Filed 3/14/17 Cardet v. Burlison CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SANDRA CARDET, Plaintiff and Respondent, v. ROBERT C. BURLISON, JR., et al., Defendants and Appellants.	B270033 (Los Angeles County Super. Ct. No. BC319397)

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

Burlison Law Group, Robert C. Burlison, Jr., and Melody S. Mosley for Defendants and Appellants.

Cummins & White, Larry M. Arnold, Kevin J. Price, and William S. Hoang for Plaintiff and Respondent.

Defendants and appellants Robert C. Burlison, Jr., Walter R. Luostari, and Burlison & Luostari challenge a trial court order denying their posttrial motion to expunge abstract of judgment and writ of execution.[1] Because defendants never gave plaintiff and appellant Sandra Cardet (Cardet) a full, unconditional offer, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 2, 2004, Cardet filed a legal malpractice action against defendants. On January 22, 2007, the jury rendered a verdict in favor of Cardet and against defendants. Judgment[2] was entered and defendants appealed. In connection with their appeal, defendants filed and served a declaration that put up property located at 1117 Foothill Boulevard (the bond property) in lieu of bond on appeal.

On December 17, 2008, we affirmed the judgment in favor of Cardet. (*Cardet v. Burlison* (Dec. 17, 2008, B198625) [nonpub. opn.].)

On January 9, 2009, defendants offered to transfer the bond property to Cardet as full payment for the judgment. Defendants claimed that the value of the property was $1,971,000. They noted that the bond property had two leases as well as three mortgages.

Cardet responded on January 12, 2009, stating that it was "not feasible for her at this time to accept [defendants'] proposal involving the purchase of the building." Cardet indicated that she was hopeful that the parties could

---

[1] Initially it appeared that defendants were also challenging the trial court's order regarding their motion to quash levy under writ of execution. As set forth at the end of their reply brief, defendants abandoned this aspect of their appeal. Thus, we do not address it.

[2] The judgment was amended several times. Ultimately, judgment was entered in the amount of $873,065.30, plus interest at the legal rate from January 9, 2007.

continue to discuss ways in which she could "receive a much needed cash payment to satisfy this judgment."

From mid-2010 to mid-2011, defendants made regular payments towards the judgment, totaling $240,000. However, payments stopped in July 2011. The only credit thereafter was a credit of $150,000 made as a result of a credit bid by Cardet against the bond property.

Thus, Cardet filed a writ of execution (money judgment), seeking $1,054,657.01. On February 2, 2015, defendants filed a motion to expunge abstract of judgment and writ of execution. They argued that the tender of the bond property in satisfaction of the judgment was proper and that Cardet's failure to object to the tender at the time of the tender waived any objection.

Cardet opposed defendants' motion to expunge. In support, she offered a declaration from her attorney, who stated, among other things, "In January 2009, after [defendants'] appeal was denied, I received a letter from [defendants] offering to tender the [bond property] in full performance of the judgment."

On August 26, 2015, the trial court denied defendants' motion to expunge, except for an issue regarding the calculation of interest. [3]

This timely appeal ensued.

---

[3] According to Cardet's counsel's declaration, the trial court denied defendants' motion to expunge on the grounds that their tender of the bond property was not an unqualified tender. We do not have the reporter's transcript of the hearing, and the trial court's minute order only indicates that the motion was denied.

DISCUSSION

I. *Defendants' Contention on Appeal*

Defendants challenge the trial court order denying their motion to expunge the abstract of judgment. Their argument is as follows: The trial court erred in finding that defendants' tender was not unqualified. Alternatively, the trial court erred in sustaining Cardet's objection that the tender was unqualified because she forfeited that objection by not advising defendants of her objection at the time she rejected their offer. Because defendants made a full, unconditional tender, the trial court erred in denying their motion to expunge. Alternatively, interest and attorney fees ceased to accrue on the judgment as of January 9, 2009.

II. *Standard of Review*

We review the trial court's order denying defendants' motion for abuse of discretion. (*Biddle v. Superior Court* (1985) 170 Cal.App.3d 135, 136 [reviewing order on motion to expunge lis pendens for abuse of discretion].) However, we review the trial court's factual findings supporting its order for substantial evidence (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461), and we review the trial court's interpretation and construction of the relevant statutory provisions de novo (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432).

III. *Analysis*

California Civil Code section 1504 provides: "An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof." In order for the tender to be valid, it must be for the full amount. (*Lovetro v. Steers* (1965) 234 Cal.App.2d 461, 479.) "An offer of performance must be free

from any conditions which the creditor is not bound, on his part, to perform." (Cal. Civ. Code, § 1494.)

Here, defendants' offer to satisfy the judgment with a transfer of the bond property to Cardet was inadequate because it was not an unqualified offer.[4] The property was encumbered by two leases and three mortgages.

Defendants contend that Cardet cannot challenge their offer of the bond property because she did not object at the time the tender was made. According to defendants, because she was silent, she forfeited any alleged defect in the tender. (Cal. Civ. Code, § 1501; Cal. Code Civ. Proc., § 2076.) We cannot agree. These statutes do not apply because, as set forth above, defendants never made a full, unconditional offer to Cardet.[5] (*Gaffney v. Downey Savings & Loan Assn.* (1988) 200 Cal.App.3d 1154, 1166 ["These statutory provisions do not apply where, as here, the amount of the creditor's demand is known to the debtor and the amount of the tender is wholly insufficient"]; *McElroy v. Chase Manhattan Mortgage Corp.* (2005) 134 Cal.App.4th 388, 394 [same].)

It follows that defendants' reliance upon *Lockhart v. J.H. McDougall Co.* (1923) 190 Cal. 308 (*Lockhart*), overruled on other grounds in *Ellis v. Mihelis* (1963) 60 Cal.2d 206, 221, is misplaced. In that case, the plaintiffs offered to pay the full amount due. (*Lockhart*, *supra*, at p. 312.) Again, at the risk of sounding redundant, defendants here never tendered a full,

---

[4] Defendants offer no legal authority to support their proposition that, even if their tender was conditional, Cardet still had the burden to prove that the value of the bond property was insufficient. For this reason, we do not address defendants' argument that Cardet relied upon inadmissible hearsay to prove the insufficiency of their tender.

[5] Because these statutes do not apply, *Hohener v. Gauss* (1963) 221 Cal.App.2d 797, which defendants raise for the first time in their reply brief, is not instructive.

unconditional offer. Thus, Cardet did not forfeit any objection and interest continued to accrue on the debt.

Although not entirely clear, it seems that defendants may be arguing that Cardet judicially admitted, in her attorney's declaration filed in support of her opposition to the motion to expunge, that their tender of the bond property amounted to a full tender. Defendants have not shown how the doctrine of judicial admission applies here. (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.) At best, Cardet may have acknowledged that defendants claimed that they were making a full tender, but that does not amount to a binding, legal admission that the tender was in fact a full tender. It follows that Cardet had no duty to object in any manner other than rejecting the offer, which she did.

Finally, for the first time in their reply brief, defendants argue that they did not know the full amount due. "This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points [citations], particularly when the [appellants] also failed to raise such issue before the trial court. [Citation.]" (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.) Therefore, we shall not consider defendants' belatedly raised argument that they did not know the full amount due.

DISPOSITION

The order is affirmed. Cardet is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J. *
GOODMAN

---

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