S232582

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVE RYAN
Plaintiff & Appellant,

vs.

MITCHELL ROSENFELD, et al.,
Defendants & Respondents.

AFTER AN ORDER OF INVOLUNTARY DISMISSAL BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FOUR, APPEAL NO. A145465
ON APPEAL FROM ORDER/ JUDGMENT OF SAN FRANCISCO SUPERIOR COURT
CASE NO. CGC-10-504983, HONORABLE CYNTHIA M. LEE, TRIAL JUDGE

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The answer brief filed by Mitchell Rosenfeld and the remaining respondents ironically reinforces the arguments presented by appellant Steve Ryan. After discussing the conflicting lines of authority on the jurisdictional appealability issue presented here (ABOM 2-4), effectively as a petition for review, Rosenfeld finally admits the validity of the exceptions adopted by the courts adopting the non-appealability view. (ABOM 7.) Rosenfeld, however, argues that those exceptions should not be applied in this particular case. None of the grounds offered by Rosenfeld justify his attempt to evade appellate review of the lower courts' refusal to examine the most important dispositive motion – the dismissal motion – decided by the trial judge in this case.

Improperly seeking to argue the merits of Ryan's motion to vacate under Code of Civil Procedure section 663 here (ABOM 11-13), [1] Rosenfeld also argues that Ryan missed the appeal deadline. (ABOM 13 [citing authorities].) Because Ryan has already conceded that his appeal from the *judgment* was untimely, the real issue here is whether, irrespective of the appealability of the judgment, Ryan should be punished or precluded from appealing the post-judgment order under section 663. While the answer brief seeks to present various legislative and public policy arguments against appealability, none of them has any merit.

In short, the Court should adopt a bright line rule that the denial of a section 663 motion is always appealable. At a minimum, the Court should apply the exceptions to the non-appealability view discussed here and in the opening brief.

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[1] All statutory references below refer to the Code of Civil Procedure unless noted otherwise.

LEGAL DISCUSSION

I. Rosenfeld's Suggestion That the Court Should Defer to the Legislature Has Been Rejected in Other Cases.

Rosenfeld argues that "the legislature may very well have recognized that an order granting a motion to vacate a judgment" should be appealable but not one denying such a motion. (ABOM 6-7.) While it is true that the legislature has expressly authorized an appeal from an order *granting* a motion to vacate, [2] "the Legislature's failure to expressly state that the denial of a motion pursuant to section [663] is appealable" does not "evidence[] a legislative intent that the order not be appealable." (*In re Molz* (2005) 127 Cal.App.4th 836, 842 [rejecting the identical argument raised by Rosenfeld and deeming as appealable an order denying a motion to vacate while addressing it under Government Code section 6026].) Rosenfeld's view that "the lawmakers did not intend that there should be a right of appeal from an order denying the motion" under section 663 is flawed. (*Westervelt v. McCullough* (1923) 64 Cal.App. 362, 363 [addressing and rejecting Rosenfeld's argument with respect to the denial of motions under section 663 in particular].)

Rosenfeld also ignores the fact that the "right of appeal is remedial and in doubtful cases the doubt should be resolved in favor of the right whenever substantial interests of a party are affected by a judgment." (*In re Molz, supra,* 127 Cal.App.4th at p. 842.) Otherwise, it "would hardly seem consistent to allow one of the parties the right of an appeal from an adverse [ruling] and deny that same right to the other party." (*Id.* at pp. 842-843; internal citation omitted; brackets added.)

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[2] "An order of the court granting a motion may be reviewed on appeal in the same manner as a special order made after final judgment." (§ 663a, subd. (e).)

Moreover, in asking this Court to adopt a *laissez faire* approach, Rosenfeld ignores the fact that interpretation of the law – e.g., section 904.1, subdivision (a)(2) – is ultimately a judicial function. In addition, contrary to Rosenfeld's view that courts cannot decide issues of appealability on their own, the entire collateral order doctrine is a judicially-created basis for creating appealability, as developed by case law in other contexts. Besides creating appealability under that doctrine, this Court can also abolish appealability when necessary. (See, e.g., *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743 [abrogating an exception to the one final judgment rule adopted in *Schoenfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401, 416-419].)

To summarize, there is no reason to defer to Sacramento to define or interpret the law on appealability.

II. The Order Denying Ryan's Motion to Vacate Is Independently Appealable Based On Multiple Grounds: the Silent-Record Exception, the Ineffective Appeal Exception and Section 904.1, Subdivision (a)(2).

A. Because the record on appeal from the judgment would have neither reflected Ryan's post-judgment evidence nor disclosed the impact of known facts, the silent-record exception applies.

1. This is a silent-record case.

Rosenfeld argues that the silent-record exception to the non-appealability view adopted under one line of authority does not apply in this particular case, thus requiring the dismissal of Ryan's appeal under the cases adopting the non-appealability view. (ABOM 8-11.) Rosenfeld

asserts that "everything that was in the record on the motion to vacate ... was also in the record" as of the time Ryan opposed his attorney's pre-trial motion to withdraw. (*Id.* at p. 8.) To further support this argument, Rosenfeld compares the abandonment-by-counsel argument that Ryan presented in his motion to vacate with the reply in support of Ryan's post-dismissal reconsideration motion. (*Id.* at pp. 9-10.) Rosenfeld also asserts that Ryan had advanced the same abandonment argument "before the trial court dismissed the case." (*Id.* at p. 10.) Rosenfeld's argument that this is not a silent-record case can be dispatched on two grounds.

First, the post-judgment motion to vacate advanced two distinct grounds for relief. In addition to seeking relief based on abandonment by counsel (CT 163-165), Ryan sought relief based on "illness of plaintiff preventing appearance at trial." (CT 162:22; 164:22; 166 [raising both grounds].) [3] As a result, even if we accept Rosenfeld's position that the record, as of the date of dismissal of the lawsuit, included the same abandonment-by-counsel argument that Ryan presented in his post-judgment motion, that does not affect or eliminate the other ground that Ryan invoked in his post-judgment motion; i.e., the combined motion to vacate and motion for relief under section 473. (CT 161-175.) To summarize, at a minimum, the record as of the date of dismissal was silent regarding Ryan's inability to attend the trial due to his in-patient hospitalization. (CT 108 [exhibit submitted with post-dismissal reconsideration motion reflecting hospital admission on October 18 and discharge on October 23 in Spanish]; CT 87 [dismissal order reflecting October 20 trial date].)

[3] While Ryan cited section 473 in the body of his motion (CT 162-166), his notice of motion and the body of that motion referred to section 663 as well. (CT 161-162, 165.)

Second, even if Ryan had not presented in his post-judgment motion to vacate evidence of his hospital treatment at the time of the trial as another ground for relief (CT 174), this case would still qualify as a silent-record case because that post-judgment motion "tendered a 'hitherto unrevealed *impact* of known facts'" regarding Ryan's previously-asserted abandonment argument. (*Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1815-1816 [emphasis added, quoting *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 388].) Ryan's former attorney, having naturally denied any claim of abandonment (CT 40, ¶2), could not have been expected to discuss the impact of Ryan's abandonment argument while remaining as Ryan's counsel of record when Ryan initially asserted his abandonment-by-counsel argument. (Cf. *Loube v. Loube* (1998) 64 Cal.App.4th 421, 428 [addressing the converse situation: once the attorney-client relationship has deteriorated, there is no reason to hold "that the position taken by attorneys on behalf of their clients somehow becomes binding on the attorneys"].)

In short, this case presents a perfect example of the silent-record exception applied by courts adopting the non-appealability view.

2. The various excuses offered by Rosenfeld to avoid addressing the application of the silent-record exception should be rejected.

Rosenfeld acknowledges the validity of the silent-record exception adopted by courts adopting the non-appealability view. Rosenfeld, however, claims that this Court should not decide "whether the silent record exception applies here" because, in his view, Ryan's "motion to vacate was untimely." (ABOM 11.) Rosenfeld is wrong for several reasons.

First, the timeliness or tardiness of a motion does not affect its appealability. For example, if a party files an anti-SLAPP motion after the 60-day, default statutory deadline (§ 425.16, subd. (f)), the court's ruling on that motion is still appealable. (§ 904.1, subd. (a)(13).) While Rosenfeld has conflated these two distinct issues, he is asking this Court to augment the narrow procedural issue that was granted review (appealability) in order to litigate the merits of Ryan's appeal here. Based on this Court's recent denial of Rosenfeld's motion to dismiss review, Rosenfeld's argument that Ryan cannot succeed on the merits of his appeal should be decided in the first instance by the Court of Appeal on remand after this Court decides the narrow appealability issue that was granted review.

In any event, Rosenfeld's claim that Ryan filed his motion too late is flawed. Ryan filed his motion to vacate on December 22, 2014. (CT 161-175.) [4] In the absence of any allegation that either the clerk or Ryan served notice of entry of judgment after the October 24 order dismissing the case was entered, the 180-day deadline for filing motions to vacate applies here. (See § 663a, subd. (a)(2) [motion must be filed "[w]ithin 15 days of the date of mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him or her by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest"].) The 180th day after the October 24, 2014 entry of the dismissal order (a judgment under section 581d) was April 22, 2015. Because Ryan filed his motion to vacate prior to April 22, 2015, his motion was timely. (CT 161.)

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[4] This is the date identified by Rosenfeld. (ABOM 13.) Although we previously identified December 23 (OBOM 8) as the filing date based on the hard-to-read file stamp reflected on the motion (CT 161), the docket reflects December 22 as well. (CT 16.)

Rosenfeld's argument that the motion was untimely is based on the premise that the 15-day alternative deadline, after service of notice of entry, applies. (§ 663a, subd. (a)(2).) Rosenfeld relies on the fact that Ryan, in pro per, had stated in one of his filings that he "was served with written notice of entry of the order [of dismissal] on October 24, 2014 by facsimile." (CT 93:25-27; ABOM 12.) Rosenfeld, however, does not cite to anything in the record to show that Ryan or his counsel had consented to receive notices by fax, "as required by Code of Civil Procedure section 1013, subdivision (e). Thus, the service was defective on this ground alone." (*Humane Society of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1248-1250 [deadline for filing writ petition cannot be based on party's statement in points and authorities regarding when it was served with notice of entry; faxing corrected proof of service, and attaching the notice of entry to that fax, without prior consent to accept service by fax, was equally ineffective in triggering the writ deadline].) As a result, assuming that Ryan or his counsel had received notice of entry of the dismissal order by fax, that does not trigger the filing deadline under section 663. Therefore, Ryan's motion was filed timely under this statute based on the 180-day deadline. (§ 663a, subd. (a)(2).)

Rosenfeld's argument that Ryan's motion was denied by operation of law on December 23, 2014, though flawed for the same reason, is totally irrelevant. (ABOM 13.) When a post-trial motion to vacate a judgment or one seeking a new trial is denied by operation of law, all that means is that the moving party has one less opportunity, at the trial court level, to unravel the adverse ruling. The losing party can still pursue an appeal, and if

successful, obtain reversal on the merits – assuming appealability and timeliness as discussed next. [5]

Mixing apples and oranges, Rosenfeld further argues that Ryan's "deadline to file notice of appeal expired on March 23, 2015." (ABOM 13.) Rosenfeld confuses the issue of timeliness of an appeal with the separate issue of appealability again. While Ryan concedes that his appeal from the *judgment* (CT 88-89) is untimely, if the denial of his section 663 motion was separately appealable, Ryan can pursue his appeal from that ruling. Because Ryan filed his notice of appeal (CT 190) within three weeks after the court issued its formal order denying Ryan's section 663 motion (CT 185-186), the appeal from the denial of his motion to vacate is timely. (Cal. Rules of Court, rule 8.104(a)(1).) The real question here, the one granted review, is whether that order is appealable.

To summarize, none of the grounds invoked by Rosenfeld justify his request to avoid addressing the silent-record exception applied by the courts under the non-appealability line of authority.

B. Because an appeal from the judgment would not have been effective, this provides a related ground for deeming the denial of the motion to vacate as appealable.

Rosenfeld appears to acknowledge that having two bites at the apple is consistent with post-trial motion practice. (ABOM 7.) He maintains, however, that "there is nothing that would have prevented [Ryan] or any litigant who receives an adverse judgment in the trial court from filing a

[5] We acknowledge that the denial of a motion under section 663 by operation of law will impact the length of the extension for filing an appeal from the judgment itself. (Eisenberg, et al., Cal. Practice Guide: Civil Appeals & Writs (Rutter Group 2016) ¶ 3:81; Cal. Rules of Court, rule 8.108(c).) That is not the issue here.

timely notice of appeal." (*Ibid.*) This argument is flawed because it ignores a related exception "to the general rule that the denial of a motion to vacate is nonappealable[.]" (*In re Marriage of Brockman* (1987) 194 Cal.App.3d 1035, 1043.) Under this exception (OBOM 18 ["ineffectual" appeal subsumed under the silent-record exception]), an appeal from the denial of a motion to vacate is "recognized where there is no effective appeal from the judgment." (*Marriage of Brockman,* at p. 1043.)

Applying this principle, if Ryan had timely appealed the judgment itself, the Court of Appeal would have decided that appeal solely based on the evidence that was available to the trial judge as of October 24, 2014 when the judge dismissed the case. (OBOM 18 [citing *In re Zeth S.* (2003) 31 Cal.4th 396, 400, 405].) Because the documentary evidence submitted by Ryan in support of his subsequent motions was not available to the judge on October 24 (CT 173-175 [exhibits for motion to vacate]; CT 98 [itemizing new exhibits for reconsideration motion]), an appeal based on that limited scope of review would not have been effective. The record presented to the trial judge, as of the time of the dismissal of the action, consisted primarily of the medical issues that Ryan's wife had experienced in Mexico. (CT 73-75; CT 72, ¶¶ 4-5 [self-inflicted drug overdose]; CT 83, ¶¶ 2-4.) Ryan's explanation of the secondary effect of his wife's attempted suicide, in terms of his own inability to focus his attention on this lawsuit, was not deemed as a valid reason to continue the trial. (CT 72, ¶ 6; 87.) [6]

[6] While Ryan's doctor initially explained that Ryan had suicidal ideation between October 14 and 16 (CT 80), the subsequent letters from his doctor (CT 82-83, 79) that were evaluated by the trial judge at the time of trial on October 20 (CT 87:4-6) addressed chest pains, depression and other forms of cognitive impairment, not suicide. (CT 79, 82.) None was persuasive to the judge.

By contrast, when Ryan filed his post-judgment motions, he presented documentary evidence confirming that *he* had been hospitalized in Mexico, on an in-patient basis, from October 18 to October 23, thus making it literally impossible for him to have attended the trial on October 20. (CT 108 [reflecting dates of admission/discharge in Spanish]; CT 110 [confirming five-day, in-patient hospitalization].) Because the trial judge's decision to dismiss the lawsuit, based on its perception that Ryan had abandoned the case (CT 87), could not have taken into account this new documentary evidence (*Zeth S.*, at pp. 400, 405), on an appeal from the judgment of dismissal, Ryan could not have shown an abuse of discretion based on the limited information the judge examined on October 20. This refutes Rosenfeld's argument that Ryan could/should have appealed that judgment on time and that Ryan seeks to have two bites at the apple. Because an appeal from the judgment would not have been effective, the denial of Ryan's motion to vacate should be appealable even under the non-appealability line of authority.

C. Section 904.1, subdivision (a)(2) provides another ground for appealability.

As Rosenfeld has acknowledged the rule (while disputing its application here), in silent-record cases, "the issues raised by the appeal from the order will be different from those that would arise from an appeal from the judgment and the order would necessarily 'affect the judgment or relate to it by enforcing it or staying its execution.'" (ABOM 7 [quoting *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652].)

The denial of Ryan's motion under section 663 "is a postjudgment order that affects the judgment or relates to its enforcement because it determines the rights and liabilities of the parties arising from the judgment,

is not preliminary to later proceedings, and will not become subject to appeal after some future judgment. Therefore, it is appealable." (*Lakin,* at p. 656.) Accordingly, as previously explained (OBOM 10-13), the trial court's order is also appealable as a post-judgment order under section 904.1, subdivision (a)(2).

III. The Final Judgment Rule and the Availability of Other Remedies Do Not Justify Adoption of Rosenfeld's Non-Appealability View.

A. The final judgment rule is not particularly informative here.

Rosenfeld also argues that our appealability view violates the basic principles behind the final judgment rule. (ABOM 13-15.) A close examination of that rule refutes this argument. The justifications for adopting the final judgment rule are primarily designed to address interlocutory (pre-judgment) appeals. Those concerns are not particularly informative in resolving the post-judgment appealability issues presented here. This Court's discussion of the factors animating the final judgment rule illustrates that only one of those five factors applies in deciding whether a *post*-judgment ruling should be appealable:

> the purpose of the final judgment rule is to prevent piecemeal disposition and multiple appeals which tend to be oppressive and costly. Interlocutory appeals burden the courts and impede the judicial process in a number of ways: (1) They tend to clog the appellate courts with a multiplicity of appeals. (2) Early resort to the appellate courts tends to produce uncertainty and delay in the trial court. (3) Until a final judgment is rendered the trial court may completely

> obviate an appeal by altering the rulings from which an appeal would otherwise have been taken. (4) Later actions by the trial court may provide a more complete record which dispels the appearance of error or establishes that it was harmless. (5) Having the benefit of a complete adjudication will assist the reviewing court to remedy error (if any) by giving specific directions rather than remanding for another round of open-ended proceedings.

(*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5-6 [internal quotation marks, ellipses and citations omitted].)

While the first factor is the only one pertinent here, adopting Ryan's appealability view does not clog the court system. If the appeal from the judgment is untimely (as in Ryan's case), there would be only one appeal. The Court of Appeal would merely adjudicate the appeal from the denial of the section 663 motion. On the other hand, if the appeals from the judgment and such a post-judgment order are both timely, resolution of the latter may create more efficiency. For example, adjudication of the appeal from the denial of a motion to vacate the judgment – which naturally entails a much shorter appellate record raising narrow issues limited to such a post-judgment ruling – may render the appeal of the judgment completely moot. (See *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 373 [where defendants timely appealed the judgment and the denial of their motion to vacate default judgment, this Court's decision on the merits of the motion to vacate rendered the appeal from the judgment moot; dismissing the appeal from the judgment without having to address it].)

The second and third factors, creating unnecessary delays in the trial court and the possibility of self-correction by the trial judge, do not apply

here because these factors are inherently limited to pre-judgment appeals. Similarly, because there are typically no subsequent actions pending in the trial court (e.g., motions in limine, summary judgment, etc.) that may establish the harmlessness of the trial judge's erroneous denial of a motion under section 663, the fourth factor does not apply here. Finally, the last factor, waiting for a final adjudication, does not apply here because such a post-judgment motion is necessarily filed at the conclusion of the case when the case has been fully adjudicated in the trial court.

To summarize, only one of the five factors that justify the application of the final judgment rule has any relevance in this case. That factor weighs in favor of finding appealability of the denial of motions under section 663.

B. The other procedural protections cited by Rosenfeld do not justify adopting his non-appealability view.

Rosenfeld also argues that there are adequate procedural "protections in place for those who request relief under section 663." (ABOM 7; emphasis omitted.) Rosenfeld explains that the denial of a valid motion under this statute extends the deadline to appeal the judgment itself. (*Id.* at pp. 7-8.) But while the same is true as to the denial of a JNOV motion (Cal. Rules of Court, rule 8.108(d)(1)), a party can appeal the denial of a JNOV motion despite missing the deadline to appeal the judgment based on lack of substantial evidence. The fact that the denial of a JNOV motion extends the deadline to appeal the judgment does not preclude the appealability of the JNOV denial. (Code Civ. Proc., § 904.1, subd. (a)(4).) Rosenfeld does not even bother to explain or justify this incongruous result for litigating such post-trial motions. (OBOM 1.)

CONCLUSION

This Court should deem the trial court's order as appealable. This Court should then transfer the case to the Court of Appeal to review the merits of Ryan's motion under section 663. (Cal. Rules of Court, rule 8.528(c).)

Rather than expanding the jurisdictional issue granted review, as Rosenfeld has tried to do by arguing the merits of Ryan's statutory motion, such a post-decision transfer would also allow the Court of Appeal to address whether Ryan was alternatively entitled to relief under section 473 (irrespective of section 663). In addition, if the Court of Appeal were to uphold the denial of Ryan's motion under section 663 on the merits, it can also address whether that motion may be treated as another type of post-trial motion. (E.g., *Finnie v. District No. 1 - Pacific Coast Dist.* (1992) 9 Cal.App.4th 1311, 1316, 1320 [upholding the trial court's decision granting relief under section 663 when trial court vacated its prior dismissal order that was issued under the diligent-prosecution statute; assuming without deciding that section 663 motion was improper as argued by Rosenfeld].)

Respectfully submitted,

DATED: January 4, 2017

WILSON ELSER MOSKOWITZ
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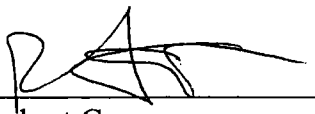
By 

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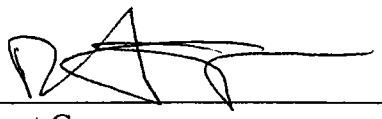
By 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18. I am not a party to this action. My business address is 555 S. Flower Street, Suite 2900, Los Angeles, CA 90071.

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Deborah Atkinson

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