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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JAMES R. O'BRIEN,

Appellant,

v.

CLARENCEY M. THOMAS-
O'BRIEN,

Respondent.

B275714

(Los Angeles County
Super. Ct. No. MD044452)

APPEAL from an order of the Superior Court of Los
Angeles County, Scott J. Nord, Commissioner. Affirmed.

Lawrence C. Buchanan, for Appellant.

John Fu, for Respondent.

Appellant, James O'Brien challenges the family court's denial of his motion under Family Code section 2122¹ to set aside portions of a judgment disposing of community property assets. He argues respondent committed fraud and nondisclosure of certain encumbrances on community property, rendering the distribution judgment unjust. Because his motion to partially set aside judgment was untimely, we affirm the family court's order denying it.

FACTUAL AND PROCEDURAL SUMMARY

In July 2013, appellant filed for dissolution of his marriage to respondent. In September 2013, respondent filed a property declaration listing a parcel of real property as community property. In that declaration she claimed that the gross fair market value of the property was \$102,000, that the amount of debt associated with the property was \$195,590, and that the net fair market value of the property was \$93,590. She proposed that the property be divided so that she would receive \$93,590 of its value and appellant would receive none. She subsequently filed an amended property declaration in January 2014, in which she claimed that both the gross and net fair market values of the property were \$102,000 and that the property was encumbered by \$194,518 of debt. On this amended declaration, she proposed that \$194,518, the amount of the debt, be awarded to her.

At a dissolution hearing in March 2014, appellant argued the property was community property, while respondent argued it was separate property. Appellant stated he did not "sign off" on the property and that respondent "took a second out on the

¹ Subsequent undesignated statutory references are to the Family Code.

property without even consulting [him].” The court asked if there was anything further appellant wished to say regarding the property, to which appellant replied “No.” The court found the property was community property and ordered it sold, with the proceeds divided equally between appellant and respondent. The court awarded appellant 50 percent of respondent’s retirement funds. The court directed the parties to prepare a judgment in conformity with these findings.

In September 2013, appellant retained an attorney, Mr. Lawrence C. Buchanan. Mr. Buchanan conducted a title search and found that respondent had refinanced the property three times, withdrawing equity from the property totaling at least \$118,450, allegedly without appellant’s knowledge. Mr. Buchanan also discovered that respondent had claimed to be a widow in her refinancing applications when she, in fact, was married to appellant. In October 2014, Mr. Buchanan was advised by a real estate expert that the property was worth \$113,000. That month, appellant received a letter from Mr. Buchanan informing him that respondent had refinanced the property without his knowledge. Appellant speculated that respondent had spent the money she received from refinancing the property on her children from a previous marriage.

Mr. Buchanan prepared and filed a declaration in September 2015 in support of a request for attorney fees, in which the issue of respondent’s refinancing of the property was raised to the court for the first time. At a November 2015 hearing on the fee motion, Mr. Buchanan claimed he was delayed in preparing the judgment because he did not have the respondent’s birth date. Respondent provided her birth date and the court opined that the issue should not have prevented Mr.

Buchanan from preparing the judgment. The attorney fee request was denied.

The dissolution judgment was entered in January 2016. In March 2016, appellant moved to partially set aside the judgment under section 2122, claiming respondent had breached her fiduciary duty pursuant to sections 721, 1101, and 2102 by refinancing the property without appellant's knowledge and failing to disclose information relating to the refinancing during the dissolution. He argued the court could compensate him for the equity which respondent spent without his knowledge by awarding him more than 50 percent of respondent's retirement income. Appellant argued his motion was timely under section 2122 because it was filed within one year of the time he discovered respondent's alleged wrongdoing, which he claims was September 2015. The court denied the motion to partially set aside judgment. This appeal followed.

DISCUSSION

Respondent argues appellant's motion to partially set aside judgment was untimely under section 2122. We agree.

The family court's decision to set aside a dissolution judgment is discretionary and therefore is reviewed for abuse of discretion. (§ 2121, subd. (a) [providing that the court "may" relieve spouse from judgment]; see also *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682.)

Section 2122, subdivision (f) provides that a motion to set aside judgment based on nondisclosure "shall be brought within one year after the date on which the complaining party either

discovered, or should have discovered, the failure to comply.”² Appellant claimed in his March 2016 motion to partially set aside judgment that he first learned of respondent’s alleged misconduct in September 2015, rendering the motion timely. But appellant had earlier declared that his attorney informed him of the alleged misconduct in October 2014. He also stated at the March 2014 dissolution hearing that respondent had taken “a second out on the property without even consulting [him].” Because respondent filed her property declarations in September 2013 and January 2014, appellant should have recognized any discrepancy amounting to nondisclosure when he learned of respondent’s alleged misconduct. Appellant clearly knew or should have known about respondent’s alleged nondisclosure more than one year before his motion to partially set aside judgment. The motion was therefore untimely under section 2122.³ Because the

² On appeal, appellant alleges for the first time that respondent committed fraud by claiming to be a widow in her refinancing applications. Although fraud also is a ground for a motion to set aside judgment under section 2122, subdivision (a), we consider this argument forfeited. (*Hearn Pacific Corp. v. Second Generation Roofing, Inc.* (2016) 247 Cal.App.4th 117, 148 [argument not raised before the trial court is forfeited] (*Hearn Pacific*).) We also note that fraud claims have the same one-year time limit as nondisclosure claims, so that even if the argument were not forfeited, the result would be the same. (§ 2122, subd. (a).)

³ Section 2122 may be utilized when relief from judgment is no longer available under Code of Civil Procedure section 473. (See § 2121, subd. (a) [the family court “may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts thereof . . . after the six-month time limit of Section 473 of

motion to partially set aside judgment was untimely,⁴ the family court did not abuse its discretion in denying it.

the Code of Civil Procedure has run, based on the grounds, and within the time limits, provided in this chapter.”] (italics added.) Code of Civil Procedure section 473, subdivision (b) allows a motion to set aside judgment based upon the movant’s “mistake, inadvertence, surprise, or excusable neglect” to be filed within six months of the judgment. Although appellant’s motion to partially set aside judgment was filed two months after the judgment, he did not raise timeliness under Code of Civil Procedure section 473, subdivision (b) before the family court or this court. His motion failed to address the enumerated grounds of “mistake, inadvertence, surprise, or excusable neglect” under that statute. (Code Civ. Proc., § 473, subd. (b).) For these reasons, he has forfeited the argument that his motion was timely under Code of Civil Procedure section 473, subdivision (b). (*Hearn Pacific, supra*, 247 Cal.App.4th at p. 148.)

⁴ We note that appellant’s motion to set aside judgment was due in October 2015 at the latest, even though this was four months before the judgment was entered. This result is caused by the parties’ almost two-year delay in filing the judgment following the family court’s request that they do so in March 2014. The family court found appellant’s attorney’s excuses for delaying filing of the judgment unconvincing. Granting a motion to set aside judgment when not explicitly authorized by statute is an exercise of the court’s equitable powers. (See *In re Marriage of Thorne & Raccina* (2012) 203 Cal.App.4th 492, 501 [family court possesses statutory and equitable powers to set aside dissolution judgments].) Appellant’s delay in entering judgment justifies the court’s decision not to exercise its discretion in his favor.

DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.