Supr. Ct. No. S175907

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Respondent,

v.

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

After a Decision by the Court of Appeal,
Second Appellate District, Division Three
Case No. B208691 (L.A. Sup. Ct. No. SJ0969)

REPLY BRIEF ON THE MERITS

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I. LUMBERMENS CONCEDES THAT A MOTION FOR RELIEF IS REQUIRED BUT FAILS TO CREDIBLY EXPLAIN WHY ITS AGENT DID NOT TIMELY FILE A MOTION

LUMBERMENS claims, for the first time in this case, that its agent, The Bail Hotline, arrested and surrendered Laimbeer to the custody of the San Bernardino Sheriff's Department, citing to a single document in the appellate record and implying his arrest and surrender by its agent in the underlying case.[1] (ABM, pp. 2, 4, 21; CT, p. 17.) LUMBERMENS new claim[2] does not explain why its agent failed to seek an order to set the bail forfeiture order with more than three months remaining in the 180-day period. LUMBERMENS argues that, "[o]f course, the record is not going to reflect 'any attempts to locate Laimbeer during the 180-day appearance

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[1] At best, the record is unclear that The Bail Hotline surrendered Laimbeer in the underlying case. While the Arrest/Booking Application (CT, p. 17) reflects The Bail Hotline as the arresting agency and that Laimbeer was not released because he was a "bond surrender," the San Bernardino Superior Court case number for which he was arrested on July 16, 2007 was case number FV1701258, not 5NE00172-01, which is the *underlying* Los Angeles Superior Court case number. (CT, 2-5,17.) According to the Arrest Information dated October 30, 2007 Laimbeer was arrested on May 2, 2007 – the same as his arrest in the San Bernardino Superior Court case. (CT, p. 19).

[2] For the purpose of the appeal, the parties have assumed that a hold was placed on Laimbeer for the charges in the underlying case. LUMBERMENS' proffered declaration in its motion to set aside the summary judgment did not state that an agent of The Bail Hotline arrested and surrendered Laimbeer in the underlying case. Rather, it merely stated that Laimbeer had been arrested and booked into custody with the San Bernardino Sheriff's Department. (CT, 9:18-21.)

period,' since he had been surrendered and there was no longer any reason to make any further attempts to locate him." (ABM, pp. 4-5.) LUMBERMENS further argues it must be presumed that its agent failed to file a motion to set aside the forfeiture order and exonerate the bond because of a mistaken belief that the trial court would exonerate the bond when Laimbeer was brought back to court. (ABM, 21.) Its claim is unavailing.

First, LUMBERMENS fails to cite any authority to establish that the court can presume a *fact*, i.e., that its agent had *any* belief in the trial court's future action to exonerate the bond, that is not in the appellate record. The only declaration in the appellate record was submitted by LUMBERMENS attorney in the Motion to Set Aside Summary Judgment, which focused on Laimbeer's incarceration status at the California Correctional Institution. (CT, 13:1-12.) Moreover, LUMBERMENS did not even argue below that its agent had a mistaken belief in the trial court's future action on the bond. The appellate court, however, cannot presume a fact that is not in the appellate record. (cite)

Second, the appellate record does not reflect that Laimbeer was ever brought back to the jurisdiction of the court for disposition on this

underlying case. While *Penal Code* section 1305,[3] subdivisions (c)(1) and (c)(2) mandate exoneration *sua sponte*, the record does not reveal when, if ever, Laimbeer was expected to return to the Los Angeles Superior Court to appear in the underlying charge. Indeed, nothing in the record even implies whether anything was done by anyone to have Laimbeer return to Los Angeles county so that exoneration of the bond could be effected under subdivisions (c)(1) or (c)(2). The burden is upon the bonding company seeking to set aside the forfeiture to establish by competent evidence that its case falls within the four corners of these statutory requirements. (*People v. Accredited Surety & Casualty Co.* (2004) 132 Cal.App.4th 1134, 1139; *People v. Am. Sur. Ins. Co.* (1999) 75 Cal.App.4th 719, 725; *People v. American Bankers Ins. Co.* (1992) 4 Cal.App.4th 348, 354.) LUMBERMENS' burden was to show any effort to have Laimbeer brought back to the Los Angeles Superior Court to appear for the underlying charges. No such showing exists.

Finally, it is assumed for the purpose of this appeal that Laimbeer was being held on the underlying Los Angeles Superior Court case. However, the issue before this Supreme Court is whether the surety or its agent is required to file a motion to exonerate the bond within the 180-day

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[3] All further statutory references are to the *Penal Code* unless otherwise specified.

period. Even if it can be presumed that LUMBERMENS' agent took efforts towards locating Laimbeer, the question is why its agent failed to file a motion to exonerate the bond within the 180-day period. As further explained, *infra*, this case exposes the very reason why sureties should be required to file timely motions to exonerate the bond – to encourage the return of the defendant to the jurisdiction of the court and not simply to locate the defendant.

II. A SURETY NEED NOT BE DILIGENT IN THEIR SEARCH OF A DEFENDANT WHEN THE PROSPECT OF FINANCIAL LOSS IS PARTIALLY OR ENTIRELY MITIGATED BY ITS INTEREST IN COLLATERAL PLEDGED BY THE INDEMNITOR

In response to the People's position that a timely motion is required for exoneration, LUMBERMENS takes the position that sureties are motivated to be diligent and active in their search of bail jumpers by the prospect of financial loss and its obligation to its indemnitors and, therefore, the state should not be the prognosticator of sureties' actions. (CT, pp. 3-4.) LUMBERMENS ignores the oft-repeated notion that it is the indemnitors who face loss of their personal assets, not their own, when a forfeiture and ensuing judgment cannot be set aside. (*County of Los Angeles v. American Contractors Indemnity Co.* (2007) 152 Cal.App.4th 661, 666 (family members and friends pledge their homes and other

financial assets to the bonding companies to secure the defendant's release); *County of L.A. v. Sur. Ins. Co.* (1984) 162 Cal.App.3d 58, 62.)

Judicial policy shows deference towards granting relief under the rationale that innocent indemnitors face forfeiture of their personal assets when the forfeiture turns to a judgment. The personal assets of the indemnitor serve as collateral for the bond that is issued for the defendant's release on bail, often times a deed of trust against real property. If the forfeiture turns to a judgment, the bondsman can foreclose on the deed of trust for the amount of its obligation. Through this scheme, the surety has means to not only mitigate its financial loss against an adverse judgment, but can (with good underwriting practices) make itself fully whole. This Supreme Court, therefore, should not be so concerned with the surety's potential financial loss for its effort, or perhaps its lack of effort, in locating an absconding defendant.

LUMBERMENS misconstrues its obligation to the indemnitor. Whatever obligation LUMBERMENS, or any surety, has to the indemnitor to search for and surrender the defendant back into custody and to timely seek an order vacating the forfeiture is not in the appellate record. Even if it is assumed there is an obligation, it is counterintuitive for the surety to expose the indemnitor to a potential loss of his or her asset once the defendant is located and simply assume that a particular judicial act will occur to exonerate the bond. The sureties' obligation to the indemnitor, if

any, should be to act in the indemnitor's best interest. And it is in the best interest of the indemnitor to have its property reconveyed in a timely manner once the defendant is in custody. Sureties, therefore, should be responsible for filing timely motions to exonerate bonds once the opportunity arises to release the indemnitor of his/her risk.

III. THE EXONERATING EVENT UNDER SUBDIVISION (C)(3) CANNOT SIMPLY BE THE SURRENDER TO CUSTODY OF THE DEFENDANT WITHIN THE 180-DAY PERIOD

LUMBERMENS argues that sureties' duties to bring bail-jumping defendants to the jurisdiction of the court should be extinguished once the defendant is surrendered to the custody or arrested in the underlying case because there is nothing more that the surety can do to bring him to the jurisdiction of the court. (ABM, pp. 8-9.) It argues that the defendant's transfer between counties is distinctly a function of those counties. (ABM, p. 8.) That sureties' duties are extinguished by the defendant's mere custody status without a procedural mechanism to exonerate the bond under subdivision (c)(3) is not established by the statutory scheme nor does it satisfy the purpose of the statute (to bring the defendant into the court's jurisdiction):

> "In adopting a rule of strict construction the courts' concern is not so much for the bail bond companies, to whom forfeiture is an everyday risk of doing business, but for those who bear the ultimate weight of the forfeiture, family

> members and friends who have pledged their homes and other financial assets to the bonding companies to secure the defendant's release. *There is a public interest at stake here as well—the return of fleeing defendants to face trial and punishment if found guilty.*" (*County of Los Angeles v. American Contractors Indemnity Co.*, *supra*, 152 Cal.App.4th at p. 666 (emphasis added).)

LUMBERMENS concedes, as it must, that subdivisions (c)(1) and (c)(2) were drafted in nearly identical terms as they pertain to *sua sponte* exoneration by the court. Yet to be explained by LUMBERMENS is why subdivision (c)(3) was drafted the way it was if *sua sponte* exoneration was intended upon the surrender of the defendant within the 180-day period. As pointed out in Petitioner's Opening Brief on the Merits, the unambiguous expression in the statute should prevail. (POB, pp. 17-18.)

Second, LUMBERMENS conveniently forgets that its obligation to the PEOPLE is not simply to surrender the defendant to custody, but to insure that the " defendant will appear in the above-named court, in whatever court [the accusatory pleading] may be prosecuted, or if he/she fails to perform either of these conditions, that [LUMBERMENS] will pay to the People" the amount of the bail bond. (CT, p. 3.) This is consistent with the bail statute. (See, § 1278, subd. (a) (the surety "undertake[s] that the above-named [defendant] will appear and answer any charge in any accusatory pleading…").) The express terms of the statute and the bail

bond itself do not extinguish the surety's obligations once the defendant is surrendered to custody outside the county in which he was charged.

LUMBERMENS is not without ability to extinguish its obligations for a statutorily sanctioned basis. Upon discovering the whereabouts of the defendant, sureties can move to exonerate the bond based on permanent custody by civil or military authorities (§ 1305, subd. (d)(1)), to toll the 180-day period (§ 1305, subd. (e)) based on temporary custody by civil or military authorities, or at least move for an extension of the 180-day period (§ 1305.4) so that the defendant's permanent or temporary custody status can be ascertained. There should be no reason why a surety cannot be relieved of its obligation while the purpose of the bail bonds can be upheld, when there are adequate opportunities for it protect itself.

IV. THE SURETY SHOULD BEAR THE RISK THAT IT WILL BE UNABLE TO FILE A MOTION FOR AN OUT-OF-COUNTY DEFENDANT UNTIL AS LATE AS THE 180TH DAY

LUMBERMENS' most obvious concern, and which should bear scrutiny by this Supreme Court, is a scenario wherein the defendant is being held in custody out-of-county on or very near the 180th day and the surety is unable to file a motion with the court before the 180th day. Further, neither the surety nor the court may be aware that the defendant is in custody out-of-county. (ABM, p. 12.) The answer to this apparent

conundrum lies in the answer to the question of who should bear the risk that a motion is not timely filed. It should be apparent that the risk to sureties for failing to timely file a motion to exonerate the bond under subdivision (c)(3) is no more onerous than those subdivision under which already require a timely filed motion within the 180-day period.

LUMBERMENS argues that there is no mandatory language within section 1305, subdivision (c)(3) to support the *Lexington* court's belief that "subdivisions (i)'s reference to 'motions' generally strongly suggests that the Legislature intended that all motions to vacate forfeiture and exonerate a bond under section 1305 be filed within the statutory period." (*People v. Lexington National Ins. Co.* (2007) 158 Cal.App.4th 370, 375.) It characterizes the statutory interpretation as "myopic." (ABM, p. 19.)

Under section 1305, subdivision (d), a defendant may be under a permanent disability because he is "deceased or otherwise permanently unable to appear in the court due to illness, insanity, or detention by military or civil authorities." In such a case, the subdivision explicitly states that the court shall direct the order of forfeiture to be vacated if it is made apparent to the satisfaction of the court *within 180 days of the date of mailing of the notice* that the defendant is under such disability and the absence of the defendant is without the connivance of the surety. (*Id.*) Similarly, but without the explicit language requiring a motion to be filed within 180 days of the mailed notice, under section 1305, subdivision (e),

the 180-day period may be tolled if within the 180-day period the surety files a motion based upon the defendant's temporary disability because of illness, insanity, or detention by military or civil authorities. (See *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 658;[4] *County of Los Angeles v. Harco National Ins. Co.* (2006) 144 Cal.App.4th 656, 661.) If the defendant is in custody beyond the jurisdiction of the court that ordered the bail forfeited, the surety can seek an order setting aside the forfeiture and exonerating the bail under section 1305, subdivision (f) if it is filed within the 180-day period.[5] (See *People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at p. 657 ("[S]urety that posted the bond then has a statutory 'appearance' period in which either to produce the accused in court and have the forfeiture set aside, or to demonstrate other circumstances requiring the court to vacate the forfeiture."); *People v. Alistar Ins. Co.* (2003) 115 Cal.App.4th 122, 125; *People v. Ranger Ins. Co.* (2002) 101 Cal.App.4th 605, 608; *People v. American Bankers Ins. Co.* (1991) 227 Cal. App. 3d 1289, 1297.) In these latter instances, section 1305 does not have explicit requirements within their respective

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[4] LUMBERMENS must also consider this Supreme Court's validation of the *Lexington* court equally myopic as it pertains to the requirement for a timely filed tolling motion.

[5] As with subdivision (e), subdivision (f) does not explicitly require that a motion be filed, yet the Court of Appeal have found differently.

subdivisions for the filing of a timely motion within the 180-day period. Past appellate authorities confirm that timely filing requirements of subdivision (i) apply to subdivisions that do not have explicit requirements in and of themselves. But back to LUMBERMENS' concern....

If a defendant is discovered to be detained by military or civil authorities on the 180th day, or even if he is discovered to be in custody beyond the jurisdiction of the court that ordered bail forfeited, the liability of the surety is the same as if he is discovered to be in out-of-county custody – the surety bears the risk of forfeiture for failing to file a motion to set aside the forfeiture order after the 180th day under section 1305, subdivision (c)(3). The only difference, it seems to LUMBERMENS, is that the subdivision (c)(3) falls within subdivision (c) and is not set apart as a separate subdivision despite the difference in how subdivision (c)(3) is explicitly phrased.

Who should bear the risk of a late discovery that a defendant is in custody out-of-county? Bail forfeiture "is an everyday risk of doing business" for bail sureties. (*County of Los Angeles v. American Contractors Indemnity Co.*, *supra*, 152 Cal.App.4th at p. 666.) The fact that the risk occurs within the context of a defendant who is in custody out-of-county on the 180th day and the surety is unable to file a timely motion

is one that is already contemplated by much of the other subdivisions under section 1305.[6]

Moreover, this Court should be mindful that "the responsibilities of a surety are based upon *the surety's* custody of the person bailed." (*Kiperman v. Klenshetyan* (2005) 133 Cal.App.4th 934, 939 (emphasis added).) Should courts, or perhaps law enforcement agencies, bear the responsibility for the surety's inability to timely file a motion? As the Court of Appeal stated, "Given the limited resources of law enforcement agencies, it is bail bond companies, as a practical matter, who are most involved in looking for fugitives from justice." (*County of Los Angeles v. American Contractors Indemnity Co.*, *supra*, 152 Cal.App.4th at p. 666.) Even LUMBERMENS concedes that under subdivision (c)(3), "a court has no *sua sponte* duty to exonerate, because it has no direct jurisdiction over the defendant who is in custody in another county." (ABM, p. 8.) Its contention is in direct conflict with having the courts bear the risk of the surety's failure to file timely motions. Sureties should have the most interest, and the concomitant risk, in ensuring that motions be timely filed.

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[6] These subdivisions, namely, (d) through (g) can afford relief in some manner to the sureties if they are diligent in filing a timely motion.

V. LUMBERMENS' CITED CASES ARE NOT HELPFUL

LUMBERMENS relies on *County of Los Angeles v. Resolute Ins. Co.* (1972) 22 Cal.App.3rd 963 in support of its position that there is no time limit by which to file a motion to vacate bail forfeiture. There, however, the Court of Appeal held the summary judgment on the forfeited bail bond to be void because the bail forfeiture notice failed to have the surety's principal place of business, which was imprinted on the bail bond. This case is distinguishable, for a void judgment can be attacked collaterally at any time, even after the 180-day period has expired. (See *People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at p. 661 ("if a court or court clerk fails to perform in a specific manner, the surety is released of all obligations or the bond is exonerated"); cf. *County of Los Angeles v. Harco National Ins. Co.* (2006) 144 Cal.App.4th 656 (denial of motion to set aside summary judgment on forfeited bail bond based on claimed error in denying a motion to extend the 180-day period is a voidable judgment that cannot be attacked collaterally and for which a direct appeal must be filed).) Here, the trial court had jurisdiction over the bond when the bail forfeiture order was not set aside within the 180-day period and the summary judgment was timely entered pursuant to section 1306.

People v. Far West Ins. Co. (2001) 93 Cal.App.4th 791 is equally distinguishable from the present case. The PEOPLE recognize that the appellate court reversed the denial of the surety's motion to vacate judgment on equitable grounds. The dispositive feature of that case was that county officials committed errors which resulted in the release of the defendant who was in an out-of-state custody. (*Id.*, at p. 798.) The purpose of the bail statutes, i.e., the return of the defendant to the jurisdiction of the court, had been stymied by the very acts of the government. In short, the Court of Appeal did not hold that equity be applied in *any* context as if it were in a vacuum. Equity must be applied within the context of the facts of the particular case:

> "We need not attempt to formulate a broad legal rule illustrated by the facts of this case. It is enough to conclude that under the circumstances shown here--a California fugitive admitted to bail, apprehended and held in custody in another state, is released as a result of errors committed solely by officials of the demanding county government and the surety has done all that is required of it under the terms of the bond--bail is exonerated." (*Id.*)

Here, no such error by the government occurred. Indeed, Laimbeer did not leave the custody of any law enforcement agency. *Far West* simply has no application to this case.

VI. CONCLUSION

It is interesting to note that LUMBERMENS concludes its argument with the consideration that the ultimate aim of the law is to protect those innocent citizens who stand to lose valuable property, even their homes, when a forfeiture is enforced. Without belaboring the obvious, these "innocent" citizens post their property as collateral with the sureties voluntarily and at their own peril. To put it bluntly, they enter into the contractual relationship with their "eyes wide shut," sometimes hoping upon hope that the defendant will not jump bail. As English jurist Sir Richard Richards wrote, "If a man will make a purchase of a chance he must abide by the consequence." (*The Quotable Lawyer*, Ed. D. Shrager & E. Frost, (New England Publishing Associates, Inc., 1986) p. 55, quoting *Hitchcock v. Giddings* (1817) 4 Price 135.) For LUMBERMENS, and the bail industry as a whole, to argue on the side of the indemnitor belies the fact that they have accepted the collateral and, without hesitation, will mitigate their financial losses to the utmost.

For these and reasons previously set forth in the Petitioner's Opening Brief on the Merits, the PEOPLE respectfully submit that this Supreme Court should affirm the ruling of the Superior Court denying LUMBERMENS motion to set aside summary judgment, set aside forfeiture and exonerate bond, and further overrule *People v. Ranger Ins. Co.* (2006) 141 Cal.App.4th 867.

DATED: January 5, 2010

Respectfully submitted,

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CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.360

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DATED: January 5, 2010

Respectfully submitted,

OFFICE OF THE COUNTY COUNSEL

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DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

I am employed in the County of Los Angeles, State of California, over the age of eighteen years and not a party to the within action. My business address is 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012-2713.

That on January 5, 2010, I served the attached

REPLY BRIEF ON THE MERITS

upon Interested Party(ies) by placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed ☐ as follows ☒ as stated on the attached mailing list:

(BY MAIL) by sealing and placing the envelope for collection and mailing on the date and at the place shown above following our ordinary business practices. I am readily familiar with this office's practice of collection and processing correspondence for mailing. Under that practice the correspondence would be deposited with the United States Postal Service that same day with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 5, 2010, at Los Angeles, California.

Jennifer Moon
Type or Print Name of Declarant
and, for personal service by a Messenger Service, include the name of the Messenger Service

Jennifer Moon
Signature

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