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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

COUNTY OF LOS ANGELES, Plaintiff and Appellant, v. BANKERS INSURANCE COMPANY, Defendant and Respondent.	B226908 (Los Angeles County Super. Ct. No. SJ3493)

APPEAL from an order of the Superior Court of Los Angeles County. Terry A. Bork, Judge. Affirmed.

Office of the County Counsel, Ralph L. Rosato and Joanne Nielsen, Deputies County Counsel for Plaintiff and Appellant.

Nunez & Bernstein and E. Alan Nunez for Defendant and Respondent.

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After a defendant failed to appear for arraignment, the trial court issued a minute order which stated there was no excuse for the nonappearance and that a bench warrant and forfeiture card were both issued. The minute order also incorrectly stated that bail was exonerated. The bail agent never received notice of forfeiture and relied on the minute order stating that bail had been exonerated. We find the burden for the mistake in the minute order should be borne by the County of Los Angeles, and that the trial court did not abuse its discretion in setting aside summary judgment on the bond. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 2009, Bankers Insurance Company, through its agent, posted bail bond No. 79177005 in the amount of $20,000 for the release of criminal defendant Ivan Mendoza. On August 18, 2009, Mendoza failed to appear in court for his arraignment. The minute order stated that Mendoza failed to appear "without sufficient excuse and not represented by counsel," that a $50,000 bench warrant was issued, and that bail forfeiture card No. AB0003436 was issued. The minute order also incorrectly stated bail "exonerated," and showed exoneration No. 5270882746. On August 21, 2009, the bail agent's court runner obtained a copy of this minute order. The bail agent reported to Bankers that the bond had been exonerated, and closed its file on Mendoza.

Though the actual date is not clear, the court later corrected the August 18, 2009 minute order nunc pro tunc by deleting the phrase "bail exonerated" and replaced it with "bond forfeited." There is nothing in the record to indicate that the correction order was ever served on anyone. On August 26, 2009, the court clerk mailed a notice of forfeiture to both Bankers and the bail agent. Because the clerk noticed that the printed address appearing for the bail agent on the court's automatically-generated forfeiture notice did not match the address for the agent appearing on the original bond, she handwrote that

address and sent the notice of forfeiture to both addresses for the bail agent.[1] The notice stated that the agent had 185 days (until February 27, 2010) within which to surrender Mendoza or move to set aside the forfeiture.

On March 3, 2010, the court clerk sent a written demand for payment on the bond to Bankers and the bail agent, advising that summary judgment would be entered if payment was not made within 30 days. The letter was mailed to the bail agent only at the court-generated address; the agent received the letter on March 9, 2010 from Bankers. The agent sent a court runner to obtain a copy of the court file, which now contained the minute order correcting the status of bail from exonerated to forfeited. The agent contacted the bond clerk at the criminal court to determine the status of the bond, and was advised the bond was in forfeiture.

On April 2, 2010, the bail agent filed a motion to vacate forfeiture on the grounds that it did not receive notice of forfeiture within the required timeframe and had relied on the original minute order.[2] The trial court denied the motion, finding that the agent had a duty to investigate the conflicting information in the original minute order. On May 12, 2010, the court entered summary judgment on the forfeited bond and mailed notice of the judgment to Bankers and the agent at its correct address. On June 10, 2010, the court issued a notice of order to show cause re failure to pay the summary judgment.

On June 11, 2010, Bankers filed a motion to set aside summary judgment, discharge forfeiture and exonerate bail. Bankers argued that the court lost jurisdiction over the bond because the clerk failed to timely mail a copy of the forfeiture notice to the agent's correct address, and that the agent had a right to rely on the court record showing the bond was exonerated. Bankers relied on the declaration of its bail agent, which stated that it did not receive any notice of forfeiture. The county opposed the motion, relying on

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1 The bail agent moved in 2008 from the address in the court's records to the address listed on the bond.

2 The county did not file any written opposition or appear at the hearing.

the clerk's declaration that she had mailed the notice of forfeiture to the bail agent at both addresses. Bankers attached to its reply brief a supplemental declaration of the bail agent, emphasizing its extensive background in law enforcement and fugitive recovery. The declaration also stated that the bail agent knew the criminal defendant's whereabouts at all times and could have surrendered him.

The trial court granted Bankers' motion to set aside summary judgment, discharged forfeiture and exonerated bail. The county filed this appeal.[3]

DISCUSSION

I. Standard of Review and Bail Forfeiture Scheme

The abuse of discretion standard applies to a trial court's resolution of a motion to set aside a bail forfeiture. (*County of Los Angeles v. Fairmont Specialty Group, supra,* 173 Cal.App.4th at p. 542.) "As the Supreme Court has noted, however, 'The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.'" (*Id*. at p. 543, citing *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712.)

"'The law traditionally disfavors forfeitures and this disfavor extends to forfeiture of bail. [Citations.] Thus, Penal Code sections . . . dealing with forfeiture of bail bonds must be strictly construed in favor of the surety to avoid the harsh results of a forfeiture.' [¶] The standard of review, therefore, compels us to protect the surety, and more importantly the individual citizens who pledge to the surety their property on behalf of

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[3] "An order denying a motion to vacate or set aside a forfeiture and exonerate the bail bond is an appealable order." (*County of Los Angeles v. Fairmont Specialty Group* (2009) 173 Cal.App.4th 538, 542.) The county argued below that Bankers should have appealed from the order denying its motion to vacate forfeiture, and that Bankers' motion to set aside summary judgment based on the same grounds was an improper "second bite at the apple." The county has abandoned this argument on appeal.

persons seeking release from custody, in order to obtain the corporate bond." (*County of Los Angeles v. Surety Ins. Co*. (1984) 162 Cal.App.3d 58, 62; *County of Orange v. Lexington Nat. Ins. Corp*. (2006) 140 Cal.App.4th 1488, 1492.)

"The object of bail and its forfeiture is to insure the attendance of the accused and his obedience to the orders and judgment of the court." (*People v. Wilcox* (1960) 53 Cal.2d 651, 656–657.) Therefore, in determining matters of bail forfeiture, "there should be no element of revenue to the state nor punishment of the surety." (*Id*. at p. 657.)

II. No Abuse of Discretion in Setting Aside Summary Judgment

"[Penal Code] Section 1305 is jurisdictional in the sense it sets forth certain 'prerequisites before a court can order forfeiture of bail.' [Citation.] 'Failure to follow the jurisdictional prescriptions in sections 1305 and 1306 renders a summary judgment on the bail bond void.'" (*County of Orange v. Lexington Nat. Ins. Corp., supra,* 140 Cal.App.4th at pp. 1492–1493; *People v. Ranger Ins. Co.* (1996) 51 Cal.App.4th 1379, 1385 ["jurisdiction-defeating mistake[s] . . . can be raised at any time, including for the first time on appeal"].)

Penal Code section 1305[4] requires a court in open court to declare bail forfeited if a defendant fails to appear without sufficient excuse at certain hearings, including arraignment. (§ 1305, subd. (a).) Subdivision (b) provides that if the amount of the bond exceeds $400, the clerk of the court shall mail notice of the forfeiture, within 30 days of the forfeiture, to both the surety and the bail agent, and that "mailing alone to the surety or the bail agent shall not constitute compliance with this section." (§ 1305, subd. (b).) The statute also provides that the surety shall be released of all obligations under the bond if "(1) The clerk fails to mail the notice of forfeiture in accordance with this section within 30 days after the entry of the forfeiture. [¶] (2) The clerk fails to mail the notice of forfeiture to the surety at the address printed on the bond. [¶] (3) The clerk fails to

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[4] All statutory references are to the Penal Code, unless otherwise noted.

mail a copy of the notice of forfeiture to the bail agent at the address shown on the bond." (§ 1305, subd. (b).) It is well established that the surety and bail agent are entitled to separate notice under the statute every time a forfeiture is declared. (*County of Orange v. Lexington Nat. Ins. Corp.*, *supra*, 140 Cal.App.4th at p. 1493.)

At the hearing on the motion to set aside summary judgment, Bankers's attorney "accept[ed] the statements from the clerk of the court" that she mailed the notice of forfeiture to the bail agent at both addresses. Bankers thus concedes that the court clerk fulfilled the statutory duty to mail the notice of forfeiture to the bail agent. Relying on the declaration of its bail agent, Bankers's position is that the agent never received the notice of forfeiture. The county is willing to assume that the agent did not receive the notice of forfeiture that was properly sent by the court clerk, asserting that the issue of *receipt* is not relevant. Section 1305 does not require that notice of forfeiture be received, only that it be mailed by the court clerk to the bail agent at the address on the bond. "It is well established in the case law that Penal Code sections 1305 and 1306 are subject to precise and strict construction." (*County of Los Angeles v. Surety Ins. Co.*, *supra*, 162 Cal.App.3d at p. 62.) Failure to receive a properly mailed notice of forfeiture is not one of the statutory bases for exoneration of bail.

The dispositive issue is not statutory compliance by the court clerk in mailing the forfeiture notices, but whether there were equitable considerations that justified the trial court in setting aside summary judgment in the exercise of its discretion.

The county argues that the ambiguity in the minute order—i.e., statements that Mendoza failed to appear at his arraignment and that a bench order had issued, together with statements that a forfeiture card was issued and bail was exonerated—put the bail agent on notice that something was wrong and triggered a duty to investigate. The county argues that the agent should have contacted the court for further clarification or obtained the August 18, 2009 reporter's transcript in which the court orally stated that bail was forfeited.

But the county's position ignores case law holding that the burden of clerical errors should not be borne by the surety. As the court noted in *People v. Far West Ins. Co*. (2001) 93 Cal.App.4th 791, 796: "In several of the (surprisingly many) reported bail forfeiture cases, clerical and like errors by county employees in mail and other communications relating to bail and extradition were held sufficient to require vacatur of the forfeiture order. The results in these cases are grounded in principles of equity and a commonsense, practical construction of the bail forfeiture statute."

For example, in *People v. Surety Ins. Co*. (1973) 34 Cal.App.3d 444, the minute order failed to state that bail was forfeited or that the defendant's nonappearance was excused. In reversing the trial court's denial of the surety's motion to vacate forfeiture, the appellate court stated: "The clerk's minutes are accessible as a matter of routine, a reporter's transcript may or may not exist and may or may not be available to the surety. The surety should be able to rely on the entries in the clerk's minutes . . . to conclude that it need no longer be concerned to locate and produce its bailee." (*Id*. at p. 447.) The *Surety* court quoted *People v. United Bonding Ins. Co*. (1971) 5 Cal.3d 898, 906: "If a surety is to be afforded the protections provided by these provisions he must be advised at an early date of the fact of the forfeiture in order that he may institute procedures to locate and compel the appearance of the bailee. Should the surety not have an early opportunity to institute these endeavors the possibility of discharging the forfeiture will be severely prejudiced, and it is manifest that he will suffer such prejudice whether there is an undue delay in advising him after the declaration of a forfeiture or a delay in making the declaration itself."

In *County of Orange v. Allied Fidelity Ins. Co.* (1984) 161 Cal.App.3d 510, the court exonerated the bond but failed to state that the original forfeiture was set aside. The surety called the court clerk, who confirmed the exoneration. Summary judgment was subsequently entered, and the surety's motion to set it aside was denied. (*Id*. at p. 512.) In reversing, the appellate court stated: "There could be no equity in permitting the county to recover on the bond. . . . All the errors below, if any, were clerical and

ministerial—and committed by county personnel who compounded the problem by misleading [the surety] as to the status of the bail. There is no profit in requiring a bonding company to investigate further . . . . The county's clerical staff is already harassed enough, and there is no reason to foster an increase in bail premiums in order that sureties can afford to maintain a daily vigil at the courthouse to monitor their risks." (*Id*. at p. 513.)

Indeed, it can generally be said that where an act of the government prevents performance by the surety, the surety is released from its obligations under the bail contract. In *People v. Far West Ins. Co*., *supra*, 93 Cal.App.4th 791, the surety located the defendant in Georgia and he was arrested after police in California affirmed the existence of a warrant and willingness to extradite, without consulting the local district attorney. The police later advised the Georgia authorities to release the defendant. In reversing the trial court's order denying the surety's motion for relief from forfeiture, the appellate court stated: "In our view, the result reached by the trial court on these facts is at odds with the purposes underlying the statutory bail scheme and contrary to the ancient equitable principle that forfeitures are abhorrent. . . . it is preferable to rest the outcome on principles of equity rather than to embrace a result that can fairly be termed 'absurd.'" (*Id*. at p. 796; see also *People v. Meyers* (1932) 215 Cal. 115, 119–120 ["The state, acting through its officers in one county, cannot hold defendants liable for failure to perform, when such performance was delayed, hindered and finally made, for all practical purposes, impossible, by the state acting through its officers in another county"]; *People v. American Surety Ins. Co*. (2000) 77 Cal.App.4th 1063, 1067, 1068 [reversing order denying relief from forfeiture where deportation of defendant prevented surety from performing because returning an inadmissible alien would violate federal law].)

Here, the bail agent sent its runner to the court to check on Mendoza's case. At that time, the only minute order in the court file was the original order stating that bail was exonerated. Although the court made a nunc pro tunc correction of this error in the minute order, there is nothing in the record indicating when this correction was made or

that it was ever served on anyone. We think it was incumbent on the court to serve this nunc pro tunc order on the surety and bail agent. Particularly here, where the bail agent never received notice of forfeiture, the surety was severally prejudiced by both the court's original mistaken minute order and the failure to serve a correction of that order, because the evidence demonstrates that the bail agent could have surrendered Mendoza within the required timeframe.

Under these circumstances, we are satisfied the trial court did not abuse its discretion in setting aside the summary judgment on the bond.

DISPOSITION

The order is affirmed. Bankers is entitled to recover its costs on appeal.

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_____, J.

DOI TODD

I concur:

_____, J.

ASHMANN-GERST

BOREN, P.J.—Dissenting

I respectfully dissent.

I would reverse the judgment. The trial court erred by granting the motion to set aside the summary judgment and by discharging the forfeiture and exonerating the bail. The trial court had promptly and properly corrected the original minute order that incorrectly stated that bail was exonerated. This nunc pro tunc correction occurred about a week after the erroneous minute order was entered on August 18, 2009.

The court clerk mailed a notice of bail forfeiture on August 26, 2009, to both Bankers and the bail agent. In light of both the obviously flawed and inconsistent original minute order and the notice of forfeiture, Bankers had no valid reason to rely merely on the original incorrect minute order. Such reliance was unreasonable.

The county complied completely with Penal Code section 1305. The bail agent claims that the whereabouts of the defendant was always known. The equities do not favor Bankers. Bankers' decision to ignore the notice of forfeiture is wholly unreasonable. The burden to ensure the original minute was correct was a very minimal one under the circumstances. The right of the public to have justice done by apprehending and punishing criminals is most certainly an important interest.

In my view, the trial court abused its discretion.

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BOREN, P.J.