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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

EDWARD GILLIAM,

Plaintiff and Appellant,

v.

NADIA MILLER et al.,

Defendants and Respondents.

B265122

(Los Angeles County
Super. Ct. No. BC557004)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Samantha P. Jessner, Judge. Affirmed.

Edward Gilliam, in pro. per., for Plaintiff and Appellant.

Nadia Miller, in pro. per., for Defendant and Respondent Nadia Miller.

No appearance for Defendant and Respondent Lee Frazier.

INTRODUCTION

Plaintiff and appellant Edward Gilliam brought an action against defendants and respondents Nadia Miller (Nadia) and Lee Frazier to void a fraudulent conveyance and/or transfer, for conspiracy, and for preliminary and permanent injunctions concerning Gilliam's efforts to collect on various judgments and an attorney fees award he had against Minon Miller (Minon), Nadia's mother.¹ The trial court issued an order dismissing Gilliam's action as barred by "res judicata,"² and ruling that Nadia's and Frazier's motions to quash service of a subpoena to produce business records were moot. Gilliam appeals. We affirm.³

BACKGROUND

In his action, Gilliam alleged that between 2008 and 2012, he obtained three judgments and an attorney fees award in state and United States Bankruptcy court actions against Minon in the total amount of \$98,759.16. In his cause of action to void a fraudulent conveyance and/or transfer, Gilliam alleged Minon, Nadia, and Frazier, Minon's future husband, took actions to prevent him from collecting those debts. He alleged that Minon transferred money to Nadia and Frazier that they used to purchase a

¹ We refer to the Millers by their first names for clarity.

² Although the trial court and the parties use the term "res judicata," the appropriate legal doctrine is "claim preclusion." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823-824 ["To avoid future confusion, we will follow the example of other courts and use the terms 'claim preclusion' to describe the primary aspect of the res judicata doctrine and 'issue preclusion' to encompass the notion of collateral estoppel. [Citation.] . . . [¶] *Claim preclusion* 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] . . . [¶] *Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.]"].)

³ We grant Gilliam's motion to augment the record on appeal with a corrected copy of his "Notice of Ex Parte Application and Motion and Motion to Vacate and Set Aside Final Judgment on Grounds that it is Invalid and Void on its Face, Special Order."

residence (the Property) in 2010. Nadia and Frazier concealed Minon's interest in the Property by taking title in their names alone. Gilliam also alleged that in 2010 Minon transferred her tax preparation business to Nonim, a limited liability company of which Nadia was a member. Nadia and Frazier knew that Minon grossed \$540,180.45 in income in 2012 and 2013 from her tax preparation services through Nonim.

Gilliam alleged in his cause of action for conspiracy that Nadia and Frazier knew that Minon intended to prevent Gilliam from collecting on his claims against her and conspired with her to prevent collection. In furtherance of the conspiracy, they agreed to receive money from Minon and use it to purchase the Property, thereby sheltering the money from Gilliam's collection efforts. Minon would then attempt to discharge Gilliam's claims in bankruptcy proceedings.

In his cause of action for preliminary and permanent injunctions, Gilliam sought to enjoin Nadia and Frazier "from disposing, transferring, or selling the . . . Property; and [to] enjoin[] said Defendants from encumbering or hypothecating its equity cushion, until [he] has levied upon the . . . Property in satisfaction of his claims against Minon."

In separate, but substantively identical motions, Nadia and Frazier moved to dismiss Gilliam's action arguing, in part, that it was barred by "res judicata." In their motions, they stated that Gilliam filed a lawsuit against them and others in May 2012 in Orange County Superior Court "alleging Fraudulent Transfers amongst other things." Gilliam obtained default against them. At the default prove up hearing, Gilliam prevailed in obtaining a judgment as to two defendants (Minon and Nonim), but failed to prove his fraudulent transfer claim as to Nadia and Frazier and other defendants. Excerpts from the reporter's transcript for the prove up hearing show that Gilliam attempted to prove fraudulent transfers with respect to the Property and Minon's transfer of her tax preparation business, but the Orange County Superior Court ruled that Gilliam had not proved any fraudulent transfers.

Nadia and Frazier stated that in October 2012, Gilliam filed a motion for reconsideration, seeking to add Nadia to the default judgment. On December 5, 2013, the trial court "granted" the motion in part, stating that it previously had not recognized that

Nadia's default had been entered. It ruled, however, that Gilliam had attempted to prove up his claims against all defendants, including Nadia, and had prevailed only as to two defendants. It further ruled that its December 17, 2012, statement of decision (apparently referring to its "Order and Findings of Fact") and December 17, 2012, judgment should have reflected its ruling in favor of the defaulted defendants, including Nadia.

Accordingly, it acted nunc pro tunc to amend its December 17, 2012, order and judgment to include the following: "Plaintiff failed to prove his claims against defaulted defendants Nadia . . . [and] Frazier . . . ; therefore, judgment is entered in favor of these defendants. [¶] Should Plaintiff have claims of fraudulent transfers by or to these persons and/or entities that occurred after the events encompassed in the 12/17/12 judgment, his remedy is to file another lawsuit that is limited to those transfers."

In support of the motions to dismiss, Nadia and Frazier attached Nadia's declaration in which she stated that Gilliam's current case was a "duplicate" of his Orange County Superior Court case "with the same allegations, and the same defendants." They also attached Frazier's declaration in which he asserted that Gilliam had not appealed the Orange County Superior Court's December 5, 2013, nunc pro tunc order.

Gilliam's opposition to Nadia and Frazier's motions to dismiss attached the Orange County Superior Court's order and findings of fact and judgment. Gilliam argued that because the order and findings of fact and judgment referred only to Minon and Nonim—i.e., they did not refer to Nadia or Frazier—"res judicata" did not apply in Gilliam's current case. He further contended the Orange County Superior Court's December 5, 2013, nunc pro tunc order was null and void because the error it purported to correct was a judicial and not a clerical error.⁴

⁴ "The general rule is that once a judgment has been entered, the trial court loses its unrestricted power to change that judgment. The court does retain power to correct clerical errors in a judgment which has been entered. However, it may not amend such a judgment to substantially modify it or materially alter the rights of the parties under its authority to correct clerical error. [Citations.]" (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237.) "The difference between judicial and clerical

The trial court granted Nadia and Frazier's motions to dismiss Gilliam's action, ruling the action was barred by "res judicata." Citing *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556, the trial court set forth the elements of "res judicata" as follows: "(1) a claim . . . raised in the present action is identical to a claim litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding." It ruled the first prong was satisfied because Gilliam's prior Orange County Superior Court action against Nadia and Frazier also alleged the fraudulent transfer of the Property and the third prong was satisfied because Gilliam was a party in the Orange County Superior Court and present actions.

As for the second prong, the trial court ruled that if the Orange County Superior Court's December 5, 2013, nunc pro tunc amendment of its December 17, 2012, judgment was proper, then Gilliam's Orange County Superior Court action resulted in a final judgment. The trial court ruled that the December 5, 2013, amendment was proper because "[t]he error made here was an error in recording the judgment rather than in rendering the judgment, therefore the error is clerical in nature and may be revised at any time. The record clearly demonstrates that the error was not the result of the exercise of judicial discretion, but rather by inadvertence to ensure the judgment submitted by Gilliam corresponded with the ruling given by the judge at the hearing. . . . [¶] The judge explicitly stated that Gilliam failed to prove [h]is claims against the other defendants, including Frazier and Nadia Miller. . . . Once the Judge realized the judgment did not dispose of the claims against Frazier and Nadia Miller, as he ordered it to do at the hearing, he corrected the clerical error in the judgment *nunc pro tunc*."

Having determined that the Orange County Superior Court's December 5, 2013, nunc pro tunc amendment was proper, the trial court reasoned, "The prior proceeding, as

error rests not upon the party committing the error, but rather on whether it was the deliberate result of judicial reasoning and determination. The distinction between clerical error and judicial error is whether the error was made in rendering the judgment, or in recording the judgment rendered." (*Id.* a p. 1238.)

amended by the *nunc pro tunc* amendment to the December 17, 2012 order and judgment, resulted in a final judgment and a determination that Gilliam could not prove that the transfer of the house to Frazier and Nadia Miller was fraudulent. Gilliam had a full opportunity to present his claims at a default prove-up hearing, but he failed to prove that he was entitled to judgment on the fraudulent transfer claim against Frazier and Nadia Miller as explicitly shown in the transcript of the hearing. . . . As a result, [the Orange County Superior Court] entered judgment in favor of Frazier and Nadia Miller, among other defendants.”

Nadia and Frazier also moved to quash a deposition subpoena Gilliam served for the production of business records related to Nadia and Frazier’s mortgage on the Property, claiming the records invaded their right to privacy and thus were privileged from discovery. The trial court ruled that the motion to quash was moot in light of its ruling dismissing Gilliam’s action, but indicated that it believed Gilliam was entitled to the discovery he sought and that it would have denied the motion to quash if it also had denied the motion to dismiss.

DISCUSSION

I. Claim Preclusion

Gilliam contends that the trial court erred in dismissing his action as barred by “res judicata” because he appealed the judgment in his Orange County Superior Court case and, as a result, the judgment in that case is not yet final. Because Gilliam did not raise this issue in the trial court, he has forfeited appellate review.

“The pendency of an appeal precludes finality” for purposes of “res judicata.” (*Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1163, fn. 1.) The failure to raise an issue in the trial court, however, forfeits review of the issue on appeal. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 262-265; *Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 306; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222 [“A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court”].) Gilliam did not contend in his opposition to

Nadia's and Frazier's motions to dismiss in the trial court that "res judicata" or claim preclusion did not apply because he had appealed from the Orange County Superior Court's order dismissing his action—i.e., either the December 17, 2012, order and judgment or the December 5, 2013, nunc pro tunc order—and that appeal was not final. Accordingly, he has forfeited that claim on appeal. (*Keener v. Jeld-Wen, Inc.*, *supra*, 46 Cal.4th at pp. 262-265; *Zubarau v. City of Palmdale*, *supra*, 192 Cal.App.4th at p. 306; *In re Dakota H.*, *supra*, 132 Cal.App.4th at pp. 221-222.)

Moreover, Gilliam does not cite any part of the record on appeal that demonstrates that he directly appealed from either the Orange County Superior Court's December 17, 2012, order and judgment or its December 5, 2013, nunc pro tunc order. The only appeal from the Orange County Superior Court that Gilliam identifies is an appeal that was "perfected on March 24, 2015," and that appears to be from an order awarding receivership fees against Gilliam. Under California Rules of Court rule 8.104(a)(1)(C), the latest date a notice of appeal may be filed, under certain circumstances, is 180 days after entry of judgment. Even if we construe December 5, 2013, as the date judgment was entered, Gilliam's March 24, 2015, appeal fell outside that 180-day period, and the December 12, 2012, order and judgment and the December 5, 2013, nunc pro tunc order are thus final for claim preclusion purposes.

II. Nunc Pro Tunc Order

Apparently also with respect to the trial court's "res judicata" ruling, Gilliam argues that the Orange County Superior Court was without jurisdiction to issue its December 5, 2013, nunc pro tunc order because it was made outside the six-month period Code of Civil Procedure section 473, subdivision (b) provides a party to apply for relief from a judgment taken against the party through the party's mistake, inadvertence,

surprise, or excusable neglect. He further contends that the nunc pro tunc order impermissibly corrected a judicial error and was appealed.⁵

Assuming arguendo that Gilliam may challenge in this case the viability of an order previously made in the Orange County Superior Court, Gilliam did not argue in the trial court that the Orange County Superior Court was without jurisdiction to issue its December 5, 2013, nunc pro tunc order because it was not timely under Code of Civil Procedure section 473, subdivision (b) or because the nunc pro tunc order had been appealed. Accordingly, he has forfeited appellate review of those issues. (*Keener v. Jeld-Wen, Inc.*, *supra*, 46 Cal.4th at pp. 262-265; *Zubarau v. City of Palmdale*, *supra*, 192 Cal.App.4th at p. 306; *In re Dakota H.*, *supra*, 132 Cal.App.4th at pp. 221-222.)

Gilliam also has forfeited review of his claim that the Orange County Superior Court's December 5, 2013, nunc pro tunc order impermissibly corrected a judicial error. "An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) Gilliam has not cited any authority in support of a determination that the trial court in this case had the jurisdiction to overturn the Orange County Superior Court's prior nunc pro tunc order and thus has forfeited his challenge to the trial court's "res judicata" ruling based on his nunc pro tunc challenge. (*Ibid.*)

⁵ Although the appeal referred to above that was "perfected on March 24, 2015," appears to be from an order awarding receivership fees against Gilliam, the apparent opening brief in that appeal purports also to address the propriety of the Orange County Superior Court's December 5, 2013, nunc pro tunc order.

Even if he had raised these claims below and briefed them here, he still would not be able to attack the Orange County Superior Court's December 5, 2013, nunc pro tunc order in this appeal. Gilliam had the opportunity to challenge on appeal the Orange County Superior Court's order. As explained above, Gilliam has not demonstrated that he timely and directly appealed from the Orange County Superior Court's December 5, 2013, nunc pro tunc order. (See *Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 Cal.App.4th 387, 398 [“a judgment rendered in an action in personam by a court having jurisdiction over the subject matter and the parties is not . . . subject to collateral attack merely because it may erroneously determine some matter not specifically raised in the pleadings, and not covered by the evidence before the trial court, and . . . such a judgment is res judicata”].)

On the merits, moreover, with respect to Gilliam's jurisdictional argument, the matter before the Orange County Superior Court was a motion for reconsideration that Gilliam brought seeking to add Nadia to the default judgment and not a motion under Code of Civil Procedure section 473. Thus, Code of Civil Procedure section 473, subdivision (b)'s jurisdictional six-month filing period did not apply. Also, under Code of Civil Procedure section 473, subdivision (d), a trial court may, without time limit and on “its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed.” (*Estate of Goldberg* (1938) 10 Cal.2d 709, 717.)

As for the merits of Gilliam's appeal argument, as explained above, Gilliam has not demonstrated that he directly appealed from either the Orange County Superior Court's December 17, 2012, order and judgment or its December 5, 2013, nunc pro tunc order. Gilliam's March 24, 2015, appeal of an order awarding receivership fees against Gilliam was not filed within 180 days of the December 5, 2013, nunc pro tunc order and thus was filed beyond the 180-day outer limit in California Rules of Court, rule 8.104(a)(1)(C).

III. Discovery⁶

In their motions to quash Gilliam's deposition subpoena for the production of business records related to Nadia and Frazier's mortgage on the Property, Nadia and Frazier claimed the records invaded their right to privacy and thus were privileged from discovery. Having dismissed Gilliam's action, the trial court ruled that the motions to quash were moot. Gilliam apparently challenges that ruling on appeal, contending he was entitled to the discovery sought. Because we affirm the trial court's ruling dismissing Gilliam's action, we also affirm the trial court's mootness ruling on the motions to quash.

DISPOSITION

The judgment is affirmed. Nadia and Frazier are awarded their costs on appeal.

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RAPHAEL, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

⁶ In addition to his "res judicata," nunc pro tunc, and discovery arguments, Gilliam asserts other, incomprehensible arguments that we treat as forfeited. (*Benach v. County of Los Angeles*, *supra*, 149 Cal.App.4th at p. 852; *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119 [The "failure of an appellant in a civil action to articulate any pertinent or intelligible legal argument in an opening brief may, in the discretion of the court, be deemed an abandonment of the appeal justifying dismissal"].)

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.