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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ARVIND SHANKAR,

Plaintiff and Appellant,

v.

GEORGE KASSABIAN et al.,

Defendants and Respondents.

B267970

(Los Angeles County
Super. Ct. No. BC567260)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Dismissed.

Arvind Shankar, in pro. per., for Plaintiff and Appellant.

Veatch Carlson and Cyril Czajkowskyj for Defendant and Respondent George Kassabian.

Bremer, Whyte, Brown & O'Meara, Lanetta D. W. Rinehart and Kelli M. Winkle-Patterson for Defendants and Respondents Samuel Wu, Susan Su-Chun Wu, Sakiko Ogura, Sakiko Senga, Kensuke Ogura and S.C. Enterprise.

Arvind Shankar (plaintiff), in propria persona, appeals from an order denying his ex parte application to vacate the voluntary dismissal with prejudice of his first amended complaint against Samuel Wu, Susan Su-Chun Wu, Sakiko Ogura, Sakiko Senga, Kensuke Ogura, S.C. Enterprise and George Kassabian.¹ The limited record on appeal establishes that plaintiff entered into a settlement agreement with defendants, which he signed, that required him to execute a request for dismissal of this action with prejudice and send it to defendants' counsel for filing after certain conditions were met. Although plaintiff's counsel provided defense counsel with a request for dismissal pursuant to the settlement agreement, defense counsel did not file it until months later, by which time plaintiff was no longer represented by the attorney who executed the request for dismissal. Two months after the dismissal, plaintiff, acting in pro. per., filed an ex parte application to vacate the dismissal. He did not contend that defendants failed to fulfill their obligations under the settlement agreement or that the settlement agreement was invalid. Instead, he argued, in substance, that he did not authorize the voluntary dismissal of the case. The trial court denied the ex parte request, and there is no record on appeal of that proceeding.

We conclude: (1) the court's order denying appellant's ex parte request to vacate the voluntary dismissal is not appealable, and (2) even if the order were appealable in the unusual circumstances here, the

¹ The defendants other than Kassabian are collectively referred to as "defendants."

record is insufficient to demonstrate that the trial court erred in denying the ex parte request to vacate the dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

Settlement Agreement

The instant case was filed originally on December 18, 2014. However, on January 15, 2015, plaintiff entered into a settlement agreement with defendants and Kassabian.² The agreement, which is part of the record on appeal, “fully and finally resolve[d] any and all claims (known or unknown, suspected or unsuspected)” arising out of or in any way related to the litigation concerning plaintiff’s tenancy at the apartment building, which consisted of the instant case (No. BC567260), two other superior court cases (No. SC120807 and *Ogura v. Shankar*, No. 14R01133), and two appellate court cases. The parties further waived all rights to any claims that “are unknown and unanticipated” at the time of the agreement, citing Civil Code section 1542.³

The settlement agreement required defendants to pay plaintiff a confidential sum and to release plaintiff from all claims for delinquent

² The copy of the agreement in the record was signed by plaintiff and defendants, but not Kassabian.

³ The statute provides: “A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.” (Civ. Code, § 1542.)

rent. Plaintiff was required to send defense counsel executed requests for dismissal with prejudice of every action subject to the agreement. The requests for dismissal were to be held by defendants' counsel and filed after plaintiff received his settlement payments and the checks were cleared by the bank. Plaintiff further was required to return the keys to the property to defendants. After plaintiff vacated the property, a case filed against him would be dismissed with prejudice.

The settlement agreement gave the parties the right to enforce the agreement by filing a motion pursuant to Code of Civil Procedure sections 664.6 and 664.7.⁴

On January 16, 2015, plaintiff's counsel, Robert Moest, sent defendants' counsel executed requests for dismissal with prejudice of plaintiff's cases, including the instant case, No. BC567260. The requests for dismissal were signed by Moest. For reasons not clear from the record, defendants' counsel did not file the request for this case until August 27, 2015.

The Amended Complaint

In the meantime, Moest substituted out as plaintiff's counsel on May 6, 2015. On May 19, 2015, acting in pro. per, plaintiff filed a first amended complaint. The amended complaint repeated nearly verbatim

⁴ Unspecified statutory references are to the Code of Civil Procedure. Sections 664.6 and 664.7 provide that "the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (§§ 664.6, 664.7, subd. (a).)

the factual allegations and causes of action of the original complaint. The amended complaint added only the allegation that defendants continued to employ Kassabian after settling the action in January 2015.⁵

In the amended complaint plaintiff alleged that he lived in an apartment building owned by defendants. Plaintiff began living in the building in 1987. Defendants hired Kassabian as the on-site building manager in 1997.

Plaintiff alleged that Kassabian suffered from a mental disorder that caused his behavior to be “abusive, violent, and sexually aberrant” against tenants of the building. Kassabian allegedly engaged in behavior such as assaulting an elderly female tenant, stalking and sexually harassing other female tenants, interfering with tenants’ utilities and mail delivery, and entering tenants’ apartments without permission. Kassabian allegedly tried to force plaintiff to move out by threatening to harm him, making false allegations of drug activity against him to the Los Angeles Police Department and the California Medical Board, and interfering with plaintiff’s visitors, repairs, utilities, and use of the common areas.

Plaintiff alleged that in January 2015, defendants confidentially settled an action arising out of Kassabian’s conduct, but they continued to employ Kassabian. Plaintiff alleged that defendants continued to employ Kassabian in order to force out their tenants and thereby raise

⁵ The amended complaint also dropped a claim for negligent infliction of emotional distress.

rents more quickly than they otherwise would have been allowed under the Los Angeles Rent Stabilization Ordinance. Plaintiff alleged fair housing violations pursuant to 42 United States Code section 3601, Civil Code section 51 et seq., and Government Code section 12955 et seq., and intentional infliction of emotional distress.

Filing of the Requests for Dismissal

On August 12, 2015, counsel for defendants filed a Notice of Related Case, stating that plaintiff had filed a case for contractual fraud in May 31, 2013, No. SC120807, which involved the same parties, was based on the same claims, and arose from the same incidents. Defendants asserted that the amended complaint sought “recovery on [an] identical basis” to the related case, which had been settled confidentially.

Then, on August 27, 2015, defendants’ counsel filed the request for dismissal with prejudice of the case at issue here, No. BC567260, which had been signed by Moest on January 16, 2015.⁶ The proof of service shows that the request was served on plaintiff but not on counsel for Kassabian. Pursuant to the voluntary requests for dismissal, the instant case was dismissed.

Kassabian demurred to the first amended complaint in this case on August 31, 2015. Kassabian argued, in part, that demurrer was

⁶ Defendants’ counsel incorrectly stated in a declaration that she filed the request for dismissal in case No. SC120807 on August 27, 2015, but the request for dismissal in that case was filed on April 9, 2015.

appropriate because of the request for dismissal with prejudice of case No. SC120807, which was based on the same causes of action and involved the same parties.

Plaintiff's Ex Parte Application to Vacate Dismissal

Although the case was dismissed on August 27, 2015, it was not until October 20, 2015, that plaintiff filed his ex parte application for an order vacating the dismissal with prejudice of the entire action. In the written ex parte request, plaintiff cited the following grounds: (1) the request for dismissal was filed by defendants, not plaintiff; (2) the request for dismissal applied to the original complaint, not the amended complaint; (3) the request for dismissal was filed by plaintiff's former attorney; and (4) the request for dismissal applied only to claims in the original complaint against the defendant named therein, not the claims against the other defendants who were named in the amended complaint. In support of his ex parte application, plaintiff stated in a declaration that he did not authorize the request for dismissal and that he would suffer irreparable harm because he "would be forced to proceed promptly in the Court of Appeal to avoid the claim that the Notice of Appeal was untimely because more than 60 days have elapsed since the dismissal was entered."

Plaintiff also attached a declaration from Moest, in which Moest asserted that he did not file or authorize the filing of the request for dismissal of the entire action. However, Moest also stated in his declaration that when he prepared and signed the request for dismissal

and provided it to defense counsel, he “was anticipating that they would file the document shortly thereafter.” Moest asserted that he did not intend to dismiss claims “that may have arisen as a result of conduct that occurred after the . . . settlement.”

Defendants opposed the ex parte motion in writing. They argued that plaintiff failed to show a threat of “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). Defendants further argued that plaintiff was not entitled to relief under section 473, subdivision (b), which allows a court to grant a party relief if the dismissal was entered through “mistake, inadvertence, surprise, or excusable neglect.” Defendants argued that the dismissal was bargained for in the settlement agreement and that the allegations of the amended complaint were addressed in the settlement agreement. Even if the motion were meritorious, defendants contended the motion “should be heard as a noticed motion.”

Following a hearing which was not reported, the trial court denied plaintiff’s ex parte request for an order vacating the dismissal. Nothing in the record indicates the grounds on which the trial court denied the application. Plaintiff filed a timely notice of appeal from the order.

DISCUSSION

Plaintiff challenges the trial court’s denial of his ex parte application for an order vacating the dismissal with prejudice of his action. We conclude that the order denying plaintiff’s ex parte request

to vacate the voluntary dismissal is not appealable, and even if it were in the unusual circumstances here, plaintiff fails to demonstrate error.

I. *The Order is not Appealable*

“‘[A] plaintiff’s voluntary dismissal is deemed to be nonappealable on the theory that dismissal of the action is a ministerial action of the clerk, not a judicial act.’ [Citation.] Reasoning from this axiom, courts have also held that a ruling on a motion to vacate a voluntary dismissal is not appealable.” (*Mesa Shopping Center-East, LLC v. O Hill* (2014) 232 Cal.App.4th 890, 897 (*Mesa*)). The dismissal with prejudice of an action “deprive[s] the superior court of subject matter jurisdiction. Absent a pending lawsuit, a court cannot issue judgments or orders. . . . A dismissal terminates an action. [Citation.] A superior court thereafter has no subject matter jurisdiction to grant relief other than costs and fees as appropriate. [Citations.]” (*Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004, 1007-1008 (*Hagan*)).⁷

Thus, a petition for writ of mandate, not an appeal, is the proper procedure to challenge a denial of a request to vacate a dismissal. “[A]

⁷ “A court may . . . entertain a motion to vacate on grounds of mistake, excusable neglect and so forth (Code Civ. Proc., § 473). [Citations.]” (*Hagan, supra*, 115 Cal.App.4th at p. 1008; *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254–255 [“California courts have long held that ‘[e]ven after a voluntary dismissal with prejudice has been filed, the trial court *has jurisdiction* to vacate the judgment of dismissal under Code of Civil Procedure section 473 where it has been entered as a result of the plaintiff’s “mistake, inadvertence, surprise, or excusable neglect.””]).) However, plaintiff did not file a motion under section 473.

petition for a writ of mandate is the appropriate vehicle to review an order on a motion to vacate a voluntary dismissal. [Citations.] [¶] An appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate, but that power should be exercised only in unusual circumstances. [Citation.] ‘A petition to treat a nonappealable order as a writ should only be granted under extraordinary circumstances, “compelling enough to indicate the propriety of a petition for writ . . . in the first instance’ [Citation.]” [Citation.]’ (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366–1367 (*Arnaiz*).)

In *Arnaiz*, the appellate court treated the appeal as a petition for writ of mandate because of considerations such as the potential “waste of judicial resources to hold a trial,” and “the delay and expense of trial.” (*Arnaiz, supra*, 96 Cal.App.4th at p. 1367.) No such considerations are present here. The record shows that plaintiff entered into a settlement agreement based upon the same factual allegations and claims he presented in his amended complaint. Plaintiff has not asserted that defendants failed to comply with the terms of the settlement agreement, which required him to execute the request for dismissal. Plaintiff has never argued, and there is nothing in the record to indicate, that he did not receive his settlement payments or that the checks were not cleared by the bank. Under the terms of the settlement agreement, defendants’ counsel was entitled to file the request for dismissal after those

conditions were met.⁸ Thus, there are no “extraordinary circumstances, “compelling enough to indicate the propriety of a petition for writ . . . in the first instance’ [Citation.]” [Citation.]” (*Ibid.*) Therefore, we decline to treat this appeal as a petition for writ of mandate. Because the dismissal with prejudice deprived the superior court of jurisdiction, the order denying plaintiff’s ex parte application for an order vacating the dismissal is not an appealable order. (*Hagan, supra*, 115 Cal.App.4th at p. 1007; *Mesa, supra*, 232 Cal.App.4th at p. 897.)

II. *The Record on Appeal is not Sufficient to Show Error in the Denial of Plaintiff’s Ex Parte Application*

Even if the order were appealable, the record is not sufficient to show the trial court erred in denying plaintiff’s application. “Error must be affirmatively shown. [Citation.] The party appealing has the burden of overcoming the presumption of correctness. For this purpose, it must provide an adequate appellate record demonstrating the alleged

⁸ We note that, under section 581, a request for dismissal with prejudice requires “written consent of the attorney for the party or parties applying therefor.” (§ 581, subds. (b)(1), (j).) Here, it is arguable that the request for dismissal did not comply with section 581 because Moest was no longer the attorney for plaintiff at the time the request was filed. However, plaintiff has not raised section 581. Moreover, the record shows that the request for dismissal was authorized by the settlement agreement. Plaintiff has never disputed the validity of the agreement. He complained only that defendants continued to employ Kassabian after executing the settlement agreement. The settlement agreement did not require defendants to fire Kassabian, but instead required plaintiff to vacate the apartment. Defendants’ continued employment of Kassabian did not violate the settlement agreement nor render the request for dismissal invalid.

error. Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. [Citation.]” (*Defend Bayview Hunters Point Com. v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 859-860.)

In order to prevail on an ex parte application, “[a]n applicant must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte.” (Cal. Rules of Court, rule 3.1202(c).) Defendants raised numerous arguments in opposition to the ex parte application. The record does not show the grounds on which the trial court ruled, and the record we do have is not sufficient to show that there was any error in the ruling.

The record does not show that plaintiff made the factual showing required for ex parte relief. He asserted in his declaration in support of his application that he did not authorize the filing of the request for dismissal. However, as discussed above, the settlement agreement expressly required him to execute the request for dismissal and deliver it to defense counsel to file after certain conditions were met. Plaintiff did not assert that those conditions were not met.

Nor was Moest’s declaration in support of plaintiff’s application sufficient to establish that plaintiff was entitled to ex parte relief. Moest’s declaration inconsistently stated on the one hand that he did not authorize the filing of the request for dismissal, but on the other hand, that he expected defendants’ attorneys to file the request for

dismissal after he provided it to them. The terms of the settlement agreement clearly contradict the assertion that Moest did not authorize the filing of the request for dismissal.

Moest's statement in his declaration that he did not intend to dismiss claims against defendants that arose as a result of conduct that occurred after the settlement also is contradicted by the terms of the settlement agreement. The agreement expressly provided that it applied to "all claims (known or unknown, suspected or unsuspected) arising out of, from or in any way related to the subject Action and the subject incident." Plaintiff further waived all claims regarding "unknown and unexpected consequences or results" related to the litigation, pursuant to Civil Code section 1542. The only allegation in the amended complaint of conduct that occurred after the settlement was that defendants continued to employ Kassabian after entering into the settlement agreement. Any alleged damage from defendants' continued employment of Kassabian clearly arises out of the claims resolved by the settlement agreement.⁹

Plaintiff's arguments in favor of granting his ex parte application are specious in light of the settlement agreement, which explicitly required him to execute the requests for dismissal and release any

⁹ Plaintiff relies on *Capri v. L.A. Fitness International, LLC* (2006) 136 Cal.App.4th 1078, to argue that the settlement agreement "cannot legally resolve allegations of torts committed after settlement." To the contrary, the agreement addressed claims arising out of the subject incident that were unknown or unanticipated at the time of the agreement, and plaintiff's claims clearly arise out of the subject incident.

claims that could arise out of the incident. Nothing in the record raises a question about the validity of the settlement agreement. Plaintiff does not dispute the settlement's validity and, in fact, relied on it in his amended complaint. (Compare *Irvine v. Regents of University of California* (2007) 149 Cal.App.4th 994, 996 [reversing the dismissal of an action where the plaintiff argued that no enforceable agreement had been reached]; *Levitz v. The Warlocks* (2007) 148 Cal.App.4th 531, 535-536 [reversing the dismissal of a complaint where the record showed there was no binding settlement].)

Plaintiff relies on *Romadka v. Hoge* (1991) 232 Cal.App.3d 1231 (*Romadka*), but *Romadka* is distinguishable. There, the plaintiffs' attorney completed a request for dismissal form but mistakenly checked the "with prejudice" box instead of the "without prejudice" box. The plaintiffs argued "that the voluntary dismissal with prejudice was invalid because their attorney lacked authority to surrender their substantive rights in the action and thus the dismissal could be voided under Code of Civil Procedure section 473." (*Id.* at p. 1235.) The appellate court reversed the trial court's denial of the plaintiffs' motion to vacate the dismissal, explaining that the "plaintiffs' attorney's lack of authority invalidated her dismissal of the . . . action with prejudice." (*Id.* at p. 1237.) Unlike *Romadka*, Moest's execution of the requests for

dismissal with prejudice was authorized by plaintiff under the terms of the settlement agreement, which plaintiff signed.¹⁰

On this record, plaintiff's ex parte application does not show the potential for "irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." (Cal. Rules of Court, rule 3.1202(c).) Nor does his application set forth any "basis for a finding of good cause to dispense with proceeding by noticed motion. (See Cal. Rules of Court, rule 3.1202(c); Cal. Rules of Court, former rule 379(g); 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 54, p. 479.)" (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 523.) Plaintiff has failed to meet his burden of establishing error on appeal. (See *Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348 [citing "the well-established rule of appellate review that a judgment or order is presumed correct and the appellant has the burden of demonstrating prejudicial error"].)

¹⁰ Defendants' counsel has provided no explanation for the failure to file the request for dismissal in a timely fashion. Nonetheless, the record shows no error in the trial court's denial of plaintiff's ex parte application.

DISPOSITION

The appeal is dismissed. Defendants and Kassabian shall recover costs on appeal. Defendants' motion for sanctions is denied. Plaintiff's request for sanctions is denied.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.