Filed 11/21/19 Bank of America, N.A. v. Figg CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BANK OF AMERICA, N.A., Plaintiff and Respondent, v. JACQUIE A. FIGG, as Trustee, etc., Defendant and Appellant; CITY OF REDONDO BEACH, Defendant and Respondent.	B290302 (Los Angeles County Super. Ct. No. BC586255)

APPEAL from an order of the Superior Court of Los Angeles County. Terry A. Green, Judge. Appeal dismissed.

Law Office of Richard L. Antognini and Richard L. Antognini for Defendant and Appellant.

Wright Finlay & Zak, Jonathan D. Fink and Michael J. Gilligan for Plaintiff and Respondent.

Richards, Watson & Gershon and Lisa Bond for Defendant and Respondent.

In January 2018, the trial court entered default judgment against all defendants in this case. Prior to entry of judgment, however, defendant and appellant Jacquie A. Figg, as trustee of the Paulina 733 Revocable Living Trust (appellant), had filed a motion to set aside an earlier-entered default against her.[1] Although appellant filed her motion to set aside default before entry of the default judgment, the trial court heard and decided the motion in April 2018, months after judgment had been entered. Appellant filed this appeal from the trial court's April 2018 order—entered postjudgment—denying her motion to set aside default. On appeal, however, appellant does not challenge the postjudgment order denying relief from default. Instead, appellant challenges only the court's entry of default judgment, arguing as a matter of law, Code of Civil Procedure section 764.010 (section 764.010) barred the trial court from entering default judgment against her.

As explained below, we conclude we lack jurisdiction to consider appellant's appeal. Accordingly, we dismiss the appeal.

---

[1] The other defendants, excluding the City of Redondo Beach (City), are not parties to this appeal. Because the City has stipulated with the parties below to be bound by the judgment issued below, the City did not fully brief the issues presented in this appeal.

BACKGROUND

Because the factual history of this case is not particularly germane to our decision, we briefly summarize it here.

1. Complaint and Answer

On June 25, 2015, respondent Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing LP (respondent) filed a complaint against appellant and five other defendants who are not parties to this appeal. The complaint alleged two causes of action: cancellation of instruments and declaratory relief. In its complaint, respondent claimed it held a deed of trust to real property in Redondo Beach (the property). The complaint alleged one of the defendants executed and recorded that deed of trust in 2003 to secure a $650,000 loan against the property (2003 deed of trust). The complaint further alleged that in late 2010 and early 2011 the defendants, including appellant, participated in a fraudulent scheme in an attempt to reconvey the property and create additional liens or encumbrances on the property superior to that of respondent. Respondent sought to have the fraudulent conveyances and other liens canceled as well as a declaration that its 2003 deed of trust was in the first priority position. Respondent attached multiple documents to the complaint to support its allegations.[2]

On October 29, 2015, appellant filed a verified answer to the complaint. Appellant denied almost all allegations of the

---

[2] In September 2016, respondent filed a supplemental complaint adding defendants and additional facts and attaching additional documents to reflect events that occurred after the original complaint was filed. The supplemental complaint did not include new causes of action.

complaint and alleged 11 affirmative defenses, including defenses asserting the 2003 deed of trust was void or otherwise unenforceable. Appellant admitted she claimed a 100 percent ownership interest in the property and would "disavow or otherwise challenge" respondent's claim to the deed of trust or other ownership interest. Appellant was represented by counsel.

2. Appellant's First Default Entered Then Set Aside

In May 2016, after appellant failed to provide discovery responses as ordered by the trial court and failed to pay sanctions as also ordered by the trial court, the court struck appellant's answer and entered her default. Appellant hired new counsel and filed motions to set aside both the May 2016 default and the trial court's order striking appellant's answer. In September 2016, over respondent's opposition, the trial court granted appellant's motions and set aside both the default and the order striking appellant's answer. The court also ordered appellant to respond to discovery without objections and to pay the previously ordered sanctions no later than October 12, 2016.

3. Appellant's Second Default Entered Followed by Default Judgment

Appellant failed to respond to discovery or to pay sanctions by the October 12 deadline as ordered by the trial court and, by early November 2016, she was no longer represented by counsel. At a November 2016 case management conference, appellant appeared in propria persona and provided respondent with a check for the court-ordered sanctions, as well as with discovery responses (although appellant's responses were mostly objections, which the court had ordered her not to do). Despite the requirement that the trust be represented by an attorney, it was months before appellant again retained legal counsel. During

that time, appellant failed to appear for a status conference, and the trial court ruled if appellant again failed to appear, the court would strike appellant's answer. Although appellant eventually retained counsel, neither she nor her attorney appeared for a noticed May 30, 2017 status conference.

a. *Default Entered*

In light of appellant's nonappearance, and just as the trial court had warned it would do, the court ordered appellant's answer struck and entered her default. On June 16, 2017, the court issued its formal order striking appellant's answer and entering her default (2017 default). A few weeks later, counsel for respondent gave notice to all counsel of the scheduled default judgment prove-up hearing.

b. *Appellant's First Motion to Set Aside the 2017 Default*

On July 27, 2017, appellant filed an unsuccessful motion to set aside the 2017 default. The final date for the default judgment prove-up hearing was January 26, 2018. Respondent's counsel gave written notice of that hearing and date. At some point after her unsuccessful first motion to set aside the 2017 default, appellant hired new counsel.

c. *Appellant's Second Motion to Set Aside the 2017 Default*

On January 23, 2018, a few days before the scheduled default judgment prove-up hearing, appellant's newest attorney filed a second motion to set aside the 2017 default. The day before the default judgment prove-up hearing, appellant's then-attorney filed an ex parte application to stay the prove-up hearing pending the hearing on appellant's second motion to set aside the 2017 default. However, appellant's counsel failed to

appear for the hearing on his ex parte application due to car trouble, and the ex parte hearing did not occur.

d. *Default Judgment Entered*

Despite notice and knowledge of the scheduled default judgment prove-up hearing, neither appellant nor her attorney appeared for the hearing. On January 26, 2018, the trial court entered default judgment in favor of respondent and against appellant and all defendants. The judgment declared the 2003 deed of trust was the senior deed of trust on the property and respondent was the "current beneficiary" of that 2003 deed of trust. The judgment also declared the 2010 substitution of trustee and full reconveyance "VOID *ab initio*, and had no effect on the [2003 deed of trust]."

On February 14, 2018, counsel for respondent filed and served notice of the judgment.

e. *Further Briefing on Second Motion to Set Aside*

Following entry of judgment, the parties continued to brief appellant's second motion to set aside the 2017 default. Respondent filed an opposition to the motion, arguing the motion was untimely. In her reply, appellant stated the motion was timely and in any event the trial court could and should exercise its inherent equitable powers to grant the motion.

On April 5, 2018, the trial court held the hearing on appellant's second motion to set aside the 2017 default. The reporter's transcript from the hearing is not in the record on appeal. The following day, on April 6, 2018, the trial court filed its ruling denying appellant's second motion to set aside the 2017 default. On April 17, 2018, counsel for respondent filed and served notice of entry of the court's order denying the second motion to set aside.

4. Appeal

On May 24, 2018, almost four months after the default judgment was entered, appellant filed her notice of appeal. Although appellant's notice of appeal does not include the required date of the judgment or order being appealed, appellant attached to the notice of appeal respondent's April 17, 2018 notice of entry of the trial court's April 6, 2018 order denying appellant's second motion to set aside the 2017 default, as well as the order itself. The notice of appeal states appellant sought to appeal from "An order or judgment under Code of Civil Procedure, § 904.1(a)(3)-(13)" and "Other . . . Judgment of Dismissal / Denial of Motion under CCP sec 473." On the notice of appeal, appellant did not check the box next to "Default Judgment" from the list of possible appealable judgments and orders.

DISCUSSION

As noted above, appellant makes one argument on appeal. She claims that, in entering default *judgment*, the trial court violated section 764.010, which both prohibits a trial court from entering a default judgment in a quiet title action and requires the court in such cases to allow defendants to offer evidence. Appellant does not challenge any ground asserted by the trial court for denying her second motion to set aside the 2017 default. Rather, appellant's entire argument on appeal challenges the trial court's entry of default judgment.

1. Appellate Jurisdiction

As an initial matter, we must determine whether we have jurisdiction to consider this appeal. Respondent argues that, to the extent the appeal challenges the default judgment, the appeal is untimely. Respondent explains the deadline for filing a timely notice of appeal from the judgment was April 16, 2018, i.e., the

60th day after the February 15, 2018 notice of entry of judgment. Appellant filed her appeal more than one month later, on May 24, 2108. On the other hand, appellant argues her appeal is timely because it is from the trial court's order denying her second motion to set aside the 2017 default. In her opening brief, appellant explains, "The trial court filed its order denying [appellant's] motion for relief from default on April 6, 2018. [Respondent] served notice of entry of this order on April 17, 2018. [Appellant] filed her notice of appeal on May 24, 2018, less than 60 days later. This appeal is timely under California Rule of Court 8.104(a)(1)(B)." Prior to oral argument, we invited the parties to brief whether we must dismiss this appeal as untimely and whether *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644 (*Lakin*) provides guidance on this issue.

In the context of a direct appeal such as this, our jurisdiction extends only to appealable judgments and appealable orders. (*Griset v. Fair Political Practices Commission* (2001) 25 Cal.4th 688, 696.) "An appealable judgment or order is essential to appellate jurisdiction." (*Winter v. Rice* (1986) 176 Cal.App.3d 679, 681.) An order is appealable "when it is made so by statute." (*Ibid.*) We are not aware of a statute, and the parties have not cited one, that explicitly makes an order denying a motion to set aside default directly appealable. Indeed, case law appears to be to the contrary. For example, when a motion to set aside default is denied before entry of judgment, the order denying the motion is not appealable. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) Rather, the order may be reviewed on appeal from the final judgment. (*Ibid.*) Although appellant repeatedly argues she may appeal from the denial of a statutory motion to vacate a default judgment, that is not what she did. Appellant never filed a

motion to vacate the default judgment. Rather, before judgment was entered, she filed a motion challenging the entry of her default. She appealed from the denial of that motion.

Nonetheless, Code of Civil Procedure section 904.1 makes certain postjudgment orders generally appealable. Under that section, an order made after an appealable judgment is itself appealable. (Code Civ. Proc., § 904.1, subd. (a)(2); *Lakin*, *supra*, 6 Cal.4th at p. 651.) Here, the parties do not dispute the appealability of the January 26, 2018 judgment and, for purposes of this appeal, we assume it was an appealable judgment. However, despite the inclusive language of section 904.1, our Supreme Court has explained, "not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements." (*Lakin*, *supra*, 6 Cal.4th at p. 651.) First, "the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment." (*Ibid.*) Second, " 'the order must either affect the judgment or relate to it by enforcing it or staying its execution.' " (*Id.* at pp. 651–652.)

Here, the first requirement unquestionably is not met.[3] Although appellant ostensibly appealed from the trial court's postjudgment order denying her second motion to set aside default, the only issue she raises on appeal concerns the judgment, which she did not appeal. The substance of her appeal has no bearing on the trial court's postjudgment order denying her motion to set aside default. Plainly, appellant's appeal from the postjudgment order raises an issue she could have raised in an appeal from the judgment itself. The impossibility of

---

[3] Because the first requirement is not satisfied, we need not and do not address the second requirement.

appellant's appeal is highlighted by the fact she filed her second motion to set aside the 2017 default before the default judgment prove-up hearing and before judgment was entered. As such, her motion necessarily could not and did not challenge the judgment itself. Indeed, it is undisputed appellant did not raise her appellate argument challenging the default judgment at any time below. Accordingly, we conclude the trial court's postjudgment order denying appellant's second motion to set aside default is not an appealable order.

Thus, because appellant did not appeal the default judgment itself and the postjudgment order denying her motion to set aside is not an appealable order, we simply have no jurisdiction to consider this appeal.[4]

---

[4] In any event, were we to reach the merits of the appeal (which we do not), we do not perceive any error. Appellant claims section 764.010 prohibited the trial court from entering a default judgment in this case. That section applies to quiet title actions and provides in full: "The court shall examine into and determine the plaintiff's title against the claims of all the defendants. The court shall not enter judgment by default but shall in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants, other than claims the validity of which is admitted by the plaintiff in the complaint. The court shall render judgment in accordance with the evidence and the law." First, it is not clear section 764.010 applies here, where although the complaint concerns rights to real property, it does not allege a quiet title cause of action. Second, there is no indication the trial court violated section 764.010 by prohibiting appellant to appear and present evidence at the default judgment prove-up hearing. Rather, having full notice and knowledge of that hearing, plaintiff and her counsel simply failed to appear.

2. Respondent's Motion for Sanctions

While this appeal was pending, respondent filed a motion for monetary sanctions against appellant and her appellate counsel, arguing this appeal is frivolous and was brought in bad faith. Respondent also claimed appellant improperly ignored this court's order to address the absence of reporter's transcripts in the record on appeal. In compliance with rule 8.276(c) of the California Rules of Court, we notified the parties we were considering imposing sanctions on appellant and her counsel.

Although we conclude we lack jurisdiction to consider this appeal, we do not find the appeal to be so frivolous or brought in bad faith so as to warrant sanctions.

DISPOSITION

The appeal is dismissed. Respondent's motion for sanctions is denied. Respondent Bank of America, N.A., is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.