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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff,

v.

JAY C. SHAH,

Defendant and Respondent;

INTERNATIONAL FIDELITY INSURANCE
CO.; BUFFY/SPARACINO BAIL BONDS,

Real Parties in Interest and Appellants.

A130902

(San Francisco County
Super. Ct. No. 10009193)

International Fidelity Insurance Company (surety) and bail agent Buffy/Sparacino Bail Bonds, Inc. (Buffy/Sparacino) appeal from a December 21, 2010 order for them to return a bail bond premium to the parents of defendant Jay C. Shah. We affirm, upholding the trial court’s implicit determination that, in the words of Penal Code section 1300, subdivision (b), “good cause d[id] not exist for the surrender of a defendant who has not failed to appear or has not violated any order of the court”¹

BACKGROUND

At root is a decision by appellants, after posting defendant’s bail on collateral that included a 106-acre property in Santa Clara County (also identified as Quimby Ranch or Quimby Road property), to surrender him back into custody after the People requested

¹ Undesignated section references are to the Penal Code; all dates are in 2010.

that the court examine his bail sources under section 1275.1.² The People noted that the property lacked court approval, claimed Shah had willfully misled the court regarding the source of his bail, and sought to increase the bail amount for the asserted misrepresentation. Appellants surrendered defendant before any hearing on the request, and their haste is what defendant raised successfully in a motion to return premium, as a lack of good cause under section 1300, subdivision (b).³

² Section 1275.1 provides: “(a) Bail . . . shall not be accepted unless a judge or magistrate finds that no portion of the consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained.

“(b) A hold on the release of a defendant from custody shall only be ordered by a magistrate or judge if any of the following occurs:

“(1) A peace officer . . . files a declaration . . . setting forth probable cause to believe that the source of any consideration, pledge, security, deposit, or indemnification . . . was feloniously obtained.

“(2) A prosecutor files a declaration . . . setting forth probable cause to believe that the source . . . was feloniously obtained. . . .

“(3) The magistrate or judge has probable cause to believe that the source . . . was feloniously obtained.

“(c) Once a magistrate or judge has determined that probable cause exists, as provided in subdivision (b), a defendant bears the burden by a preponderance of the evidence to show that no part . . . was obtained by felonious means. Once a defendant has met such burden, the magistrate or judge shall release the hold previously ordered and the defendant shall be released under the authorized amount of bail.

“

“(i) The bail of any defendant found to have willfully misled the court regarding the source of bail may be increased as a result of the willful misrepresentation. . . .

“(j) If a defendant has met the burden under subdivision (c), and a defendant will be released from custody upon the issuance of a bail bond . . . , the magistrate or judge shall vacate the holding order imposed under subdivision (b) upon the condition that the consideration for the bail bond is approved by the court. [¶]”

³ Section 1300 provides in part: “(a) At any time before the forfeiture of their undertaking, or deposit by a third person, the bail or the depositor may surrender the defendant in their exoneration . . . to the officer to whose custody he was committed at the time of giving bail, in the following manner: [¶] . . . [¶] (3) The officer to whom the defendant is surrendered shall . . . bring the defendant before the court in which the defendant is next to appear on the case for which he has been surrendered. The court shall advise the defendant of . . . the authority of the court, as provided in subdivision (b),

Warrant through Approval Proceedings

On March 19, 2010, Superior Court Judge Charles Haines issued an arrest warrant for defendant, set bail at \$10 million, and ordered a hold under section 1275.1—i.e., required that defendant prove that no portion of the consideration offered for his bail was feloniously obtained. Defendant was arrested on March 23 and charged with conspiracy (§ 182, subd. (a)(1)), grand theft (§ 487, subd. (a)), identity theft (§ 530.5, subd. (a)), recording false or forged documents (§ 115, subd. (a)), recording false or forged real estate documents/instruments (§ 115.5, subd. (a)), and money laundering (§ 186.10, subd. (a)). The case allegedly involved defendant and others recording phony title deeds to three condominiums in San Francisco, taking out \$2.2 million in loans against those properties, and laundering most of the funds through a shell company in Nevada and a Swiss bank account.

At a hearing in late May, on defendant’s motion for approval brought after efforts to have bail reduced failed, Judge Cynthia Ming-Mei Lee approved use of two retirement accounts and six real properties, all owned by defendant’s parents. An order approving those specific sources was filed on June 10. It stated that “no part of the assets described below has been feloniously obtained,” ordered that those assets could be “used as the consideration, pledge, security, deposit or indemnification for defendant’s bail,” and stated that the hold under section 1275.1 was “released as to these assets.”⁴

The approved properties left defendant \$1.9 million short of meeting the bail of \$10 million, and he moved in late June for court approval of a seventh property, the 106-

to order return of the premium paid by the defendant or other person, or any part of it. [¶] . . . [¶] (b) Notwithstanding subdivision (a), if the court determines that good cause does not exist for the surrender of a defendant who has not failed to appear or has not violated any order of the court, it may, in its discretion, order the bail or the depositor to return to the defendant or other person who has paid the premium or any part of it, all of the money so paid or any part of it.”

⁴ Two of the approved properties were “20-acre” and “40-acre” parcels at 4217 Quimby Road in San Jose, the same street address as the unapproved 106-acre parcel at the heart of this appeal, but each parcel had a distinct APN (assessor’s parcel number).

acre property. The People sought time to consider based on numerous title transfers between Shah and his parents, Chandrakant K. (C.K.) Shah and Mdurula C. Shah, and Judge Lee ordered a continuance. In a letter of July 2 to the court, defendant's counsel informed the court that the approval request was withdrawn as moot given that the family would cover the balance of \$1.9 million through a surety bond.

At an equity evaluation hearing (§ 1298) on July 6, Judge Lee found that the six properties already approved were worth an aggregate \$16.2 million, sufficient to post \$8.1 million of the \$10 million bail, and directed the county sheriff to release defendant on bail upon the posting of certain instruments for those properties, "together with additional cash or surety bond in the amount of \$1.9 million."⁵ Judge Lee fashioned her order of that date by adding to and striking out language of a proposed order drafted for July 1, when defendant's request for approval of the 106-acre property was not yet withdrawn. Judge Lee struck through references to the 106-acre property and deducted the anticipated equity value for that property from her total calculation.

Bail Posting, Release and Surrender

Meanwhile, discussions about possible collateral had been ongoing since late March between defendant's father and bail agents John E. Reynolds and Reynolds's boss, Lamont "Buffy" Osti, of Buffy/Sparacino, all of whom filed declarations below. Reynolds recalled that they were considering a letter of credit when, on July 6, the father called to say they were putting up a property bond directly with the court (with properties the surety had previously rejected) but were short \$1.9 million and needed a surety bond in that amount. The father told him the hold had been lifted by the court, that he wanted bond posted immediately, and that he would fax Reynolds a copy of the order. The next day, Reynolds received a fax of Judge Lee's order of June 10 (not the July 6 order) and

⁵ The court applied section 1298 in determining that only half of the \$16.2 million in equity counted toward the bail. Section 1298 allows the court to accept, in lieu of cash or state or federal bonds deposits, security in the form of "equity in real property," but only after finding at a hearing that "the value of the equity is equal to twice the amount of the cash value required"

reviewed it with Osti, and it appeared to them to lift the hold. The father told Reynolds that a letter of credit they had been discussing was expensive and difficult, and Reynolds explained that the retirement funds were insufficient collateral and rejected the father's idea of using the properties approved by the court to also support liens. The father said he needed his son out of custody for scheduled surgery, and when Reynolds asked about using the 106-acre property, the father said he could not because they needed it available for other projects. But he agreed after Reynolds queried "why the property would specifically need to be approved for use as collateral for the bail bond, because the hold had already been lifted according to the [faxed June 10 order]," which neither included nor excluded the property. Reynolds also recounted that defendant's counsel, Dek Ketchum, knew what they were doing, had been on the phone for a prior meeting, and "did not state that there was any problem using it."

The father's recollection of the conversation differed a bit: "I told [Mr. Reynolds] that my wife and I were trustees of [a revocable trust owning the property], but that this property had not been approved for bail use by the Court. Mr. Reynolds, who said he was very experienced in the bail-bond business, explained that the 106-acre property would not actually be used to post bail, but merely to secure the surety bond that he was posting. According to Mr. Reynolds, using the property as collateral would not violate the Court's order. Mr. Reynolds further pointed out that the order did not prohibit use of the property for securing the surety bond. [¶] Based on these assurances from Mr. Reynolds, I did not believe that I would violate the Court's order by pledging the 106-acre property as collateral for the surety bond. Therefore, I gave a deed of trust for the property to Buffy/Sparacino Bail Bonds, Inc. Had I realized that deeding the property would violate the Court's order I would have found another asset to use as collateral."

Reynolds drew up a bond proposal with varying figures given that there was an unresolved writ proceeding pending for reduced bail. The specified collateral was in part, "[a]ll parcels connected to Quimby Ranch," and monitoring during bail release would be by landline phone contact and defendant wearing an ankle monitor. Reynolds claimed that he faxed the proposal to the father and that Ketchum at some point received

a fax as well, but Ketchum declared that neither he, nor a colleague or paralegal in his office, recalled getting faxes of the deed of trust or other bail documents, and that a review of his files turned up none.

With surety's approval, a bond agreement was written for a premium of \$95,000, the 106-acre property as partial collateral, and monitoring through the ankle monitor and weekly phone contact. The parents signed the agreement on July 8, and paid with a \$40,000 check and a \$55,000 charge to an American Express credit card. On July 9, Reynolds went with the father to the superior court, posted the bond with the clerk, and secured defendant's release.

On September 9, Assistant District Attorney Michael Troncoso filed a "PEOPLE'S SUPPLEMENTAL REQUEST FOR AN ORDER TO EXAMINE SOURCE OF DEFENDANT SHAH'S BAIL AND MOTION TO INCREASE BAIL (PC 1275.1)" (supplemental request). Troncoso noted that the 106-acre property securing the surety bond had not been approved by the court and took the position that defendant, by withdrawing his request to approve that property, proposing instead using a surety bond, and then using the property for the security bond, had willfully misled the court as to the source of his bail. The request noticed a hearing for September 13 and asked that (1) the court reject the \$1.9 million surety bond, (2) defendant "be remanded into custody, unless and until clean bail is tendered and accepted by the court," and (3) bail be raised from \$10 to \$12 million for misleading the court.

Troncoso called Reynolds that same day to advise of his intent to file a request to have defendant "remanded to custody for violation of the court's orders pertaining to the bail bond." Reynolds told Osti and spoke with defendant, who e-mailed Reynolds a copy of the supplemental request. Reynolds forwarded it to Osti, suggesting that they consider alternative sources of collateral that could be needed "depending on the outcome of the D.A.'s motion."

The next day, September 10, Reynolds recounted, Osti called him saying surety was insistent that defendant be surrendered into custody. He told Reynolds to apprise an investigator of defendant's location, and Reynolds did so, determining the location from

defendant's ankle monitor. Defendant was arrested and surrendered into custody, and he and his parents began calling Reynolds immediately, demanding to know what happened. Ketchum called, too, saying the surrender was unnecessary and that the judge was not going to remand defendant. Reynolds said he did not agree with the district attorney's position or surrendering defendant, and did not see a problem in using the 106-acre property, but that the surrender decision was out of his hands.⁶

Osti declared that principals at "AIA" (*sic*) advised him, after he forwarded them the supplemental request, to surrender defendant on the bond, there being "a question as to the viability of the collateral taken to secure the bond," a perceived "flight risk," and a pending request that the bail amount be increased. Days later, American Express advised Osti that the father disputed the \$55,000 charge for the bail bond and that a debit in that amount had been placed on Osti's American Express merchant account.

Jerry D. Watson, chief legal counsel for surety, had been involved in this bail matter from the outset. He declared as to the surrender decision: "Based on our review of the District Attorney's motion, it appeared to us that the collateral for the subject bond, which was of critical importance in our decision to write the bond, was now in question. The [motion] raised the issue of whether or not the '106-acre parcel' could be pledged as collateral for the bond, because Defendant 'willfully misled the Court concerning the source of his bail.' . . . [¶] [It] also included requests to remand Defendant and to increase bail from \$10 million to \$12 million. Based on both the issue of the collateral and these requests, we considered Defendant to be an increased flight risk, because (1) we might not have the property pledged as collateral anymore; and Defendant would conceivably be out on our \$1.9 million bond without any collateral; and (2) Defendant was aware that the court might order him to be taken into custody at the hearing on the [motion].

⁶ According to Ketchum, Reynolds told him he had spoken by phone two weeks earlier with the district attorney's office about the 106-acre property and had been asked to arrest defendant on the bond; Reynolds said he refused because defendant had made his court appearances and wore an ankle bracelet, and because the collateral for the bail bond had been reviewed by the clerk's office when bail was posted. ~(CT 54)~

Accordingly, the Defendant's flight risk status was increased, because without our having the ability to execute on his family's property, the only loss to defendant's family if he fled would be the \$95,000.00 premium paid. [¶] Prior to seeing the District Attorney's motion, we never knew of any court orders or representations made by Defendant and/or his attorneys that the '106-acre parcel' would not be used to secure a bail bond. This was the first time that we were made aware of any such orders and/or representations. We would not have gone to so much trouble in evaluating the property and taking a deed of trust as to the '106-acre parcel' had we known that there was an issue as to whether or not it could be used for such purpose."

Supplemental Request Hearings and Counter-Motions

Meanwhile, on Friday, September 10, the same day that defendant had been surrendered, bail status was discussed at a pretrial conference attended by Ketchum where Judge Haines indicated he would *not* remand defendant into custody at Monday's hearing. At the Monday hearing, it developed that neither Judge Haines nor Assistant District Attorney Troncoso knew that defendant had already been taken into custody. Judge Haines continued the matter to September 15 to allow defendant to file written opposition to the People's supplemental request. Troncoso told defense attorneys Ketchum and Jenny D. Smith that day that he never requested that the bonding company arrest defendant. (See fn. 6, *ante.*) Defense counsel filed opposition, along with a motion to reduce bail, and defendant was eventually released on a new bail bond, with a different surety and bail agent.

Reynolds declared that he went to the courthouse at an unspecified time after the surrender to review the court file and saw for the first time the order of July 6 specifically excluding the 106-acre property from the approved properties.

On November 3, defendant filed an application for an order returning bail bond premium. Citing section 1300, subdivision (b), the application argued that his surrender was without good cause. It urged that the real reason was an underwriting deficiency created by the bonding agent having obtained a deed of trust on unapproved real estate by misrepresenting to defendant's parents that the court's section 1275.2 order did not apply

to collateral for the bond. The facts and declarations summarized above constituted the evidentiary bases for and against the application.

Return-of-Premium Hearing and Ruling

Judge Lee held a hearing on November 23, quizzing counsel at length about their precise arguments and positions. Appellants clarified that their reliance on the June 10 order should be viewed as reasonable since that order dealt with collateral for a *property* bond, lifted the section 1275.1 hold, and imposed no limitation on what might serve as collateral for a *surety* bond as later authorized by the order of July 6. In other words, the July 6 order excluding the 106-acre property from inclusion in the approved properties or consideration in assessing equity value, in their view, was irrelevant. Their counsel conceded that it was not good business practice to rely on just the June 10 order received from defendant, without checking the court file for later orders, but stood by having acted based on the earlier order. The parties agreed that, while the development shed no light on appellants' decision to surrender defendant into custody, Troncoso was ultimately satisfied with the defense declarations and, at the continued hearing, withdrew his supplemental request.

Judge Lee took the matter under submission and issued an order on December 21, finding that defendant's parents were entitled to a full refund of amounts paid in connection the \$1.9 million bail bond issued on July 9, and that appellants were "entitled to no part of the \$40,000 bail bond premium . . . or the disputed American Express charge of \$55,000." The order included no express finding that appellants had lacked good cause for surrendering defendant, but it ordered them to refund the premiums and execute and record a full reconveyance of the deed of trust on the 106-acre property.

DISCUSSION

I. General Principles

"The legislative purpose behind section 1300, subdivision (b) was to temper a bonding company's virtually unlimited power, which power is based on the venerable notion that its dominion over the defendant merely continues the original imprisonment and therefore permits the bonding company to surrender a defendant into custody and

terminate liability at any time before forfeiture. [Citations.] This extraordinary power is tempered by the statutory ‘good cause’ requirement (§ 1300, subd. (b)), which operates as a check on the potential abuse of that power.” (*Kiperman v. Klenshetyn* (2005) 133 Cal.App.4th 934, 939, italics omitted (*Kiperman*).)

Section 1300, subdivision (b), “does not define ‘good cause,’ other than as a failure to appear or violation of a court order” (*People v. Smith* (1986) 182 Cal.App.3d 1212, 1217 (*Smith*)), yet “[i]t is implicit in the statute that even where a defendant has *not* failed to appear and has *not* violated any order of the court, good cause may exist so as to preclude the return of the premium” (*id.* at pp. 1217-1218). Case law has defined good cause, in general terms, as evolving circumstances that substantially increase the risk assumed by the surety. (*Kiperman, supra*, 133 Cal.App.4th at p. 940.) Good cause has been found, for example, from a combination of lost contact with the defendant, a new \$1 million warrant in a new case, and the defendant’s apparent attempt to flee, even though the defendant had not yet failed to appear for a hearing. (*Ibid.*) It has also been found from a defendant’s failure to appear in a different court, plus his disappearance without any forwarding address or phone number—circumstances that “materially altered the risk” on the bond. (*Smith*, at p. 1221.)

“[T]he availability of the [return-of-premium] remedy provided a defendant by section 1300, subdivision (b) . . . rests within the discretion of the trial court which must determine the good cause issue on a case-by-case basis” (*Smith, supra*, 182 Cal.App.3d at p. 1217), and an abuse of that discretion “arises when the action of the court ‘ ‘exceeds the bounds of reason, all of the circumstances being considered.’ ’ [Citation.]” (*Id.* at p. 1221.) Generally, “[e]ach implied finding must be upheld if supported by substantial evidence [citation], viewing the evidence in the light most favorable to the prevailing party and giving that party the benefit of every reasonable inference [citation]. We must accept all evidence favorable to that party as true and discard contrary evidence as lacking sufficient verity to be accepted by the trier of fact. [Citation.] The testimony of a single witness, even the party himself, may be sufficient. [Citation.]” (*In re Marriage of Catalano* (1988) 204 Cal.App.3d 543, 548.) This same standard, of course, applies to our

review in this case of findings made on declarations. (*Khan v. Superior Court* (1988) 204 Cal.App.3d 1168, 1170-1171, fn. 1.)

II. Lack of Express Finding as to Good Cause

We reject initially appellants' contention that Judge Lee's return-of-premium order was "void for noncompliance with the requirement of the statute" since it did not state that their surrender of defendant had been without good cause. We are cited no authority that such a finding must be made expressly, and we know of none. Accordingly, "all intendments favor the ruling below [citation], and we must assume that the trial court made whatever findings are necessary to sustain the judgment. [Citation.]" (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793.)

There is also no reason to think that the court did *not* impliedly find lack of good cause for the surrender, for that was the sole and determinative issue presented by the papers and arguments, and by section 1300, subdivision (b), itself. Citing some colloquy at the hearing about whether there is always a risk that a district attorney might request a remand of a defendant, appellants suggest that the court may have erroneously found no increased risk here from the filing of the supplemental request, but this does not suggest that the court failed to find lack of good cause for the surrender—only that appellants dispute that conclusion. Just as importantly, the remarks were informal and part of a long, searching, and open exploration of the issues. Venerable case law encourages such inquiry by holding that even antecedent *erroneous* remarks of a judge cannot be used to impugn the ensuing findings or judgment (*McCracken v. Teets* (1953) 41 Cal.2d 648, 651-652; *Strudthoff v. Yates* (1946) 28 Cal.2d 602, 616), partly because a trial judge is entitled to consider issues further and reach other conclusions before issuing a formal order (*Oldis v. La Societe Francaise* (1955) 130 Cal.App.2d 461, 472).

III. Unconstitutional Impairment of Contract

Appellants argue that the premium was "fully earned as a matter of contract between the parties" because they assumed a risk of forfeiture for two months before surrendering defendant back into custody. We accept that notion as a matter of contract law. A bail bond is a contract between the surety and the government whereby the surety

acts as a guarantor of the defendant's appearance in court under the risk of forfeiture of the bond (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657), and it has been observed in one case, where a return of premium was reversed on appeal, that the surety had fully earned its premium by being at risk while the defendant enjoyed freedom for just five weeks before being surrendered on the bond (*Kiperman, supra*, 133 Cal.App.4th at p. 939). But this only begs the question whether, assuming there was an otherwise valid and enforceable contract, the court was within its discretion to impliedly find lack of good cause for the surrender (§ 1300, subd. (b)).

Moreover, we reject appellants' claim that "[a]n unjustifiable interference" by the court with the parties' agreement "would be an impairment of contract in violation of the state and federal [C]onstitutions." First, if by "unjustifiable interference" they mean a return of premium ordered without evidentiary support for a no-good-cause finding, this is a phantom issue. It would gain them nothing beyond the reversal they would achieve by showing a lack of substantial evidence. Second, if they mean to say that a return of premium based on a *supported* no-good-cause finding violates their constitutional rights, the claim is untenable. Bail in California is governed by the statutory scheme of section 1268 et seq. (*People v. Indiana Lumbermens Mutual Ins. Co.* (2010) 49 Cal.4th 301, 304), and, "[o]rdinarily, 'all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.'" [Citation.]' [Citations.]" (*City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 378-379.) For purposes of a contract-clause argument, appellants thus presumably knew from the start that their "risks" in entering this contract included the possibility that a return-of-premium could be ordered if they surrendered defendant without good cause within the meaning of section 1300, subdivision (b), and their constitutional claim crumbles. (*Id.* at pp. 377-378.)

IV. *Good Cause*

The dispositive question is simply whether the implied finding of no good cause is supported, and we hold that it is. A threshold controversy on this point is whether, as appellants insist, the order of June 10 approving two retirement accounts and six real estate properties for bail use, as not feloniously obtained under section 1275.1, justified their decision to rely on the unmentioned 106-acre property, but appellants are mistaken on this point.

“The purpose of section 1275.1 is to ensure release on bail is not secured by way of feloniously obtained funds.” (*People v. Indiana Lumbermens Mutual Ins. Co.* (2011) 192 Cal.App.4th 929, 936 (*Indiana Lumbermens*)). It may be, as case law has suggested (*id.* at pp. 936-937), that a so-called section 1275.1 or bail “hold” is a relatively rare event in bail proceedings, and the court and parties here agreed that a supplemental request as filed by the People below is even more rare. But if this lent some novelty to the situation from appellants’ perspective, the effect of a hold under section 1275.1 is clear from the provision’s language.

Subdivision (a) of the section mandates, in sweepingly inclusive language, that “[b]ail . . . shall not be accepted unless a judge or magistrate finds that no portion of the consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained.” Subdivision (b) provides that, once probable cause exists to question the legitimacy of bail assets, a “hold on the release of a defendant from custody” must be ordered, and subdivision (c) clarifies that, once cause exists (and a hold has been ordered), “a defendant bears the burden by a preponderance of the evidence to show that no part [of the assets were] obtained by felonious means.” “Once a defendant has met such burden,” subdivision (c) specifies, “the magistrate or judge shall release the hold previously ordered and the defendant shall be released under the authorized amount of bail.” (§ 1275.1, subd. (c); see fn. 2, *ante.*)

What happened here is that, after issuance of the hold, defendant offered two retirement accounts and six pieces of real estate, all owned by his parents, for the court to approve for use toward bail. The approval order on June 10, however, did not lift the

hold completely. Rather, it stated that “no part of *the assets described below* has been feloniously obtained,” ordered that *those assets* could be “used as the consideration, pledge, security, deposit or indemnification for defendant’s bail,” and stated that the hold under section 1275.1 was “released *as to these assets.*” (Italics added.) No surety or bail agent, or counsel for them, could reasonably divine from that language, in light of section 1275.1, that the bail hold had been completely lifted or that there was no need to obtain court approval for any further real property assets that might be used to support defendant’s release on bail. Thus we reject appellants’ argument that, once the hold was “ ‘released’ by virtue of the order, there was no longer any hold in existence.” Also, the declarations show that appellants anticipated that the approved properties were not enough to meet the full \$10 million bail amount, and that they continued their discussions with the parents in an effort to find further assets for an anticipated shortfall of \$1.9 million. They knew they might need more collateral, and should have been on notice to beware of using any unapproved properties going forward.

Judge Lee’s later order of July 6, after an equity evaluation hearing (§ 1298), would confirm that the six approved properties left a shortfall of \$1.9 million, and therefore *condition* defendant’s release on bail upon the posting of instruments for those properties “together with additional cash or surety bond in the amount of \$1.9 million.” It also expressly struck through any consideration of the 106-acre property that defendant had sought to have approved, only to withdraw his request before the order issued. The July 6 order thus would have reinforced what they already knew and would have highlighted that the 106-acre property (part of struck-through language) lacked court approval.

We must correct a serious misconception in appellants’ briefing, which speaks of whether the section 1275.1 hold was a “hold on the Quimby Ranch property,” and states: “The property certainly was never subject to any hold, because it was not listed. A hold affects only the property which is before the court and which is subject to examination as to the source.” No authority for those propositions is cited, not surprisingly, for they are backwards. A section 1275.1 hold is not on property, but “on the release of a defendant

from custody” (§ 1275.1, subd. (b).) Once probable cause exists to believe that a source of bail was feloniously obtained, “a defendant bears the burden by a preponderance of the evidence to show that no part of *any* consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was obtained by felonious means” (*id.*, subd. (c), italics added), and it is only after that burden is met that “a defendant will be released from custody upon the issuance of a bail bond” and the judge or magistrate “shall vacate the holding order imposed under subdivision (b) *upon the condition that the consideration for the bail bond is approved by the court*” (*id.*, subd. (j), italics added). Thus, what matters is not that any particular piece of property is *not* mentioned in a section 1275.1 order; but that it *is* mentioned—as a permitted source of bail.

Appellants stress their ignorance of the July 6 order when they drafted the bond agreement on July 8 and the next day had defendant released on bail, but there are four problems with the claimed ignorance. First, an examination of the court file would have revealed the order, as well as defendant’s prior and ultimately withdrawn request to have the 106-acre property approved and evaluated. Case law in similar circumstances has rejected claims by sureties of good faith ignorance when diligence in examining a court file would have revealed the subject risk. One case reasoned, in upholding denial of a surety’s motion to vacate a forfeiture: “[B]y checking the file, it would have known that this was not a routine drug case and that it warranted additional inquiry. Review of the file would have alerted Accredited to the fact that bail had been set originally for \$2 million, but following [the defendant’s] guilty plea and his admissions, bail was then reduced to \$20,000. Indeed, Accredited would have found in the court file: (a) the written agreement between the People and [the defendant] stating the terms of the plea bargain, (b) the arraignment information and bail computation which calculated the presumptive bail was \$2 million, (c) the order initially setting bail at \$2 million, and (d) the court order reducing bail to \$20,000 ‘pursuant to stipulation.’ [¶] . . . [¶] . . . [T]he trial court aptly found that Accredited assumed the risk, because if [its bond agent] had conducted a routine investigation of the information that was available, he would have

learned the true nature of the charges.” (*People v. Accredited Surety & Casualty Co., Inc.* (2004) 125 Cal.App.4th 1, 10 (*Accredited Surety*)). A factually similar case reasoned, in upholding a forfeiture over a surety’s argument that its bail bond was rendered void by error on a county sheriff’s part in releasing a defendant before a hearing on a section 1275.1 hold (*Indiana Lumbermens, supra*, 192 Cal.App.4th at p. 934): “[I]t was clear from the record that a section 1275.1 hold had been placed on [the defendant’s] release. Nonetheless, . . . the bail agent executed a \$200,000 bond for [his] release. The Surety’s executing a bond in the face of the bail hold must be laid to a lack of diligence in not checking the court record and in limiting its inquiry to the Internet booking details. [¶] In sum, the Surety’s asserted lack of knowledge of the section 1275.1 hold must be laid to its own neglect and is not chargeable to the county.” (*Id.* at p. 937.) Here, too, a check of the case file would have revealed the July 6 order and the proceedings leading to it, and appellants’ actual ignorance is immaterial.⁷

Second, even without that knowledge, appellants’ conceded knowledge of the June 10 order should have alerted them to the continued existence of the section 1275.1 hold, which had only been lifted as to the specified assets, and the need to get court approval for any further property they might use, to support a surety bond.

Third, as appellants themselves note elsewhere in their briefing, the fact that references to the 106 acres in the July 6 order had been struck through did not necessarily mean the court had considered or rejected that property. It could mean that the parents

⁷ Appellants would have us distinguish *Accredited Surety* and *Indiana Lumbermens* as involving bail agreements, which are between a surety and the *People*, whereas the surety bond here was between a surety and its *indemnitor*. That is, of course, a distinction, but not one that matters. Lack of diligence is lack of diligence no matter who is on the other end of the contract, and the Legislature surely contemplated that a request for return of premium under section 1300, subdivision (b), would be between an indemnitor and surety, since the protected party is the indemnitor (sometimes the defendant). It also makes no sense, in policy, that a statutory provision designed to guard against abuse of a bondsman’s otherwise unbridled power to surrender a defendant (*Kiperman, supra*, 133 Cal.App.4th at p. 939; *Smith, supra*, 182 Cal.App.3d at p. 1217), would disregard careless indifference by the bondsman or surety.

had withdrawn their request to have that property approved and evaluated, perhaps because, as they had stated, they wanted it for other projects.

Fourth, the key issue is not whether appellants issued the bond in good faith, but whether their immediate surrender of defendant two months later, in response to a request as yet unheard by the court, was done with “good cause.” We proceed to that question.

Notably, in cases summarized in part I above, good cause for surrender was found in part from actions taken by the defendants (*Kiperman, supra*, 133 Cal.App.4th at p. 940 [lost contact, a new warrant, and an effort to flee]; *Smith, supra*, 182 Cal.App.4th at p. 1221 [failure to appear in a different court and disappearance without a forwarding address or phone number]), and here, defendant did not flee, cease contact, or incur new charges. He was readily available, immediately located by his ankle monitor, responded, and had even supplied Reynolds and Osti a copy of the June 10 order. All that happened is that a request by Assistant District Attorney Troncoso called appellants’ attention to the fact that they had bungled this bail-hold case by releasing defendant on a deed to property that the court had not approved.

Yes, this cast doubt on whether that property should have been used and, in turn, had led Troncoso to suspect that defendant misled the court given his recent withdrawal of a request to have that property approved, and led him to suggest that the court remand defendant into custody and raised his bail as a sanction. This would reasonably create a sense of increased “risk” to appellants, but, on the other hand, and what surely troubled Judge Lee, is that the entire situation was created by appellants. Defendant’s father, C.K. Shah, declared that, when bail agent Reynolds suggested using the property, he cautioned “that this property had not been approved for bail use by the Court.” Then, relying on Reynolds’s claim of great experience in the bail bond business, he went along with the idea after Reynolds assured him that the 106-acre property “would not actually be used to post bail, but merely to secure the surety bond,” and that this “would not violate the Court’s [June 10] order,” which had not expressly disallowed use of that property. Reynolds was essentially mistaken on both points. The June 10 order only lifted the section 1275.1 bail hold as to the assets specifically listed, and its lack of mention of the

106-acre property, of course, did not allow that property's use toward bail. On appeal, moreover, appellants do not attempt to distinguish a property bond from a surety bond for these purposes, no doubt because the broadly inclusive language of section 1275.1, subdivision (a) ("consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for [bail's] execution"), lends no support to the idea that approval was not required for assets used for a surety bond.

Judge Lee could reasonably conclude that Shah was misled by Reynolds into using the unapproved source for bail, and even Reynolds's declaration supports that conclusion. Reynolds said he asked about using the 106-acre property and, while not recounting that Shah specifically warned him that it was not court approved, did say Shah resisted since he needed it for other projects. But Shah then agreed after Reynolds queried "why the property would specifically need to be approved for use as collateral for the bail bond, because the hold had already been lifted according to the [June 10 order]," which was silent as to the property. Reynolds added that defense counsel Ketchum had not raised any objection by phone during some discussion held long before then. Shah declared that, based on Reynolds's assurances, "I did not believe that I would violate this Court's order by pledging the 106-acre property as collateral for the surety bond. . . . Had I realized that deeding the property would violate the Court's order I would have found another asset to use as collateral." The court presumably also resolved in defendant's favor the record conflict about whether Troncoso wanted appellants to surrender defendant. That resolution also accords with the supplemental request, which asked that *the court* remand defendant into custody if he were found to have misled the court.

The record evidence—which would also later persuade Troncosco to withdraw his supplemental request—amply supports the conclusion that appellants, by using the 106-acre parcel over C.K. Shah's warning about lack of court approval, and while possessed of the June 10 order that showed no approval for that property, made faulty legal and business decisions to use the property for the bond. Defendant did nothing to increase their risks, and appellants simply realized from Troncoso's request that they had made an underwriting decision that now appeared to be more risky than they had assumed when

they made it two months earlier. They then made a further poor legal and strategic decision by opting to immediately surrender defendant into custody, over options to await resolution of the matter at the Monday hearing, seek court approval of the property, or approach defendant's parents about alternative collateral.⁸

No abuse of discretion appears in Judge Lee's conclusion that the circumstances did not create "good cause" for appellants to surrender defendant into custody within the meaning of section 1300, subdivision (b).

V. Unclean Hands

In their reply brief, appellants contend for the first time that defendant and his parents acted inequitably toward them, principally by withholding information about the withdrawn approval request, and that their arguments are therefore barred by the doctrine of unclean hands. We reject this contention as improperly raised for the first time in a reply brief. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.) The defense of unclean hands is also complex and intensely fact based. (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446-447; *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978-979.) Failure to raise the defense below has waived it for purposes of appellate review. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 533.)

⁸ Appellants complain, as they did before Judge Lee, that the parents did not take them up on their offer to rewrite the bond agreement with new collateral, at no additional charge, if the court denied the supplemental request. As Judge Lee observed, however, appellants should have anticipated the parents taking their business elsewhere, for a new bail agreement, if appellants breached trust in the relationship by opting for immediate surrender of their son.

DISPOSITION

The order is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.