Filed 4/14/17 Rosas v. Kensington Caterers CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROSA ROSAS et al., Plaintiffs and Appellants, v. KENSINGTON CATERERS INC. et al., Defendants and Respondents.	B270721 (Los Angeles County Super. Ct. No. BC507797)

APPEAL from orders of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed in part and dismissed in part.

Donald E. Iwuchukwu and Metu C. Ogike for Plaintiffs and Appellants.

Cruz & Del Valle, Leonard G. Cruz and Sonia H. Del Valle for Defendants and Respondents.

Plaintiffs and appellants Rosa Rosas (Rosas) and Julio Casas (Casas) (collectively, Plaintiffs) appeal an order denying their motion for reconsideration of an order vacating entries of default and default judgments that Plaintiffs obtained against defendants and respondents Richard Mooney (Mooney) and Kensington Caterers, Inc. (Kensington) (collectively, Defendants). Plaintiffs also appeal a subsequent order insofar as it compels their attorneys to return funds seized from Defendants' accounts pursuant to the vacated judgments.

Although Plaintiffs contend the trial court erred in granting the motion to vacate, Plaintiffs' notice of appeal did not specify the December 18, 2015 order vacating the entry of Defendants' defaults and default judgments as the order being appealed from. Rather, the notice of appeal specified the February 9, 2016 order denying Plaintiffs' motion for reconsideration. However, no separate appeal lies from the order denying reconsideration. (Code Civ. Proc., § 1008, subd. (g).)[1] Therefore, Plaintiffs have not perfected their appeal from the order granting Defendants' motion to vacate. Further, and in any event, on the motion to vacate default, the trial court found that that Defendants were not served with the summons and complaint, and we defer to the trial court's determination as to credibility. Therefore, the order granting the motion to vacate must be upheld.

As for the appeal from the order directing Plaintiffs' counsel to return seized funds to Defendants, Plaintiffs lack standing to assert error on their attorneys' behalf. (*Conservatorship of Gregory D.* (2013) 214 Cal.App.4th 62, 68

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

(*Gregory D.*).) Therefore, Plaintiffs' appeal from that order is dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Pleadings and entries of default*.

On May 3, 2013, Plaintiffs filed suit against Defendants, alleging, inter alia, wrongful termination in violation of public policy, as well as statutory claims under the Labor Code and under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).

In September 2013, Plaintiffs obtained entry of default as to both Defendants.

2. *Default prove-up and default judgments*.

On March 19, 2015, the matter proceeded to a default prove-up hearing at which both Plaintiffs testified. The trial court found that both Plaintiffs had pled and proven claims against both Defendants for sexual harassment and intentional infliction of emotional distress, and against Kensington for failure to prevent harassment. The trial court also found that Casas had established his claim against Mooney for sexual assault.

On March 19, 2015, the trial court entered separate default judgments in favor of Casas and Rosas, against both Defendants, awarding each plaintiff the sum of $250,585.

3. *Plaintiffs' assignee executes on the default judgments*.

On March 26, 2015, Plaintiffs assigned their judgments for purposes of collection to Willie McMullen d.b.a. Strategic Collections, who obtained writs of execution.[2]

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[2] We note the record is inconsistent with respect to the spelling of McMullen's name.

On July 22, 2015, McMullen levied on $293,896.07 in accounts belonging to Defendants.

On October 7, 2015, McMullen assigned and transferred all rights, title and interest in the judgments back to Plaintiffs.

4. *Defendants obtain relief from the entries of default and default judgments*.

On September 4, 2015, nearly six months after entry of the default judgments, Defendants filed a motion under section 473 to set aside the entries of default, default judgments, and writs of execution. Defendants contended the court lacked jurisdiction because the judgments were procured by a false affidavit of service, due process was violated because the judgments exceeded the amount demanded in the complaint and Defendants had not been served with notice of case management conference, and the judgments were excessive.

In support of their motion, defendants submitted the declaration of Mooney, who indicated he was Kensington's agent for service of process. Mooney disputed that he had been personally served by an individual named Kingsley Ollawa. Mooney asserted he only learned of Plaintiffs' allegations when his attorneys obtained a copy of the complaint in August 2015. Defendants also submitted the declaration of Leo Burgara, a manager at Kensington, who stated that Plaintiffs never complained to him of sexual harassment, gender discrimination, wage and hour violations, or other issues before they were terminated on June 22, 2012. The moving papers also included a proposed answer to Plaintiffs' complaint.

On November 24, 2015, the matter came on for hearing. The trial court orally ruled that it would grant the motion "on all grounds asserted by the defense." On December 18, 2015, the

trial court entered a formal order setting aside the entries of default and the default judgments, cancelling the abstract of judgment, recalling the writs of execution, and deeming Defendants' answer served as of November 24, 2015, the date the matter was heard.

Plaintiffs did not appeal the December 18, 2015 order.

5. *Plaintiffs unsuccessfully move for reconsideration and then file notice of appeal from the order denying reconsideration*.

On December 3, 2015, Plaintiffs filed a motion for reconsideration under section 1008, subdivision (a). Plaintiffs asserted "[t]he new or different fact that was not considered by the Court at the time it rendered the Order was that Plaintiff filed its Statement of Damages with the court on September 6, 2013 and not concurrently with the Summons and Complaint as noted by the Court in its Order."

On February 9, 2016, the trial court heard and denied Plaintiffs' motion for reconsideration, stating: "Plaintiffs have not demonstrated any new or different facts, and the matters raised in the motion were fully considered at the 11/24/15 hearing. The court granted Defendants' motion for relief from default on all grounds asserted in the motion. Plaintiffs' motion for reconsideration only addresses one ground (relating to the statement of damages) which was fully considered by the court, and it does not address the other grounds for the ruling." The trial court set the matter for a jury trial for November 14, 2016.

On March 4, 2016, Plaintiffs filed a notice of appeal, specifying the February 9, 2016 order denying reconsideration as the order being appealed.

6. *Defendants successfully move to compel Plaintiffs to return the seized funds; Plaintiffs file a second notice of appeal, specifying the restitution order.*

On February 4, 2016, Defendants filed a motion for an order compelling Plaintiffs, their counsel, and McMullen to return property seized by Plaintiffs or on their behalf pursuant to a void judgment. Defendants asserted the failure of Plaintiffs, their counsel and their assignee to return funds wrongfully seized from Defendants constituted the tort of conversion, as alleged in a proposed cross-complaint which Defendants sought to file.

In opposition, Plaintiffs contended the proposed cross-complaint was untimely, the elements of the tort of conversion were not satisfied, and the proposed cross-complaint against Plaintiffs' attorneys was meritless and frivolous.

On March 2, 2016, the trial court heard the matter and granted Defendants' motion. It ordered Plaintiffs, their counsel, and McMullen to return all funds seized in execution of the vacated judgments within 20 days, adding that disobedience of the court's order could subject them to contempt of court.

The trial court explained: "It is well settled that Defendants are entitled to return of their funds. . . . [¶] Plaintiffs have opposed the motion, stating that they have no control over the funds because they assigned their rights to McMullen, who executed on the judgment.[3] The Court has jurisdiction over both Plaintiffs and McMullen. McMullen appeared in this action on 4/6/15 by filing a written assignment of the judgment, and he directly participated in the action by filing opposition to the motion to vacate on 9/26/15. Defendants'

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3 We note that on October 7, 2015, McMullen assigned his rights back to Plaintiffs.

present motion was served on McMullen, but he did not respond. Plaintiffs and McMullen cannot ignore their obligation to return the funds by pointing fingers at each other." The trial court deferred ruling on Defendants' request for leave to file a cross-complaint for conversion.

On March 16, 2016, Plaintiffs filed a notice of appeal from the March 2, 2016 order.

CONTENTIONS

Plaintiffs contend: the trial court erred in declaring their judgment void, as the amount awarded did not exceed the amount demanded in the complaint; there was no extrinsic fraud and Defendants did not overcome the presumption that they were served; and the trial court erred in ordering Plaintiffs' attorneys to return funds seized by Plaintiffs' assignee.[4]

DISCUSSION

1. *No showing of error in trial court's grant of motion to vacate.*

a. *Appealability: The February 9, 2016 order denying reconsideration is not appealable.*

The notice of appeal filed March 4, 2016 specified the February 9, 2016 order denying reconsideration. However, the appellants' opening brief asserts the first appeal is from the November 24, 2015 "judgment" granting Defendants' motion to vacate the default judgments. Likewise, appellants' case information statement indicated the appeal was from the order or judgment of November 24, 2015. However, the record reflects there was no judgment entered on November 24, 2015. On that

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[4] This court has read and considered Plaintiffs' two supplemental letter briefs pertaining to the issues of appealability and standing.

date, the trial court *orally* ruled that it was granting Defendants' motion to vacate the default judgments. On December 18, 2015, the trial court signed and entered a formal order vacating the entries of default and the default judgments. Plaintiffs did not file a notice of appeal from the December 18, 2015 order. Instead, on March 4, 2016, Plaintiffs filed a notice of appeal that specified the February 9, 2016 order denying their motion for reconsideration.

The December 18, 2015 order granting the motion to vacate the entries of default and the default judgments, which order was not appealed, became final and nonreviewable. (Cal. Rules of Court, rule 8.104 [notice of appeal must be filed on or before the earliest of 60 days after service of notice of entry of the order, or 180 days after entry of the order].)

As for the February 9, 2016 order denying reconsideration, because the motion for reconsideration was brought pursuant to section 1008, subdivision (a), the order denying reconsideration is not separately appealable. The controlling language is found in section 1008, subdivision (g), which states: "An order denying a motion for reconsideration made pursuant to subdivision (a) is not separately appealable. However, if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order."

Here, the underlying order, namely, the December 18, 2015 order granting the motion to vacate under section 473, was an appealable order. (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 628; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 194(a), p. 271.) Thus, the order denying the motion for reconsideration would have been reviewable as part of an appeal from the order of

December 18, 2015. (§ 1008, subd. (g).) However, Plaintiffs failed to appeal the order of December 18, 2015, and the subsequent order denying reconsideration of that order is not separately appealable. (§ 1008, subd. (g).)

Plaintiffs contend that pursuant to *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15 (*Walker*), this court should construe the notice of appeal from the nonappealable order to refer to the underlying appealable order. However, *Walker* is distinguishable. It held "a reviewing court should construe a notice of appeal from an order denying a new trial to be an appeal from the underlying judgment when it is reasonably clear the appellant intended to appeal from the judgment and the respondent would not be misled or prejudiced." (*Id*. at p. 22; accord, *Vibert v. Berger* (1966) 64 Cal.2d 65, 67-68.)

Here, appealability is governed by section 1008, subdivision (g), which provides an order denying reconsideration is appealable "as part of an appeal" from the underlying appealable order. (*Ibid*.) Plaintiffs did not specify the December 18, 2015 order in their notice of appeal, in their case information statement, or in their appellants' opening brief. Instead, they repeatedly represented to this court that they were appealing the November 24, 2015 "judgment." Thus, it is not "reasonably clear" (*Walker, supra*, 35 Cal.4th at p. 22) to this court that Plaintiffs intended to appeal the December 18, 2015 order granting the motion to vacate in conjunction with an appeal from the February 9, 2016 order denying reconsideration.

b. *No showing of error in grant of motion to vacate.*

Assuming arguendo the notice of appeal should be construed to refer to the December 18, 2015 order granting the motion to vacate, Plaintiffs have not shown reversible error.

" '[C]ompliance with the statutory procedures for service of process is essential to establish personal jurisdiction. [Citation.] Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void. [Citation.]' [Citation] Under section 473, subdivision (d), the court may set aside a default judgment which is valid on its face, but void, as a matter of law, due to improper service." (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.) When the issue on appeal is whether service was invalid, so as to render a default judgment void for lack of proper service of process, we review the trial court's order de novo. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.)

Nevertheless, "we defer to the trier of fact on issues of credibility." (*Lenk v. Total–Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) "Moreover, neither conflicts in the evidence nor ' "testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." ' [Citation.] Testimony may be rejected only when it is inherently improbable or incredible, i.e., ' "unbelievable *per se*," ' physically impossible or ' "wholly unacceptable to reasonable minds." ' " (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.) In addition, "on appeal we presume the trial court's order is correct, indulge all presumptions in favor of that correctness, and resolve all ambiguities in favor of affirmance." (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 889.)

The record reflects the trial court granted the motion to vacate "on all grounds asserted by the defense." Defendants'

moving papers on the motion to vacate included Mooney's declaration, which flatly denied that he was "personally served with the documents listed on the proofs of service on May 3, 2013." This was controverted by the affidavit of process server Kingsley Ollawa, who asserted that on May 3, 2013, he personally served Mooney with two copies of the summons, complaint, statement of damages and related documents, because Mooney was both a defendant and the registered agent for service of process for Kensington.

Here, the trial court evidently found Mooney's declaration credible and rejected Plaintiffs' claim that they had duly served Defendants. " '[A] determination of the controverted facts by the trial court will not be disturbed.' [Citations.]" (*Lynch v. Spilman* (1967) 67 Cal.2d 251, 259.) Therefore, we will not disturb the trial court's determination that the process server's declaration was not credible. Accordingly, the trial court acted within its discretion in granting Defendants' motion to vacate the entries of default and default judgments.

2. *Plaintiffs' appeal from the March 2, 2016 order directing their counsel to return seized funds to Defendants is dismissed, as Plaintiffs are not aggrieved thereby and lack standing to assert error on behalf of their attorneys, who did not appeal.*

Standing to appeal is jurisdictional (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 295) and the issue of whether a party has standing is a question of law (*IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299).

The March 2, 2016 order directs Plaintiffs, McMullen, and Plaintiffs' attorneys, to return funds seized from Defendants' accounts pursuant to the judgments which were later vacated.

The two individual Plaintiffs filed a notice of appeal from the March 2, 2016 order. However, Plaintiffs do not contend on appeal that the trial court erred in ordering *them* to return the seized funds. With respect to the March 2, 2016 order, Plaintiffs' only contention is that the trial court erred in ordering their attorneys, Donald E. Iwuchukwu and Metu C. Ogike, to return funds seized by McMullen. However, Plaintiffs have not demonstrated that they were aggrieved by that aspect of the order, and Iwuchukwu and Ogike have not appealed.

Gregory D., *supra*, 214 Cal.App.4th 62, is on point. There, we held the mother of a conservatee lacked standing to prosecute an appeal relating to various alleged violations of her son's rights. (*Id.* at p. 64.) The mother contended, inter alia, a visitation order that required the conservatee to spend weekends with his parents violated the conservatee's rights to liberty and privacy. (*Id.* at p. 68.) However, the mother did not identify any of her own rights or interests that were injuriously affected by the trial court's order; her assignments of error pertained solely to alleged deprivations of the conservatee's rights. (*Ibid.*) This court held the mother "lacks standing to assert error that injuriously affects only [the conservatee], a nonappealing party." (*Ibid.*; see also *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42 [client lacks standing to appeal a sanctions order on behalf of his attorney, who was the sanctioned party]; *Taylor v. Varga* (1995) 37 Cal.App.4th 750, 761-762 & fn. 12 [trial court sanctioned appellants *and* their attorneys but counsel did not appeal, precluding appellate court from reviewing portion of sanction order applicable to appellants' counsel].)

Here, Plaintiffs have not shown they are aggrieved by the provision in the March 2, 2016 order directing Iwuchukwu and

Ogike to return seized funds to Defendants. Plaintiffs lack standing to assert error on behalf of Iwuchukwu and Ogike, who did not appeal.

Although Iwuchukwu and Ogike were not listed as appellants on the notice of appeal, appellants cite *Beltram v. Appellate Department* (1977) 66 Cal.App.3d 711 for the proposition that this court should liberally construe the March 16, 2016 notice of appeal to include Iwuchukwu and Ogike as appellants. *Beltram* is unavailing. The issue presented in that case was "whether the appellate department of the superior court exceeded its jurisdiction in permitting the name of [a municipal employee] to be added to the City of Los Angeles' notice of appeal." (*Id.* at p. 714.) *Beltram* concluded the appellate department did not exceed its jurisdiction in liberally construing the notice to refer to the omitted employee. It reasoned, "[a]ny liability of the City of Los Angeles to plaintiffs is wholly derivative from the liability of its employee . . . . *The issues as to the City and its employee are identical.* Therefore the inadvertent omission of the employee's name from the notice of appeal cannot have prejudiced or misled plaintiffs or in any way affected their preparation for the appeal." (*Id.* at p. 715, italics added.)

Beltram is distinguishable. There, the issues as to the city and the omitted employee were identical. Here, the issues as to Iwuchukwu and Ogike, on the one hand, and Plaintiffs, on the other, are dissimilar; the appellants' opening brief argues the trial court erred in ordering Iwuchukwu and Ogike to return funds seized by McMullen because Iwuchukwu and Ogike "were not parties to the assignment." *Beltram* does not mandate this court to exercise its discretion to construe the March 16, 2016

notice of appeal to include the names of Iwuchukwu and Ogike, attorneys who were free to appeal on their own behalf.[5]

Therefore, Plaintiffs' appeal from the March 2, 2016 order is dismissed.

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[5] Attorneys Iwuchukwu and Ogike, although nonparties, could have appealed the March 2, 2016 order insofar as it ordered them to return seized funds to Defendants. "Nonparties who are aggrieved by a judgment may appeal from it. '[A]ny entity that has an interest in the subject matter of a judgment and whose interest is adversely affected by the judgment is an aggrieved party and is entitled to be heard on appeal. However, the aggrieved party's interest must be immediate, pecuniary and substantial, and not merely a nominal or remote consequence of the judgment.' (*Howard Contracting, Inc. v. G.A. MacDonald Construction* Co. (1998) 71 Cal.App.4th 38, 58 (*Howard*); accord *People v. Hernandez* (2009) 172 Cal.App.4th 715, 720 (*Hernandez*) [nonparty pawnbrokers may appeal order directing them to release pledged goods].)" (*In re FairWage Law* (2009) 176 Cal.App.4th 279, 285.)

DISPOSITION

The December 18, 2015 order granting the motion to vacate is affirmed. Plaintiffs' appeal from the March 2, 2016 order compelling their counsel to return seized funds to Defendants is dismissed. Defendants shall recover their costs on appeal.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.