

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

PAUL COBB et al.,

Plaintiffs and Respondents,

A133247

v.

**(Alameda County
Super. Ct. No. RG05246424)**

VELDA M. BERKLEY,

Defendant and Appellant.

_____ /

Ronald W. Carter, as assignee of Velda M. Berkley, appeals contending the trial court erred when it granted respondent “The Good News Is . . .” (GNI) a satisfaction of judgment. We conclude the trial court ruled correctly and will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is the second time we have addressed this dispute so only a brief statement of facts is necessary.

The Alameda Publishing Corporation (APC) is a newspaper publishing corporation that was owned by Velda M. Berkley. In December 2004, Berkley sold all the stock in APC to GNI, a limited liability company that is controlled by Paul Cobb. As part of the sale, Berkley agreed to indemnify GNI against any undisclosed liabilities. In a separate agreement, Berkley agreed not to compete with APC for three years in exchange for \$66,000. Cobb’s associate Barbara Bauer guaranteed the \$66,000 payment.

In May 2006, Cobb, APC and GNI filed an amended complaint against Berkley alleging she failed to disclose several significant liabilities of APC. In August 2006, Berkley filed a cross-complaint against APC, GNI and Bauer alleging she had not been paid the \$66,000 she was owed under the noncompetition agreement.

The case was tried to jurors who ruled in favor of GNI on its complaint and against Berkley on her cross-complaint. In March 2009, the court entered a \$245,869.50 judgment against Berkley.

Berkley appealed and the case was assigned to this division. In November 2010, we affirmed the judgment in part and reversed it in part. We found that certain elements of the judgment could not stand because they were not supported by substantial evidence. We also ruled that Berkley was entitled to judgment on her cross-complaint based on the guarantee as a matter of law. Accordingly, our disposition stated as follows: “The judgment is reversed and the matter is remanded with directions to enter a new judgment reducing the damages awarded to GNI by \$111,414.03 to reflect the reduction in economic and noneconomic damages. The court shall also enter judgment in the amount of \$66,000 in favor of appellant on her cross-claims against GNI and APC, and on her claim against Bauer under the Guaranty. The judgment is otherwise affirmed.”

The case was returned to the trial court where Berkley filed a motion arguing she was entitled to prejudgment interest and attorney fees on her portion of the judgment. Cobb, APC and GNI opposed the motion arguing Berkley was not entitled to prejudgment interest or attorney fees because when the entire judgment was viewed as a whole, they were the prevailing parties.

The matter came before the Honorable Winifred Y. Smith who interpreted our ruling in the prior appeal as compelling the conclusion that Berkley was entitled to prejudgment interest and attorney fees. As Judge Smith stated, “What am I supposed to do when it says, disposition? ‘The Court shall enter judgment in the amount of \$66,000 in favor of appellant on her cross-complaint against GNI, APC and her claim against Bauer under the guarantee.’ Now, the Court of Appeal has ordered me to do that. Tell me that I should somehow do a different analysis and not issue that judgment?” Accordingly,

Judge Smith entered an order granting Berkley prejudgment interest and attorney fees on her cross-complaint.

On May 20, 2011, Judge Smith filed a judgment in the case. As is relevant here, it stated as follows:

“IT IS HEREBY ORDERED, AJUDGED, AND DECREED that The Good News Is . . . , LLC shall recover the principal sum of \$132,455.47 and \$8,775.85 in costs against Velda M. Berkley . . .

“IT IS FURTHER ORDERED, ADJUDED, AND DECREED that Velda M. Berkley shall recover against the Good News Is . . . , LLC, Alameda Publishing Corporation, and Barbara Bauer, jointly and severally, the principal sum of \$66,000.00 and \$32,782.32 in prejudgment interest.

“IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Velda M. Berkley shall recover from Barbara Bauer \$38,750.00 in attorney fees and \$2,243.37 in costs.”

On June 7, 2011, Berkley assigned her judgment to the attorney who had represented her throughout the proceedings, appellant Ronald W. Carter. Carter served notice of the assignment by mail on June 15, 2011.

Two days later on June 17, 2011, Carter obtained writ of execution and instructed the local sheriff to serve the writ and a notice of levy on Wells Fargo Bank to collect on his judgment against APC and GNI.

Counsel for Cobb, APC and GNI sent letters to Carter stating that because GNI's judgment against Berkley was larger than Berkley's judgment against them, they were entitled to a setoff and an acknowledgment of satisfaction of judgment. When Carter failed to agree, Cobb, APC and GNI filed a motion that asked the court to quash the writ of execution and to issue to them a satisfaction of judgment, arguing that they as judgment debtor were entitled to apply their favorable judgment to offset Berkley's creditor judgment.

The matter proceeded to a hearing before the Honorable Frank Roesch on July 18, 2011. He agreed Cobb, APC and GNI were entitled to a setoff explaining his decision as

follows: “There is no reason at all to do anything other than set [off]. There is none. The file is very clear that it’s the plaintiff in this case who is willing to set off the entire judgment on the cross-complaint against theirs; and your client should be happy about that, but they’re not. They’d rather assign it to you on a conveyance that is suspect at best. Because I personally have reservations on the question of whether anybody would get \$141,000 behind in attorney’s fees even if that was the amount of money expended.” Therefore, Judge Roesch quashed the writ and ordered Berkley and her assignee Carter to pay \$865.

On August 15, 2011, Judge Roesch further ruled Cobb, APC, GNI, and Bauer were entitled to a satisfaction of judgment.

Carter then filed the present appeal challenging the court’s July 18, 2011 and August 15, 2011 orders.

II. DISCUSSION

A. Whether Judge Roesch Erred When Ruling GNI was Entitled to a Setoff

Carter contends Judge Roesch erred when he ruled GNI was entitled to setoff its judgment against the judgment Carter obtained from his former client Berkley.

The right to equitable setoff is well established. As Witkin explains, “If a judgment debtor recovers a money judgment against the judgment creditor, or acquires a third person’s judgment or any other claim against that creditor, the debtor may use the claim as an offset, thus satisfying, in whole or in part, the judgment the creditor has against the debtor. This equitable right exists independent of statute” (8 Witkin, Cal. Procedure (5th ed. 2008) Enforcement of Judgment, § 512, p. 549.) The right to setoff can be enforced in several ways including a motion by the judgment debtor after judgment has been rendered in favor of the judgment creditor. (*Id.* at p. 550.)

Here, Carter sought to enforce the judgment he obtained from Berkley by levying a bank account maintained by APC and GNI. Cobb, APC and GNI resisted that action by arguing they were entitled to apply GNI’s larger judgment as a setoff against the smaller judgment Carter obtained from Berkley. Judge Roesch agreed, stating there was “no reason” not to allow the setoff. We agree and conclude Judge Roesch correctly ruled

Cobb, APC and GNI were entitled to setoff GNI's judgment against the judgment Carter had obtained.

Carter contends Judge Roesch erred because *this court* decided the setoff issue in our prior judgment. Carter bases this argument on a single sentence in his reply brief in the prior appeal where he (on behalf of his then client Berkley) argued as follows: “[a]ny damages sustained by GNI for Berkley’s breach of contract must be offset and reduced by the damages sustained by Berkley for GNI’s breach of contract. The amount of the offset is the \$66,000.00 that Berkley is owed for not competing with APC and the \$9,185.89 for half of the receivables, a total of \$75,185.89.” We reject this argument because it is based on a false premise. While Carter (on behalf of Berkley) tried to raise the setoff issue in the prior appeal, this court declined to do so and our opinion does not discuss the issue in any way.¹ We did not decide the setoff issue in our prior opinion.

Next, Carter argues Judge Roesch erred because Judge Smith had already decided the setoff issue and her decision was controlling under principles of collateral estoppel. But collateral estoppel precludes the relitigation of an issue only where it is *identical* to an issue decided in a prior proceeding (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341), and the issues before Judge Smith and Judge Roesch were different. Judge Smith was only asked to decide whether Berkley was entitled to prejudgment interest and attorney fees on the \$66,000 judgment Berkley had obtained on her cross-complaint against APC, GNI, and Bauer. Judge Smith interpreted our prior decision to mean that she was required to award Berkley prejudgment interest and attorney fees. By contrast, Judge Roesch was not asked to determine which party was entitled to prejudgment interest or attorney fees. He was instead asked to evaluate both judgments and to determine whether GNI was entitled to an equitable setoff because the judgment it obtained against Berkley was greater than the judgment Berkley obtained. We conclude

¹ We note that Berkley first attempted to raise the setoff issue in her reply brief. This was improper. (*Greenlining Institute v. Public Utilities Com.* (2002) 103 Cal.App.4th 1324, 1329, fn. 5.)

Judge Roesch was not precluded from deciding the issue by principles of collateral estoppel.

Carter also argues Judge Roesch erred because “the parties to the judgments were not the same” i.e., while GNI’s judgment was against Berkley, Berkley’s judgment was against GNI, APC, and Bauer. Carter bases his argument on a quote from a single case, *Harrison v. Adams* (1942) 20 Cal.2d 646 (*Harrison*) where our Supreme Court stated that in order for one judgment to be setoff against another, “mutuality is essential, that is, the judgments must be between the same parties in the same right.” (*Id.* at pp. 649-650.)

Carter misinterprets the language upon which he relies. The issue in *Harrison* was whether a judgment debtor, acting as a trustee, who obtained the right to collect a debt that was owed by the judgment creditor to the trust, could use that debt as a setoff against his personal judgment debt. Our Supreme Court ruled the judgment debtor could not use the debt he obtained as a setoff because the judgment debtor was acting only as a trustee with respect to the debt and “a trustee, or one bearing a similar fiduciary relationship, may not set off a claim due the trust estate against his own personal obligation.” (*Harrison, supra*, 20 Cal.2d at p. 650.) Here, we are not faced with the situation where one of the parties is acting as a trustee for another. *Harrison* is not controlling here.

Next, Carter argues Judge Roesch erred because the setoff of mutual judgments is an equitable remedy that was not required in this case. Carter notes the debtors in *Machado v. Borges* (1915) 170 Cal. 501, 502 (*Machado*), and *Harrison, supra*, 20 Cal.2d at pages 647-648 were both insolvent, and he argues that because the original debtor here (Berkley) was not insolvent, no setoff was required. While *Machado* and *Harrison* do indicate that setoff is an equitable remedy that can be used when a debtor is insolvent, neither case holds that setoff can *only* be used when a debtor is insolvent. Indeed, many cases approve equitable setoff even when the debtor is not insolvent. (See, e.g., *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 743-750; *Hauger v. Gates* (1954) 42 Cal.2d 752, 755-756; *Keith G. v. Suzanne H.* (1998) 62 Cal.App.4th 853, 858-861.)

Next, Carter argues Judge Roesch erred because when he ordered the setoff on July 18, 2011, the judgment had already been assigned. According to Carter, “no setoff

was possible at that time because Berkley . . . assigned her judgment to Carter on June 7, 2011 and notice of the assignment had been served on GNI’s attorney on June 15, 2011.” Carter’s argument violates the bedrock principle that an assignee stands in the shoes of and is subject to all defenses that are available against an assignor. (See e.g. *Porter and Allen v. Liscom* (1863) 22 Cal. 430, 433 [“a purchaser and assignee of a judgment . . . takes subject to a right of set-off existing at the time of the assignment, for an assignee takes subject to all equitable as well as legal defenses which can be urged against the assignor”].) Furthermore, the primary case upon which Carter relies *Haskins v. Jordan* (1898) 123 Cal. 157 (*Haskins*) does not support his position. We recount the complex factual background of *Haskins* to explain why.

In *Haskins*, the plaintiff Haskins obtained a civil judgment against the defendant Jordan on May 15, 1896. That judgment for Haskins was entered, then later reduced on defendant Jordan's motion for a new trial. What was apparently an amended judgment on acceptance of a remittitur was entered on December 4, 1896. There also existed an older January 13, 1896 judgment against Haskins in favor of a judgment creditor named Crossman. On June 1, 1896, Crossman assigned his judgment to defendant Jordan. On June 9, 1896, Jordan gave notice to attorneys representing Haskins in both the litigation with Jordan and the litigation with Crossman of his acquisition of the Crossman judgment against Haskins.

On December 8, 1896—four days after entry of the reduced judgment in the action on appeal—Jordan filed a motion to assert the Crossman judgment he acquired in June 1896 to set off the Haskins judgment against him. Meanwhile, Haskins had assigned this judgment against Jordan to his attorneys. But Haskins did not give notice of the assignment. The trial court ruled Jordan was not entitled to a setoff.

The Supreme Court reversed, explaining its decision as follows: “When the attorneys for Haskins accepted the assignment of his judgment, they took it *cum onere*, subject to all the rights affecting that judgment which Jordan had, or which he might acquire, before notice to him of the assignment. Of these rights is the valuable and universally recognized one—the right to acquire an existing judgment against the

judgment creditor, and to present it by motion in reduction or extinguishment of the judgment debt. This was precisely what Jordan did. He acquired the Crossman judgment long before he knew that Haskins had assigned the judgment against him. More than that, his motion to set off was served upon Haskins' attorneys before knowledge of any such assignment made. . . . Code of Civil Procedure . . . [section 368] declare[s] that the assignment shall be without prejudice to the right of setoff until notice of the assignment is given. . . . Whatever may be the rule as to notice in other states . . . the fact remains that in this state there is no room for the exercise of discretion upon the question. The rule is one rigidly fixed by statute, and under it the right of the assignees of the Haskins judgment was subject to the right of [Jordan] to set off the Crossman judgment against it." (*Haskins, supra*, 123 Cal. at pp. 161-162.)

Carter interprets *Haskins* to mean that Berkley's assignment of the judgment to him on June 7, 2011, and the subsequent serving notice of the assignment on June 15, 2011, somehow cut off any right to setoff that Cobb, APC and GNI may have had. That is incorrect. *Haskins* explicitly holds that an assignee takes subject to all rights and burdens that exist against the assignor at the time the debtor was notified of the assignment. That is precisely what respondents assert here.

In summary, the statute upon which Carter relies, Code of Civil Procedure section 368,² does not support Carter's argument. That section simply means that a judgment debtor is entitled to enforce against an assignee all setoffs and defenses the debtor may have had against the assignor up to the time the debtor was notified that the assignee had acquired the assignment. (*Ornbaun v. First Nat. Bank* (1932) 215 Cal. 72, 76.) It does not mean the right of a judgment debtor to setoff may be defeated simply by assigning a judgment to another person.

² As is relevant here, Code of Civil Procedure section 368 states: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment"

B. Whether Judge Roesch Erred when he Criticized the Assignment

Carter contends that Judge Roesch erred when he criticized Berkley's assignment of the judgment to him as "a conveyance that is suspect at best" because he "personally [had] reservations on the question of [a client getting] \$141,000 behind in attorney's fees . . ." He claims he had no notice that issue would be discussed at the hearing and complains that Judge Roesch improperly restricted his ability to argue the issue. We need not address these arguments because Judge Roesch did not take any action against Carter based on his views of the Berkley/Carter assignment. Any possible error the court may have committed on this ground was harmless.

C. Whether the Court Erred when it Awarded Costs

Judge Roesch ordered Carter and Berkley to pay \$865 in costs GNI had incurred when obtaining the acknowledgment of satisfaction of judgment. The order was based on Code of Civil Procedure section 724.050, subdivision (e) that as is relevant here states: "If the judgment has been satisfied and the judgment creditor fails without just cause to comply with the demand [for an acknowledgment of satisfaction of judgment] . . . the judgment creditor is liable to the person who made the demand for all damages sustained by reason of such failure"

Carter contends Judge Roesch erred when he awarded costs under this section but his arguments echo those we have already rejected: i.e., the assignment defeated any right of setoff GNI may have had, that this court's prior opinion resolved the setoff issue, and that Judge Smith's prior ruling was controlling. Since we have rejected each of Carter's arguments, we reject these derivative arguments as well.³

³ Appellant also argues that "because there was no order offsetting the judgments until July 18, 2011, neither Berkley nor Carter could have had any obligation to acknowledge satisfaction of Berkley's judgment before July 18, 2011." Carter has not cited any authority to support his position. The issue is forfeited. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.)

D. Attorney Fees

Finally, Carter argues because he should have prevailed in the court below, the court should have awarded him attorney fees. Because we have concluded appellant was not entitled to prevail, we conclude the court did not err when it rejected his request for attorney fees.

III. DISPOSITION

The July 18, 2011 and August 15, 2011 orders are affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.