Filed 6/12/18 Elie v. Kallie CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MEHRDAD ELIE, Plaintiff and Appellant, v. JOHN KALLIE, Defendant and Respondent.	B278267 (Los Angeles County Super. Ct. No. BC559113)

APPEAL from a postjudgment order of the Superior Court of Los Angeles County, Michael J. Raphael, Judge. Dismissed.

Jeffer Mangels Butler & Mitchell, Michael J. Hassen, Joseph N. Demko, Christopher H. Doyle, for Plaintiff and Appellant.

Fredman Lieberman Pearl, Howard S. Fredman, for Defendant and Respondent.

INTRODUCTION

This is the second of two appeals filed by seller Mehrdad Elie concerning his sale of a condominium to buyer John Kallie. In the first appeal (*Ellie v. Kallie,* B272360), seller challenged the judgment ordering the sale of the property and awarding attorney fees and costs to buyer. In this appeal, seller attacks the postjudgment order requiring him to post an undertaking or appeal bond to stay enforcement of the judgment pending appeal. In neither appeal, however, did seller petition for a writ of supersedeas to stay enforcement of the postjudgment order. For the reasons that follow, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are set forth in our opinion affirming the underlying judgment, also filed today. (*Elie v. Kallie* (June 12, 2018, B272360 [nonpub. opn.].)

Briefly, seller sued buyer for declaratory relief to void the parties' agreement on the basis there was no "meeting of the minds" and, consequently, no enforceable agreement.[1] Buyer cross-complained for specific performance. The trial court entered judgment in favor of buyer, ordered specific performance of the parties' contract, and awarded buyer attorney fees and costs.

These rulings resolved the pleadings between seller and buyer, leaving only seller's complaint against the real estate brokers. Before the final judgment was entered in favor of buyer, counsel for seller and counsel for the real estate defendants

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[1] Seller also sued his realtors. They are not parties to either appeal.

stipulated to stay the litigation between their clients pending the seller's appeal of the judgment in favor of buyer. Counsel for buyer did not join in the stipulation. In approving the stipulation, the trial court "stay[ed] execution of judgment until the appeal has terminated," but neither the stipulation nor the order mentioned buyer.

The second amended judgment between seller and buyer—the one that triggered seller's right to appeal—was filed April 20, 2016. It required seller, "within seven calendar days of entry of this Judgment and the lifting of any stay of its enforcement," to begin the process to consummate the sale of the real property by delivering signed instructions to escrow. The judgment did not refer to the earlier order based on the stipulation between seller and the realtors.

On June 15, 2016, buyer filed a motion to enforce the judgment or to set a "bond and require its posting to stay enforcement during appeal." (Code Civ. Proc., § 917.4.)[2] Seller opposed the motion, advising the court that counsel for seller and buyer both agreed a stay was appropriate pending appeal. But seller also took the position the stipulation it entered into with counsel for the *real estate defendants*—which did not provide for the posting of an appellate bond—was somehow binding on buyer. The declaration by seller's counsel, Christopher H. Doyle, stated, "This Court has previously ordered that execution of the judgment be stayed pending appeal without requiring posting security. (I have attached as Exhibit A a true and correct copy of the order entered by this Court on March 23, 2016.)" Alternatively, seller suggested (1) buyer deposit the balance of

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[2] All statutory references are to the Code of Civil Procedure.

the purchase price in escrow and deduct the awarded attorney fees from the purchase price should buyer prevail on appeal; (2) no undertaking was required because, with a tenant living in the property, seller had no "right to possession"; (§ 917.4) or, (3) if an undertaking were ordered, it be for a nominal sum, "for example $5,000."

Buyer's motion to set an undertaking was argued September 15, 2016. The hearing was not reported. The trial court ordered seller to post a bond or undertaking pursuant to two different provisions. Under section 917.4, a portion of the bond was based on fair market value for use and occupancy of the real property; under section 917.1, subdivision (d), a portion was based on the award of attorney fees and costs. Relying on the declaration of buyer's real estate expert, the trial court calculated the fair market value for use and occupancy at $3,500 per month, for an estimated 18 months. The base bond/undertaking amount under section 917.4 was $63,300; it was to be either doubled for a bond or posted at one-and-one-half times that sum if seller used an admitted surety insurer. No separate sum was awarded under section 917.4 for any waste the tenant may commit on the real property.

The bond/undertaking amount was also to include an additional $97,516, the sum included in the judgment as buyer's attorney fees and costs. (§ 917.1, subd. (d).)

Plaintiff appealed.[3] In respondent's brief, buyer advised, "Although [seller] never posted the bond or undertaking, the

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[3] Seller attached a nonappealable "memorandum of decision" to the Civil Case Information sheet filed October 31, 2016. (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901.) This court issued an order on September 27, 2017, asking the

issue was resolved by [seller's] furnishing [buyer] a letter of credit in an agreed-upon amount." Given this information, we asked counsel to submit supplemental letter briefs addressing whether (1) seller was actually an aggrieved party, (2) seller's failure to seek a writ of supersedeas or other extraordinary relief pending appeal rendered the appeal moot, and (3) if not, this court can provide any effective relief.

Both parties responded to our request. They agreed seller was aggrieved, with seller noting he "was forced to incur costs associated with the standby letter of credit."

Buyer stated, "it was clear that the seller would never have provided a letter of credit in an agreed-upon amount" without the postjudgment order. Buyer took no position on the questions of whether seller should have sought extraordinary relief and there is any effective relief seller can obtain at this point, but did assert that if he "prevails on the main appeal, the letter of credit is payable to" him.

Seller asserted he "need not have sought extraordinary relief from the trial court's order that he post an undertaking or bond because that order was made [appealable by] section 904.1[, subdivision] (a)(2).)" Seller described "the effective relief that this Court can provide is to reverse the trial court's order concerning the bond." Seller reiterated he has incurred costs, but did not specify what they were or explain how, if at all, they could be recouped.

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parties to brief whether seller was appealing from a nonappealable tentative ruling. The record on appeal, however, included the final, appealable order.

DISCUSSION

The Postjudgment Order Is Not Appealable

Citing only section 904.1, subd. (a)(2), seller asserts the order that he post an undertaking or bond is appealable as an order after an appealable judgment. The Supreme Court has determined, however, that "[d]espite the inclusive language of . . . section 904.1, subdivision (b), not every postjudgment order that follows a final appealable judgment is appealable." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651.) The trial court's postjudgment order requiring an undertaking or appellate bond falls into this category.

Seller has not cited, nor have we discovered, any appellate decisions holding that a postjudgment order requiring the posting of an undertaking or appellate bond is itself appealable. Rather, seller's remedy has always been a petition to the reviewing court for a writ of supersedeas, the purpose of which is to suspend enforcement of the postjudgment order pending appeal.[4]

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[4] Authority for writ review of the postjudgment order is plentiful. (Cal. Rules of Court, Rule 8.112(a)(1) ["A party seeking to stay enforcement of a judgment or order pending appeal may serve and file a petition for writ of supersedeas in the reviewing court"]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1434 [petition for writ of supersedeas; no automatic stay on appeal from SLAPP judgment that included award of attorney fees: "To stay enforcement of such a judgment, the SLAPP plaintiff must give an appropriate appeal bond or undertaking under the money judgment exception to the automatic stay rule"]; *Chapala Management Corp. v. Stanton* (2010) 186 Cal.App.4th 1532, 1540, 1547 [petition for writ of supersedeas; appellant not required to post bond to stay appeal of judgment for injunctive relief and award of attorney fees]; *Vadas v. Sosnowski* (1989) 210 Cal. App.3d 471, 427, 474-475 [petition for writ of supersedeas

This Court Will Not Treat the Appeal as a Petition for Writ of Supersedeas

We decline to treat the appeal as a petition for writ of supersedeas. With our opinion today affirming the judgment and postjudgment orders in buyer's favor, this court cannot provide any effective relief to seller who, in any event, never complied with the trial court's order that he post an undertaking or appellate bond. Instead, he was able to come to an agreement with buyer for issuance of a standby letter of credit. Despite seller's assertion that he would not have taken this course of action but for the trial court's order, we are still left with an issue that is moot or only of abstract significance.

Additionally, seller did not provide this court with an adequate record for review; there is no reporter's transcript or adequate substitute for the hearing where the postjudgment order was made. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 ["Because they failed to furnish an adequate record . . . , [the appellant's] claim must be resolved against [him]"].) We have no way of knowing, for example, what counsel discussed and what agreements, if any, were reached.

Seller has also failed to support his challenge to the order with sufficient legal argument or cogent authority. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 (*Allen*).) As noted,

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granted to stay enforcement of judgment in an attorney malpractice case for costs alone without appellant's posting a bond]; *Baar v. Smith* (1927) 201 Cal. 87, 104-105 [petition for writ of supersedeas granted to permit appeal from judgment ordering appellant to deliver stock without posting an appellate bond]; *Freeman v. Donohue* (1922) 188 Cal. 170, 174 [petition for writ of supersedeas granted to prevent respondent from executing on judgment after appellant posted a bond].)

the trial court's order was based on both section 917.4[5] and section 917.1, subdivision (d).[6] But seller ignored section 917.4 in his opening and reply briefs and did not explain why the trial court erred by relying on section 917.4. His failure to brief the issue has resulted in his forfeiture of it. Trial court decisions are presumed correct; and seller, as appellant, has the burden to "to support claims of error with meaningful argument and citation to authority. (Cal. Rules of Court, rule 8.204(a)(1)(B) . . . .) When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration. [Citations.] In addition, citing cases without any discussion of their application to the present case results in forfeiture. [Citations.] We are not required to examine undeveloped claims or to supply arguments for the litigants." (*Allen, supra,* 234 Cal.App.4th at p. 52.)

Nor do we agree the judgment in this case was for "costs only," as seller argues. Buyer was awarded specific performance, with seller ordered to deliver signed instructions and an executed grant deed into escrow, plus attorney fees and costs. Again, seller's failure to acknowledge the bases for the trial court' postjudgment order and to brief the section 917.4 issue resulted in a forfeiture.

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[5] Section 917.4 provides in pertinent part, "The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order appealed from directs the sale, conveyance or delivery of possession of real property . . . ."

[6] Section 917.1, subdivision (d) provides that no undertaking is "required . . . solely for costs awarded [pursuant to section 1021 through 1039]."

Seller's overarching complaint is an abuse of discretion by the trial court. As with the other issues, seller failed to support this issue with argument or apt authority. It, too, has been forfeited: "Appellate briefs must provide argument and legal authority for the positions taken. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.] We are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956, internal quotation marks omitted.)

Seller appealed from a nonappealable, postjudgment order. His remedy was to seek a writ of supersedeas. Seller 's arguments in this court, including those presented in response to our request for supplemental briefing, failed to carry his burden to demonstrate error. Accordingly, we do not treat the appeal a petition for extraordinary relief, but dismiss it as having been taken from a nonappealable order.

DISPOSITION

The appeal from the postjudgment order is dismissed. Defendant is awarded costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.