Filed 9/28/12 Powell v. San Simeon Condo Assn. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PATRICIA POWELL, Plaintiff and Appellant, v. SAN SIMEON CONDOMINIUM ASSOCIATION et al., Defendants and Respondents.	B236429 (Los Angeles County Super. Ct. No. YC053965)

APPEAL from an order of the Superior Court of Los Angeles County, Dudley W. Gray II, Judge. Dismissed.

Patricia H. Powell for Plaintiff and Appellant.

Kulik, Gottesman & Siegel and Joseph R. Serpico for Defendants and Respondents.

In 2006 appellant Patricia Powell sued the governing board of her condominium complex and its members for alleged malfeasance. The trial court sustained defendants' demurrer to the second amended complaint without leave to amend and awarded prevailing party contractual attorney fees and costs, in an amount to be determined by a subsequent motion. Defendants' fee motion was filed but stayed while Powell, unsuccessfully, pursued an appeal with this Court and a petition for review with the California Supreme Court. Defendants' fee motion was revived after the remittitur issued in fall of 2008. In December 2008, judgment was entered awarding defendants over $63,000 in attorney fees and costs.

In June 2011, Powell filed a motion seeking reconsideration of the 2008 fee award. The trial court denied the motion and ordered Powell to pay sanctions. Powell appeals from that postjudgment order. This appeal, which is brought from a nonappealable order and is otherwise untimely, is meritless and must be dismissed. We also impose sanctions on Powell for filing this frivolous appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The operative facts are drawn primarily from our decision in an earlier appeal in this action. (See *San Simeon Condominium Association v. 2006, 2007 Board of Directors et al*., (July 29, 2008, B204041) [nonpub. opn.] (*San Simeon*).) Defendants are the San Simeon Condominium Association, a nonprofit mutual benefit corporation/common interest development governed by a board of directors, and members of its board. (*Id*. at p. 3.) Powell, a licensed attorney, owns a condominium in the San Simeon complex. For years Powell complained that she believed the defendants had committed numerous misdeeds, including engaging in financial improprieties, manipulating elections and self-dealing. (*Ibid*.)

In October 2006, Powell filed the first of several complaints purportedly in the name of the San Simeon Condominium Association as plaintiff, denominating herself, variously, as the San Simeon Condominium Association's "'owner/representative'" or its attorney of record. Powell never filed suit in her own name even though the complaint alleged injuries to Powell and sought relief personal to Powell, and sought to enforce

covenants, conditions and restrictions. Nor did Powell plead the action as a derivative cause of action under the Corporations Code. The complaint was a confusing mass of ambiguous allegations that failed to state any cause of action. (*San Simeon, supra*, B204041, at pp. 3-4.)

The defendants demurred to Powell's original and first amended complaint. Both demurrers were sustained with leave to amend, after Powell was given detailed information regarding specific deficiencies in her pleadings. (*San Simeon, supra*, B204041, at pp. 4–5.) Ultimately, in August 2007, the trial court sustained defendants' demurrer to a second amended complaint without leave to amend. The court found that Powell had filed the action on behalf of the San Simeon Condominium Association without authorization from its board of directors and without meeting the statutory requirements for a derivative action, and failed to name herself as plaintiff in order to properly assert individual claims against the defendants. (*Id*. at pp. 5–6.) The court found Powell incapable of amending the complaint, and also denied her request to file a third amended complaint on the San Simeon Condominium Association's behalf against its insurer for bad faith insurance practices. (*Id*. at p. 6.)

Judgment was entered in favor of the defendants on October 3, 2007. The defendants were awarded legal fees and costs, set to be determined by a subsequent fee motion. (Civ. Code, § 1354, subd. (c).)

In October 2007, as prevailing parties, the defendants filed a motion seeking contractual attorney fees and costs, as provided in the covenants, conditions and restrictions of the San Simeon complex. (Civ. Code, §§ 1021, 1354, subd. (c), 1717.) The hearing on the fee motion was stayed after Powell filed an appeal from the 2007 judgment.

In July 2008, we affirmed the trial court's ruling sustaining, without leave to amend, the defendants' demurrer to the second amended complaint. (*San Simeon, supra*, B204041, at p. 13.) In August 2008 we denied Powell's petition for rehearing.

In August 2008, the defendants sought an award of $63,469 for their attorney fees and costs incurred to date or, alternatively, monetary sanctions in the same amount.

(Code Civ. Proc., § 128.5.) The September 2008 hearing on that motion was stayed pending a ruling from the California Supreme Court, after Powell filed a petition seeking review of our decision on the merits in *San Simeon*, *supra*, B204041. The Supreme Court denied review in October 2008. The remittitur issued on November 10, 2008.

Following a hearing in mid-November 2008, the trial court granted defendants' fee motion, and ordered Powell to pay $63,469 for defendants' attorney fees and costs. Judgment on the fee motion was entered December 30, 2008. Powell sought a writ of mandate, which we denied, in January 2009.

In June 2011, over two and one-half years after judgment on the motion for attorney fees was entered, Powell filed a "Motion for Reconsideration." The trial court denied the motion and imposed $600 in sanctions against Powell. This appeal ensued.

DISCUSSION

1. Powell's appeal

The substantive arguments in Powell's motion for reconsideration are virtually unintelligible, and the motion fails to identify the statutory basis or bases upon which it was brought.[1] We conclude this untimely appeal from a nonappealable order must be dismissed.

To the extent Powell filed her motion for reconsideration pursuant to Code of Civil Procedure section 1008 (section 1008), the order denying the motion may not be independently appealed. (§ 1008, subd. (g).) However, "if the order that was the subject

---

[1] Powell does not take issue directly with the trial court's ruling, its stated reasons for denying her motion for reconsideration, or the order imposing sanctions. To the extent we are able to ascertain her contentions, Powell appears to assert that defendants' counsel committed contempt by allegedly circumventing unspecified court orders, by submitting false or misleading documentation to the trial court and by committing extortion and impairing her property rights by threatening to enforce the 2008 fee judgment and to record a lien against her real property.

of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order." (*Ibid.*)[2]

Powell's notice of appeal states only that her appeal is from an order after judgment. (Code Civ. Proc., § 904.1, subd. (a)(2).) "The notice of appeal must be liberally construed." (Cal. Rules of Court, rule 8.100(a)(2).) If possible, a notice of appeal from a nonappealable order, should "'be interpreted to apply to an existing appealable order or judgment, if no prejudice would accrue to the respondent'" and if "it is reasonably clear the appellant intended to appeal from the [appealable order or] judgment." (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20, 22.) This appeal runs aground however, because the only potentially appealable order or judgment is the 2008 order awarding defendants their attorney fees and costs as prevailing parties. That judgment had long been final by the time Powell filed the instant motion for reconsideration in mid-2011. Once a judgment becomes final, the trial court lacks jurisdiction to rule on a motion for reconsideration. (*Branner v. Regents of University of California* (2009) 175 Cal.App.4th 1043, 1048.)

Even if we construed Powell's motion for reconsideration as having been brought pursuant to Code of Civil Procedure section 473 (section 473), potentially rendering the underlying judgment appealable (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394), the motion would still properly have been denied: it was untimely and failed to present a basis for relief under any provision of section 473.[3]

---

[2] Subdivision (g) of the Code of Civil Procedure section 1008 was not effective until January 2012. Nevertheless, because that subdivision merely codified the prevailing rule it effected no substantive change to the law at the time the ruling at issue was made. (See *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576 [denial of "motion for reconsideration is not appealable, even when based on new facts or law"]; *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, 1632–1633.)

[3] Section 473, subdivision (a)(1) permits the court to allow a party to amend a pleading and authorizes it to grant extensions of time to answer or demur. Powell's motion did not seek such relief. Section 473, subdivision (b) authorizes a court, within

The trial court was correct. It lacked jurisdiction to address and properly denied Powell's untimely motion for reconsideration.

2. The motion for sanctions

The defendants requested that we impose sanctions against Powell in favor of defendants and also sanctions payable to the court for filing this frivolous appeal. (Cal. Rules of Court, rule 8.276;[4] *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*).)[5] We notified Powell that we were considering imposing sanctions and gave her an opportunity to file written opposition to the sanctions motion and to appear to argue the issue during our oral arguments calendar in September 2012. (Rule 8.276; *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 28 (*Pierotti*).) Powell filed a 23-page brief entitled "Association's Opposition to Motion to Sanction Attorney Powell for Attorney Siegel's Attorney's Fees, Costs," in which she failed entirely to address the question of whether any sanctions should be imposed against her in this appeal. Powell chose not to appear to address the court during oral argument.

Rule 8.276(a), vests the appellate court with authority to "impose sanctions . . . on a party . . . for: [¶] (1) Taking a frivolous appeal or appealing solely to cause delay . . . ." According to Code of Civil Procedure section 907, "[w]hen it appears to the reviewing

---

six months of entry of an order, to relieve a party or counsel of the consequences of their own mistake, inadvertence, surprise, or excusable neglect; Powell's motion makes no claim of mistake, inadvertence, surprise, or excusable neglect. Section 473, subdivision (c) deals with matters related to relief from defaults or dismissal, either of which is at issue here. And section 473, subdivision (d) permits the court to correct clerical errors or set aside void judgments or orders. A motion for relief under section 473, subdivision (d) must be made within the statutory period set forth in section 473.5, subdivision (a), i.e., within a reasonable time not to exceed the earlier of two years after entry of a default judgment or 180 days after service of a notice of entry of that judgment. (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 209, p. 815.)

[4] Further undesignated references are to the California Rules of Court.

[5] In conjunction with their motion defendants also requested that we take judicial notice of certain documents that are already included in the appellate record. The request is denied.

court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." We may impose sanctions on an offending attorney, offending party, or both. (Rule 8.276(a).) Sanctions serve the dual purpose of compensating a respondent for incurring attorney fees to defend a meritless appeal, and to discourage additional frivolous appeals. (*Harris v. Sandro* (2002) 96 Cal.App.4th 1310, 1316.)

Flaherty, *supra*, 31 Cal.3d 637 set the standards for determining whether an appeal is frivolous: An appeal is "frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Id*. at p. 650.)

Flaherty, *supra*, 31 Cal.3d 637 established both a subjective and an objective standard. "The subjective standard looks to the motives of the appellant and his or her counsel. . . . [¶] The objective standard looks at the merits of the appeal from a reasonable person's perspective. 'The problem involved in determining whether the appeal is or is not frivolous is not whether [the attorney] acted in the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous.' [Citations.] [¶] The two standards are often used together, with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay. [Citations.] [¶] Both strands of this definition are relevant to the determination that an appeal is frivolous. An appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts. Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*Id*. at

pp. 649–650, fn. omitted; see also Code Civ. Proc., § 907 ["When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just"]; rule 8.276(a).) Measured by these standards, there is no question that this appeal is frivolous and that sanctions are in order.

Powell's appeal indisputably lacks merit. As discussed above, Powell's untimely appeal from a nonappealable order presents no colorable claim. Based on an incomplete record and unintelligible briefs bereft of any relevant authority, or legal or factual support, Powell, herself a licensed attorney and active member of the State Bar, persists in rearguing repeatedly rejected meritless legal contentions and challenging rulings that have long been final.

Sanctions are also in order because Powell clearly appears to have filed this appeal for the improper purpose of harassing defendants and/or its counsel, and to delay enforcement of the fee judgment. As our Supreme Court has observed, if an appeal is objectively without merit, that will often indicate it was filed it for an improper purpose. (See *Flaherty*, *supra*, 31 Cal.3d at p. 649 ["the total lack of merit of an appeal" is often "viewed as evidence that appellant must have intended it only for" improper purposes].) This case is no exception. The complete absence of merit to Powell's appeal is an obvious sign that she filed it in order to cause defendants to devote more time and resources to defending this action and to prevent it from enforcing the 2008 judgment to recover over $63,000 in fees and costs it owed and has already incurred defending this action—which has never gone beyond the pleading stage—through three demurrers, an appeal, and petitions for writs, rehearing and review by the Supreme Court. At the hearing on the motion for reconsideration, Powell candidly acknowledged to the trial court that she filed that motion in an effort to get the 2008 fee judgment expunged because its existence was interfering with her ability to refinance a loan on her real property. The trial court found the motion meritless and untimely, and ordered Powell to pay $600 in sanctions. Choosing to ignore that explicit warning regarding the frivolous nature of her motion, Powell filed the instant dilatory appeal raising the same arguments asserted below.

The defendants request an award of sanctions of $8,504, representing the fees they have expended to defend this appeal. Attorney fees are an appropriate and common measure of sanctions payable to an opposing party. A fee award is particularly in order here given the "'degree of objective frivolousness'" of the instant appeal and the need to discourage similar conduct in the future. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 189; *Pierotti*, *supra*, 81 Cal.App.4th at p. 29.) We recognize that this is not a complicated appeal. Still, defendants were required to hire counsel to defend them. And, according to counsel's declaration and records, which we have no reason to question, the defendants incurred $8,504 in costs and fees resisting this appeal, and we impose sanctions in that amount.

We will also impose sanctions in the amount of $4,000 payable directly to the court system. "Because a frivolous appeal, or one taken for improper reasons, harms the court, not just the respondent, a growing number of courts are ordering appellants to pay sanctions directly to the court clerk to compensate the state for the cost of processing such appeals." (*Pierotti*, *supra*, 81 Cal.App.4th at p. 35.) "'The appellate system and the taxpayers of this state are damaged by what amounts to a waste of this court's time and resources.'" (*Ibid.*)

The cost to process, review, and decide a frivolous appeal requires the work of court clerks, judicial attorneys, judicial assistants and justices. In 2006, the clerk's office of this district estimated that the cost to process a civil appeal that results in an opinion was about $8,500. (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 520; see also *Foust v. San Jose Const. Co., supra,* 198 Cal.App.4th at pp. 189–190; *Huschke v. Slater* (2008) 168 Cal.App.4th 1153, 1163.) We recognize that the legal issues in this appeal are not complex. But the cost of processing even a relatively simple appeal undoubtedly has risen in the six years since our clerk's office performed its analysis. Litigants with bona fide disputes must wait even longer and are more prejudiced when dwindling judicial resources are needlessly devoted to processing meritless appeals such as this. (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1451.) Accordingly, we conclude that sanctions of $4,000 payable to the clerk of this court are appropriate to

reimburse the state for the expense of processing this frivolous appeal. The sanctions are to be paid by Powell, who is both counsel and litigant on appeal.

Finally, we direct Powell's attention to Business and Professions Code section 6068, subdivision (*o*)(3), which requires her to report judicial sanctions in excess of $1,000 to the State Bar. (*Pierotti*, *supra*, 81 Cal.App.4th at pp. 37–38.)

DISPOSITION

The appeal is dismissed. Patricia Powell shall pay as sanctions $8,504 to respondents and $4,000 to the clerk of this court as sanctions for bringing this frivolous appeal. All sanctions shall be paid no later than 30 days after the date the remittitur is filed. Upon issuance of the remittitur, Powell and the clerk of this court are each directed to forward a copy of this opinion to the State Bar of California. (Bus. & Prof. Code, §§ 6086.7, subd. (c), 6068, subd. (*o*)(3).) Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.