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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TIMOTHY D. REUBEN, INC.,

Plaintiff and Appellant,

v.

ONE WEST BANK,

Defendant and Respondent.

B234958

(Los Angeles County  
Super. Ct. No. BC380152)

APPEAL from an order of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Affirmed.

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Reuben Raucher & Blum, Timothy D. Reuben, Stephen L. Raucher and K. Cannon Brooks for Plaintiff and Appellant.

McKenna Long & Aldridge, Charles A. Bird, Jess R. Bressi and Deanna Mayer Spelber for Defendant and Respondent.

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Timothy D. Reuben, Inc. (the Reuben Firm) appeals from the order denying its motion for judgment under Code of Civil Procedure section 708.470, subdivision (c),<sup>1</sup> to recover from One West Bank \$103,240.69 that it maintains was subject to a lien in its favor but wrongfully transferred by One West Bank to the Reuben Firm's judgment debtor. Because substantial evidence supports the trial court's decision that One West Bank did not pay money to the judgment debtor as contemplated by section 708.470, subdivision (c), we affirm the order.

### **FACTUAL AND PROCEDURAL BACKGROUND**

1. *The Underlying Debt, Notice of Lien and Purported Transfer of Lien Proceeds*

On June 22, 2007, after a binding arbitration, the Reuben Firm obtained a judgment in the amount of \$140,446.28 against Arnold Simon relating to legal fees owed by Simon to the Reuben Firm. The Reuben Firm collected \$47,053.16 of the judgment.

Several months later, on November 2, 2007, First Federal Bank filed an unrelated state court action against Simon to collect on his personal guaranty of a \$6,000,000 loan from First Federal Bank to DAKS, LLC. Simon was DAKS's majority owner and managing member. The loan was secured by a deed of trust on a luxury home in Newport Beach. DAKS defaulted on the loan and filed for Chapter 11 bankruptcy protection. The bankruptcy court appointed "an independent, third-party responsible manager for DAKS[.]" replacing Simon, and directed the manager to conduct settlement negotiations with creditors as "the sole person with any authority on behalf of DAKS to discuss a sale of the [Newport Beach] [p]roperty or to discuss settlement of claims secured by the [p]roperty." First Federal Bank filed a claim in the bankruptcy proceeding, as well as the state court action against Simon to collect on the guaranty.

On April 15, 2010, in the state court action, the jury found in favor of Simon and against First Federal Bank. Several weeks later, on May 5, "having learned of the jury's verdict" and ostensibly hoping that the trial court would award Simon attorney fees and expenses for defending the action, the Reuben Firm filed a lien to collect the \$103,240.69

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<sup>1</sup> Statutory references are to the Code of Civil Procedure unless otherwise specified.

it claimed still was outstanding on its judgment against Simon. The Reuben Firm purported to serve One West Bank with notice of the lien, as the “successor” to First Federal Bank.<sup>2</sup> The court entered judgment for Simon and against First Federal Bank on October 15, specifying that “[t]he Court reserves jurisdiction to address and resolve as part of this proceeding the issues of the entitlement to costs and attorney[] fees, together with interest thereon.” After judgment, First Federal Bank’s counsel “expressed . . . confidence that [the bank] would prevail on appeal of the [j]udgment and that . . . Simon could ultimately be liable for payment of First Federal[] [Bank’s] fees and expenses incurred in the . . . [a]ction.”

“Faced with the prospect of having to defend against an appeal of judgment in the First Federal [Bank] [a]ction, and [counsel’s] continued assertion that . . . Simon would not be entitled to recover his fees,” Simon asserted in the bankruptcy proceeding a right to indemnification from DAKS of the legal fees and expenses he had incurred in defending the state court action. Simon premised his right to indemnification on DAKS’s operating agreement, as well as on Corporations Code section 17155, subdivision (a), providing for indemnification of expenses to managers of limited liability companies.

In November, the appointed manager of DAKS and Simon’s counsel “discussed the merits of . . . Simon’s right to indemnification from DAKS’[s] bankruptcy estate for fees and expenses incurred in defending against the First Federal [Bank] [a]ction. [They] also discussed the merits of First Federal[] [Bank’s] possible appeal of the [j]udgment . . . and . . . Simon’s possible liability to pay First Federal [Bank] its attorney[] fees and costs if it was successful on appeal.” About this same time, One West Bank’s counsel “independently commenced separate settlement negotiations” with the appointed

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<sup>2</sup> On December 18, 2009, the Office of Thrift Supervision closed First Federal Bank and appointed the Federal Deposit Insurance Commission (FDIC) as receiver. One West Bank purchased certain of First Federal Bank’s assets from the FDIC, including the loan to DAKS on the Newport Beach property. The state court action against Simon to collect on the guaranty, however, was pursued only in the name of First Federal Bank, and One West Bank never became a party to that action.

manager regarding the unpaid balance on First Federal Bank's loan secured by the Newport Beach property.

On November 9, "in order to preserve all potential avenues of recovery of [his] attorney fees," Simon filed a motion in the state court action seeking attorney fees and expenses of \$225,661.50. First Federal Bank's counsel "continued to assert that . . . Simon would not be entitled to reimbursement of his attorney[] fees."

On November 19, the appointed manager executed a settlement agreement under which DAKS agreed to pay Simon \$200,000 "in full satisfaction of . . . Simon's indemnification claims under the DAKS operating agreement" and DAKS "independently" agreed to pay One West Bank \$1,562,000 "in full and final satisfaction of any and all amounts remaining due on the First Federal [Bank] [l]oan." The settlement agreement, in the recitals, identifies the state court action against Simon and recognizes that he filed a motion for attorney fees and that One West Bank, although not a party to the action, disputes his right to attorney fees and "asserts that it would prevail on appeal of the [j]udgment and that Simon could ultimately be liable for payment of [First Federal Bank's] fees and expenses incurred in the . . . [a]ction." The agreement mutually releases all claims between One West Bank, on behalf of itself and First Federal Bank, and DAKS and Simon.

Three days later, on November 22, DAKS filed a motion in bankruptcy court to approve the settlement. According to the appointed manager, the settlement "provides a resolution in the near term that avoids the risks and costs associated with litigation with [One West Bank] and Simon. Further, the [settlement] represents a significant compromise of the [First Federal Bank] [c]laim, as well as a significant compromise of Simon's indemnification claim . . . ." The manager further stated, DAKS "has carefully considered the . . . issues and has exercised its business judgment to settle the controversies . . . . I, on behalf of [DAKS], have carefully considered the . . . issues and . . . believe that [DAKS] has properly exercised its business judgment to settle the controversies . . . and that the proposed [settlement] is reasonable, fair, equitable, and in the best interests of [DAKS's] estate."

On January 6, 2011, the bankruptcy court approved the settlement agreement. Based on the approval, Simon considered his motion for attorney fees and expenses filed in the First Federal Bank action moot and took the motion off calendar. DAKS's bankruptcy proceeding was dismissed on March 8.

2. *The Motion for Judgment, the Opposition and the Trial Court's Ruling*

On April 15, in the state court action, the Reuben Firm moved for a judgment of \$103,240.69, the amount of its lien, under section 708.470, subdivision (c), against One West Bank, as the successor in interest to First Federal Bank.<sup>3</sup> According to the Reuben Firm, One West Bank "had notice of the Reuben Firm's lien, but settled with Simon, causing \$200,000 to be paid to [the] judgment debtor, which was subject to the Reuben Firm's lien. Therefore, under . . . [section] 708.470(c), the Court must order [One West Bank] to pay the Reuben Firm in full satisfaction of its lien filed with the Court." One West Bank opposed the motion, arguing that the Reuben Firm could not obtain judgment against it because it was not a party to the action or a successor to First Federal Bank for purposes of the action and, in any case, that the Reuben Firm had failed to demonstrate that One West Bank paid any money to Simon that was subject to the lien. DAKS's appointed manager submitted a declaration in support of the opposition explaining the settlement agreement and representing that the Reuben Firm's lien was not discussed during the settlement negotiations. According to the manager, "the subject of [the] Reuben[] [Firm's] purported lien never arose in my discussions with One West Bank's counsel."

The trial court denied the motion for judgment, concluding One West Bank did not pay any money to Simon that was subject to the Reuben Firm's lien and thus no basis

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<sup>3</sup> Section 708.470, subdivision (c), provides, "If the court determines that a party (other than the judgment debtor) having notice of the lien created under this article has transferred property that was subject to the lien or has paid an amount to the judgment debtor that was subject to the lien, the court shall render judgment against the party in an amount equal to the lesser of the following: [¶] (1) The value of the judgment debtor's interest in the property or the amount paid the judgment debtor. [¶] (2) The amount of the judgment creditor's lien created under this article."

existed for judgment under section 708.470, subdivision (c). According to the court, “the settlement agreement was approved by the bankruptcy court in relation to the bankruptcy filed by DAKS. Simon had filed a claim in the bankruptcy action for indemnification by DAKS for the legal fees incurred in defending this action [between First Federal Bank and Simon] pursuant to the operating agreement of DAKS. Thus, the settlement agreement . . . providing that DAKS pay Simon monies to settle Simon’s indemnification claim against DAKS was proper in the bankruptcy action. It was not, as [the] Reuben [Firm] contends, a settlement of Simon’s motion for attorney fees against First Federal [Bank] (even though the settlement did render Simon’s motion moot and thus[] it was placed off calendar). [¶] . . . [¶] . . . Simon simply elected not to pursue recovery of attorney fees in this action.” The Reuben Firm timely appealed the denial order.

### **DISCUSSION**

Under section 708.470, subdivision (c), if a court determines that a party (other than the judgment debtor) with notice of a lien transfers property that was subject to the lien or pays an amount to the judgment debtor that was subject to the lien, the court shall render judgment against the party in the amount of the judgment creditor’s lien (unless the amount paid is less than the amount of the lien). The Reuben Firm contends that DAKS’s payment of \$200,000 to Simon to settle his indemnification claim in the bankruptcy proceeding constitutes a payment to Simon by One West Bank and thus invokes section 708.470, subdivision (c). One West Bank argues that DAKS’s \$200,000 payment to Simon does not constitute a payment to Simon by One West Bank to settle Simon’s claim for attorney fees and expenses against First Federal Bank. The trial court agreed with One West Bank, concluding, based on the evidence submitted in conjunction with the Reuben Firm’s motion for judgment, that DAKS’s payment to Simon to settle his indemnification claim does not establish that One West Bank paid money to Simon.

Substantial evidence supports the trial court’s finding. (See *In re Marriage of Katz* (1991) 234 Cal.App.3d 1711, 1721 [affirming entry of judgment for lienholder when substantial evidence supported trial court’s finding that party transferred property

to invoke § 708.470, subd. (c)].)<sup>4</sup> As the Reuben Firm concedes, One West Bank did not make a direct payment to Simon. And evidence supports the conclusion that DAKS's payment to Simon to settle his indemnification claim in the bankruptcy proceeding does not constitute an indirect payment by One West Bank to Simon as a settlement of Simon's claim for attorney fees and expenses against First Federal Bank. DAKS's appointed manager evaluated the merits of Simon's indemnification claim independently from the settlement negotiations with One West Bank's counsel regarding compromise of the loan on the Newport Beach property. Simon had a bona fide contractual and statutory indemnification claim against DAKS, a claim that the Reuben Firm does not dispute. Simon's counsel in the state court action represented that Simon moved for attorney fees "to preserve all potential avenues of recovery," knowing that First Federal Bank disputed his right to fees, while seeking indemnity from DAKS in its bankruptcy proceeding.

Absent a finding that One West Bank paid money to Simon, section 708.470, subdivision (c), does not apply. (*Pangborn Plumbing Corp. v. Carruthers & Skiffington*, *supra*, 97 Cal.App.4th at p. 1057 [§ 708.470, subd. (c), authorizes only "a judgment against the party that, despite notice of a judgment creditor's lien, *actually transfers funds* to the judgment debtor" (italics added)]). "These judgment lien statutes are subject to strict construction because they are purely the creation of the Legislature. [Citations.]" (*Id.* at p. 1056; see also *Casa Eva I Homeowners Assn. v. Ani Construction & Tile, Inc.* (2005) 134 Cal.App.4th 771, 780.) Because substantial evidence supports

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<sup>4</sup> The Reuben Firm's reliance on *Pangborn Plumbing Corp. v. Carruthers & Skiffington* (2002) 97 Cal.App.4th 1039, 1049 to support application of a de novo standard of review is misplaced. In that case, the appellate court applied a de novo standard of review to a trial court's determination under section 708.470, subdivision (c), noting that "[t]he facts in this case are not in dispute; the parties simply disagree about the legal effect of such facts." (*Id.* at p. 1043, fn. 1.) Here, in contrast, a factual dispute exists as to whether the payment by DAKS to Simon to settle his indemnification claim constitutes a payment by One West Bank to settle Simon's claim for attorney fees and expenses against First Federal Bank. The trial court's decision, therefore, is reviewed for substantial evidence, as in *In re Marriage of Katz*, *supra*, 234 Cal.App.3d at p. 1721, which, like this case, involved the factual question whether a party made a payment or transferred property to the judgment debtor to invoke section 708.470, subdivision (c).

the trial court's finding that One West Bank did not pay money to Simon, no basis exists to reverse the order denying the Reuben Firm's motion for judgment under section 708.470, subdivision (c).

**DISPOSITION**

The order is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.