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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FIDELITY NATIONAL TITLE  
COMPANY,

Plaintiff,

v.

CITY OF EL MONTE,

Defendant and Respondent;

BANG ZHAO LIN,

Defendant and Appellant.

B265870

(Los Angeles County  
Super. Ct. No. KC066649)

APPEAL from an order of the Superior Court of Los Angeles County,  
William F. Highberger, Judge. Dismissed.

Kenny Tan and Tiffany Garrick for Defendant and Appellant.

Alston & Bird, Michael Zweiback, Rachel L. Fiset and Erin C. Coleman  
for Defendant and Respondent.

## INTRODUCTION

Bang Zhao Lin, a defendant in this interpleader action, appeals from an order denying his motion to set aside his default. The trial court initially granted the motion, conditioned on Lin's payment of \$90,000 in attorney's fees incurred by co-defendant City of El Monte (the City). When Lin refused to make the payment, the court denied the motion. Lin argues that the court abused its discretion in attaching a payment condition to relieving Lin from default. The City initially moved to dismiss the appeal as interlocutory, as no default judgment had been entered against Lin and he lacked standing to appeal any subsequent proceedings. We summarily denied the motion, and the parties fully briefed the merits of Lin's appeal. After full consideration of the record, we agree with the City that the orders are not appealable. We therefore dismiss the appeal.

## FACTS AND PROCEDURAL BACKGROUND

On February 6, 2014, Fidelity National Title Company (Fidelity) filed a complaint in interpleader for the proceeds of a trustee's sale (the interpleader action). At issue was almost one million dollars in surplus proceeds that remained "following the non-judicial foreclosure sale" of a parcel of property located in the city of El Monte. Fidelity, the appointed trustee, named Lin and other defendants who allegedly claimed an interest in the remaining sale proceeds. The complaint sought to compel defendants to litigate their claims to the proceeds amongst themselves and to discharge Fidelity from liability. The City was not originally named, but filed an answer after acquiring the interests of four other claimants through settlement.

On May 6, 2014, the court deemed the interpleader action related to another pending case in which Lin was a defendant, entitled *City of El Monte v. TV LLC, et al.*, Los Angeles Superior Court, Case No. BC456530 (*City of El*

*Monte*). Lin also was the plaintiff in a third pending case, entitled *Bang Zhao Lin v. Ken Wong, et al.*, Los Angeles Superior Court, Case No. BC509758.

The court ultimately consolidated all three cases in February 2015.

Beginning in April 2014, Fidelity attempted to serve Lin with the interpleader complaint through various means, including contacting Lin's agents and attorneys to accept service on Lin's behalf and attempting to reach Lin in China. These efforts were unsuccessful. On July 31, 2014, the court granted Fidelity's request to serve Lin by publication. Fidelity served Lin by publication on August 12, 19, 26, and September 2, 2014.

Lin did not respond to the complaint. Fidelity filed a request for entry of default on October 10, 2014. After Fidelity resubmitted the request several times with additional documentation, the clerk of court entered Lin's default on November 19, 2014.

On January 22, 2015, Lin filed an ex parte application seeking to set aside his default. He claimed he did not know of the interpleader action until after a trip to the United States from China in December 2015, at which point he moved to set aside the default. The City argued that Lin knew about the case since its inception, was actively involved in litigating the related case in which he was the plaintiff, and even referenced the interpleader in pleadings in the related *City of El Monte* case.

At the hearing on Lin's application on February 5, 2015, the court noted that it had the option to deny the request "on the grounds that [Lin's] agents last spring acknowledged awareness of the pendency of the interpleader which therefore creates imputed and constructive knowledge in the mind of Mr. Lin," but that it was more inclined to set aside the default based on excuse and neglect, but imposing "several conditions, which I believe I have broad equitable authority to impose as a precondition." The

court acknowledged the City's argument that the City's work on settlement and the motion to release the interpleader funds were premised on Lin's default and therefore would be "essentially wasted effort," if the default were set aside, because with Lin out of default, "analytically it is a different settlement negotiation, and analytically it is a different motion for release of interpled funds." Thus, the court reasoned that "while it would not normally be logical to give a co-defendant in a default situation financial recovery for its fees before a default is set aside . . . this is a procedurally unusual case. . . ." Further, the original plaintiff, Fidelity, had been discharged and thus "the setting aside of the default of Mr. Lin has no consequences on the nominal plaintiff herein, but as amongst the parties who are de facto put into adversary situation as co-defendants, there is a real change in the shape of the table, as it were, for litigation and/or any associated negotiations such that I do think that in the peculiar circumstances of this interpleader, the city's burden of having gone this far in good faith on the assumption that Mr. Lin was in default or would be put in default and was going to stay in default was a reasonable expectation to have when they expended their funds on what now would be a poor version of a first draft of their motion to rel[ease] the interpled funds." The court then ordered counsel for the City to submit details regarding the fees incurred and continued the hearing pending receipt of that information.

The City filed a declaration supporting its request for fees. The declaration stated that the fees sought "represent legal services rendered for the Interpleader Action only" between October 10, 2014 (purportedly the day after Lin's answer was due) and February 5, 2015. City outlined the work performed "as a result of Mr. Lin's default," including work on the City's motion for release of funds, opposing another defendant's competing motion,

settlement negotiations with other defendants, and opposition to Lin's ex parte, totaling \$126,692.24 in fees and costs.

At the continued hearing on February 18, 2015, the court found that Lin's "agents were aware of the interpleader action" and Lin therefore was "considered to be on notice." The court then stated it was inclined to set aside the default on the condition that Lin pay \$125,000 in fees to the City. Following argument by Lin's counsel that some of the fees requested were for work performed prior to entry of default and for work that was necessary regardless of Lin's status, the court reduced the fee amount to \$90,000. The court declined further review of the bills from the City's counsel, indicating it had "plenary authority to decide the value of legal fees. I've seen enough and know enough about this case to be satisfied that \$90,000 is at the low end of reasonable, but it was responsive to" the objections raised by Lin's counsel. Accordingly, the court granted Lin's ex parte application to set aside his default, conditioned on proof that Lin had issued payment of the fees to the City. The court further reminded Lin that, because it had consolidated all three cases, an appearance in the interpleader action would constitute an appearance "for all purposes" in the consolidated action.

Lin filed an appeal of the court's February 18, 2015 order. We granted the City's motion to dismiss the appeal as taken from a nonappealable order, but denied the City's request for sanctions. Following the dismissal of Lin's first appeal, the court held a further hearing on May 27, 2015. The court inquired of counsel for Lin whether he intended to meet the condition to set aside his default. Counsel responded that "I believe at this point he's going to let the chips fall where they may" and remain in default. The court rescinded the prior order, finding that Lin had failed to meet the condition provided, and ordered that Lin would "remain in default in the interpleader action."

The remaining parties filed a stipulation for release of interpleader funds on July 27, 2015. Pursuant to a settlement, the City and the other remaining defendant agreed to disbursement of the funds between them. The court entered the stipulation as an order dated July 27, 2015.

On August 3, 2015, Lin filed the instant appeal, purportedly from the July 27, 2015 “[o]rder for release of interpleader funds and underlying granting of Bang Zhao Lin’s motion to set aside default on the condition of payment of \$90,000, subsequently denied for failure to meet condition. CCP 904.1(a)(1).”

The City filed a motion to dismiss the appeal on September 3, 2015, arguing that Lin lacked standing to appeal the July 2015 order dispersing the interpleader funds and that the May 2015 order denying his motion to set aside his default was not an appealable order. Lin opposed. We issued an order on September 25, 2015 summarily denying the motion to dismiss.<sup>1</sup> The parties proceeded to submit their briefs and appellate record. After full consideration of the record and relevant legal authorities, we conclude dismissal is warranted.

## DISCUSSION

Lin contends the trial court erred in refusing to set aside his default unless he paid \$90,000 in attorney’s fees incurred by the City. But the threshold issue is one of appealability.

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<sup>1</sup> A summary denial of a motion to dismiss an appeal does not “preclude later full consideration of the issue, accompanied by a written opinion, following review of the entire record. . . .” (*Kowis v. Howard* (1992) 3 Cal.4th 888, 900, overruling the contrary holding in *Pigeon Point Ranch, Inc. v. Perot* (1963) 59 Cal.2d 227, 230–231; *accord, Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 509, fn. 6 [reversing prior order and dismissing appeal upon “review of a complete record and further analysis of the law”].)

“Absent jurisdiction over the case or controversy, a court is without power to act. . . . The right of appeal of a judicial decision is wholly statutory and no judgment or order is appealable unless expressly made so by statute. [Citations.]” (*Supple v. City of Los Angeles* (1988) 201 Cal.App.3d 1004, 1009, disapproved on other grounds by *Jennings v. Marralle* (1994) 8 Cal.4th 121, 129, fn.5.) Code of Civil Procedure section 904.1<sup>2</sup> authorizes an appeal “[f]rom a judgment, except . . . an interlocutory judgment,” with exceptions not applicable here. This “one final judgment” rule is based on the reasoning “that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case.” [Citations.]” (*Griset v. Fair Political Practices Com’n* (2001) 25 Cal.4th 688, 697.)

Lin’s appeal challenges the court’s order denying his application to set aside his default. This order is not directly appealable. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 [“the order denying the motion to vacate the default is not independently appealable”]; *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 960 (*First American*); *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1465-1466.) A defaulting party may challenge denial of a motion to vacate default through a timely appeal from the entry of default judgment. (*First American, supra*, 108 Cal.App.4th at p. 960; *Winter v. Rice* (1986) 176 Cal.App.3d 679, 682.) However, because there has been no default judgment against Lin in this case, his appeal is barred. (*City of Riverside v. Horspool* (2014) 223 Cal.App.4th 670, 679 [“[A]bsent a judgment by default, an order denying a motion to set aside a clerk's entry of default is nonappealable.”]; see also *Misic v. Segars* (1995) 37 Cal.App.4th 1149, 1153-1154 [“A default judgment is reviewable on appeal the same as any other

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

civil judgment. [Citation.]”].) While the parties occasionally (and unhelpfully) refer to the “default judgment” in their briefs, from our review of the record it is clear that the only entry of default as to Lin in this case was the court clerk’s entry of default on November 19, 2014, a “ministerial act preceding the actual default judgment.” (*First American, supra*, 108 Cal.App.4th at p. 960.)<sup>3</sup>

The other ruling specified in Lin’s notice of appeal is the July 2015 order dispersing the interpleader funds. However, Lin does not challenge this order in his appeal, apart from an implied objection to his absence from the proceedings due to his default. Moreover, Lin has not established that this order is appealable as a “final determination of the rights of the parties.” (*UAP-Columbus JV 326132 v. Nesbitt* (1991) 234 Cal.App.3d 1028, 1035-1036.) In particular, the record contains no entry of judgment as to the interpleader action and the parties (including Lin) have continued to litigate the consolidated case. While Lin suggests that “an order releasing funds in interpleader is a final appealable judgment,” his cited case suggests the opposite, as it involved an appeal taken after *judgment* was entered. (*UAP-Columbus JV 326132 v. Nesbitt, supra*, 234 Cal.App.3d at pp. 1035-1036 [“The issues raised by the parties in their pleadings, which were their causes of action in interpleader and for declaratory relief, had been tried and decided, and a judgment disposing of them had been signed by the court and entered.”]; see also *City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1128 [allowing appeal of judgment entered determining ownership of fees in

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<sup>3</sup> Nor can we construe Lin’s notice of appeal as a premature notice of appeal from a subsequent judgment, as there has been no entry of default judgment to date. (See Cal. Rules of Court, Rule 8.104(d)(2) [“The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.”].)



interpleader, despite remaining litigation of cross-complaints, as judgment was a severable collateral matter requiring the aggrieved party to pay money].)

Thus, neither ruling specified in the notice of appeal is appealable. We therefore must dismiss the appeal.

**DISPOSITION**

The appeal is dismissed. The City is awarded its costs on appeal.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.