

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 TWO

EMMA COURT, LP et al.,
Plaintiffs and Appellants,

v.

UNITED AMERICAN BANK, a California
banking association et al.,
Defendants and Respondents.

A133505

(San Francisco City and County
Super. Ct. No. CGC 09-488187)

Emma Court, LP, a California limited partnership, and Mark Migdal, individually and as trustee of the Mark Migdal 2000 Revocable Trust (collectively, property owners), filed a complaint in 2009 against the United American Bank and the Lighthouse Bank, California banking associations (collectively, the banks), for, among other things, injunctive relief and rescission. On May 29, 2009, no party appeared at the hearing and the trial court adopted its tentative ruling denying property owners' request for a preliminary injunction. On June 1, 2009, the trial court entered an order denying the preliminary injunction and—at the banks' oral ex parte request—adding language waiving the requirements of Civil Code section 2924g, subdivision (d).¹ Property owners filed a notice of appeal from this order and we dismissed the appeal on March 16, 2011, for failure to file a brief in this court.

¹ All further unspecified code sections refer to the Civil Code.

In 2011, property owners filed a motion in the trial court to vacate the order of June 1, 2009. The trial court denied this motion. Property owners appeal and claim that they may appeal from the order denying their motion to vacate because it affirmed the order of June 1, 2009, and this earlier order, according to property owners, is void. We conclude that the June 2009 order is not void and property owners are appealing from a nonappealable order. Accordingly, we dismiss this appeal.

BACKGROUND

On May 8, 2009, property owners filed a complaint in the Superior Court of the City and County of San Francisco (San Francisco Superior Court) against the banks for, among other things, rescission and injunctive relief. Property owners applied ex parte for a temporary restraining order and an order to show cause regarding a preliminary injunction to enjoin the banks from engaging in a non-judicial foreclosure proceeding pending the resolution of their lawsuit.

Judge Quentin Lewis Kopp issued an order to show cause regarding the preliminary injunction and set the matter for hearing on May 28, 2009. Judge Kopp issued a tentative ruling denying property developers' motion for a preliminary injunction. After Judge Kopp issued the tentative ruling, property owners filed a peremptory challenge to Judge Kopp and the hearing was continued to Friday, May 29, 2009, to be heard by Judge Charlotte Walter Woolard.

According to Catherine Schlomann Robertson, counsel for the banks, she was contacted on May 28, 2009, by John Hartford, counsel at that time for property owners, regarding his intention to make an ex parte request on June 1, 2009, to have the court provide him with preliminary injunctive relief pursuant to the Unfair Business Practices Act. She declared that she told Hartford that she intended to proceed on her own ex parte motion to request a modification of the order denying the preliminary injunction to add a provision waiving section 2924g, subdivision (d), to permit the foreclosure of the real property in Hillsborough on or after June 2, 2009. Later that evening, at 10:22 p.m., Hartford sent a facsimile to Robertson's office stating that he would "not be appearing to

challenge the tentative ruling denying the preliminary injunction and let said ruling become the order of the court.”

No party appeared at the hearing on May 29, 2009, before Judge Woolard. Judge Woolard adopted the tentative ruling as follows: “Preliminary injunction is denied. [Property owners] fail[ed] to establish irreparable harm or that they could not be adequately compensated by money damages. . . .”

Robertson declared that Hartford never made any objection to her when she disclosed to him her intent to make an ex parte request to the court to add a waiver of section 2924g, subdivision (d) to the denial of the preliminary injunction. Robertson appeared before the trial court on June 1, 2009, and, since Hartford was not present, she contacted Hartford’s office to ask whether he objected to her ex parte request. She left a message on his answering machine and her cell phone number. Robertson’s cell phone records provided by her cell phone provider confirmed that she called Hartford’s office at approximately 10:08 a.m. on June 1, 2009. Robertson was unaware that Sunday night, May 31, 2009, at approximately 7:09 p.m., Hartford had sent a facsimile to her office stating that he was not going to file an ex parte motion on June 1, 2009. After waiting for a period of time and not hearing from Hartford, the trial court entered the order denying property owners’ request for a preliminary injunction and adding the language requested by the banks waiving the mandates of section 2924g, subdivision (d) (the June 2009 order).²

Robertson asserted that on June 1, 2009, the banks served by federal express the entry of the June 2009 order to be delivered to Hartford the following day. Robertson maintained that property owners did not file a motion for reconsideration or a motion to vacate the June 2009 order. Rather, on June 10, 2009, Migdal wrote a letter to the trial court requesting the court to vacate sua sponte the June 2009 order. Migdal stated in his letter that his attorney was “presently unavailable” and that the June 2009 order was

² The order stated that the court orders that section 2924g, subdivision (d) “is hereby deemed waived and the Foreclosure may be conducted on or after May 2, 2009.” “May 2” appears to be a typographical error and should have been June 2.

“materially different from the tentative ruling.” He claimed that neither he nor his counsel was aware that the order would contain the additional language waiving section 2924g, subdivision (d). He asserted that the banks had not complied with California Rules of Court, rule 3.1312, “which has caused extreme prejudice” to property owners, as it authorized the banks to conduct a trustee’s sale of their real properties without observing the mandates of section 2924g, subdivision (d).

On July 30, 2009, property owners filed a notice of appeal from the June 2009 order.³ On February 17, 2011, the clerks of this court sent the following to Hartford: “If [property owners’] opening brief is not filed within 15 days after the date of this notice, the appeal will be dismissed unless good cause is shown for an extension of time (Cal. Rules of Court, rule 8.220(a)(1)).”

On March 11, 2011, Robertson directed a member of her office to contact this court to determine whether property owners had filed an opening brief. The clerk stated that a message had been left for Hartford admonishing him that property owners’ opening brief was overdue and that the appeal would be dismissed unless property owners’ counsel contacted the court no later than March 14, 2011. On March 15, Robertson contacted this court and the clerk of this court told her that Hartford had not responded to the court’s voicemail.

On March 16, 2011, this court issued an order stating that property owners “hav[e] failed to file a brief” after being given notice “under rule 8.220(a)(1) of the California

³ While the appeal was pending, the banks filed a notice of removal of the state action to the federal court. The federal district court granted property owners’ motion to remand the matter to the San Francisco Superior Court.

On December 3, 2010, property owners filed a complaint for violation of civil rights, quiet title, and declaratory relief against the banks in the County of San Mateo Superior Court (San Mateo Superior Court). The action sought relief related to the June 2009 order of the San Francisco Superior Court. The banks filed a motion for summary judgment, which was granted on June 1, 2011. The San Mateo Superior Court found that the lawsuit was barred because there was another action pending between the same parties for recovery relative to the same alleged violation of the same primary rights and that no authority permitted the trial court “to act in place of the appellate court in reviewing the propriety of Judge Woolard’s June 1, 2009 order.”

Rules of Court, [and] the appeal is dismissed.” On May 16, 2011, we issued a remittitur certifying “that the decision entered in the above-entitled cause on March 16, 2011[,] has now become final.”

On July 14, 2011, property owners filed a motion in the San Francisco Superior Court to vacate the June 2009 order. The court denied the motion to vacate on September 6, 2011. The court sustained in part the banks’ objections to evidence submitted by property owners. In particular, it sustained the objection to Hartford’s declaration filed in the action in the San Mateo Superior Court, and overruled the banks’ objection to property owners’ request for judicial notice regarding the matter filed in the federal district court.

On September 21, 2011, property owners filed in this court a motion to recall the remittitur from the first appeal. The banks opposed the motion. On October 26, 2011, this court denied property owners’ motion to recall the remittitur.

Property owners filed a notice of appeal on September 29, 2011, indicating that they were appealing from the order on September 6, 2011, denying their motion to vacate the June 2009 order. On May 7, 2012, we granted the request by property owners to take judicial notice of the motion, opposition, and order related to the request in this court to recall the remittitur. Property owners and the banks filed their opening briefs in this court; property owners did not file a reply brief.

DISCUSSION

Property owners are appealing from the order denying their motion to vacate the June 2009 order. We must first determine whether they are appealing from an appealable order.

The right to appeal in California is governed by statute and appellate courts have no jurisdiction to entertain appeals except as provided by the Legislature. (*In re Marriage of Loya* (1987) 189 Cal.App.3d 1636.) When we determine an appeal has been taken from a nonappealable judgment or order, it is our duty to dismiss the appeal. (*Id.* at p. 1638.)

“It is established that an order denying a motion to vacate a judgment is deemed appealable only to the extent it raises new issues unavailable on appeal from the judgment. This restriction is imposed to prevent both circumvention of time limits for appealing and duplicative appeals from essentially the same ruling. [Citations.]” (*Malatka v. Helm* (2010) 188 Cal.App.4th 1074, 1082.) “[O]therwise, an appellant would receive “ ‘either two appeals from the same decision, or, if no timely appeal has been made, an unwarranted extension of time in which to bring the appeal.’ ” (*Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 690.)

In the present case, the issue on appeal concerns property owners’ alleged lack of notice regarding the waiver of section 2924g, subdivision (d) in the June 2009 order. This issue was clearly “available” to property owners when they filed their first appeal in this court. On June 10, 2009, Migdal wrote a letter to the trial court complaining about a lack of notice regarding the language waiving the requirements under this statute in the June 2009 order. Thus, property owners knew about this issue while their appeal was pending in this court and within the time period to file a motion for reconsideration of the June 2009 order.

Property owners contend that nevertheless this appeal is proper because the June 2009 order is void and they may challenge a void order at any time. Property owners maintain that the June 2009 order denying their request for a preliminary injunction deprived them of their property without due process because they did not receive any notice that the court was going to add the language waiving the mandates of section 2924g, subdivision (d).

An exception to the general rule that a party cannot appeal from the denial of a motion to vacate exists when the underlying judgment is void. (*Carlson v. Eassa, supra*, 54 Cal.App.4th at p. 691.) “In such a case, the order denying the motion to vacate is itself void and appealable because it gives effect to a void judgment.” (*Ibid.*)

The law is clear that challenges to void orders, as distinguished from voidable orders, can be made at any time. (*Carter v. Carter* (1957) 148 Cal.App.2d 845, 850 [“a void order or judgment is subject to collateral attack at any time and in any place by any

interested party”]; *People v. Glimps* (1979) 92 Cal.App.3d 315, 325 [“As orders which were void on their face, the sealing orders were subject to being set aside at any time by the court which rendered them”]; see also *Wilson v. Superior Court* (1980) 108 Cal.App.3d 816, 818-819.) A judgment or order is void when there is an absence of fundamental jurisdiction. “Lack of jurisdiction in its most fundamental or strict sense means an entire absence of . . . authority over the subject matter or the parties. [Citation.]” (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 (*Abelleira*)). For the purpose of making a collateral attack on a final judgment, the term “jurisdiction” has been interpreted narrowly to include: “(1) jurisdiction of the subject matter . . . , (2) personal jurisdiction over the parties, and (3) adequate notice.” (*Estate of Buck* (1994) 29 Cal.App.4th 1846, 1854 & fn. 7, 1855-1856.) A judgment is void on its face “when the defects appear without going outside the record or judgment roll” (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1226.)

“A litigant may collaterally attack a final judgment for lack of personal or subject matter jurisdiction, or for granting relief that the court had no power to grant, but may not collaterally attack a final judgment for nonjurisdictional errors.” (*Estate of Buck, supra*, 29 Cal.App.4th at p. 1854.) A court acts in excess of jurisdiction in the broader sense “where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no ‘jurisdiction’ (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.” (*Abelleira, supra*, 17 Cal.2d at p. 288.) “Action ‘in excess of jurisdiction’ by a court that has jurisdiction in the ‘fundamental sense’ . . . is not void, *but only voidable*.” (*Conservatorship of O’Connor* (1996) 48 Cal.App.4th 1076, 1088, disapproved on another point in *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 280.) A claim that does not concern the trial court’s fundamental subject matter jurisdiction is waived if not timely asserted and a party seeking to set aside a voidable judgment must act before the matter becomes final. (*Ibid.*; *Lee v. An* (2008) 168 Cal.App.4th 558, 565-566.)

Thus, “[t]he key question in the case at bench is whether the [alleged] error, appearing on the face of the judgment [or in the judgment role], [would render] the judgment void . . . as being beyond the jurisdiction of the court, and subject to collateral attack, or [would simply render] the judgment erroneous—not void—but within the jurisdiction of the court, and free from collateral attack.” (*Jones v. World Life Research Institute* (1976) 60 Cal.App.3d 836, 844.)

Here, property owners argue that the June 2009 order was void because they did not receive any notice that the court was going to waive the requirements under section 2924g, subdivision (d) when denying their request for a preliminary injunction. We disagree that this order was void. The trial court had fundamental jurisdiction and the court’s actions, even if we were to presume were made in error, cannot be challenged at this late date. The time to challenge a possible voidable June 2009 order has lapsed. As already pointed out, property owners did appeal this order, but we dismissed the appeal for failure to file a brief in this court.

The trial court had jurisdiction over the parties and had the power to grant the relief requested by the banks. Section 2924g, subdivision (d), provides for a seven-day grace period after a restraining order is dissolved “whether by entry of an order by a court of competent jurisdiction, operation of law, or otherwise, unless the injunction, restraining order, or subsequent order expressly directs the conduct of the sale within that seven-day period.”⁴ Thus, under this statute, the trial court had the authority to waive the seven-day grace period and the June 2009 order is not void on its face.

⁴ Section 2924g, subdivision (d) provides: “(d) The notice of each postponement and the reason therefor shall be given by public declaration by the trustee at the time and place last appointed for sale. A public declaration of postponement shall also set forth the new date, time, and place of sale and the place of sale shall be the same place as originally fixed by the trustee for the sale. No other notice of postponement need be given. However, the sale shall be conducted no sooner than on the seventh day after the earlier of (1) dismissal of the action or (2) expiration or termination of the injunction, restraining order, or stay that required postponement of the sale, whether by entry of an order by a court of competent jurisdiction, operation of law, or otherwise, unless the injunction, restraining order, or subsequent order expressly directs the conduct of the sale

Other courts have made it clear that the court has the authority to modify the seven-day grace period under section 2924g, subdivision (d). In *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101 (*Abdallah*), a case not cited by either party, the appellants argued that the bankruptcy court's order violated section 2924g, subdivision (d) "insofar as it 'immediately terminated' the stay as to United [Savings Bank] and directed that, notwithstanding this statute, United could, 'after filing this Order with the Court, proceed immediately' with the foreclosure." (*Abdallah*, at p. 1107.) The state appellate court reasoned that there was no conflict between the bankruptcy court's order and section 2924g, subdivision (d), because this statute "allow[ed] the bankruptcy court to direct that a sale be conducted within seven days after the stay is terminated for any reason, 'whether by entry of an order . . . or otherwise.'" (. . . , § 2924, subd. (d), italics added.)" (*Abdallah*, at p. 1108.) "The stay was thus terminated, 'otherwise' than by 'entry' of an order, when the order was *filed* on December 20, 1989." (*Ibid.*)

As in *Abdallah, supra*, 43 Cal.App.4th 1101, here, the trial court had the authority to direct that the sale could be conducted without observing the requirements of section 2924g, subdivision (d). Thus the June 2009 order is not void on its face.

Property owners argue that there is nothing in the statute suggesting the trial court may waive the requirements under section 2924g, subdivision (d) by an ex parte motion. Even if we were to presume that an oral ex parte motion was not the proper method for requesting this type of relief, this would simply support the argument that the trial court erred. Section 2924g, subdivision (d) provides the trial court with the authority to modify the seven-day grace period and the statute does not prescribe the procedure or the manner in which the court can provide this relief. Thus, property owners' argument is really that

within that seven-day period. For purposes of this subdivision, the seven-day period shall not include the day on which the action is dismissed, or the day on which the injunction, restraining order, or stay expires or is terminated. If the sale had been scheduled to occur, but this subdivision precludes its conduct during that seven-day period, a new notice of postponement shall be given if the sale had been scheduled to occur during that seven-day period. The trustee shall maintain records of each postponement and the reason therefor."

the court acted in excess of its jurisdiction, or that the June 2009 order was voidable. (See, e.g., *In re Marriage of Goddard* (2004) 33 Cal.4th 49, 55.)

Property owners also argue that the June 2009 order is invalid on its face because the docket statement does not indicate that the banks filed any ex parte application on June 1, 2009. They maintain that if the banks had complied with California Rules of Court, rules 3.1201 and 3.1204, the record would have included a written ex parte application, a declaration of counsel in support of the application, and a declaration in writing. They assert that none of these documents exists.

This argument, however, relies on extrinsic evidence. The docket statement is not part of the June 1999 order and is not part of the judgment roll. Code of Civil Procedure section 670 sets forth the documents comprising the judgment roll, and the docket statement is not included.⁵ Moreover, the absence of an entry on the docket or the lack of any documents in the judgment roll does not indisputably show that counsel for property owners did not receive notice of the banks' intention to request to have the June 1 order modified to include the waiver of the mandates under section 2924g, subdivision (d).

⁵ Code of Civil Procedure section 670 provides: "In superior courts the following papers, without being attached together, shall constitute the judgment roll:

"(a) In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint; the request for entry of default with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; if defendant has appeared by demurrer, and the demurrer has been overruled, then notice of the overruling thereof served on defendant's attorney, together with proof of the service; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons.

"(b) In all other cases, the pleadings, all orders striking out any pleading in whole or in part, a copy of the verdict of the jury, the statement of decision of the court, or finding of the referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him or her by default, the summons, with proof of its service, on the defendant, and if the service on the defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons."

The lack of this evidence indicates a failure to comply with the California Rules of Court, but the docket statement and judgment roll are silent on the issue of notice. Other evidence submitted in opposition to the motion to vacate indicated that property owners did receive notice. The banks' counsel declared that she provided such notice prior to appearing. Furthermore, once the trial court issued the June 2009 order, property owners did not file a motion for reconsideration based on a lack of notice.⁶

An "order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "[W]hen an order or a judgment of a [state] court . . . is collaterally attacked, the only evidence that may be considered in determining whether the order or judgment is void is the record in the proceeding in which it was entered. *If the record is silent as to the existence of a jurisdictional fact, that fact will be presumed.*" (*Burge v. City & County of San Francisco* (1953) 41 Cal.2d 608, 612-613, italics added.)

Here, the record does not contain uncontroverted evidence that property owners did not receive notice of the banks' intent to make an ex parte request to have the trial court modify the order denying the preliminary injunction to add language waiving the

⁶ Property owners are essentially arguing that they are entitled to relief based on extrinsic fraud. " 'Extrinsic fraud occurs when a party is deprived of his opportunity to present his claim or defense to the court, where he was kept in ignorance or in some other manner fraudulently prevented from fully participating in the proceeding. . . . [¶] Fraud is intrinsic and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary, but has unreasonably neglected to do so.' " (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 140.) To qualify for equitable relief on the ground of extrinsic fraud or mistake, the moving party must demonstrate diligence in seeking to set aside the [judgment or order] once it was discovered. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 49.) Here, property owners did not argue extrinsic fraud in the trial court and the record indicates that such an argument would probably have been futile since the evidence does not demonstrate diligence. The record establishes that property owners knew about the alleged error on June 10, 2009, but they did not file a motion for reconsideration and we dismissed their appeal from the June 2009 order after they failed to file an opening brief in this court.

requirements under section 2924g, subdivision (d). The trial court had the authority to issue such an order and we presume that proper notice was given. Accordingly, the June 2009 order was not void, and the present order affirming this judgment is a nonappealable order. We have no jurisdiction over this appeal and therefore dismiss it.

DISPOSITION

The appeal is dismissed. The banks are awarded the costs of appeal.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.