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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHARLES KINNEY,  
Cross-complainant and  
Appellant,

v.

MICHELE R. CLARK,  
Cross-defendant and  
Respondent.

B272408

(Los Angeles County  
Super. Ct. No. BC354136)

CHARLES KINNEY,  
Cross-complainant and  
Appellant,

v.

MICHELE R. CLARK,  
Cross-defendant and  
Respondent;

WILLIAM M. RUBENDALL,

Objector.

B276290

(Los Angeles County  
Super. Ct. No. BC354136)

APPEALS from orders of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Appeals dismissed.

William M. Rubendall; Cyrus Sanai for Cross-complainant and Appellant.

Marcus, Watanabe & Enowitz, David M. Marcus and Eric Chomsky for Cross-defendant and Respondent.

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Charles Kinney appeals from a March 17, 2016 post-judgment award for attorney fees Michele Clark incurred in a prior appeal while attempting to enforce an earlier award for attorney fees against him. He also challenges the denial of his motion for reconsideration. He does not dispute that Clark's attorneys performed the legal services for which she requested fees. Nor does he challenge the reasonableness of the amount of the award. Instead he contends the trial court lacked jurisdiction to award Clark fees under a 2005 real estate purchase agreement, a contention he has raised unsuccessfully several times in federal and state courts. Most recently, in *Kinney v. Clark* (2017) 12 Cal.App.5th 724, we rejected the arguments Kinney reasserts in this appeal in challenging Clark's entitlement to attorney fees under the agreement. On August 16, 2017, the California Supreme Court denied Kinney's petition for review of our published decision (case No. S242796). This appeal is frivolous and we dismiss it.

In a second appeal, consolidated for oral argument and decision, Kinney and his attorney, William M. Rubendall, appeal from an order imposing \$9,575 in sanctions on them for filing a frivolous motion for reconsideration of the March 17, 2016 fee award. This appeal too is frivolous and we dismiss it.

## BACKGROUND

The facts regarding this litigation, related state court litigation between Kinney and Clark (Super. Ct. case No. BC374938), Clark's bankruptcy, the trial court, this court and the federal district court's designation of Kinney as a vexatious litigant, and the numerous awards of attorney fees and costs in favor of Clark and against Kinney are set forth in detail in *Kinney v. Clark, supra*, 12 Cal.App.5th at pages 727-731. Accordingly, we set forth only briefly the facts regarding the particular award of attorney fees and the sanctions order at issue in these appeals.

The 2005 purchase agreement governing Clark's sale of a residential property to Kinney and Kimberly Kempton<sup>1</sup> (the Agreement) included a prevailing party attorney fees clause. On December 15, 2008, after Clark prevailed on demurrer in this cross-action Kinney and Kempton filed against her for unmerchantable title,<sup>2</sup> the trial court granted her motion and awarded her \$9,349 in attorney fees. Kinney and Kempton appealed and we affirmed the fee award. (*Kempton v. Clark* (Feb. 3, 2010, B213386) [nonpub. opn.].) Clark filed a motion for attorney fees she incurred in successfully defending the appeal. In July 2010, before the trial court heard the motion for fees, Clark declared bankruptcy.

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<sup>1</sup> Kempton is now deceased.

<sup>2</sup> This action is one of six Kinney and Kempton filed against their new neighbors, the City of Los Angeles, Clark, and the brokers who represented her in the transaction, primarily relating to easements and fences around the property Clark sold, known as the Fernwood Property.

Two years into Clark's bankruptcy, on July 10, 2012, the trial court in the present action heard Clark's motion and awarded her attorney fees for the work her attorneys performed in successfully defending Kinney's appeal from the December 15, 2008 fee award (appellate case No. B213386).<sup>3</sup> Kinney objected to the July 10, 2012 award, contending Clark could not pursue attorney fees and costs in state court while her bankruptcy petition was pending. Armed with the knowledge the bankruptcy trustee did not intend to pursue Clark's claims for attorney fees and costs against Kinney, Clark filed a motion to compel abandonment of property (her claims for attorney fees and costs) in the bankruptcy court. On October 18, 2012, after Clark was discharged from bankruptcy, the United States Bankruptcy Court for the Central District of California issued an order stating in pertinent part, "All of [Clark]'s right to recovery [of] attorneys' fees and costs from Kempton and Kinney arising from litigation concerning the Fernwood Property are deemed to have been abandoned by the Trustee." The order further explained: "Kempton and Kinney are not creditors of this estate. They have

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<sup>3</sup> We grant Clark's March 6, 2017 request that we take judicial notice of (1) the trial court's July 10, 2012 order awarding Clark attorney fees against Kempton, (2) the trial court's September 26, 2012 order denying Kempton's motion for reconsideration of the July 10, 2012 fee award, and (3) the trial court's July 31, 2013 order amending the July 10, 2012 order nunc pro tunc to reflect that the award of attorney fees was against both Kempton and Kinney. We deny the balance of Clark's March 6, 2017 request for judicial notice because the resolution of this appeal does not require that we take judicial notice of these documents.

twice sued [Clark] in state court, and lost both times. (Kempton and Kinney also lost several related appeals.) As non-creditors, Kempton and Kinney have no interest in the administration of this Estate. Therefore, the Court finds that Kempton and Kinney do not have standing to object to the Motion [to compel abandonment of property].” The bankruptcy court stated that “the amount of fees, if any,” recoverable under the Agreement and California law “will be adjudicated in the state court.”<sup>4</sup>

In 2014, Clark began her efforts to enforce the July 10, 2012 award of attorney fees the trial court granted for work her attorneys performed in successfully defending Kinney and Kempton’s appeal from the December 15, 2008 fee award (appellate case No. B213386). Neither Kinney nor Kempton had appealed from the July 10, 2012 award (which was by then final). Kinney filed a claim of exemption, contending Clark’s enforcement of the July 10, 2012 award was stayed by pending appeals in state court (including case No. B253093, an appeal from the denial of his first claim of exemption relating to Clark’s efforts to enforce the December 15, 2008 fee award) and federal court (arising out of the bankruptcy proceedings). Clark countered by filing a motion to determine the second claim of exemption, which Kinney, his mother’s trust and estate, and the Estate of Kimberly Kempton opposed. The trial court denied this

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<sup>4</sup> We grant Kinney’s November 7, 2016 request for judicial notice of the bankruptcy court’s October 18, 2012 order. We deny the remainder of Kinney’s requests for judicial notice 1-5, filed November 7, 2016, attaching documents related to the 2005 real estate transaction as well as documents from Clark’s bankruptcy. These other documents are not necessary to our resolution of this appeal.

claim of exemption and allowed a levy by Clark upon Kinney's funds to pay the award. Kinney, his mother's trust and estate and the Estate of Kimberly Kempton appealed. We dismissed the appeal for lack of standing as to Kinney's mother's trust and estate and the Estate of Kimberly Kempton because they could not show they were aggrieved by the order, as the levy was upon Kinney's property only. We dismissed the appeal as to Kinney, concluding it lacked merit because the state and federal appeals, which were not related to the July 10, 2012 fee award, did not stay Clark's efforts to enforce that award. (*Kinney v. Clark* (Sept. 8, 2015, B258399) [nonpub. opn.], pp. 3-5.)

On March 17, 2016, the trial court granted Clark's motion and awarded her \$10,619 in additional attorney fees under the Agreement for work her attorneys performed in successfully defending Kinney's appeal in appellate case number B258399. This is the fee award we are reviewing on appeal.

Attorney Rubendall filed a motion for reconsideration of the March 17, 2016 fee award on Kinney's behalf. The motion did not include an affidavit setting forth "new or different facts, circumstances, or law," as required under Code of Civil Procedure<sup>5</sup> section 1008, subdivision (a). The motion cited section 473, subdivision (b), but did not explain any "mistake, inadvertence, surprise, or excusable neglect" on the part of Kinney or Rubendall that would warrant relief from the fee award under this statutory provision. Instead, the motion contained only the same recycled arguments Kinney has been raising for years—including on appeal here—as to his position

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<sup>5</sup> Further statutory references are to the Code of Civil Procedure.

the trial court lacked jurisdiction to award Clark attorney fees under the Agreement due to her bankruptcy. Attached to the motion were 182 pages of exhibits, none of them supporting valid grounds for reconsideration of the March 17, 2016 fee award.

On April 22, 2016, the trial court denied the motion for reconsideration, stating in its order: “Plaintiff [Kinney] has failed to establish any grounds for reconsideration under either CCP Section 1008 or 473. All of plaintiff’s arguments have previously been presented to and rejected by this court, the court of appeals [*sic*] and the United States District Court.”

Also on April 22, 2016, the trial court issued an order to show cause regarding sanctions against Kinney and Rubendall for filing a frivolous motion for reconsideration. Kinney and Rubendall filed separate oppositions, reiterating their position the trial court lacked jurisdiction to award Clark attorney fees under the Agreement due to her bankruptcy.

On June 21, 2016, after hearing oral argument on the matter, the trial court issued an order imposing \$9,575 in sanctions on Kinney and Rubendall<sup>6</sup> under sections 128.5, 128.7 and 1008, subdivision (d), for filing a frivolous motion for reconsideration.

## **DISCUSSION**

### **Appeal No. B272408**

Kinney contends the trial court lacked jurisdiction on March 17, 2016 to award Clark additional attorney fees under

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<sup>6</sup> The sanctions also were imposed against an attorney who appeared at a hearing on the motion for reconsideration in Rubendall’s place. That other attorney is not a party to this appeal.

the Agreement because (1) all orders awarding Clark attorney fees after she declared bankruptcy in July 2010 violate bankruptcy law and are void, and (2) a pending state court appeal related to a different award of attorney fees (appellate case No. B265267)<sup>7</sup> automatically stayed the action below under section 916,<sup>8</sup> preventing the trial court from awarding Clark additional fees. He also attacks the March 17, 2016 fee award by challenging Clark’s retainer agreement with her attorneys. In *Kinney v. Clark, supra*, 12 Cal.App.5th 724, we rejected the arguments Kinney again raises in this appeal.

The circumstances of that appeal (appellate case No. B265267) were nearly identical to this one: there, Kinney appealed from a May 5, 2015 award of additional attorney fees Clark incurred for work her attorneys performed in successfully defending Kinney’s appeal from the denial of his first claim of exemption related to Clark’s enforcement of the December 15, 2008 fee award. (*Kinney v. Clark, supra*, 12 Cal.App.5th at pp. 729-731.) Here, we are reviewing Kinney’s appeal from the March 17, 2016 award of additional attorney fees Clark incurred for work her attorneys performed in successfully defending

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<sup>7</sup> This is the appeal resulting in our opinion in *Kinney v. Clark, supra*, 12 Cal.App.5th 724.

<sup>8</sup> Under section 916, subdivision (a), “the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.”



Kinney's appeal from the denial of his second claim of exemption related to Clark's enforcement of the June 10, 2012 fee award.

In *Kinney v. Clark*, *supra*, 12 Cal.App.5th 724, we concluded Clark's bankruptcy did not eliminate her entitlement to attorney fees and costs under the Agreement. We rejected Kinney's assertion (repeated here) that the Agreement was rendered unenforceable under title 11 United States Code section 365 because Clark did not "reaffirm" it in the bankruptcy court. (*Kinney v. Clark*, *supra*, 12 Cal.App.5th at p. 733.) We explained that "[o]nly executory contracts and unexpired leases are affected by title 11 United States Code section 365," and the "Agreement containing the attorney fees and costs provision is not an executory contract because it was fully performed when the real estate transaction occurred in 2005, nearly five years before Clark declared bankruptcy." (*Ibid.*) We also rejected Kinney's argument (again repeated here) that Clark was not entitled to collect on a pre-discharge fee award because her debt to her attorneys was discharged in bankruptcy. We explained that this argument was not before us on appeal because we were reviewing a post-bankruptcy award of attorney fees (as we are here) and, in any event, Kinney lacked standing to challenge what Clark owes her attorneys and what she chooses to pay them. (*Id.* at p. 734.)

One circumstance that is different in the factual history of this appeal is that the trial court issued the July 10, 2012 fee award while Clark's bankruptcy was pending, one month prior to discharge. Thus, Kinney argues the July 10, 2012 fee award violated the automatic stay arising from Clark's bankruptcy petition. The December 15, 2008 fee award—at issue in appellate case number B265267—was issued prior to Clark's bankruptcy. The issue of the automatic bankruptcy stay, however, is not

material to our resolution of *this* appeal. Kinney complained to the bankruptcy court about the purported violation of the automatic stay, and the bankruptcy court decided not to grant him relief. Kempton and Kinney chose not to appeal the July 10, 2012 fee award to this court. Kinney may not collaterally attack the July 10, 2012 fee award at this late juncture as a means of challenging the March 17, 2016 fee award we are now reviewing on appeal.<sup>9</sup>

In *Kinney v. Clark, supra*, 12 Cal.App.5th 724, we also addressed the state law contentions Kinney reasserts in this appeal. We rejected Kinney’s unsupported assertion that an appeal from one attorney fees order automatically stays the entire action under section 916 and prevents the trial court from issuing a subsequent, separate and distinct attorney fees order based on new and different legal services rendered. (*Kinney v. Clark, supra*, 12 Cal.App.5th at pp. 735-736.) We further rejected his assertion (based on inapposite authority)<sup>10</sup> that Clark’s

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<sup>9</sup> We note the trial court denied Kinney’s motion for reconsideration of the July 10, 2012 fee award on September 26, 2012, after Clark’s discharge from bankruptcy and after the bankruptcy court granted the motion to compel abandonment of Clark’s claims for attorney fees and costs against Kinney. The bankruptcy court issued its written order on October 18, 2012, as set forth above.

<sup>10</sup> *Mojtahedi v. Vargas* (2014) 228 Cal.App.4th 974, 977 (attorney’s action against his former client’s subsequent attorney for a portion of settlement proceeds was properly dismissed on demurrer because the attorney failed to “establish the existence, amount, and enforceability of the lien in an independent action against his clients”).

attorneys were required to sue her to establish their entitlement to be paid for the legal work they performed. (*Id.* at pp. 736-737.)

An appeal is frivolous “when it is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Because this court and several other state and federal courts have addressed and rejected the contentions Kinney reasserts in this appeal, as outlined in *Kinney v. Clark*, *supra*, 12 Cal.App.5th 724, we dismiss this appeal as frivolous.

**Appeal No. B276290**

Kinney and Rubendall contend the trial court erred in imposing monetary sanctions on them for filing a frivolous motion for reconsideration of the March 17, 2016 fee award. Given the motion merely repeated the arguments Kinney has been raising for years as to why Clark is not entitled to attorney fees under the Agreement,<sup>11</sup> Kinney and Rubendall fail to explain in their appellate briefs how the motion complied with the requirements of section 1008, subdivision (a), that they set forth “new or different facts, circumstances, or law.” The motion was

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<sup>11</sup> In fact, in summarizing their position on the sanctions order, Kinney and Rubendall stated in their opening appellate brief: “These arguments have been presented to the lower court in case BC354136 and this Court (e.g., B253093, B255794, B258399, B265267 and B272408),” thus conceding they have been raising these same arguments for years. Kinney filed his notice of appeal in appellate case number B253093 in December 2013.

clearly frivolous because it was not a motion for reconsideration at all—it was a rehashing of issues that have been decided already by the trial court, this court, the bankruptcy court, the federal district court and the Ninth Circuit Court of Appeals. The trial court did not err in sanctioning Kinney and Rubendall for continuing to harass Clark and delay the proceedings by collaterally attacking final orders (e.g., the July 10, 2012 fee award). We dismiss this appeal because it too is frivolous.

We will visit the issue of sanctions against Kinney and his attorneys for filing and maintaining these frivolous appeals in an order to show cause to be filed subsequently to this opinion.<sup>12</sup>

#### **DISPOSITION**

The appeals are dismissed. Respondent is to recover her costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

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<sup>12</sup> At oral argument in this matter, Kinney’s counsel, Cyrus Sanai, argued that this court’s 2008 decision affirming the trial court’s sustaining of Clark’s demurrer to Kinney and Kempton’s cross-complaint for unmerchantable title was wrongly decided. (*Kempton v. Clark* (June 30, 2008, B200893) [nonpub. opn.].) Sanai urged us to “invite” Kinney to file a writ petition challenging the 2008 decision. We decline to do so.