Filed 7/24/12 Nash v. Singer CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HESTER NASH, Plaintiff and Appellant, v. KEVIN SINGER, Defendant and Respondent.	B231237 (Los Angeles County Super. Ct. No. BC425266)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debre K. Weintraub, Judge. Affirmed.

Hester Nash, in pro. per., for Plaintiff and Appellant.

Ervin Cohen & Jessup, Byron Z. Moldo, and Eric W. Cheung for Defendant and Respondent.

Plaintiff Hester Nash appeals from the judgment of dismissal entered upon the sustaining of defendant Kevin Singer's demurrer without leave to amend. We conclude that Nash's contentions lack merit and we affirm.

BACKGROUND

I. Nash Was the Defendant in a Receivership Action

In 2006, Nash was sued by her former partner, Chris Shiohama, for the partition and sale of their home and the dissolution of their business. (*Shiohama v. Nash* (Super. Ct. L.A. County, No. EC043484) (the receivership action).)[1] Singer was appointed as the receiver and referee in the receivership action.

II. While the Receivership Action Was Pending, Nash Filed This Action Against the Receiver Without Permission From the Court in the Receivership Action

While the receivership action was pending, Nash filed the present action against Singer in November 2009, based on his alleged acts and omissions as the receiver in the receivership action. The complaint alleged claims for malicious prosecution and abuse of process, negligent interference with economic advantage, breach of fiduciary duty, negligence, and fraud.

In anticipation of the rule that "[a] receiver is a court-appointed official who can be sued only by permission of the court appointing him" (*Ostrowski v. Miller* (1964) 226 Cal.App.2d 79, 84 (*Ostrowski*)), Nash alleged in her complaint that she would "seek the Court's permission to sue the Receiver on Wednesday, November 4," and would apply "for a stay of the hearing on the discharge of the receiver."

---

[1] Having issued two appellate opinions in the receivership action, we are familiar with the facts and proceedings in that case. (*Shiohama v. Nash* (May 27, 2010, B208390, B212855) [nonpub. opn.]; *Shiohama v. Nash* (Mar. 29, 2011, B222417) [nonpub. opn.].)

III. The Receiver's Final Accounting, Report, and Discharge Were Approved by the Court in the Receivership Action

On November 4, 2009, the court in the receivership action (Judge Michelle R. Rosenblatt) considered Nash's ex parte application to stay the action pending her appeal in B208390 and B212855. The court ordered Nash to post a $10,000 bond within 30 days, which she did not do, and continued the hearing on Singer's request for approval of his final accounting and report until December 18, 2009.

The November 4 order purported to stay Nash's action against Singer "pending determination of permission to file a lawsuit against [the receiver]." Nash, however, never filed a motion to obtain permission to maintain her action against Singer.

On December 3, 2009, Nash petitioned this court for writ of supersedeas or immediate stay pending appeal, seeking a stay of the hearing on Singer's motion to approve the final acts of dissolution and his final fees and discharge. We denied the petition on December 17, 2009.

On December 18, 2009, and January 22, 2010, respectively, the court in the receivership action (Judge William D. Stewart) heard and approved Singer's final accounting, report, fees, expenses, and discharge. The court retained jurisdiction "over any matters or claims which may later arise concerning [the] Receivership Estate." Nash appealed the January 22 order, which we affirmed in B222417 on March 29, 2011.

IV. The Amended Complaint and Demurrer in This Action

On February 16, 2010, Nash filed a first amended complaint, the operative pleading, alleging that the receiver's discharge had rendered the "issue of permission . . . moot." Referring to the receivership action, the amended complaint alleged that because a "new judge" had conducted the December 18 hearing, "[t]he issues were therefore never adjudicated at all, and could not have been, given the new judge's complete ignorance of the case."

On March 23, 2010, Singer demurred to the amended complaint based on Nash's failure to obtain permission to sue from the court in the receivership action. In support of

his demurrer, Singer requested that judicial notice be taken of the January 22, 2010 order in the receivership action, which stated that Nash's failure to obtain permission to sue was fatal to her complaint. According to the January 22 order: "A review of the Court file in this action shows that the Defendant [Nash] never obtained permission from this Court to sue the Receiver. Further, the Defendant has not set a motion to obtain permission from this Court to sue the Receiver. Thus, her complaint in BC425266 [the present action] should be stricken forthwith. However, the Court has no jurisdiction over the complaint in BC425266. Instead, the Court directs the Receiver to file the appropriate motion in BC425266."

In opposition to the demurrer, Nash argued that the issue of permission to sue was rendered moot by the receiver's discharge. She contended that as a result of Singer's discharge, the appointing court "lost jurisdiction over the issues" and had "no means by which to offer the same relief to Nash as she may receive in this action. Therefore the appointing court has neither the jurisdiction, nor the discretion, to grant or to deny permission to sue, making any such request moot."

In reply, Singer contended that this action was barred by the January 22, 2010 order approving his final report and fee request, exonerating his bond, and discharging him. He argued that "Nash's only available remedy was to seek timely and appropriate review of the decisions by the court in the Receivership Action." He maintained that the January 22 order was not subject to attack in the present action, because "a discharge order upon review of a receiver's final report and accounting not only relieves a receiver of his duties, but 'operates as res judicata as to any claims of liability by parties to the receivership against a receiver in his or her official capacity.' [*O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044,] 1094. Since Nash was a party to the Receivership Action, and was given proper notice of Singer's final report, the order approving the final report and discharging Singer operates as *res judicata* to Nash's claims here."

On June 22, 2010, the trial court sustained the demurrer to the first amended complaint without leave to amend and, on December 27, 2010, entered a judgment of dismissal. This timely appeal followed.

DISCUSSION

Nash raises three issues on appeal: (1) whether the rule requiring permission to sue a receiver applies to referees; (2) whether "the quasi-judicial immunity suggested by the permission requirement [is] limitless, permitting the receiver to shield him or herself from personal responsibility"; and (3) whether "the receiver's discharge from the original case operate[s] as *res judicata*" under the present circumstances.

I. Standard of Review

"'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) 'To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court.' (*William S. Hart Union High School Dist. v. Regional Planning Com*. (1991) 226 Cal.App.3d 1612, 1621.) '[W]e may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court.' (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243,

252, fn. 1.)" (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 999.)

II. The Rule Requiring Permission to Sue Applies to This Action

The record is undisputed that Singer was the receiver in the receivership action. He therefore cannot be sued in this action without the permission of the court that appointed him. (*Ostrowski*, *supra*, 226 Cal.App.2d at p. 84.) That permission was never obtained and, therefore, the demurrer was properly sustained.

Nash suggests that because Singer was appointed as both a receiver and a referee, the rule requiring permission to sue somehow does not apply. She cites no authority for this proposition, which we reject for the simple reason that Singer's dual status as a referee and receiver does not and cannot alter the fact that he is being sued, without permission, for his official acts and omissions as a receiver. Because permission to sue was never obtained from the appointing court, the trial court properly sustained the demurrer without leave to amend.

Nash also contends that the rule requiring permission to sue does not apply because, in her opinion, the receiver was acting against the interests of the parties, in excess of his authority as a receiver, and for his own personal gain. Regardless of the merits of her contention, the proper forum to resolve those issues was the court that appointed Singer. As we previously mentioned, that court expressly retained jurisdiction "over any matters or claims which may later arise concerning [the] Receivership Estate." In light of that express reservation of jurisdiction, Nash may not pursue this independent action without the receivership court's permission.

III. The Rule Requiring Permission to Sue Does Not Bestow Limitless Immunity

Nash implies that because her action was dismissed as a result of her failure to obtain the permission to sue the receiver, the rule requiring permission to sue bestows limitless immunity on the receiver. The contention lacks merit.

The rule requiring permission to sue does not bar all litigation; it simply bars unnecessary litigation. The court explained this distinction in *Ostrowski*: "The rule is established to protect receivers from unnecessary litigation. The law is accurately set forth in 42 California Jurisprudence 2d, Receivers, section 92, page 387, as follows: 'The court that appointed a receiver may grant leave to sue him in an independent action, or it may deny leave and require the claimant to intervene in the receivership proceedings to assert his claim. Although in a proper case leave to sue the receiver in another court will not be denied, and under some situations the denial of leave may amount to an abuse of discretion, ordinarily the court has a wide discretion in the matter. It may not properly refuse leave to sue when it cannot afford in intervention the same relief as the applicant is entitled to in an independent action, or when, by virtue of a statute or constitutional provision, a particular kind of action must be brought in a jurisdiction other than that in which the original special proceeding is pending. But permission may be denied where full relief can be granted by intervention in the original proceeding. The more common practice, and the one generally recommended, is to hear and determine all rights of action and demands against a receiver by petition in the cause in which he was appointed.'" (*Ostrowski*, *supra*, 226 Cal.App.2d at p. 84.)

IV. We Need Not Determine Whether Res Judicata Applies

As previously discussed, the demurrer was properly sustained on the ground that Nash never obtained the required permission to sue the receiver from the appointing court. We therefore need not decide whether the demurrer was properly sustained on the additional ground that the action is barred under the doctrine of res judicata.

DISPOSITION

The judgment of dismissal is affirmed. Singer is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.