating that we were considering issuing a peremptory writ directing the trial court to vacate its contempt order because the record did not contain (1) an affidavit of facts constituting the contempt as required by section 1211, subdivision (a), and (2) evidence of the attorney's fees and costs incurred by respondent under section 1218, subdivision (a). On July 23, 2010, the trial court complied with our order and vacated its contempt order, rendering the writ proceeding moot.

The second contempt proceedings

On August 25, 2010, respondent reinitiated a contempt proceeding, filing an "Affidavit of Facts re the Initiating of Contempt of Court Proceeding in Relation to [appellant]," which was supplemented with another "affidavit" filed on November 15, 2010."[5] The declarations stated that: on December 10, 2009, a preliminary injunction was issued, restraining appellant from selling or transferring title to the Property; notice of the restraining order was served on Hann and Pearson by U.S. mail on December 14, 2009; Johnson learned that someone was changing the locks on the door to the Property and obtained a copy of a deed of a trustee's sale of the Property conducted by Reliable; one day before the sale, Hann provided Reliable with a letter indicating that appellant and Reliable had the ability to comply with the preliminary injunction but chose not to do so; and Johnson spent a total of 52.30 hours in connection with the contempt proceeding at his hourly rate of $350, causing respondent to incur legal fees of $18,305 and costs of $188.88.

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[5] Though designated "affidavits," in fact, they were declarations. (§ 116.130, subd (i).)

In appellant's response to the declarations, he raised essentially the same claims he asserted in his February 25, 2010, opposition to the sanction motion.

Respondent filed a reply, arguing, among other things, that appellant had no right to disregard the court's order without first challenging it in court, and that the preliminary injunction was properly served.

The trial court issued an order to show cause re contempt for willful disobedience of the injunction order.

Appellant then filed an opposition to the contempt order to show cause, again providing essentially the same arguments it had made in its previous oppositions.

At the contempt hearing, Hann argued that a contempt hearing could not be properly conducted without live testimony. He also objected that Johnson's declaration was hearsay and failed to establish actual notice because there was no evidence of actual service of the preliminary injunction on his clients but only service by mail on counsel, which was disputed. The trial court issued its "Order on Finding of Contempt." It recited that appellant and Reliable were served with the Order to Show Cause and the supporting affidavit of facts and that the defendants had notice of the preliminary injunction at the time that they willfully proceeded with the foreclosure sale. It stated: "The rule of law must prevail in this country. Parties are free to disagree with each other and with the courts but those disagreements are resolved, in our society, by our judicial system which affords due process to all concerned. To merely ignore a preliminary injunction because one side is of the view that it was improperly issued without notice to the other side, [without] appellate review or [without] return[ing] to the issuing court, can be viewed as nothing more than contempt of the court and of our judicial system." It found appellant and Reliable to be in contempt of court, fined each $1,000 payable to the court clerk and ordered them jointly and severally to pay respondent the reasonable attorney's fees and costs incurred in connection with the contempt proceedings.[6]

Appellant filed a petition for writ of mandate/or prohibition with this court regarding the new contempt order, which we denied without comment.[7]

Thereafter, a judgment was filed, holding appellant in contempt and ordering $23,590 in attorney's fees and $498.22 in costs.

DISCUSSION

I. Appellate jurisdiction

Section 1222 provides: "The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." Section 904.1, subdivision (a) setting forth appellate jurisdiction, states: "An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following: [¶] (1) From a judgment, except . . . (B) a judgment of contempt that is made final and conclusive by Section 1222." These sections establish that orders in a contempt proceeding are not appealable. The California Supreme Court in *People v. Gonzalez* (1996) 12 Cal.4th 804, 816 (*Gonzalez*) corroborates this conclusion. It states: "The contemner possesses no right of appeal, however, and review of the contempt judgment is by extraordinary writ." (*Gonzalez*, *supra*, 12 Cal.4th at p. 816.)

We therefore conclude that we are without jurisdiction to entertain appellant's appeal, at least as such. But "even when an order is not appealable, Courts of Appeal not infrequently treat an appeal as a writ and determine the issue presented." (*Patchett v. Bergamot Station, Ltd.* (2006) 143 Cal.App.4th 1390, 1396.) Though this is generally done in unusual cases (*Safai v. Safai* (2008) 164 Cal.App.4th 233, 242), an appeal can be treated as a writ in the interests of justice in the appellate court's discretion. (*County of Orange v. Superior Court* (2007) 155 Cal.App.4th 1253, 1257.)

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6 Because appellant is the only party before us, we do not discuss nor consider the contempt order against Reliable.

7 We take judicial notice of the appellate court file in the March 2, 2011 writ proceeding, appellate case No. B231241. (Evid. Code, § 452, subd. (d).)

We find that the interests of justice warrant treating this appeal as a writ proceeding. It is not an appeal from an interim order for which there may be a later opportunity for appeal, but an appeal from a final judgment of contempt for which there is no further appeal. We also consider that this purported appeal is from an adjudication of contempt, for which the contemner may be punished with up to five days in jail and a $1,000 fine. (§§ 1209, subd. (a)(5), 1218.) Because of the potential punishment, this type of proceeding is considered quasi-criminal, and the defendant possesses some of the rights of a criminal defendant (*Gonzalez, supra,* 12 Cal.4th at p. 816). This justifies our considering it on the merits as a writ. Further, a professional stigma attaches to an attorney accused of unilaterally flaunting a court order, which should not be left without a definitive determination of the attorney's conduct. Yet another reason for treating this appeal as a petition for writ of mandate is that a *Palma*[8] notice was issued earlier in the proceedings, suggesting that there were already problems in the handling of the contempt charge, justifying a closer review of this matter. Because it was filed as an appeal, it provides an opportunity for a more plenary review than was the case when the previous writ of March 2, 2011, was before us.

We therefore treat this proceeding as a writ proceeding and consider the merits.

II. Unilateral violation of void judgment

Respondent's principal contention is that appellant cannot challenge the propriety of the contempt judgment because appellant brazenly ignored the trial court's preliminary injunction without first challenging it in court. We begin our analysis with respondent's contention, because if correct, it is dispositive of this entire matter. We conclude that it is incorrect, and appellant could therefore properly ignore a void preliminary injunction and challenge its validity in defense of the contempt proceeding.

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8 *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.

While numerous other jurisdictions follow the "'collateral bar'" rule that persons affected by an injunctive order must challenge it directly and in the meantime obey it, California does not. "The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment." (*Gonzalez, supra,* 12 Cal.4th at p. 817; *see In re Misener* (1985) 38 Cal.3d 543, 558.) A contempt adjudication cannot stand if it is based upon the violation of a void injunction. (*Gonzalez, supra,* at pp. 817–818, citing 6 Witkin, Cal. Procedure, (5th ed. 2008) Provisional Remedies, § 330, p. 278; *Davidson v. Superior Court* (1999) 70 Cal.App.4th 514, 522, quoting *In re Misener, supra,* at p. 558.) "'The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment.' [Citation.] More broadly, '[a] void judgment may be attacked "'anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever.'"' [Citations.] Accordingly, 'in [a] contempt proceeding, the contemner may . . . collaterally challenge the validity of the order he or she is charged with violating.' [Citation.]" (*Moore v. Kaufman* (2010) 189 Cal.App.4th 604, 616; see also *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1162 (conc. opn. Baxter, J.).)

The articulated rationale for California's rule emanates "out of a concern to protect the constitutional rights of those affected by invalid injunctive orders, and to avoid forcing citizens to obey void injunctive orders on pain of punishment for contempt, . . . [A] person subject to a court's injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court." (*Gonzalez, supra,* 12 Cal.4th at p. 818.)

In light of the foregoing, we conclude that appellant could violate the preliminary injunction without forfeiting the opportunity to defend a contempt action by establishing that the injunction was a nullity. We must therefore determine whether or not the preliminary injunction was valid.

III. Preliminary injunction requires a bond

Section 529 states that the trial court *must* require an undertaking by the applicant on granting an injunction.[9] Thus, a preliminary injunction ordinarily cannot take effect unless and until the applicant provides an undertaking that it will pay damages that the restrained party may sustain if the court ultimately decides that the applicant was not entitled to the injunction. (*City of South San Francisco v. Cypress Lawn Cemetery Assn.* (1992) 11 Cal.App.4th 916, 920.) Without a bond, a preliminary injunction is a nullity. (*Oksner v. Superior Court* (1964) 229 Cal.App.2d 672, 687.)

It is undisputed that there was no preliminary injunction bond ordered or posted in this case. Consequently, under generally governing principles, the injunction appellant challenges was a nullity, the violation of which will not support a contempt finding, unless appellant waived or forfeited its entitlement to a bond.

IV. Waiver of injunction bond

A. Background

Respondent argues that appellant waived or forfeited his right to have a preliminary injunction bond posted. The trial court so found at the first contempt hearing, stating: "The Court finds that defendant Montana Bail Bonds waived or forfeited its right to a bond under CCP 529 by failing to request one in its opposition to Plaintiff's petition for a preliminary injunction (indeed, defendant did not even mention the requirement of CCP 529 in its opposition) by failing to mention the requirements of a bond at Plaintiff's hearing on her petition and by failing thereafter to mention the necessity for a bond until after the preliminarily enjoined event occurred (the foreclosure on Plaintiff's property)."

At the second contempt hearing, the trial court stated: "And there's also an argument that can be made that Montana Bail Bonds presumptively was aware of the

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9 Section 529, subdivision (b) provides several statutory exceptions to the bond requirement, none of which are applicable here.

requirement of a bond at the time that it opposed the petition for a preliminary hearing. Knowing that a bond, for its benefit, was available, [appellant] failed to call that to anybody's attention. That could be a basis upon [sic] implied finding that the bond had been waived."

B. Standard of Review

To review an adjudication of contempt, "'the responsibility of the reviewing court is merely to ascertain whether there was sufficient evidence before the trial court to sustain the judgment and order. The power to weigh the evidence rests with the trial court.' [Citations.]" (*In re Buckley* (1973) 10 Cal.3d 237, 247.)

C. Waiver exception to requirement of a bond

In addition to the statutory exceptions to the bond requirement (§ 529, subd. (b)), it has been held that the bond requirement can be waived or forfeited in very narrow circumstances. For example, the California Supreme Court has approved waiver of an injunction bond in some cases where the party seeking the injunction is indigent. (See *Conover v. Hall* (1974) 11 Cal.3d 842, 852–853.) Also, the requirement of a bond for a preliminary injunction may be waived where the parties stipulate to an injunction. (*Greenly v. Cooper* (1978) 77 Cal.App.3d 382, 385.) Here, the trial court's finding of waiver or forfeiture is unsupported by substantial evidence.

"'[W]aiver'" is the express relinquishment of a known right whereas "'forfeiture'" is the failure to object or to invoke a right. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.) There was no mention of a preliminary injunction bond in any of the papers filed in connection with the preliminary injunction, during oral argument at the injunction hearing or in the trial court's minute order. There is nothing in the record that would give rise to an obligation of appellant to raise the issue of the absence of the bond.

The statutory scheme for obtaining an injunction makes clear that a bond is mandatory. It is the obligation of the applicant seeking the injunction. Nothing in the injunction statutes condition the trial court's obligation to require a bond on a request from the parties. As stated in *Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 10,

"Since an undertaking is an indispensable prerequisite to the issuance of a preliminary injunction, regardless of whether the party to be restrained has reminded the court to require the applicant to post one, the restrained party does not waive its right to that statutorily mandated protection by failing to affirmatively request it. Therefore, the defendant's initial silence did not waive their right to an undertaking." For similar reasons, it cannot be said that a restrained party has forfeited the right to a bond by failing to invoke the right or object to the injunction issued without a bond.

It is the applicant for a preliminary injunction that is required to obtain the bond if it wants the benefit of an injunction. It is that party that places the restrained party in the position of being damaged by the injunction if it is later determined that it was improvidently granted. It is in the applicant's interest to make certain that all of the prerequisites for the issuance of the preliminary injunction have been satisfied. The applicant cannot sit by and hope to avoid the expense of the bond by reason of the trial court's oversight in failing to order it.

Relying upon *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729 (*Smith*), respondent argues that appellant forfeited or waived the preliminary injunction bond by failing to ask for one in its opposition to the request for a preliminary injunction or at the hearing on the request. *Smith* is distinguishable. There, Dr. Brenton Smith obtained a preliminary injunction ordering that his status at Selma Community Hospital be restored until his lawsuit was decided. (*Smith, supra,* 182 Cal.App.4th at pp. 734–735.) Smith's memorandum of points and authorities in support of his motion for a preliminary injunction included the following heading: "'VI. A BOND IS UNNECESSARY.'" (*Id.* at p. 738.) Under that heading, he asserted: "'In this instance, a bond is unnecessary because there can be no compensable damages to Defendant Hospital for following the law with respect to the treatment of [Smith's] Medical Staff membership and clinical privileges.'" (*Ibid.*) The opposition to Smith's motion for a preliminary injunction did not address Smith's claim that a bond was unnecessary, did not mention the bond requirement, and did not cite section 529. (*Smith, supra,* at p. 738.)

(*Ibid.*) During the hearing on the motion for preliminary injunction, the topic of a bond was not addressed. (*Ibid*.) The order granting the preliminary injunction issued by the superior court, however, included a statement in the last sentence: "'No bond is ordered to be posted by [Smith].'" (*Ibid.*) The order included no discussion or express findings of fact relating to the bond. The Court of Appeal concluded that substantial evidence supported the superior court's implied finding that defendants waived the bond requirement, as they were aware of Smith's position regarding the bond, yet did not oppose it in writing or at the hearing. (*Id*. at p. 746.)

The facts of *Smith* bear little resemblance to those presented in the matter before us. Respondent did not indicate anywhere in her papers that she wanted to be relieved of the bond obligation. She did not mention the bond at the hearing on the preliminary injunction request. The trial court's order did not mention a bond requirement. In short, there were no facts that would have required appellant to say anything about a bond or lose its right to one.

Given the complete absence of such facts, the trial court's finding of an implied waiver is unsupported by substantial evidence and must be reversed. Because the bond requirement was not waived, the preliminary injunction was a nullity upon which the contempt order cannot stand. Having so concluded, we need not consider appellant's other challenges to the contempt order.

DISPOSITION

The contempt judgment is reversed. Each party to bear its and her own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ