

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL M. KOSHAK et al.,

Plaintiffs and Respondents,

v.

HANY MALEK ,

Defendant and Appellant.

B230119

(Los Angeles County
Super. Ct. No. LC083095)

DISMISSAL ORDER

APPEAL from an order of the Superior Court of the County of Los Angeles,
Frank Johnson, Judge. Dismissed.

Law Office of Edward J. Blum, Edward J. Blum for Defendant and Cross-
Appellant.

Johnson & Higgins, Jeffery W. Johnson for Plaintiffs and Respondents.

Pasternak, Pasternak & Patton, John W. Patton, Jr., for Real Party-in-Interest.

BACKGROUND¹

In 2005, plaintiff and respondent Michael Koshak formed a business venture with defendant and appellant Hany Malek (Malek) that operated through a medical corporation, Choice Providers Medical Group (Choice Providers). In December 2008, the trial court entered an order appointing a receiver to take possession, custody, and control of Choice Providers. On September 2, 2009, the receiver applied ex parte for and obtained from the trial court an order adding certain other business entities to the receivership (September 2 ex parte order). Malek did not appeal from the September 2 ex parte order, but thereafter filed a motion in the trial court to vacate that order, which motion was denied on December 10, 2009 (December 10 order), well after the time to appeal from the September 2 ex parte order had expired.

DISCUSSION

Malek attempts to appeal from the trial court's December 10 order denying his motion to vacate the September 2 ex parte order. An order denying a motion to vacate an order appointing a receiver, however, is ordinarily nonappealable. (See *Raff v. Raff* (1964) 61 Cal.2d 514, 518.)

In his reply brief, Malek contends that the December 10 order is appealable, citing *311 South Spring Street Co. v. Department of General Services* (2009) 178 Cal.App.4th 1009, 1014 (*311 South Spring*), which explained, inter alia, that although an order denying a motion to vacate a judgment is generally not appealable, an exception to that general rule applies when the underlying judgment is void. In such a case, the order denying the motion to vacate is itself void and appealable because it gives effect to a void judgment. (*Ibid.*; see also *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 691 (*Carlson*.)

¹ Certain of the background facts are taken from our opinion in a prior appeal in this case concerning a different issue, published at *Koshak v. Malek* (2011) 200 Cal.App.4th 1540.

According to Malek, because the September 2 ex parte order was void, the December 10 order denying his motion to vacate that void order is appealable.

“A judgment is void if the court rendering it lacked subject matter jurisdiction or jurisdiction over the parties. Subject matter jurisdiction ‘relates to the inherent authority of the court involved to deal with the case or matter before it. [Citation.]’ Lack of jurisdiction in this ‘fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.’ [Citation.] [¶] In a broader sense, lack of jurisdiction also exists when a court grants ‘relief which [it] has no power to grant.’ [Citations.] Where, for instance, the court has no power to act ‘except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites,’ the court acts without jurisdiction in this broader sense. [Citation.]” (*Carlson, supra*, 54 Cal.App.4th at p. 691.)

But “[c]ollateral attack of such judgments is disfavored, even when the judgment is unauthorized by statute. (See, e.g., *Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 727 [285 P.2d 636] [judgment contrary to statute]; *Armstrong v. Armstrong* [(1976)] 15 Cal.3d [942,] 950-951 [mistaken application of law not reaching court’s power to act]; *Conservatorship of O’Connor* [(1996)] 48 Cal.App.4th [1076,] 1087-1088 [excess of jurisdiction]; *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 Cal.App.4th 1011, 1021-1022 [43 Cal.Rptr.2d 717] [excess of jurisdiction].)” (*Carlson, supra*, 54 Cal.App.4th at p. 691.)

Unlike the motions in *311 South Spring, supra*, 178 Cal.App.4th 1009 and *Carlson, supra*, 54 Cal.App.4th 684—each of which challenged the underlying order as void because it was in excess of the trial court’s jurisdiction—Malek’s motion to vacate was not made on the grounds that the September 2 ex parte order was void because the trial court lacked jurisdiction over the subject matter or the person, or because it was otherwise in excess of the trial court’s jurisdiction. The motion to vacate was based on

an alleged violation of California Rules of Court, rule 3.1176,² which requires a trial court that appoints a receiver ex parte to set and hold a hearing on an order to show cause why the appointment should not be confirmed. Thus, the motion to vacate was based on an alleged procedural defect, not jurisdictional grounds, i.e., Malek did not contend that the trial court lacked jurisdiction to add entities to the receivership, but only that the court did so without holding the hearing required by the Rules of Court. As such, the motion to vacate did not challenge the September 2 ex parte order as void, but rather as legally erroneous. The December 10 order denying the motion to vacate is therefore nonappealable. (See *Carlson, supra*, 54 Cal.App.4th at p. 690 [an order denying a motion to vacate a judgment is ordinarily not appealable because, otherwise, an appellant would receive either two appeals from the same decision, or, if no timely appeal has been filed, an unwarranted extension of time in which to bring the appeal].)

Malek's appeal from the December 10 order denying his motion to vacate is hereby dismissed.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.

² California Rules of Court, rule 3.1176(a) provides: "Order to show cause. Whenever a receiver is appointed without notice, the matter must be made returnable upon an order to show cause why the appointment should not be confirmed. The order to show cause must be made returnable on the earliest date that the business of the court will admit, but not later than 15 days or, if good cause appears to the court, 22 days from the date the order is issued."