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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DOUGLAS A. SMITH et al.,
Plaintiffs and Respondents,
v.
GFT PROPERTIES, LLC,
Defendant and Appellant.

A133789

(San Francisco City & County
Super. Ct. No. CGC-10-502878)

In this real property dispute, the parties reached a settlement under which the defendant agreed to convey its interest to the plaintiffs so that they could sell the property. The defendant executed a grant deed in accordance with the settlement, and the plaintiffs then filed a voluntary dismissal with prejudice. Shortly thereafter, while attempting to sell the property, the plaintiffs discovered defects in title that were within the defendant's power to cure, including the existence of a misrecorded deed of trust in favor of the defendant.

The trial court granted the plaintiffs relief from the voluntary dismissal on the ground of surprise, and ordered the defendant to execute the documents necessary to clear plaintiffs' title. On appeal, the defendant argues that the plaintiffs did not present grounds for relief from the dismissal, and that the trial court added terms to the settlement agreement rather than merely enforcing it. We disagree, and therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

The plaintiffs in the action from which this appeal arose (Owners) are a group of individuals, some of whom are acting as trustees. As of August 2010, Owners

collectively owned, as tenants in common, 99.99 percent of a parcel of property in San Francisco (the Property) occupied by a public parking garage. Defendant, GFT Properties LLC (GFT), owned the remaining 0.01 percent of the Property. GFT also managed the parking garage business conducted on the Property.

On August 20, 2010, Owners filed a partition action against GFT. In their partition complaint, Owners alleged that GFT and its principal, William F. Garlock, had fraudulently induced them to invest in the Property as part of a so-called Ponzi scheme, and that after the real estate market declined in 2008, GFT stopped paying the promised return on their investment in the Property, and also failed to pay property taxes and assessments on the Property.¹ Owners alleged that they were trying to refinance the property in order to avoid a foreclosure, but that GFT and Garlock had refused to cooperate in the refinancing and to sign necessary documents. GFT answered the complaint with a general denial, and pled various affirmative defenses.

Sometime in February 2011,² Owners and GFT entered into a settlement agreement (the Agreement). The Agreement provided that Owners would pay GFT the sum of \$7,000 “upon completed execution of all documents necessary to remove any and all interests of GFT . . . from title or interest in the ownership of the [Property].” It also provided that GFT “agrees to execute any and all documents and instruments necessary to effectuate the transfer of title to [Owners],” and that Owners would dismiss the litigation arising from their complaint “upon execution of the necessary documents.” GFT further agreed, “[a]s part of the consideration for the dismissal of the action[,] . . . to fully cooperate with the Owners to the best of its ability regarding any issues related to or [sic] transferring title,” and all parties agreed “to do all things necessary or convenient to carry out and effectuate the terms and intent of this Agreement,” and “not to directly or

¹ This appeal arises from orders issued after the Owners’ lawsuit against GFT had been resolved by settlement. The only information in the record about the facts giving rise to the litigation is the allegations of the complaint. We summarize those allegations here purely as background information. We intend no implication as to their truth.

² The exact date is not clear from the record, but is not material to the issues raised by this appeal.

indirectly take any action . . . that would tend to defeat in any way the intent of this Agreement.” All parties to the Agreement warranted that they were “the sole and lawful owner of all right, title and interest in and to all matters released” under the Agreement, and that they “ha[d] not heretofore assigned, transferred nor purported to assign or transfer” all or any part of “any released matter.” The Agreement expressly authorized the San Francisco Superior Court “to retain jurisdiction for purposes of enforcement and interpretation of this Agreement,” and provided that either party could file a motion pursuant to Code of Civil Procedure section 664.6³ requesting the court to enter judgment pursuant to the terms of the Agreement.

On March 22, 2011,⁴ Owners filed a notice to the trial court that the case had settled. On April 18, Owners filed a request for dismissal of the entire action with prejudice.

On July 19, Owners filed a motion to enforce the Agreement under section 664.6 (the enforcement motion), along with an ex parte application for an order shortening the time to hear the enforcement motion. In a declaration in support of the motion, Owners’ counsel explained that the Property was in escrow, with the sale scheduled to close on July 19, but GFT (in the person of Garlock) was refusing to sign certain documents necessary to clear the title.

The trial court granted Owners’ request for an order shortening time. GFT responded by filing a “special appearance” and requesting that the court take the enforcement motion off calendar because the order granting shortened time had not been timely served. The enforcement motion was granted on July 28, but on August 5, GFT moved for reconsideration of that order.

On August 24, as part of their opposition to GFT’s motion for reconsideration, Owners filed a declaration by their counsel (the August Bonis declaration) indicating that the enforcement motion filed in July had been accompanied by an application under

³ All further references to statutes are to the Code of Civil Procedure unless otherwise indicated.

⁴ All further references to dates are to the year 2011 unless otherwise indicated.

section 473 for relief from the dismissal of the action (the purported section 473 motion). Thereafter, Bonis repeatedly represented to the trial court that the purported section 473 motion had been filed on or about July 25, which was the date he signed it. However, the copy Bonis filed on August 24 did not bear the court clerk's file stamp, and the clerk's transcript and register of actions in the record on appeal do not reflect the filing of a section 473 motion in this case in July, or indeed at any time before August 24. Nonetheless, the purported section 473 motion is part of the record in this case, in the form of the copy filed on August 24 as an exhibit to the August Bonis declaration.⁵

In the purported section 473 motion, Owners' counsel stated that Owners had filed the partition action "to get GFT . . . off title" to the Property; that Garlock had signed a grant deed in accordance with the Agreement; but that "at the time of the settlement there were several other issues" of which Owners were unaware. Specifically, after the settlement, Owners learned that there was a deed of trust on the Property securing a loan referred to as the "Sandwich Loan," which Owners contended was a fictitious transaction. The deed of trust for the Sandwich Loan bore an incorrect parcel number and thus had not been discovered by any title search. In addition, Garlock was claiming that he had sold the Sandwich Loan. These issues were clouding the title of the Property, and in order to obtain clear the title, it was necessary to have Garlock execute a quitclaim deed, a substitution of trustee, and a full reconveyance to the title company, which Garlock had refused to do.

On August 30, the trial court set aside the July 28 order granting the enforcement motion; set a schedule for further briefing on the enforcement motion; and set the matter for hearing on September 22. That hearing was continued several times, and after a partial hearing on October 12, the trial court ordered additional briefing on the issue

⁵ A subsequent declaration from GFT's counsel states that the purported section 473 motion may have been filed in late July, but in a related quiet title action rather than in the present case. The complaint in the quiet title action was filed on July 15, and involved the same plaintiffs, the same real property, and GFT as a defendant, along with other parties.

whether Owners were entitled to relief from their voluntary dismissal under section 473. In accordance with that order, Owners filed a memorandum of points and authorities in support of their request for relief under section 473, a request for judicial notice of the court files in various other cases in San Francisco and elsewhere, and a declaration of counsel (the October Bonis declaration). In the October Bonis declaration, counsel stated that he had investigated Garlock's business affairs on behalf of the plaintiffs in the actions of which judicial notice was requested, and that he had determined that Garlock had committed various acts of fraud and misappropriation in his business affairs. GFT filed written evidentiary objections to this declaration.

On November 9, the trial court held a hearing, at which the court orally granted relief from the dismissal under section 473 on two grounds: first, that Garlock's "failure . . . to meet the terms of the [A]greement may have been actually a fraudulent act," and second, that Garlock's failure to abide by the Agreement constituted "surprise" within the meaning of section 473, in that "he had, unbeknownst to [Owners], apparently deeded this [P]roperty to someone else and, therefore, prevented the actual effect that was [the basis for] the meeting of the minds of the parties in settling this case." The court also ruled orally on the record on GFT's objections to the October Bonis declaration, sustaining certain objections and overruling others. After the hearing, the court entered a written order (the November 9 order) granting Owners' motion to enforce the settlement, directing GFT (through Garlock) to execute specified documents, and giving it until 4:00 p.m. on November 11 to deliver the executed documents to Owners' counsel.

On November 15, GFT filed a notice of appeal from the order granting relief from dismissal (the section 473 order) and from the order requiring GFT to execute the documents (the enforcement order). On November 16, GFT filed an application with the trial court for a temporary stay of the enforcement order, which the trial court denied on the same day. On November 22, this court entered an order denying GFT's request for an immediate stay and petition for supersedeas.

DISCUSSION

At the outset, we note that Owners did not file a respondents' brief on this appeal, and GFT did not timely request oral argument. Accordingly, we decide the appeal on the record and the opening brief. (Cal. Rules of Court, rule 8.220(a)(2).)

A. Section 473 Order

1. Appealability

As a threshold issue, we must determine whether the section 473 order is an appealable order. We are obligated to address this issue on our own motion, because it is fundamental to our jurisdiction to review the section 473 order. (*Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1248 (*Critzer*).)

GFT asserts that an order granting relief under section 473 from a voluntary dismissal is appealable, citing *Basinger v. Rogers & Wells* (1990) 220 Cal.App.3d 16 (*Basinger*). However, as explained in *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1364-1366 (*Arnaiz*), the *Basinger* court's holding on that point "ignores the requirement of a statutory basis for finding an order appealable and the requirement that a vacating order is appealable only if it vacates an appealable judgment . . ." (*Arnaiz, supra*, 96 Cal.App.4th at p. 1366.) We agree with the *Arnaiz* court's conclusion that *Basinger* was wrongly decided on this question, and that the order granting Owners' section 473 motion is not appealable.

Nonetheless, we will reach the merits of GFT's arguments. We do so in the interests of justice, and because we have jurisdiction on another basis. When an appeal is taken from an appealable judgment or order, we have jurisdiction to review any earlier, non-appealable ruling that substantially affects the rights of the appealing party. (§ 906; *Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 531.) In the present case, an appealable judgment has, in effect, been entered. As GFT's brief on appeal correctly points out, the enforcement order was intended as a final determination of the rights of the parties. Thus we may, and do, construe it as an appealable judgment. (*Critzer, supra*, 187 Cal.App.4th at pp. 1246, 1250-1252.) Moreover, the section 473

order was a necessary procedural predicate to the appealable enforcement order. (*Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004, 1007-1008 (*Hagan*).

2. Merits

Owners sought equitable relief from the judgment on the basis of fraud, and equitable relief from a judgment can only be granted on the basis of extrinsic rather than intrinsic fraud. Because Owners did not establish that GFT had procured the settlement agreement or the ensuing voluntary dismissal through any extrinsic fraud, false promise, or misrepresentation, GFT argues that the order granting relief from the dismissal must be vacated.

We need not reach this issue, however. As GFT acknowledges, Owners also sought discretionary relief from the voluntary dismissal on the alternative, independent ground of surprise under section 473.⁶ Indeed, surprise was one of the grounds on which the trial court relied in granting Owners' motion to vacate the dismissal.

We review a ruling on a motion for discretionary relief under section 473 for abuse of discretion. (*Zamora, supra*, 28 Cal.4th at pp. 257-258.) In doing so, we note that an order *granting* such relief, as in the present case, is less likely to be held an abuse of discretion than an order *denying* such relief. (See *Purdum v. Holmes* (2010) 187 Cal.App.4th 916, 922; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶¶ 5:415, 5:416, p. 5-104.2 (rev. #1, 2011).) Moreover, a trial court's findings of fact in connection with a motion under section 473, even if based only on written declarations, cannot be overturned on appeal if they are supported by substantial evidence. (*Shamblin v. Brittain* (1988) 44 Cal.3d 474, 479.)

⁶ When we refer to section 473, it should be understood that we are concerned in the present case only with the discretionary relief allowed under section 473, subdivision (b), which provides for relief from a judgment based on "mistake, inadvertence, surprise, or excusable neglect." In *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249 (*Zamora*), our Supreme Court held that a party may obtain relief from a voluntary dismissal under section 473. (*Id.* at pp. 257-258.) GFT does not argue otherwise on this appeal.

Surprise, within the meaning of section 473, is “ ‘some condition or situation in which a party to [a] cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.’ [Citation.]” (*Credit Managers Assn. v. National Independent Business Alliance* (1984) 162 Cal.App.3d 1166, 1173 (*Credit Managers*)). In granting relief under section 473, the trial court in the present case expressly found that “there has been surprise in this, in that Mr. Garlock failed to meet the terms of the settlement agreement. He had, essentially, not let the other side know of the fact that he had, unbeknownst to [Owners], apparently deeded this property to someone else and, therefore, prevented the actual effect that was [the basis for] the meeting of the minds of the parties in settling this case. And so to that extent, there was clearly surprise on the part of [Owners] who had already dismissed the action, acting in good faith on the settlement terms.”

There is substantial evidence to support this finding in the declaration submitted by Owners’ counsel in support of the section 473 motion. This declaration stated that: (1) Owners filed the partition action in order to “get GFT . . . off title”; (2) Owners paid the consideration due under the Agreement and received a grant deed in return; (3) Owners were unaware, at the time of the settlement, that Garlock had created a defect in title when he sold an interest in the property to certain Owners in 2003; and (4) Owners were also unaware, at the time of the settlement, that in late 2004, Garlock had created a fictitious additional loan (the so-called Sandwich Loan), secured by a deed of trust on the property that was misfiled and not discoverable in a title search, which Garlock had then purported to sell to a third party. The declaration also stated that Garlock had refused to sign the additional documents that would be needed in order for Owners to obtain clear title to the Property.

In short, Owners’ evidence demonstrated that they believed the grant deed received from GFT under the Agreement would give them clear title to the Property and enable them to sell it, which was their goal in filing the partition action. After they had dismissed the action in accordance with the terms of the Agreement, they discovered that they were wrong, due to title encumbrances of which they were previously unaware.

They asked Garlock to sign additional documents in order to fix the problem, and he refused. In our view, the trial court's finding of surprise is amply supported by this evidence, none of which was controverted by any evidence introduced by GFT.⁷

GFT cites *Heyman v. Franchise Mortgage Acceptance Corp.* (2003) 107 Cal.App.4th 921, 926 (*Heyman*) for the proposition that in order to obtain relief under section 473 based on mistake (or, presumably, surprise), Owners were obligated to demonstrate not only mistake or surprise, but also extrinsic fraud. In *Heyman*, the plaintiff sought to vacate a voluntary dismissal filed eight years earlier. Thus, relief under section 473 was barred by the passage of time, as a motion under section 473 must be filed within six months. For this reason, the plaintiff in *Heyman* was seeking *equitable* relief from a judgment, for which extrinsic fraud or mistake must be shown. (See, e.g., *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1114; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980-981 (*Rappleyea*)). Accordingly, *Heyman* does not apply here; it has no bearing on the showing needed to obtain discretionary relief under section 473.

GFT has cited no authority holding that extrinsic fraud, false promise, or misrepresentation must be shown in order to obtain relief under section 473 on the basis of surprise. In fact, the law is to the contrary. For example, in *Lipson v. Jordache Enterprises, Inc.* (1992) 9 Cal.App.4th 151, 156-157, 160, the court held it was an abuse of discretion for the trial court to deny a defendant's insurer's motion for relief from judgment on the basis of surprise, where the original complaint did not allege covered claims, but the complaint was amended just before trial, without the insurer's knowledge,

⁷ The only evidence introduced by GFT with regard to the issue of surprise was the declaration of GFT's counsel filed on September 7. That declaration merely confirms that Garlock executed a grant deed on behalf of GFT, thereby conveying GFT's *ownership* interest in the Property to Owners in accordance with the Agreement. The declaration does not controvert Owners' evidence that at the time they entered into the Agreement, they were unaware that GFT also held a *lien* on the Property by virtue of the deed of trust, or that there was an additional title defect that was within GFT's power to cure.

to plead additional causes of action that were covered under the policy. Similarly, in *Credit Managers, supra*, 162 Cal.App.3d at pages 1172-1173, the court held that it was an abuse of discretion to deny relief under section 473 where an assignee for benefit of creditors was surprised to learn that a default judgment on a cross-complaint had been entered against its assignor.

No showing of extrinsic fraud was made in either of these cases. Nor was such a showing necessary, because the requirements for obtaining relief from judgment under section 473 are less stringent than the showing required to obtain equitable relief from judgment after the six-month period allowed under the statute. (See *Rappleyea, supra*, 8 Cal.4th at pp. 981-982 [while relief under section 473 is still available, law favors granting relief, but after six-month period has passed, law favors finality of judgments, and equitable relief is available only available in exceptional circumstances].)

GFT also contends on appeal that the trial court erred in not excluding the August Bonis declaration and in taking judicial notice of other pending actions involving GFT and its principal. But as we have pointed out earlier, the trial court's finding of surprise did not rely in any way on the objectionable portions of the August Bonis declaration, or on the documents of which the trial court was asked to take judicial notice. Thus, even if the trial court had excluded all of the contested portions of the August Bonis declaration from evidence, and declined to take judicial notice of the other actions, the court still had before it substantial evidence of surprise warranting the setting aside of the voluntary dismissal. Accordingly, GFT has not borne its burden on appeal to establish that it was prejudiced by any evidentiary error that the trial court may have committed, either in taking judicial notice of the court files in other pending cases, or in admitting into evidence the contested portions of the August Bonis declaration.

B. Enforcement Order

With regard to the trial court's order enforcing the Agreement, GFT argues that the trial court erred in adding terms to the Agreement rather than merely enforcing it. As GFT correctly states, because neither party introduced any extrinsic evidence bearing on the interpretation of the Agreement, and the trial court's interpretation did not depend on

any findings as to disputed facts, we review this issue de novo as a question of law. (*Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 439.)

GFT asserts that in executing a grant deed conveying to Owners the 0.01 percent interest in the Property previously held by GFT, it performed all its obligations under the Agreement. GFT attempts to excuse its refusal to execute further documents as requested by Owners by contending that the deed of trust securing the Sandwich Loan, which GFT refers to as the all-inclusive deed, gave GFT only a lien on the Property, rather than any title to it.

We have no quarrel with GFT's characterization of the all-inclusive deed as a lien on the Property rather than actual title. What GFT's argument ignores, however, is that although a deed of trust does not convey title, it does constitute an *encumbrance* on title. Thus, although the owner of property may convey title to a third party despite the existence of a recorded deed of trust, the buyer will not receive clear title unless the deed of trust is reconveyed. (See, e.g., *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 438-439.) Obviously, the existence of a deed of trust recorded against a property affects the value of the title, and thus, the value of the property itself.

We agree with the trial court that by its terms, the Agreement was intended to give Owners clear title to the Property, free of any encumbrance held by GFT, in order to enable Owners to sell the Property without interference from GFT. This intent is evident in several provisions of the Agreement. (1) The Agreement required GFT to "execut[e] . . . all documents necessary to remove any and all interests of GFT . . . from title *or interest* in the ownership of the [Property]." (Italics added.) (2) GFT agreed "to fully cooperate with the Owners to the best of its ability regarding *any issues related to . . . transferring title.*" (Italics added.) (3) GFT agreed "not to directly or indirectly take any action . . . that would tend to defeat *in any way* the intent of this Agreement." (Italics added.) (4) GFT warranted that it "ha[d] not heretofore assigned, transferred nor purported to assign or transfer any released matter, *or any part or portion thereof.*" (Italics added.)

Because the Agreement was intended to vest clear title to the Property in Owners, GFT breached the Agreement by declining to execute the documents necessary to release the lien created by the deed of trust. By the same token, we are not persuaded by GFT's argument that the trial court added new terms to the Agreement by ordering GFT to execute the necessary documents. The documents in question fell well within the scope of the broadly worded provisions of the Agreement requiring GFT "to fully cooperate" with Owners regarding their title to the Property, and to execute "all documents necessary" to eliminate any interest GFT held.

The cases cited in GFT's brief are not to the contrary. In *Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, the court recognized as a general principle that a judge hearing a motion to enforce settlement under section 664.6 cannot create the material terms of a settlement. (*Id.* at p. 1360.) Nonetheless, the court affirmed the trial court's order in that case, holding that the court "did not create a material term of the settlement or otherwise err when it extended the closing date" for the real property transaction contemplated by the settlement, because the extension was necessary in order to grant the relief sought by the parties. (*Id.* at pp. 1360-1361.) The court also held that the trial court did not err in ordering one of the parties to sign a purchase agreement incorporating specific terms, in order to deliver marketable title as required by the settlement agreement. (*Id.* at p. 1361.) If anything, *Osumi v. Sutton* militates in favor of affirming the enforcement order in the present case.

GFT also relies on *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793 (*Weddington*). In that case, the court reversed an order enforcing a purported settlement agreement, concluding that the parties had never actually agreed to all of the material terms incorporated in the document, which was drawn up by a private mediator acting as a judge, and never actually agreed to by both parties. (*Id.* at pp. 796-797, 818-819.) Under general principles of contract law, the *Weddington* court found that no enforceable contract was ever reached, and therefore the purported settlement could not be enforced under section 664.6. (*Id.* at pp. 810-818.) Here, in contrast, there is no dispute as to the existence or terms of the Agreement, which incorporated the terms of the

parties' settlement into a formal written contract agreed to by both sides. Accordingly, nothing in *Weddington* undercuts our conclusion that order issued by the trial judge in the present case merely enforced the parties' own agreement, and did not impose different material terms to that agreement.

DISPOSITION

The order granting relief from the voluntary dismissal, and the order enforcing the Agreement, are affirmed. Each party shall bear its own costs on appeal.

RUVOLO, P. J.

We concur:

RIVERA, J.

BASKIN, J.*

* Judge of the Contra Costa County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.