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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GERALD MONTGOMERY,

Plaintiff and Appellant,

v.

WAL-MART STORES, INC., et al.,

Defendants and Respondents.

B281141

(Los Angeles County
Super. Ct. No. BC481718)

APPEAL from orders of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Dismissed in part; affirmed in part; motions for sanctions and other requests denied.

Gerald Montgomery, in pro. per., for Plaintiff and Appellant.

Pettit Kohn Ingrassia Lutz & Dolin and Valerie Garcia Hong for Defendant and Respondent Wal-Mart Stores, Inc.

Nelson & Fulton, Henry Patrick Nelson and Rina Mathevosian for Defendant and Respondent County of Los Angeles.

Gerald Montgomery filed suit against Wal-Mart Stores, Inc., the County of Los Angeles, multiple County departments, and several Wal-Mart and County employees. In 2012 the action was dismissed as to the County, and that judgment was affirmed by this court in 2014. Wal-Mart was dismissed from the action in 2014. In 2016, Montgomery attempted to reopen the case, obtain default judgments, and obtain sanctions against Wal-Mart and its counsel. Montgomery appeals the court's rulings denying his requested relief and has also moved for sanctions against Wal-Mart and its counsel in this court. We conclude that many of the orders challenged on appeal are not appealable and find no error in those that are appealable. We also deny Montgomery's motions for sanctions and his other requests for relief.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Montgomery I*

This is Montgomery's second appeal in this matter. We draw the facts relating to the first appeal from our opinion in *Montgomery v. Los Angeles County* (Feb. 19, 2014, B244168) [nonpub. opn.] (*Montgomery I*.) In March 2012, Montgomery filed a complaint against the County and Wal-Mart, as well as several of their employees, alleging claims for civil rights violations, negligence and fraud. (*Id.* at p. 2.) The County demurred to Montgomery's complaint. (*Ibid.*) The trial court sustained the County's demurrers with leave to amend, and then dismissed the action as to the County when Montgomery failed to file an amended complaint within the time period authorized by the court. (*Id.* at pp. 2-3.) Montgomery appealed.

Wal-Mart also demurred to Montgomery's complaint. (*Montgomery I, supra*, at p. 3.) Montgomery then filed a document seeking entry of default and a default judgment against Wal-Mart. The trial court denied Montgomery's request, and he appealed. (*Ibid.*) While the appeal was pending, on December 4, 2012, the trial court sustained Wal-Mart's demurrers to the complaint with leave to amend. (*Id.* at p. 4.)

In February 2014 we affirmed the judgment of dismissal as to the County and dismissed Montgomery's appeal from the order denying his request for the entry of default as to Wal-Mart. (*Montgomery I, supra*, at pp. 4-5.)

II. Subsequent Events

After the remittitur was issued in *Montgomery I*, in May 2014 Wal-Mart applied ex parte for dismissal of the complaint on the ground that Montgomery had not filed an amended complaint within the period of leave granted by the trial court in December 2012. The trial court granted the application and dismissed the action as to Wal-Mart on May 6, 2014. Montgomery did not appeal.

More than two years later, Montgomery moved to reopen the case under Code of Civil Procedure¹ section 473. The trial court denied the motion on July 21, 2016. Montgomery moved for reconsideration of the court's ruling. After a continuance, the hearing on Montgomery's motion for reconsideration was set for September 6, 2016. On that date, the hearing was continued so that Montgomery could obtain a court reporter. Montgomery

¹ Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

then moved for sanctions against Wal-Mart, alleging that Wal-Mart's counsel had agreed to have a court reporter at the September 2016 hearing but had canceled the reporter at the last minute, and that counsel had made misrepresentations to the court concerning payment to the court reporter.

The hearing on Montgomery's pending motions was set for November 23, 2016, but on that date Montgomery advised the court of additional motions he wished the court to consider. The court instructed Montgomery to refile and properly serve all his motions so they could be addressed in a single hearing.

On January 20, 2017, the court heard 15 motions filed by Montgomery. The court ruled one request for judicial notice moot, granted another request for judicial notice, and denied all the other motions. Specifically, the court denied Montgomery's request for reconsideration of the July 2016 order denying his request to reopen the case; two motions for sanctions against Wal-Mart; motions for the entry of default and default judgment against the County, the Los Angeles County Sheriff's Department, former Sheriff Lee Baca, Sheriff's Deputy Joshua Whiting, the "Los Angeles County Clerks Department," and a County employee named Kelly Robbins; motions to strike the oppositions filed to Montgomery's motion for reconsideration and motions for sanctions; a motion to vacate the court's 2014 order dismissing Wal-Mart from the action; and a motion to reopen the case under section 473. Montgomery appeals.

DISCUSSION

Montgomery contends that the trial court erred in its rulings on 13 of the 15 motions it heard on January 20, 2017; seeks sanctions against Wal-Mart and its attorneys; and requests

corrections to our 2014 opinion and changes to the practices of the trial court.

I. Non-Appealable Orders

The existence of an appealable judgment or order is a jurisdictional prerequisite to an appeal. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 (*Griset*).) Of the 13 rulings from January 2017 that Montgomery challenges, 10 concern non-appealable orders.

First, Montgomery appeals from the denial of his motion for reconsideration of the July 2016 order denying his request to reopen the case pursuant to section 473. While an order denying relief from a judgment under section 473 is a separately appealable post-judgment order under section 904.1, subdivision (a), an order denying a motion for reconsideration pursuant to section 1008, subdivision (a) is not. (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 927; § 1008, subd. (g).) If Montgomery had appealed from the denial of the July 2016 motion to reopen the case pursuant to section 473, we would review the denial of his motion for reconsideration as part of an appeal from that order. (§ 1008, subd. (g).) As he did not appeal from the July 2016 ruling, we have no jurisdiction to entertain an appeal from the denial of the motion for reconsideration of that ruling.

Montgomery also appeals from the trial court's denial of his six motions for entry of default and default judgment as to Los Angeles County, its agencies, and its employees. An order denying entry of a default or default judgment is not an appealable order. (*Brown v. Sterling Fixture Co.* (1917) 175 Cal. 563, 565; *Barbaria v. Independent Elevator Co.* (1955) 133 Cal.App.2d 657, 658-659.)

Montgomery next appeals from the denial of his motions to strike Wal-Mart's oppositions to his sanctions motions and motion for reconsideration, arguing that all opposition documents filed were untimely. A trial court order is appealable only when made so by statute. (*Griset, supra*, 25 Cal.4th at p. 696.) There is no statutory provision for appeal from orders denying motions to strike a party's opposition papers. These orders are not appealable.

Finally, Montgomery appeals from the denial of his motion to vacate the 2014 judgment dismissing Wal-Mart from the action. Generally, the denial of a motion to vacate a judgment is not appealable because any assertions of error can be reviewed on appeal from the judgment itself, although there are exceptions to this rule. (*In re Marriage of Brockman* (1987) 194 Cal.App.3d 1035, 1040.) In his moving papers, Montgomery did not invoke any statutory or decisional authority for bringing this motion, nor has he argued on appeal that any of the exceptions to the general rule of non-appealability apply. We are unable to identify any applicable exception here and conclude that the order denying his request to vacate the judgment is not an appealable order.

II. Motions for Sanctions in Trial Court

Montgomery unsuccessfully sought sanctions against Wal-Mart in the trial court. A postjudgment order denying sanctions pursuant to section 128.7 is an appealable order pursuant to section 904.1, subdivision (a)(2). (*Day v. Collingwood* (2006) 144 Cal.App.4th 1116, 1123.) A trial court's order is presumed correct and will not be set aside on appeal absent an affirmative showing of reversible error. (See *Samara v. Matar* (2018) 5 Cal.5th 322, 335, 234 Cal.Rptr.3d 446, 455.)

Montgomery's full argument concerning the trial court's rulings on his sanctions motions is, "These prima facie motions have been unopposed pursuant to the rule (above) prima facie unopposed facts etc." While it is difficult to derive meaning from this argument, Montgomery appears to be referring to a theory articulated earlier in his opening brief that under California Rules of Court, rules 8.54 and 8.276 the failure to oppose a motion for sanctions constitutes consent. The Rules of Court he cites apply to motions for sanctions filed in the Court of Appeal, however, not to those filed in the trial court; and even if these rules were applicable, California Rule of Court, rule 8.276(d) expressly provides that the failure to oppose a motion for sanctions is not deemed consent. Montgomery has not met his burden to establish error by the trial court in denying his motions for sanctions.

III. Second Motion to Reopen under Section 473

Montgomery again moved to reopen the case under section 473 in December 2016. The portion of the statute on which he intended to rely is unclear because he referred to section "473 (a), (1), (c)." Section 473, subdivision (a)(1) authorizes the trial court to permit a party to amend a pleading by adding or striking out the name of the party, correcting a mistake in a party's name, or correcting any other mistake, and it also provides the trial court with authority to allow amendments "to any pleading or proceeding in other particulars" and to permit an answer to be filed belatedly. This provision does not authorize revival of an action that has previously been dismissed.

Although section 473, subdivision (b) empowers the trial court to relieve a party from a judgment taken against the party due to mistake, inadvertence, surprise, or excusable neglect, any

application under this provision must be made within a reasonable time and no more than six months after the judgment was entered. (§ 473, subd. (b).) Far more than six months have passed here: The judgment against the County was entered in 2012, and the judgment against Wal-Mart was entered in 2014. The court properly denied Montgomery's request to reopen the litigation pursuant to section 473.

IV. Sanctions Requests in the Court of Appeal

Montgomery filed motions in this court in May 2017 and September 2017 seeking sanctions against Wal-Mart and its counsel. In the May 2017 motion, Montgomery alleged that Wal-Mart engaged in bad-faith tactics when it cancelled a court reporter for a trial court hearing; filed untimely oppositions in the trial court; obtained a judgment of dismissal in 2014; filed an allegedly duplicative designation of the record on appeal; filed a late demurrer in 2012; and "plead[ed] improper service" of an unnamed document. Montgomery sought sanctions under sections 128.5 and 128.7.

In the September 2017 motion for sanctions, Montgomery argued that Wal-Mart back-dated a 2014 notice of its intent to request dismissal by ex parte application; violated the service requirements of section 1013 in 2014; failed to follow the provisions in California Rules of Court, rule 3.670 regarding a 2013 telephonic appearance; and violated several provisions of the California Rules of Court on a case management statement filed in the trial court in 2013. As relief Montgomery requested that this court award monetary sanctions and strike from the record the 2014 notice of the ex parte hearing, the 2014 application and order dismissing Wal-Mart from the case, the

2013 opposition to Montgomery's motion for default judgment, and a 2013 case management statement.

This court may award sanctions when it appears that an appeal was frivolous or taken solely for delay, or when a party engages in improper conduct in the course of an appeal or writ proceeding such as including in the appellate record matter not reasonably material to the appeal's determination, filing a frivolous motion, or committing unreasonable violations of court rules. (§ 907; Cal. Rules of Court, rule 8.276(a).) With one exception, all the conduct Montgomery alleges took place in the trial court and has no relation to the appeal, and it therefore cannot constitute an abuse of the appellate process within the scope of section 907 and California Rules of Court, rule 8.276. The only alleged improper conduct that relates in any way to this appeal is Wal-Mart's allegedly redundant designation of the reporter's transcript on appeal. We have reviewed the record designations filed by both Montgomery and Wal-Mart. Montgomery's designation set forth the wrong hearing date for one hearing and described another hearing ambiguously. In its designation Wal-Mart provided the correct hearing date and gave a more complete description of the other proceeding in keeping with the instructions on the designation form. Montgomery has not demonstrated any improper or sanctionable conduct in conjunction with the designation of the record on appeal. We deny the motions for sanctions.

V. Additional Relief Requested

Montgomery asks this court to correct purported errors in this court's 2014 opinion. Montgomery did not request a rehearing or modification of the opinion at the time the opinion was filed, and this court no longer has jurisdiction to modify its

prior opinion. A reviewing court may modify a decision only until the decision is final in that court. (Cal. Rules of Court, rule 8.264(c).) The decision became final 30 days after it was filed in February 2014. (Cal. Rules of Court, rule 8.264(b)(1).)

Montgomery also complains that the trial court had a policy, of which he was not informed, of accepting late-filed oppositions, and that this placed him at a disadvantage at the January hearing because he was only prepared to argue about the timeliness of the opposition papers. He argues that the court's policy violated his constitutional rights to due process and equal protection and asks that the court "correct" the trial court's practice for the benefit of future self-represented litigants. We need not reach the merit, if any, in this argument. The trial court ruled that all the opposition papers had been timely filed. As Montgomery has not demonstrated that he was aggrieved by the trial court's purported policy, he has no standing to raise this issue on appeal. (§ 902; *Vitatech Int'l., Inc. v. Sporn* (2017) 16 Cal.App.5th 796, 803-804.)

DISPOSITION

Montgomery's appeals from the court's January 20, 2017 orders denying his motion for reconsideration of the July 2016 order refusing to reopen the case; his motions for the entry of default and default judgment against the County, the Los Angeles County Sheriff's Department, former Sheriff Lee Baca, Sheriff's Deputy Joshua Whiting, the "Los Angeles County Clerks Department," and a County employee named Kelly Robbins; his motions to strike the oppositions filed to his motion for reconsideration and motions for sanctions; and his motion to vacate the court's 2014 order dismissing Wal-Mart from the

action are dismissed. In all other respects, the orders are affirmed.

Montgomery's requests for modification of our 2014 opinion and to modify the practice of the trial court are denied. We deny Montgomery's motions for sanctions. Respondents shall recover their costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.