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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

AMY PAUCHOO YAP,

Plaintiff and Appellant,

v.

STEVEN TECK-BOO KHO et al.,

Defendants and Respondents.

B262608

(Los Angeles County
Super. Ct. No. VC059836 c/w
VD057565)

APPEAL from an order of the Superior Court of Los Angeles County. Thomas I. McKnew, Jr., Judge. Affirmed in part and remanded in part.

Amy Pauchoo Yap, in pro. per., for Plaintiff and Appellant.

Leslie Ellen Shear and Julia C. Shear Kushner for
Defendants and Respondents Sharon Yun Fung and Jonathan
Kwok Hung Wan.

No appearance for Defendant and Respondent Steven Teck-
Boo Kho.

* * * * *

A family court adjudicating a marital dissolution found that a husband's business no longer held an interest in its sole venture, and on that basis declined to award the wife any compensation for that business. After the dissolution became final in 2007, the husband sued his business partner for not splitting the venture's profits with him. Once wife learned that husband had not been truthful during the dissolution case regarding his continuing interest in the venture, wife (1) moved to reopen the dissolution case, and (2) filed a civil lawsuit against husband, his partner, and his partner's spouse. The civil suit eventually went to trial in 2015, and was dismissed. Wife appeals. We conclude that the civil suit was properly dismissed, but that wife's motion to reopen the dissolution case was properly filed and remains to be litigated. We remand the dissolution case to the family court for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Marriage*

Amy Pauchoo Yap (wife) and Steven Teck-Boo Kho (husband) married in 1983.

B. *Husband's Business Venture*

In 2002, husband started a real estate construction and development company called Kho Builders, Inc. (Kho Builders). Kho Builders and another investor formed Cal West Development & Investment, Inc. (Cal West), and Cal West bought two properties for residential development—one in Buena Park and the other in Walnut.

When the other investor wanted out of Cal West, he offered to sell his interest in the properties to Kho Builders for \$1.48 million. To finance this purchase, husband signed a promissory note to obtain a \$1.5 million loan from Sharon Yun Fung (Fung)

in November 2004. The investor then authorized Cal West to convey the two properties to husband.

Fung disbursed the loan on November 30, 2004 and December 13, 2004. Although the promissory note was not due until June 1, 2006, husband quitclaimed both properties to Fung in January 2005, explicitly indicating that each grant was a “bona fide gift.”

Fung thereafter issued checks to husband for \$80,000 and \$60,000.

C. The Dissolution Case

Husband and wife separated on December 26, 2004. Seven weeks later, on Valentine’s Day 2005, husband filed for dissolution.

In the dissolution case, wife alleged that husband (through Kho Builders) and Fung were “de facto partners[]” in a venture to develop the Buena Park and Walnut properties. Because Kho Builders was a community property asset, wife asserted, she was entitled to one-half of any profits Kho Builders realized from the venture. Husband disputed wife’s allegations. To do so, he submitted a sworn declaration attesting that neither he nor Kho Builders had “any claim on” or “ownership interest in” “either property,” and that all payments he received were part of his “limited” role as “a salaried employee” of Fung. Based on husband’s declaration as well as the language in the quitclaim deeds expressing Kho Builder’s divestiture of *all* interest in the two properties, the family court found that husband “essentially gave . . . Fung the [two] properties to repay the loan” and that “[t]here was no partnership between . . . Fung” and husband “with respect to the [two] properties.”

The judgment of dissolution was entered on July 25, 2007.

D. Husband's Lawsuit Against Fung

In May 2008, husband sued Fung. In the operative third amended complaint, husband alleged claims for (1) breach of contract, (2) fraud, and (3) unjust enrichment. As part of discovery in the lawsuit, Fung deposed husband. In both the operative complaint and his sworn deposition testimony, husband revealed that he had lied about the venture during the dissolution case. In contrast to the position husband took in the dissolution case, husband now maintained that (1) he had quitclaimed the two properties to Fung—not as a “bona fide gift” to repay Fung’s loans—but rather as collateral for her \$1.5 million loan that he still planned to repay, and (2) he was not Fung’s employee, but was instead Fung’s partner in an ongoing venture to develop and sell the properties (such that husband was entitled to half of the \$1.805 million in profits from the sale of the properties in 2006 and 2007).

Wife was not a party to this lawsuit, and the record does not indicate that she was served with any of the pleadings.

E. Wife's Awareness of Husband's Lawsuit

Wife indicated that she first learned of husband’s lawsuit against Fung—and husband’s admission that he had lied about the nature of his relationship with Fung—in October 2009.

In November 2009, wife sued Fung in civil court for Fung’s complicity in helping husband defraud the family court; in particular, wife in the operative second amended complaint alleged claims for (1) fraud, (2) unjust enrichment, and (3) a violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). The lawsuit was dismissed in July 2010, on the ground that the “family law court has exclusive jurisdiction over” the dispute regarding Kho Builder’s status as community property and over wife’s entitlement to a share thereof.

II. Procedural Background

A. *Motion to Modify Judgment in the Dissolution Case*

In August 2010, wife filed a motion to “modif[y]” the “judgment” in the dissolution case. In her motion, wife alleged the husband had “concealed” his continuing interest in the Buena Park and Walnut properties; wife sought “equitable relief for the fraudulent transfer of community property.”

On December 7, 2011, wife filed a pleading on joinder to join Fung and Fung’s husband Jonathan Kwok Hung Wan (Fung’s husband) into the dissolution case. The pleading alleged that Fung’s husband had participated in making the loan to Kho Builders. The pleading purported to include claims for (1) fraud, (2) unjust enrichment, (3) a violation of the unfair competition law, (4) civil conspiracy, and (5) fraudulent conveyance.

The trial court subsequently deemed the pleading on joinder to be the operative pleading for wife’s motion to modify the judgment.

B. *Civil Lawsuit*

In October 2011, wife sued husband, Fung, and Fung’s husband civilly for (1) fraud, (2) unjust enrichment, (3) a violation of the unfair competition law, (4) civil conspiracy, and (5) fraudulent conveyance. In June 2012, the trial court sustained demurrers without leave to amend as to all claims against Fung and Fung’s husband.

C. *Trial of Consolidated Actions*

On January 20, 2015, trial commenced. By that time, wife’s motion to modify the judgment in the dissolution case and her civil lawsuit had been consolidated.

Despite the consolidation, the trial court at trial announced it would not “entertain a reopening [of the] 2007 dissolution proceeding.”

The trial court went on to dismiss wife's civil lawsuit. Even though the June 2012 demurrer in wife's civil lawsuit had already removed Fung's husband and Fung from the case, the trial court dismissed both of them a second time: The court granted a nonsuit to Fung's husband because wife's opening statement did not mention any wrongdoing by him, and granted a dismissal to Fung because a court had already dismissed wife's first, November 2009 lawsuit against Fung and because the current civil lawsuit against Fung was time-barred. The trial court dismissed the civil lawsuit against husband on the ground that it was time-barred. Feeling it had "no choice," the court "dismissed" the case "in its entirety."

D. Posttrial motions

On January 30, 2015, Yap filed two additional motions: (1) a motion to disqualify the trial judge under Code of Civil Procedure section 170.6, and (2) a motion for new trial (Code Civ. Proc., § 657). The trial court denied the first motion as untimely and denied the second motion after entertaining pleading and argument, but without issuing a written decision.

E. Appeal

Wife filed a timely notice of appeal. In the operative amended notice of appeal filed in March 2015, wife specified the three orders she sought to appeal: (1) the court's January 20, 2015 order of dismissal; (2) the court's February 3, 2015 order denying her motion to disqualify; and (3) the court's February 23, 2015 order denying a new trial.

On May 10, 2017, the trial court issued a written ruling memorializing its January 20, 2015 order of dismissal.¹

¹ We take judicial notice of this document. (Evid. Code, §§ 452, subds. (c) & (d) & 459.)

DISCUSSION

I. Appellate Jurisdiction

Fung and Fung’s husband argue that we have no appellate jurisdiction over any of the three orders wife seeks to appeal. We independently examine whether we have jurisdiction over an appeal. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 252.)

We have jurisdiction over wife’s appeal of the trial court’s January 2015 dismissal order. As a general matter, we may entertain an appeal “[f]rom a judgment.” (Code Civ. Proc., § 904.1, subd. (a)(1).) However, a dismissal qualifies as a “judgment” only if it is “in the form of a written order signed by the court and filed in the action.” (Code Civ. Proc., § 581d; see also *Katzenstein v. Chabad of Poway* (2015) 237 Cal.App.4th 759, 769; *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1577-1578.) Although the trial court’s initial dismissal ruling was oral (and thus did qualify as an appealable judgment), the court subsequently issued a written ruling; that act, which is now part of the record because we grant wife’s Motion to Augment the Record, cured this deficiency and renders the order properly subject to appeal.

In her reply brief, wife appears to abandon her efforts to appeal the other two orders designated in her notice of appeal—namely, the order denying her motion to disqualify the judge and the order denying her motion for new trial. We may not entertain an appeal of those orders in any event. Disqualification rulings are not appealable because the sole avenue for appellate review of such rulings is by writ. (Code Civ. Proc., § 170.3, subd. (d); *People v. Hull* (1991) 1 Cal.4th 266, 276.) Orders denying a new trial are also not appealable because they are subsumed into appellate review of the underlying judgment. (*Walker v. Los*

Angeles County Metropolitan Transportation Authority (2005) 35 Cal.4th 15, 18.)

II. Merits of Dismissal

Wife challenges the trial court's dismissal of her case. To the extent the trial court's dismissal ruling rests on questions of law or the application of the law to undisputed facts, our review is de novo (*Westchester Secondary Charter School v. Los Angeles Unified School Dist.* (2015) 237 Cal.App.4th 1226, 1236); to the extent it rests on disputed questions of fact, we review the court's factual findings for substantial evidence (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 673).

A. Civil Lawsuit

1. As to Fung and Fung's husband

Fung and Fung's husband were dismissed from wife's civil lawsuit in June 2012, when the trial court sustained their demurrers without leave to amend. The civil lawsuit should never have gone to trial against them.

Wife assails this conclusion. She argues that the demurrer was wrongly sustained, but we may not entertain that challenge: Wife did not designate the June 6, 2012 demurrer in her amended notice of appeal (*Faunce v. Cate* (2013) 222 Cal.App.4th 166, 170 ["We have no jurisdiction over an order not mentioned in the notice of appeal"]); what is more, she could not have done so because the time to appeal the demurrer had long since elapsed (Cal. Rules of Court, rule 8.104(a)(1) [requiring notice of appeal to be filed at most 180 days after entry of judgment]). Wife also notes that the court at trial dismissed Fung and Fung's husband for reasons other than the ones we cite. However, because our task is to review the court's ruling, not its reasoning (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12), we are not bound by the court's stated reasons at trial and may affirm on any ground supported by the record.

2. As to husband

To “balance[]” “[t]he public policy of assuring finality of judgments” in dissolution cases “against the public interest in ensuring proper division of marital property,” especially when that “division” “is inequitable” “due to” the “misconduct of one of the parties” (Fam. Code, § 2120, subds. (b) & (c))², our Legislature added a Relief from Judgment chapter to the Family Code and thereby created a specific two-part mechanism allowing former spouses to modify a family court’s final judgment in dissolution cases as to martial property adjudicated in that judgment. (§§ 2120-2129; *In re Marriage of Georgiou & Leslie* (2013) 218 Cal.App.4th 561, 570-571 (*Marriage of Georgiou*).) If one spouse learns within the first six months after a dissolution judgment becomes final that the other spouse may have perpetrated a fraud on the family court, the spouse may seek relief under Code of Civil Procedure section 473. (§ 2121, subd. (a); *Marriage of Georgiou*, at p. 570; *In re Marriage of Connolly* (1979) 23 Cal.3d 590, 596 [“Relief under this section is authorized where there is proof of fraud which results in excusable neglect or mistake”].) If the spouse learns thereafter that the other spouse has committed “[a]ctual fraud” on, or “[p]erjury” before, the family court, the spouse may seek relief under section 2122. (§ 2122, subds. (a) & (b); see generally §§ 2120-2129.)

These statutory remedies are exclusive and bar the spouse from suing the other in tort for the wrongful concealment of community property. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143, 1146-1148 (*Rubenstein*).) This bar rests in part upon the doctrine of res judicata: Until the final dissolution judgment is modified under the above-stated

² All further statutory references are to the Family Code unless otherwise indicated.

procedures, that judgment is final and precludes any lawsuit collaterally attacking its findings. (*Id.* at p. 1144.)

Under this authority, wife’s civil lawsuit against husband is barred. Her lawsuit enumerates five claims—for fraud, unjust enrichment, civil conspiracy, fraudulent conveyance, and violating the unfair competition law—all of which are premised upon husband’s misrepresentations during the dissolution case regarding his venture with Fung. The civil lawsuit against husband must be dismissed.

Wife resists this conclusion, arguing that *Dale v. Dale* (1998) 66 Cal.App.4th 1172, 1178-1183 and *Worton v. Worton* (1991) 234 Cal.App.3d 1638, 1647-1649 allowed one spouse to sue another in tort based on the spouse’s misrepresentations during a dissolution case. The holdings of these cases were controversial, and many courts disagreed with them. (*Kuehn v. Kuehn* (2000) 85 Cal.App.4th 824, 834; *Rubenstein, supra*, 81 Cal.App.4th at pp. 1146-1147 & fn. 9.) But irrespective of their soundness, *Dale* and *Worton* are irrelevant in this case because the Relief from Judgment chapter—and its rule of exclusivity—supersede *Dale* and *Worton*, and apply to all dissolutions filed after January 1, 1993 (§ 2129), which includes the February 2005 dissolution underlying this case. (Accord, *Rubenstein*, at p. 1147.)

B. Motion to Modify Judgment in Dissolution Case

Although the trial court purported to dismiss wife’s consolidated case “in its entirety,” the court repeatedly stated that it was *not* “entertain[ing] [any] reopening [of the] 2007 dissolution proceeding.” Thus, wife’s motion to modify the judgment has yet to be adjudicated. Because the motion is the sole remaining action between wife, husband, Fung, and Fung’s husband, and because such motions must be heard in family court (see, e.g., *Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1449-1451 (*Glade*) [“One department of the superior court cannot

enjoin, restrain, or otherwise interfere with the judicial act of another department of the superior court”]), we remand the case to family court for further proceedings on wife’s motion to modify.

Fung and Fung’s husband resist this conclusion, and do so on three grounds. (Husband never filed a brief.)

First, they argue that wife’s motion to modify the judgment is untimely. A motion seeking to set aside a final dissolution on the grounds of actual fraud or perjury must be “brought within one year after the date on which the complaining party either did discover, or should have discovered” the fraud or perjury.

(§ 2122, subds. (a) & (b); accord, *Marriage of Georgiou, supra*, 218 Cal.App.4th at p. 571.) Wife filed her motion in August 2010, which is less than one year after (1) wife claims—without contradiction thus far—to have first learned of husband’s lawsuit against Fung, and (2) wife sued Fung civilly, and in her complaint alleged husband’s fraud and perjury in the dissolution case. Fung and Fung’s husband argue that wife’s August 2010 filing is defective because it does not expressly invoke section 2122. However, nothing in the Relief from Judgment chapter requires express citation to its provisions. (§§ 2120-2129.) More to the point, courts in evaluating the sufficiency of pleadings look to the gravamen of what is pled rather than technicalities. (*County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312, 1326, fn. 11 [looking to “nature” of challenge in pleadings]; see generally *Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1386 [noting “our policy of emphasizing substance over form in characterizing pleadings”]; *People v. Schueren* (1973) 10 Cal.3d 553, 558 [“reference to the wrong statute” in a pleading is “of no consequence”]; Civ. Code, § 3528 [“The law respects form less than substance”].) The gravamen of wife’s August 2010 motion is that husband lied to, and thereby committed a fraud upon, the family court. This falls

squarely within section 2122's reach, and precludes a facial challenge to the timeliness of the motion.³

Second, Fung and Fung's husband assert that res judicata bars wife's motion to modify the dissolution judgment. This assertion ignores that the Relief from Judgment provisions operate as a legislatively created *exception* to res judicata. (Accord, *Rubenstein, supra*, 81 Cal.App.4th at p. 1152 [rejecting res judicata defense to motion to modify].)

Lastly, Fung and Fung's husband contend that they are not proper parties to the motion to modify the dissolution judgment because the dissolution involves husband and wife, not them. This contention ignores that third parties may be joined in a dissolution case, at least where their joinder "would be appropriate to determine the particular issue in the proceeding and . . . the person to be joined as a party is either indispensable for the court to make an order about that issue or is necessary to the enforcement of any judgment rendered on that issue." (Cal. Rules of Court, rule 5.24(e)(2); see also § 2021, subd. (a) [allowing for joinder of persons "claim[ing] an interest in the proceeding"]; see also *Glade, supra*, 38 Cal.App.4th at pp. 1450-1452 [so noting].) In this case, wife has alleged that husband has an interest in the profits from his real estate venture with Fung; that Fung and her husband have withheld those profits; and that

³ We reject wife's alternative argument that her motion was timely under section 2556. That section has no time limit, but applies only to marital assets "that have not been previously adjudicated by a judgment in the proceeding." (§ 2556; *In re Marriage of Thorne & Raccina* (2012) 203 Cal.App.4th 492, 501 [statute does not reach assets "actually litigated and divided in the previous proceeding"].) Because wife's interest in Kho Builders was specifically and actually litigated in the original dissolution case, section 2556 is inapplicable.

half of those profits are community property. “Joinder [of a third party] is proper where a spouse alleges that the other spouse has illegally made a gift of community funds” to that third party (*Babcock v. Superior Court* (1994) 29 Cal.App.4th 721, 725-726); the same is true when the other spouse hides community funds with third parties and is then cheated out of those funds by those third parties. In both cases, joinder of the third parties is necessary to enforce any judgment requiring refund of the property to the defrauded spouse. Indeed, Fung intervened in the original dissolution case for precisely this reason. Based on wife’s motion, the joinder of Fung and her husband is proper at this time.

DISPOSITION

We affirm the judgment dismissing the civil action in case number VC059836. We remand case number VD057565 to the family court to consider wife’s motion to modify the judgment and, if appropriate, conduct further proceedings. Each party to bear its own costs.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.