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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MITCHELL J. STEIN, Defendant and Appellant.	B275955 (Los Angeles County Super. Ct. No. LCO94571)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Ann I. Jones, Judge. Dismissed, in part, and affirmed.

Law Offices of David S. Harris, David S. Harris, and Law Offices of James N. Fiedler, James N. Fiedler, for Defendant and Appellant.

Xavier Becerra, Attorney General, Nicklas A. Akers, Senior Assistant Attorney General, Daniel A. Olivas, Supervising Deputy Attorney General, and David A. Jones and Timothy D. Lundgren, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The California Attorney General filed a civil action against then-attorney and defendant Mitchell Stein (defendant), as well as others, for engaging in unfair business and advertising practices and obtained a temporary restraining order (TRO) and preliminary injunction against defendant. After settling with and obtaining final judgments against all of the other defendants, the Attorney General moved for summary adjudication of a declaratory relief claim seeking a declaration that the Attorney General was the prevailing party in the action against defendant. The trial court granted the motion and entered a judgment against defendant declaring the Attorney General the prevailing party and dismissing without prejudice all remaining claims against defendant.

On appeal, defendant challenges the summary adjudication order as legally erroneous, as well as the orders granting the TRO and preliminary injunction. In addition, defendant challenges an order entered in a separate but related action filed by the State Bar of California, pursuant to which the trial court in that action assumed jurisdiction over defendant's law practice.

We affirm the summary adjudication order and judgment based thereon, as defendant has failed to demonstrate prejudicial error warranting reversal. We dismiss the appeals from the other orders as untimely or beyond our jurisdiction.[1]

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[1] Defendant's requests for judicial notice filed January 2 and July 27, 2017, are denied as moot.

FACTUAL AND PROCEDURAL BACKGROUND

I. Commencement of the Instant Action

On August 15, 2011, the Attorney General filed this civil action (case number LC094571) in the Northwest District of the Los Angeles County Superior Court, alleging violations of Business and Professions Code sections 17200 and 17500 against a number of nonattorney and attorney defendants, including defendant. The Attorney General summarized in the operative second amended complaint the facts giving rise to the action as follows:

"Defendants prey on desperate consumer homeowners facing foreclosure and the loss of their homes by selling participation in so-called 'mass joinder' lawsuits against their mortgage lenders. Veterans of the loan modification industry, [d]efendants use deceptive advertising and telemarketing to recruit consumers to join these lawsuits, at a cost of thousands of dollars each. Consumers are led to believe that joining these lawsuits will stay foreclosures, reduce their loan balances, entitle them to monetary benefits and potentially get them their homes free and clear of their mortgage. [¶] . . . [¶] Homeowners are told that a settlement could happen at any moment and only those who have joined the lawsuit will receive the promised benefits. Defendants repeatedly make false or misleading statements to homeowners to get them to sign a retainer agreement and pay them thousands of dollars. Once homeowners sign a contract to join a 'mass joinder' lawsuit and [d]efendants take their money, as much as $10,000, from their bank accounts, homeowners find they are unable to speak with an attorney with knowledge of the lawsuit. Basic questions such as whether the homeowner has been added to the lawsuit go unanswered. Some

homeowners pay [d]efendants thousands of dollars only to lose their homes shortly thereafter to foreclosure. [¶] Thousands of Californian homeowners have fallen for [d]efendants' scam, and [d]efendants have exported their mass joinder scheme nationwide."

The same day the original complaint was filed, the Attorney General applied ex parte, without notice, for a TRO. The trial court granted the TRO, which restrained defendant from "[m]aking or causing to be made . . . any untrue or misleading statements to consumers, in connection with any proposed or actual lawsuit or settlement with their home mortgage lender . . . ." The TRO further restrained defendant from engaging in "'running and capping,' the practice of a non-attorney acting for consideration . . . as an agent for an attorney or law firm, in the solicitation or procurement of business for the attorney or law firm, or [] soliciting non-attorneys to commit or join in running and capping."

On November 8, 2011, the trial court issued a preliminary injunction enjoining defendant from engaging in the acts or practices previously restrained under the TRO.[2]

II. The Federal Criminal Case and SEC Civil Action

On December 13, 2011, a federal grand jury in the Southern District of Florida returned an indictment, charging defendant with fourteen counts of conspiracy to commit mail and wire fraud, mail fraud, wire fraud, securities fraud, money laundering, and conspiracy to obstruct justice—all arising from conduct unrelated to the instant case. On May 20, 2013, a jury

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[2] The trial court had issued preliminary injunctions against the other defendants on September 6, 2011.

found defendant guilty as charged on all 14 counts of the indictment. On December 8, 2014, the Florida district court sentenced defendant to, among other things, 17 years in federal prison. On April 8, 2015, the Florida district court entered an amended judgment ordering defendant to pay restitution to the victims of his crimes in the amount of $13,186,025.[3]

The Securities and Exchange Commission (SEC) also brought a parallel civil action against defendant for the conduct underlying the Florida criminal case. On March 3, 2015, the U.S. District Court for the Central District of California entered judgment against defendant in the SEC's action. That judgment ordered, inter alia, that defendant disgorge $5,378,581 and pay a civil penalty in the same amount, for an aggregate judgment, including prejudgment interest, of $11,454,997.

III. Declaratory Relief in the Instant Case

During 2013, each of the other defendants in this action entered into settlement agreements with the Attorney General's Office, and final judgments were entered against them. Defendant, however, was unable to settle the claims against him.

During an April 13, 2015, status conference in this case, the trial court and the Deputy Attorney General engaged in the following discussion about bringing the action against defendant to a close: "[Deputy Attorney General]: [G]iven the reality of this case and given the fact that you can't squeeze blood from a stone, the [the Attorney General has] considered dismissal without

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[3] The Court takes judicial notice that the U.S. Court of Appeals for the Eleventh Circuit affirmed defendant's convictions on January 18, 2017, and that the U.S. Supreme Court denied defendant's petition for a writ of certiorari on December 11, 2017.

prejudice against [defendant]. This would be, of course, solely in the interest of the court's resources, as well as the state's resources. [¶] The problem from [the Attorney General's] perspective with dismissing without prejudice is first [defendant's separate civil] action against the [P]eople [for] bringing this law enforcement action [against him]. But also, the fact that under the prevailing party statute, there's a possibility that [defendant] may claim he's a prevailing party for purposes of costs. . . . [I]t's the [Attorney General's] stance that [such a result] would be inequitable and stretch[] the very definition of what a prevailing party is. [¶] So we were wondering if the court could give us any guidance on what your honor is thinking as to the prevailing party in this action. . . . [¶] . . . [¶] . . . The Court: . . . Do you have some suggestions? [¶] [Deputy Attorney General]: I was hoping the court may be willing to give some additional guidance on your thoughts as to the prevailing party in the event the [P]eople did dismiss without prejudice, if the court would be inclined to call [defendant] the prevailing party, if he did bring a motion for costs. . . . [¶] The Court: Well, one thing you might want to do . . . instead of just filing a request for dismissal[, is initiate a] summary [proceeding] . . . [¶] . . . [¶] . . . which requires court approval and in which there are certain recitations as to what has been accomplished in the suit and the findings of the court . . . and the benefits that the [Attorney General has] obtained as a result of bringing this [action]. . . . This is very new. This case is unlike any other case I've had - - [¶] . . . [¶] The Court: - - [W]ith respect to prevailing . . . in essence, [the Attorney General] did prevail. And I think [the Attorney General] did a wonderful job. [¶] . . . [¶] The Court: . . . Some people . . . turned over money for representation . . . they didn't

receive, and [the Attorney General] made sure that didn't happen again. So that might be one way of doing it. [¶] [Deputy Attorney General]: Thank you, your honor. That's very helpful guidance. [¶] . . . [¶] . . . The Court: . . . [T]he other thing I could do is . . . have a prove-up mini trial and [defendant] can submit whatever evidence he wants in writing since he can't appear by himself. . . . [¶] [Deputy Attorney General]: I'm thrilled to take both of these options back to my office."

In an April 28, 2015, minute order, the trial court directed the Attorney General to "explore the idea of adding a cause of action for declaratory relief re injunction which has already been issued." Thereafter, at a July 17, 2015, status conference, the trial court "questioned whether [the Attorney General] anticipate[d] amending its complaint against [defendant] to seek declaratory relief on the issue of costs. After [the Attorney General] confirmed that [it] plan[ned] to seek declaratory relief against [defendant], the [c]ourt sua sponte granted leave for the [Attorney General] to amend its complaint."

On July 21, 2015, the Attorney General filed a second amended complaint, which included a fifth cause of action seeking a declaration that the Attorney General was the prevailing party in the action. The newly added fifth cause of action alleged that "[w]ith the strong injunctive and monetary results obtained against the other defendants in this case, the [Attorney General] has prevailed in this action by putting an end to the Mass Joinder scheme and obtaining restitution for harmed consumers." The second amended complaint added the following prayer for relief: "That the Court provide declaratory relief that, as defined by Code of Civil Procedure section 1032 or any other relevant law, [the Attorney General] is the prevailing party as to

[defendant] for all purposes including for purposes of fees and costs, regardless of whether the [Attorney General] in the interests of conserving state and judicial resources, dismisses without prejudice its First, Second, and Third Causes of Action against [defendants]."

On September 15, 2015, the Attorney General moved for summary adjudication of the fifth cause of action only. The Attorney General summarized the grounds for the motion as follows: "[W]ith the Temporary Restraining Order and Preliminary Injunction obtained against all defendants, including [defendant], along with the strong injunctive and monetary results obtained against the other defendants in this case, the [Attorney General] has prevailed in this action by putting an end to the Mass Joinder scheme and obtaining restitution for harmed consumers. Moreover, [defendant] not only has federal law enforcement judgments exceeding $20 million against him, he is currently serving a 17-year federal prison term and is no longer eligible to practice law. In other words, [defendant] is judgment-proof. Thus, [the Attorney General] believes that dismissing the remaining [claims] against [defendant] is appropriate in order to preserve taxpayer and judicial resources. However, [defendant] should not be able to claim that he is the prevailing party for any purposes, including costs. Such a result would be unjust. This Motion for Summary Adjudication will allow the Court to determine the prevailing party issue so that the [Attorney General] may avoid uncertainty on this issue."[4]

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[4] On September 6, 2013, the State Bar issued an order suspending defendant from the practice of law effective October 1, 2013, due to defendant's criminal convictions in the federal case in Florida.

On October 5, 2015, the parties stipulated to continue the hearing on the summary adjudication motion from December 11, 2015, to February 5, 2016. On January 7, 2016—one day before his opposition to the summary adjudication motion was due—defendant applied ex parte for a continuance of the hearing date on that motion. The application was supported by defendant's declaration and several exhibits. The trial court heard and denied defendant's application that day, but granted his alternative request to treat his application as his opposition to the motion for summary adjudication.

On February 5, 2016, the trial court held a hearing on the summary adjudication motion and thereafter granted it.

On April 4, 2016, the Attorney General made a motion for entry of judgment, which defendant opposed. On May 9, 2016, the trial court entered a judgment against defendant on the fifth cause of action, declaring defendant the prevailing party in the action for all purposes. Based on the Attorney General's request, the judgment also dismissed without prejudice the remaining second, third, and fourth causes of action against defendant.

IV. The Related State Bar Action

On August 15, 2011, the same day the Attorney General brought the instant action, the State Bar filed in the Northwest District of the Los Angeles County Superior Court a verified petition and application for assumption of jurisdiction over defendant's law practice under Business and Professions Code section 6190 et seq., in case number LS021817.

On September 2, 2011, the trial court found that the instant action by the Attorney General (case number LC094571) was related to the State Bar action and designated this action as

the "lead case." That ruling was made without prejudice to the parties making a motion to consolidate both matters. On September 7, 2011, the managing judge of the complex litigation program for the Los Angeles County Superior Court determined that the related cases should be designated as complex, transferred them to the complex litigation program, and assigned them to a judge in that program in the Civil Central West District. The two separate actions were never consolidated, however, and no party to either action ever sought to do so.

On October 13, 2011, the trial court in the State Bar action issued permanent orders authorizing the State Bar to assume jurisdiction over defendant's law practice. On April 1, 2016, the trial court granted the State Bar's request to terminate its jurisdiction over defendant's law practice, thereby effectively concluding the State Bar action (case number LS021817) against defendant.

V. The Instant Appeal

On June 30, 2016, defendant filed a notice of appeal from the judgment entered after the order granting summary adjudication in the instant case. The notice expressly referenced and attached a copy of the May 9, 2016, judgment and also referred to the order granting summary adjudication. It did not, however, mention the TRO, preliminary injunction, or order terminating jurisdiction over defendant's law practice in the State Bar action (case number LS021817).

DISCUSSION

I. Appeal from Order Assuming Jurisdiction Over Defendant's Law Practice (Case No. LS021817)

Defendant challenges the trial court's order in case number LS021817, pursuant to which the trial court assumed jurisdiction over defendant's law practice and appointed the plaintiff in that action—the State Bar—to oversee that law practice pursuant to Business and Professions Code section 6190.[5] Defendant's notice of appeal in this action, however, does not mention the October 26, 2011, order assuming jurisdiction he now challenges or the April 1, 2016, presumably final order terminating the trial court's jurisdiction over defendant's law practice. Nor does the notice mention the State Bar as a party to the appeal. Indeed, the notice of appeal was served only on the plaintiff in this action—the Attorney General—and not on the State Bar, which was the plaintiff in the other action (case number LS021817).

We agree with the Attorney General that we do not have jurisdiction to address an order entered in a separate but related action in favor of a party that is not a party to this action. Furthermore, we note any such order would have been separately appealable either as a directly appealable order when made in 2011 or after the entry of the April 1, 2016, presumably final, appealable order. Defendant did not file a timely notice of appeal

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[5] Section 6190 provides: "The courts of the state shall have the jurisdiction as provided in this article when an attorney engaged in the practice of law in this state has . . . become incapable of devoting the time and attention to, and providing the quality of service for, his or her law practice which is necessary to protect the interest of a client if there is an unfinished client matter for which no other active member of the State Bar, with the consent of the client, has agreed to assume responsibility."

from either of those orders in case number LS021817. We therefore must dismiss in this action his attempt to appeal from the order assuming jurisdiction in the State Bar action. (*See Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1171 [where orders and judgments are separately appealable "each appealable judgment and order must be expressly specified . . . in order to be reviewable on appeal"]; *Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 693 ["'If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review'"].)

II. Appeal from TRO and Preliminary Injunction

Defendant attempts to appeal from the August 15, 2011, TRO and the November 8, 2011, preliminary injunction entered in this action. Those orders, however, were immediately and separately appealable under Code of Civil Procedure section 904.1, subdivision (a)(6). Because defendant did not appeal from those orders within the time provided in California Rules of Court, rule 8.104(a), we conclude his challenge to those orders in this appeal filed after entry of the final judgment in May 2016 is untimely and cannot be addressed. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 110.)

III. Appeal from Order Granting Summary Adjudication

Defendant contends that the trial court erred by granting summary adjudication of the Attorney General's declaratory relief claim. Although we have found no basis to support a stand alone cause of action for declaratory relief as a "prevailing party," we, nonetheless, affirm the trial court's order because defendant has not shown any injustice or prejudice to him arising from the

grant of summary adjudication.[6] "A judgment is reversible only if any error or irregularity in the underlying proceeding was prejudicial. . . . There is no presumption of prejudice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Instead, the burden to demonstrate prejudice is on the appellant." (*Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527-528.)

Here, defendant was obligated to demonstrate prejudice in his opening brief (*Sanchez v. State of California* (2009) 179 Cal.App.4th 467, 489), but he did not. Nor could he.[7] Indeed, defendant concedes as much in his response to this Court's letter to the parties, pursuant to Government Code section 68081, requesting briefing on whether the Court should affirm based on defendant's failure to demonstrate prejudice warranting reversal. In his response, defendant again points to no prejudice or injustice resulting from the grant of summary adjudication.

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[6] We therefore do not reach defendant's other claims that the trial court erred by declining to continue the hearing on the summary adjudication motion, by making evidentiary rulings in connection with the motion, and by ultimately granting the motion.

[7] For example, defendant did not even attempt to show that, but for the trial court's purported errors, it was reasonably probable that he would have filed a cost bill and successfully argued that he was the prevailing party for purposes of a cost award under Code of Civil Procedure section 1032. Similarly, he does not attempt to show that, but for the prevailing party determination, it was reasonably probable the Attorney General would have refused to voluntarily dismiss its claims against defendant anyway and proceeded to a determination of those claims on the merits, much less that it was reasonably probably defendant would have obtained a favorable merits determination.

Instead, defendant merely argues "the improperly adjudicated judgment *itself*" constitutes prejudice and that "requir[ing] a showing of *an additional* prejudice besides the unlawful judgment" would "create an elusive standard." The standard, however, is clear—"[n]o judgment shall be set aside" unless "the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; *see also* Code Civ. Proc., § 475.) We therefore conclude the summary adjudication order from which defendant appeals must be affirmed based on his failure to satisfy his affirmative duty on appeal of demonstrating prejudice warranting reversal.

DISPOSITION

The appeal from the order assuming jurisdiction in the separate but related case filed by the State Bar—case number LS021817—is dismissed for lack of jurisdiction. The appeals in this case from the TRO and preliminary injunction are dismissed as untimely. The summary adjudication order and judgment based thereon are affirmed.

Plaintiff is awarded costs on appeal.

KIN, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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* Judge of the Superior Court of the County of Los Angeles appointed by the Chief Justice pursuant to Article VI, section 6, of the California Constitution.