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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GUNTER ZIELKE et al.,

Plaintiffs and Respondents,

v.

SCOTT ERIC ROSENSTIEL
et al.,

Defendants and Appellants.

B287081

(Los Angeles County
Super. Ct. No. BC628570)

APPEALS from an order of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Appeals dismissed.

Scott Eric Rosenstiel, in pro. per.; Law Office of Robert L. Bachman and Robert L. Bachman for Defendant and Appellant Scott Eric Rosenstiel.

Law Office of Chad Thomas Pratt, Sr. and Chad Thomas Pratt, Sr. for Defendant and Appellant Kenneth M. Adler, as Trustee of the Federal Homeowners Relief Foundation

No appearance for Plaintiffs and Respondents.

Scott Eric Rosenstiel and Kenneth M. Adler, as trustee of the Federal Homeowners Relief Foundation (Foundation), appeal from the order granting Gunter Zielke's motion to sever Los Angeles County Superior Court Case No. (L.A. No.) BC628570 from L.A. No. BC608565. We dismiss the appeals for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

1. Rosenstiel's and the Zielkes' Actions

On January 27, 2016 Rosenstiel filed a derivative action (L.A. No. BC608565) on behalf of the Foundation, a trust, seeking, among other relief, to quiet title to real property located in Sunland.¹ His operative first amended complaint, filed July 15, 2016, named as defendants Gunter Zielke and his wife, Prapapun Zielke;² Sunland Financial Services; Marsha Stern, Rosenstiel's grandmother, as managing trustee of the Foundation; and Maximilian Joachim Sandor.

On July 28, 2016 the Zielkes filed their own action (L.A. No. BC628570) to quiet title to the Sunland property, as well as to assert other claims. The Zielkes named as defendants Rosenstiel, Stern in her individual capacity and as trustee of the Foundation, Randall Alan Alford and Andrew J. Stern.

¹ The factual and procedural background of this matter is based in part on the record in Rosenstiel's prior appeal of the trial court's orders in L.A. No. BC608565. (*Rosenstiel v. Sunland Financial Services* (Aug. 21, 2019, B286483) [nonpub. opn.], opn. mod. Sept. 10, 2019.) Pursuant to California Rules of Court, rule 8.155(a), we augment the record to include those materials.

² We refer to Gunter and Prapapun by their first names when considered severally.

2. The Zielkes' Motion To Relate and Consolidate Cases

On February 17, 2017 the Zielkes moved to relate eight cases³ and to consolidate several of them, all involving Rosenstiel or Stern and ownership of the Sunland property. The caption page indicated the motion was filed in L.A. No. BC608565, but also listed L.A. No. BC628570 (as well as other cases) as a related case. On March 3, 2017 the Zielkes filed another notice of related case, identifying eight additional cases as related to Rosenstiel's case.⁴

3. The Trial Court's March 2017 Orders Granting the Zielkes' Motion

On March 21, 2017 the trial court heard the Zielkes' motion to relate and consolidate cases. As shown by the minute orders

³ The Zielkes requested the following eight cases be deemed related: (1) L.A. No. BC608565; (2) L.A. No. BC615215, filed by Rosenstiel against the Alpha Beta Gamma Trust to resolve ownership of the Sunland property and/or of the Alpha Beta Gamma Trust, which may or may not hold the Sunland property as a trust asset; (3) L.A. No. BC628570; and (4) five cases (L.A. Nos. LS029058, LS029059, LS929090, LS929091 and LS029128) filed in Stern's name by Rosenstiel, acting with power of attorney for Stern.

⁴ The eight additional cases identified were L.A. Nos. BC505675, EC060639, BC537921, LS027892, 16U08017, LS028480, BC644918, 16VESC07036. The Zielkes' March 3, 2017 notice of related cases, a completed Judicial Council of California form CM-015, indicated L.A. No. BC608565 as its case number on some of the pages, including the face page; other pages of the same form notice, however, indicated L.A. No. BC628570 as its case number.

dated March 21, 2017 for L.A. Nos. BC608565 and BC628570,⁵ the trial court granted the Zielkes' motion to relate cases and ordered all 16 cases, listed in the orders by their case numbers, be deemed related and reassigned to its department. In addition, the minute orders stated, "The motion as to consolidation is granted." The court ordered Rosenstiel's case, L.A. No. BC608565, "to be the lead case number and case caption." The parties were also "ordered to file all future documents as to any of the above cases using that case number and caption."

4. Gunter's Motion To Dismiss and the Court's Ruling

On September 1, 2017 Gunter moved to dismiss L.A. No. BC608565 for delay in prosecution and to allow the Zielkes' case, L.A. No. BC628570, to become the lead case. Gunter contended Rosenstiel had failed to effect service of process on him. According to Gunter, both Rosenstiel's case and the Zielkes' case sought to quiet title to the Sunland property; but the issue of ownership would be better addressed by the Zielkes' case: All parties had already been served in the Zielkes' case, and that case would permit consideration of more comprehensive facts regarding the property's ownership.

⁵ The March 21, 2017 minute order for L.A. No. BC608565 indicates proceedings were held at 8:35 a.m. regarding the motion to relate and consolidate, with an appearance by the Zielkes' counsel and no appearance for Rosenstiel. The March 21, 2017 minute order for L.A. No. BC628570 indicates proceedings were conducted at 9:05 a.m. with no appearances by the parties or their counsel (characterized in the register of actions as a nonappearance case review), but was in all other material respects identical to the L.A. No. BC608565 minute order.

Gunter also explained the trial court had previously determined Rosenstiel to be a vexatious litigant, and four of 14 related cases filed by Rosenstiel had already been dismissed for failure of prosecution. Gunter argued, instead of attempting to personally serve Gunter and despite multiple opportunities to effect personal service, Rosenstiel had engaged in serial filing of additional cases in an attempt to impede the Zielkes' efforts to quiet title to the Sunland property; and, despite the Zielkes' diligence in serving and attempting to litigate their case, they were "waylaid" by Rosenstiel's vexatious filings and thus unable to quiet title. On November 1, 2017 the trial court in L.A. No. BC608565 heard and granted Gunter's motion to dismiss, with the dismissal order entered that same day.

5. Gunter's Motion To Sever and Rosenstiel's Prior Appeal of the Trial Court's Dismissal

On November 3, 2017 Gunter moved to sever L.A. No. BC628570 from L.A. No. BC608565. Gunter argued service of process had been effected on all defendants in the Zielkes' case and the case should thus be severed from L.A. No. BC608565, "including all the consolidated cases," so that title to the Sunland property could be resolved. The caption page indicated the motion was filed in L.A. No. BC608565. Although the notice of motion stated the motion was by "Defendant Gunter Zielke," the memorandum of points and authorities stated, "[T]he Zielke's [*sic*], Doe Defendants in the instant case and Plaintiffs in the consolidated case (*Zielke et al v. Rosenstiel et al*; Case Number BC628570)[,] request this court to sever their case (*Zielke et al v. Rosenstiel et al*; Case Number BC628570)"

On November 22, 2017 Rosenstiel filed a notice of appeal in L.A. No. BC608565 from the trial court's dismissal order. We

affirmed the order in a nonpublished opinion. (*Rosenstiel v. Sunland Financial Services* (Aug. 21, 2019, B286483), opn. mod. Sept. 10, 2019 (*Sunland*).)

Rosenstiel also filed on November 22, 2017 a “Notice of Telephonic Appearance,” which, despite its title, contained his opposition to Gunter’s motion to sever. Among Rosenstiel’s arguments Rosenstiel contended the court’s dismissal order in his case effectively dismissed not just his case, but also the Zielkes’ case because the two cases had been consolidated by the March 21, 2017 order relating and consolidating cases; the court, he asserted, thus lacked subject matter jurisdiction to rule on Gunter’s motion to sever.

On December 7, 2017 the trial court granted Gunter’s motion to sever the Zielkes’ case, as indicated by the minute order entered that same day in Rosenstiel’s case. The minute order also states, “Consol – This Is Lead Case.”

6. *The Instant Appeals*

Rosenstiel and Marsha Stern each filed in L.A. No. BC628570 a notice of appeal of the trial court’s December 7, 2017 order granting Gunter’s motion to sever.⁶

⁶ Rosenstiel was declared a vexatious litigant on June 15, 2017 by the Los Angeles Superior Court and prohibited from filing any new litigation in California courts in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation was proposed to be filed. (Code Civ. Proc., § 391.7, subd. (a).) Notwithstanding the prefiling order, Rosenstiel filed his notice of appeal in propria persona on December 20, 2017. On October 1, 2018 Robert L. Bachman substituted into the case as Rosenstiel’s counsel. Bachman substituted out on November 9, 2018. Rosenstiel filed his opening brief in propria persona on the same day.

Stern subsequently died, and Adler was substituted in as appellant and trustee of the Foundation.

DISCUSSION

1. *We Have No Jurisdiction To Consider Rosenstiel's and Adler's Appeals in L.A. No. BC628570*

On appeal Rosenstiel and Adler argue the trial court lacked subject matter jurisdiction to grant Gunter's motion to sever. We have no jurisdiction, however, to hear an appeal in this action because Rosenstiel and Adler seek review of a nonappealable order. (See *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 21 ["a reviewing court lacks jurisdiction on direct appeal in the absence of an appealable order or judgment"]; accord, *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.) As indicated by their notices of appeal, which were filed in L.A. No. BC628570, Rosenstiel and Adler appeal from the trial court's order granting Gunter's motion to sever as a purported order after a judgment. Although an order after a judgment is generally appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(2), there was no judgment in L.A. No. BC628570, which is a pending action.

Rosenstiel and Adler contend, because the trial court consolidated L.A. Nos. BC608565 and BC628570 and made

On May 8, 2019 this court issued its order directing Rosenstiel, pursuant to Code of Civil Procedure section 391.7, subdivision (b), to show that his appeal has merit to avoid dismissal of the appeal. Rosenstiel responded by letter filed May 20, 2019. Because we conclude Rosenstiel has attempted to appeal from a nonappealable order, we dismiss his appeal for lack of jurisdiction, not pursuant to section 391.7.

L.A. No. BC608565 the lead case, its dismissal of that case necessarily included dismissal of L.A. BC628570. However, “[t]here are two types of consolidation: a complete consolidation resulting in a single action, and a consolidation of separate actions for trial. Under the former procedure, which may be utilized where the parties are identical and the causes have been joined, the pleadings are regarded as merged, one set of findings is made, and one judgment is rendered. In a consolidation for trial, the pleadings, verdicts, findings and judgments are kept separate; the actions are simply tried together for the sake of convenience and judicial economy.” (*Committee for Responsible Planning v. City of Indian Wells* (1990) 225 Cal.App.3d 191, 196-197; see *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1147.) As shown by the record, and as we concluded in *Sunland*, the trial court consolidated the various cases, including L.A. Nos. BC608565 and BC628570, for trial, not for all purposes;⁷ and, when it granted Gunter’s motion to dismiss, it dismissed only Rosenstiel’s case. As we explained in *Sunland*, Gunter

⁷ As we observed in *Sunland*, for example, the trial court could not have consolidated for all purposes, as opposed to for trial, because not all of the consolidated cases had identical parties. Wells Fargo Bank, N.A., for instance, is a defendant in L.A. No. BC644918 (the register of actions for which indicates it was “[c]onsolidated ([n]on-lead case) 03/21/2017”), but is not a party to Rosenstiel’s or the Zielkes’ cases. (See *Committee for Responsible Planning v. City of Indian Wells*, *supra*, 225 Cal.App.3d at p. 196 [consolidation for all purposes “may be utilized where the parties are identical”]; *Sanchez v. Superior Court* (1988) 203 Cal.App.3d 1391, 1396 [same]; 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 347, pp. 476-477 [the condition requiring actions involve the same parties is not present for a consolidation of separate actions for trial].)

expressly requested only Rosenstiel's case be dismissed for delay in prosecution, not all consolidated cases, and asked that L.A. No. BC628570 be designated the lead case after dismissal. Because the trial court did not dismiss L.A. No. BC628570, we lack jurisdiction to hear Rosenstiel's and Adler's appeals in that case.

2. *We Have No Jurisdiction To Consider Rosenstiel's and Adler's Appeals in L.A. No. BC608565*

Rosenstiel and Adler argue, even if L.A. No. BC628570 survived the dismissal of L.A. No. BC608565, Gunter filed his motion to sever as a defendant in L.A. No. BC608565, not as a plaintiff in L.A. No. BC628570; and the trial court no longer had jurisdiction to grant the motion in L.A. No. BC608565 after it dismissed that case. Essentially they are asserting their appeals are from an order in L.A. No. BC608565, not L.A. No. BC628570.

That the notices of appeal indicated L.A. No. BC628570 as the superior court case number for the appeal does not necessarily preclude Rosenstiel and Adler's argument their appeal is from an order in L.A. No. BC608565. (See *Luz v. Lopes* (1960) 55 Cal.2d 54, 59 ["notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced"]; *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361-362 [inadvertent reference to incorrect superior court case number in the notice of appeal did not warrant appeal's dismissal where the notice identified the specific order being appealed and there was no evidence respondent was misled or prejudiced].) Construing Rosenstiel's and Adler's notices of appeal as relating to an order in Rosenstiel's case, however, is inconsistent not only with the

references to L.A. No. BC628570 in the notices, but also with Rosenstiel's and Adler's arguments specifically predicated on an appeal in the Zielkes' case.⁸ Nonetheless, even if we were to do so, we would still lack jurisdiction to entertain their appeals.

To be appealable, a postjudgment order “must either affect the judgment or relate to it by enforcing it or staying its execution.” (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652; accord, *Olson v. Cory* (1983) 35 Cal.3d 390, 400; *Howeth v. Coffelt* (2017) 18 Cal.App.5th 126, 132-133.) Here, the order granting Gunter's motion to sever L.A. No. BC628570 did not affect or relate to the judgment, or order, of dismissal of L.A. No. BC608565 by enforcing it or staying its execution. Indeed, severing the Zielkes' case so that it could proceed to trial independently of the other pending consolidated cases has no impact whatever on Rosenstiel's dismissed case. The order granting Gunter's motion to sever is not an appealable order after a judgment.

⁸ As discussed, Rosenstiel and Adler argue on appeal that the trial court lacked jurisdiction to issue its order in L.A. No. BC628570 because the case had necessarily been dismissed as a result of the trial court's consolidation of cases. Moreover, in response to our May 8, 2019 notice requiring Rosenstiel to show cause why his appeal should not be dismissed in light of his status as a vexatious litigant, Rosenstiel asserted the vexatious litigant statute applies only to a plaintiff and he was appealing an order in L.A. No. BC628570, an action in which he is a defendant. Rosenstiel is a plaintiff in L.A. No. BC608565.

DISPOSITION

The appeals are dismissed for lack of jurisdiction.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.