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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

RONALD ROGERS,

Plaintiff and Respondent,

v.

WILLIAM STOBBS,

Defendant and Appellant;

JOHN E.D. NICHOLSON,

Real Party in Interest and Respondent.

2d Civ. B268076
(Super. Ct. No. CV 138001)
(San Luis Obispo County)

William Stobbs obtained a money judgment against Ronald Rogers, who is represented by attorney John E.D. Nicholson in another matter. Believing that Nicholson was holding some of Rogers's money in his Interest on Lawyer's Trust Account (trust account), Stobbs attempted to enforce the money judgment against Rogers by levying on Nicholson's trust account.

Nicholson obtained an ex parte order requiring that the levied funds be returned to his trust account and awarding him sanctions.

Stobbs moved to set aside the ex parte order. The trial court vacated the sanctions award but found that the levied funds were appropriately returned to Nicholson's trust account. Stobbs, who is appearing in propria persona, contends the motion should have been granted because he did not receive adequate notice of the ex parte hearing and because Nicholson lacked standing to judicially challenge the bank levy. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In January 2015, Stobbs obtained a judgment against Rogers in the amount of $6,658. In an attempt to collect the judgment, Stobbs levied on Nicholson's trust account at Umpqua Bank (Bank). After the Bank advised Nicholson of the attempted levy, Nicholson telephoned Stobbs and told him "'[y]ou can't just take money out of my account because he [Rogers] owes you money.'" Stobbs refused to withdraw the levy, and Nicholson filed an ex parte application to quash the levy as improper due to Stobbs's failure to follow the requirements of the Code of Civil Procedure.

The ex parte hearing was scheduled for Monday, March 16, 2015. Nicholson gave Stobbs notice of the hearing by mailing a letter to him on Tuesday, March 10. The letter advised: "I will file an Ex Parte Application to immediately address this [levy] issue with the Court. The hearing is scheduled for 8:30 a.m. on Monday, March 16, 2015 in Department P-2 in the Paso Robles Courthouse. Please accept this letter as notice of same." Nicholson e-mailed a copy of the

letter to Rogers, and mailed the ex parte application to Stobbs on March 11, 2015.

Stobbs did not appear at the ex parte hearing. After considering the moving papers, the trial court granted the application and ordered the Bank to return the $8,016.38 it levied from Nicholson's trust account. The court also ordered Stobbs to pay Nicholson the Bank's garnishment fee of $125 plus $1,800 in "attorney's fees related to bringing [the] application."

Stobbs's attorney, Linda K. Durost, moved to set aside the ex parte order, arguing Stobbs received inadequate notice of the hearing and that the appropriate procedure was for Nicholson to file a claim of exemption instead of seeking ex parte relief. After Nicholson opposed the motion, Stobbs retained a new attorney, M. Robert Bettencourt. In his reply memorandum, Bettencourt concluded by stating, "Based on the foregoing, as well as the lack of any statutory or other authority for a third-party to receive damages in such a case, the current motion to set aside the order for payment of attorney fees should be granted. This is both on the merits as well as the procedural defects described above, which should result in the current order against Mr. Stobbs being set aside. [¶] Given all the circumstances, the matter should be decided with prejudice such that Attorney Nicholson does not pursue this matter further in this court, given that no monies were wrongfully diverted from his account to the benefit of Mr. Stobbs."

The trial court subsequently requested further briefing from the parties. In that briefing, Bettencourt suggested that "[t]he court should make a finding that all of these proceedings are now moot, in that the Umpqua Bank account originally at issue is no longer under a levy, or any threat of

levy." At the hearing, the court stated on the record that "the notice of ex parte was fine," but agreed with Stobbs that sanctions should not have been granted. The court vacated the sanctions, but stated that otherwise "the order stands."[1] Stobbs appeals.[2]

DISCUSSION

Standard of Review

"[A] motion in the trial court to set aside a judgment [or order] is addressed to its sound discretion and will not be reversed without a clear showing of abuse of that discretion. [Citations.] . . . [A]ny factual conflicts in the evidence, whether presented by live testimony or by affidavit, must be resolved in favor of the prevailing party below. [Citation.]" (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1077.)

Stobbs Was Not Prejudiced by the Delay in Receiving Notice of the Ex Parte Hearing

Stobbs's principal argument is that he was denied due process because he did not receive timely notice of the ex parte hearing on Nicholson's application to quash the bank levy.

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[1] The trial court did not issue a written order. When we brought this deficiency to the parties' attention, Stobbs obtained a formal order from the court memorializing its ruling. The order, dated October 5, 2016, confirmed "that notice of the ex parte hearing of March 16, 2015 was sufficient," and that "the sanctions . . . should not have been granted."

[2] Nicholson moved to dismiss the appeal on the ground that Stobbs has not been aggrieved by the order on appeal. We denied the motion.

Stobbs claims that if he had received timely notice he would have appeared or requested a continuance.

Rule 3.1203 of the California Rules of Court requires that "[a] party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance . . . ." The court day before the March 16, 2015 hearing was Friday, March 13. Instead of giving telephonic notice by 10:00 a.m. on that date, Nicholson chose to mail the notice to Stobbs on March 10, four court days before the hearing. Stobbs maintains that this notice was insufficient because Code of Civil Procedure section 1013, subdivision (a)[3] required that Nicholson add five days for mailing. Under the five-day rule, notice would have had to be mailed no later than March 8.

Even assuming that the notice by mail was untimely, the trial court properly found that Nicholson's trust account was not subject to levy for a debt owed to Stobbs by Rogers. Indeed, Stobbs's counsel conceded that the focus of his motion to set aside the court's order was not to recover the funds levied from Nicholson's trust account, but rather to vacate the sanctions award. Counsel specifically represented that "the Umpqua Bank account originally at issue is no longer under a levy, *or any threat of levy*." (Italics added.)

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[3] All further statutory references are to the Code of Civil Procedure. Section 1013, subdivision (a) provides, in pertinent part: "Service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California . . . ."

In addition, even if there were a basis for levying on the trust account, it is undisputed that Stobbs did not follow the correct procedure for doing so. Among other things, he was required to obtain a court order authorizing the levy (§ 700.160, subd. (a)), and to give notice to the third party (Nicholson) under sections 700.010, subdivisions (a) and (b), and 700.140, subdivision (c). His failure to follow these basic requirements further supports the trial court's grant of the application to quash the levy. Because Stobbs's appearance at the hearing would not have changed this result, the court did not abuse its discretion by declining to set aside that portion of the ex parte order.

Nicholson was Not Required to File a Third Party Claim to Challenge the Bank Levy

Stobbs argues that Nicholson should have challenged the bank levy by filing a third party claim instead of an ex parte application. We disagree. Third party claim procedures are optional. (*Regency Outdoor Advertising*, *Inc. v. Carolina Lanes*, *Inc.* (1995) 31 Cal.App.4th 1323, 1329.) Failure to file a third party claim does not affect the third party's right to possession of property under the levy. (§ 720.150, subd. (b).) The party may choose to pursue alternative judicial remedies, as Nicholson did in this case. (Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2016) ¶¶ 6:1607-6:1613, pp. 6H-2 to 6H-3.) Accordingly, Nicholson had standing to challenge the bank levy.

We have considered Stobbs's remaining contentions and conclude they lack merit.

DISPOSITION

The judgment (order granting in part and denying in part appellant's motion to set aside the ex parte order) is affirmed. Nicholson shall recover his costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Ginger E. Garrett, Judge
Superior Court County of San Luis Obispo

William Stobbs, in pro. per., for Defendant and Appellant.

John E.D. Nicholson, in pro. per., for Real Party in Interest and Respondent.