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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MORELAND LLC, et al.,
Plaintiffs and Respondents,
v.
MIKE ROSEN,
Defendant and Appellant.

A134906
(San Mateo County
Super. Ct. No. CIV 487714)

Defendant Mike Rosen appeals from a trial court order releasing a money deposit plaintiff Ruo Wu Chen made to stay enforcement, pending appeal, of an order awarding Rosen trial court costs and attorney fees incurred in making a special motion to strike (an “anti-SLAPP motion”).¹ Plaintiffs made the deposit when Rosen obtained a writ of execution to collect on the fee and cost order, but before any levy. The sheriff nevertheless proceeded to levy on Chen’s bank account, however, because of the deposit, did not turn the funds over to Rosen. Rosen then challenged the sufficiency of plaintiffs’ deposit, and the trial court ordered a significant increase to effectuate a stay. Unwilling or unable to make the additional deposit, plaintiffs abandoned their attempt to stay execution on the fee and cost order. Given that the sheriff had already seized Chen’s bank funds, plaintiffs also asked for the release of their deposit, contending the fee and

¹ After the events giving rise to the instant appeal occurred, this court affirmed the orders granting Rosen’s anti-SLAPP motion and awarding him trial court costs and attorney fees. (*LegacyQuest v. Rosen* (Jan. 27, 2012, A129177) [nonpub. opn.])

cost order was “now paid in full” and there was no need for security. Rosen opposed the plaintiffs’ motion for release of their deposit principally on the ground he had incurred attorney fees on appeal in defending the cost and fee order, and had incurred fees in objecting to the amount of the deposit and its release. Rosen also claimed the fee and cost order, itself, had not been paid in full by the levy because he was entitled to postjudgment interest (which he had not included in his writ of execution). As we explain, Rosen is no longer aggrieved by the trial court’s order releasing the amount plaintiffs had deposited to stay execution of the fee and cost order. His appeal therefore must be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

We recite here only the facts relevant to the instant appeal. On May 20, 2010, the trial court granted Rosen’s anti-SLAPP motion and struck plaintiffs’ tenth cause of action for defamation. Rosen then sought costs and attorney fees incurred in connection with his motion, and on August 13, 2010, the trial court awarded him \$299 in costs and \$23,449 in attorney fees (for a total recovery of \$23,748). Plaintiffs appealed these anti-SLAPP orders. (*LegacyQuest v. Rosen* (Jan. 27, 2012, A129177) [nonpub. opn.]²)

More than a year later, on September 19 , 2011, while plaintiffs’ appeal from the anti-SLAPP orders remained pending, Rosen obtained a writ of execution for \$23,773 (the principal amount of the cost and fee order, plus \$25 for the writ issuance fee). The writ did not specify any amount for postjudgment interest running from the date of the fee and cost order. It did, however, instruct the levying officer to collect \$6.51 per day in postjudgment interest from the date of the issuance of the writ until collection.

² Rosen has asked us to take judicial notice of plaintiffs’ opening brief in that appeal. We decline to do so since their brief is not relevant to any issue in the instant appeal. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, fn. 6 [court will not take judicial notice of irrelevant matters]; *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208, 225, fn. 14 [same].)

Two weeks later, on October 4, 2011, plaintiffs filed an “Agreement and Deposit in Lieu of Bond to Stay Enforcement of Judgment Pending Appeal” to stay execution. The document stated plaintiffs “by Ruo Wu Chen aka Joe Chen hereby deposit a cash amount of \$39,900.33” to stay enforcement. The amount plaintiffs actually deposited with the court was \$35,900, slightly more than one-and-a-half times the fee and cost order.

Despite the deposit, the sheriff, on October 11, 2011, seized \$23,820 from Chen’s bank account pursuant to the writ of execution. However, in light of plaintiffs’ deposit to stay execution, the sheriff did not turn over the monies to Rosen.

Shortly thereafter, Rosen objected to plaintiffs’ deposit as insufficient to cover the appellate costs and attorney fees he anticipated incurring in defending the anti-SLAPP orders on appeal and recovering if he was successful on appeal. On October 18, 2011, he filed a motion to increase the deposit to \$87,394.50. On October 25, 2011, the trial court, over plaintiffs’ opposition, sustained Rosen’s objection and ordered an increase of the plaintiffs’ deposit to \$85,819.50.

At this point, the plaintiffs opted to abandon their effort to stay execution, and on October 28, 2011, Chen filed a motion for release of the \$35,900 he had deposited. Plaintiffs maintained that since the sheriff had levied on Chen’s bank account, the fee and cost order was now “paid in full” and there was no need for security. Even though Rosen was now free to take possession of the funds the sheriff had seized, he opposed Chen’s motion—on the ground he was incurring appellate fees and costs in defending the anti-SLAPP orders on appeal, and also had incurred fees in objecting to the amount of plaintiffs’ deposit and motion for its release. He also asserted the fee and cost order had not been satisfied because he was owed postjudgment interest, which he set forth in a memorandum of costs filed October 31, 2011 (and filed again on November 7, 2011).

The trial court heard Chen’s motion to release the plaintiffs’ deposit on November 18, 2011. The court variously observed: (a) Rosen’s writ of execution had

not referenced any postjudgment interest, (b) any estimated appellate fees were not part of the “[judgment] on appeal,” and (c) the funds Rosen had already seized by levy “fully satisfy the amount of judgment” and there was therefore no need for an undertaking. Rosen disputed that the seized funds fully satisfied the cost and fee order on appeal, and the trial court agreed it did not fully cover postjudgment interest. The court ultimately offered plaintiffs a choice: (1) re-take possession of the \$23,748 the sheriff had seized and increase their deposit to comply with the court’s earlier order (the stay option) or (2) allow release to Rosen of the \$23,748 already seized by the sheriff and obtain return of their \$35,900 deposit (the no-stay option). Plaintiffs chose the second option, and in this way, the trial court granted their motion. The upshot was that plaintiffs chose not to obtain a stay of the trial court fee and cost order on appeal. This, in turn, entitled Rosen to take possession of the amount on which he had already executed and that had been seized by the sheriff.

On November 28, 2011, the trial court filed a written order granting the plaintiffs’ motion for release of the deposit. This order differed slightly from what had orally transpired in court and ordered \$35,900 returned to Chen *minus* \$3,025.80 in postjudgment interest on the cost and fee order.

About a month later, on December 21, 2011, Rosen filed a memorandum of costs and motion for attorney fees incurred in challenging the amount of the plaintiffs’ deposit, opposing their motion for release of the deposit, and for preparing the new cost memorandum and bringing the new fee motion. Plaintiffs opposed the new fee motion and moved to strike the new memorandum of costs.

On December 23, 2011, the trial court issued a supplemental order on the plaintiffs’ motion to release their deposit, commanding the sheriff to return the levied funds to Rosen’s counsel—a directive the trial court had “neglected” to include in its written order.

On March 12, 2012, Rosen filed a notice of appeal “from the order entered . . . on November 28, 2011”—that is, from the trial court’s written order granting the plaintiffs’ motion for release of their deposit, minus \$3,025.80 in postjudgment interest on the cost and fee order. Even though the notice of appeal was filed approximately five months after issuance of the order, it appears to be timely since there is no record of any party or the court serving notice of entry of the November 28, 2011, order.³ (See Cal. Rules of Court, rule 8.104(a).)

DISCUSSION

This appeal presents at the outset two jurisdictional issues: (1) whether Rosen is aggrieved by, and thus has “standing” to challenge, the November 28, 2011, order granting plaintiffs’ motion for release of their deposit, and (2) whether the November 28, 2011, order is an “appealable” order or judgment. Because we conclude Rosen is no longer aggrieved by the order and therefore has no standing to appeal from it, we need not, and do not, reach the question of whether it is an appealable order.

“Standing to appeal is jurisdictional.” (*People v. Stark* (2005) 131 Cal.App.4th 184, 200.) “Not every party has standing to appeal every appealable order. Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal. (E.g., *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 948 . . . ; cf. Code Civ. Proc., § 902 [‘Any party aggrieved may appeal’].) An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision.” (*In re K.C.* (2011) 52 Cal.4th 231, 236; cf. *Shaw v.*

³ Rosen’s claim for fees and costs incurred in connection with the amount and release of plaintiffs’ deposit came on for hearing on March 22, 2012. The trial court did not rule on the issues, however, deciding to wait until the instant appeal is resolved.

Hughes Aircraft Co. (2000) 83 Cal.App.4th 1336, 1342 [appellant must face “immediate, pecuniary, and substantial” injury].)⁴

A corollary of this aggrieved party rule is that courts do not decide questions whose answers will “ ‘have no practical effect or cannot provide the parties with effective relief.’ ” (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1519.) Such questions are moot—that is, “ ‘abstract questions of law’ ” not borne of an “ ‘actual controversy between the parties.’ ” (*Ibid.*)

Here, the question of any stay pending appeal of the challenged anti-SLAPP orders became moot in January 2012, when this court decided the appeal and affirmed the trial court’s orders granting Rosen’s special motion to strike and awarding him trial court costs and attorney fees incurred in bringing the motion. The January 2012 affirmance “eliminat[ed] both the factual necessity and statutory basis for an undertaking” rendering “moot” issues related to the deposit, including whether or not it should have been increased to effectuate a stay and whether it should have been released once plaintiffs chose not to make an increased deposit to procure a stay on appeal. (See *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 363 [“once an appeal is determined and the judgment is reversed, the question of the validity of a stay bond is moot”].)

Given that there is no present basis for, or purpose served by, any undertaking since plaintiffs’ appeal of the anti-SLAPP orders is completed, “consideration of the trial court’s ruling on the undertaking would serve no purpose.” (*City of Lodi v. Randtron, supra*, 118 Cal.App.4th at p. 363.; see also *Rauer’s Law & Collection Co. v. Higgins* (1950) 95 Cal.App.2d 483, 485 [“the court enjoined the sheriff from releasing the property pending the trial of title without requiring an undertaking. We need not decide whether this was error since that question has now become moot” upon affirmance];

⁴ All further rule references are to the Code of Civil Procedure unless otherwise indicated.

Bekins v. Smith (1918) 37 Cal.App. 802, 803 [motion to strike undertaking moot after resolution of underlying appeal].) Accordingly, Rosen’s appeal must be dismissed.

Further, even apart from questions connected with the stay becoming moot by virtue of the conclusion of the appeal, Rosen was not shown that he was aggrieved by the trial court’s November 28, 2011, order releasing the plaintiffs’ deposit. It is up to an appellant to choose whether to procure a stay by the required means. (See § 917.1, subd. (a) [absent undertaking, perfecting appeal does not stay enforcement of money judgment]; see generally Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 7:95, p. 7-28.3 [“Most judgments and orders are stayed on appeal only if appellant posts security (CCP §§ 917.1-922).”].) If an appellant chooses not to post a bond or undertaking, or to make a deposit, the judgment on appeal is not stayed, and the respondent is entitled to execute on the judgment, as Rosen did here. (See §§ 917.1, subd. (a), 922; see generally Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶¶ 7:7, p. 7-4, 7:95, p. 7-28.3, 7:226, p. 7-43.) Plaintiffs were thus entitled to decide whether or not to post the additional deposit required by the trial court to stay execution on the attorney fees and cost order pending appeal. (See §§ 922, 995.960, subd. (b)(1); see generally Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 7:226, p. 7-43 [“Appellant’s failure to give sufficient security within the court-prescribed time limit *terminates the stay*, so that enforcement of the judgment may proceed despite the appeal.”].)

The trial court recognized the procedural options here when it put it directly to plaintiffs to make a choice: either deposit another \$49,919 to effectuate a stay (and regain possession of the amount the sheriff had seized), or allow Rosen to obtain possession of the amount seized by the sheriff pursuant to the writ of execution. *In addition*, in its written order, the trial court provided Rosen with postjudgment interest he could have sought through the writ of execution, but did not. The record on appeal contains no objection by Rosen to the amount (\$ 3,025.80) the trial court withheld from the plaintiffs’

deposit for postjudgment interest. Accordingly, Rosen at least appeared to have received the benefit of the statutory provisions specifying that an insufficient bond or undertaking remains in effect as to liabilities incurred *before* expiration of the time for giving sufficient security, and has not, in any event shown how the trial court's release of funds deprived him of any statutory protection. (See §§ 995.430, subd. (b) [bond remains in force and effect until "purpose for which the bond was given is satisfied or the purpose is abandoned without any liability having been incurred"], 995.960, subd. (b)(2) [if a bond is determined to be insufficient, it "remains in effect until a bond with sufficient sureties and in a sufficient amount is given in its place, or the time in which to give the bond has expired, whichever occurs first;" in latter case, "the original bond remains in full force and effect for all liabilities incurred before . . . expiration"].)

Rosen claims he remains aggrieved because the trial court stated at the November 19, 2011, hearing on the plaintiffs' motion for the release their deposit that the funds Rosen had already seized "fully satisfy the amount of judgment." He asserts this remark "threatens to preclude" him "from recovering" the additional costs and attorney fees he incurred in connection with challenging the amount of the plaintiffs' deposit and opposing their motion for release of the deposit. Not so.

The trial court's "full satisfaction" remark is not tantamount to an order granting satisfaction of judgment under the governing statute (see § 724.050), and plaintiffs never asked the trial court for such an order. (Cf. *McCall v. Four Star Music Co.* (1996) 51 Cal.App.4th 1394, 1398 [order granting satisfaction would be appealable].) Indeed, the remark was only part of a tentative decision. (See *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1121, fn. 3 ["Even though the order was entered in the minutes, it is not an appealable judgment, but merely a tentative decision or the basis for a judgment to be made."].) Rosen's counsel addressed the remark during argument on November 18, 2011, and asserted it was an error. The trial court acknowledged the error, and asked "[i]t's not payment in full, if you include postjudgment interest;

correct?” Plaintiffs’ counsel actually responded “[c]orrect.” The trial court’s November 28, 2011, written order then required \$3,025.80 to be withheld from plaintiffs’ deposit in order to account for postjudgment interest. This sequence of events demonstrates the trial court, and even plaintiffs’ counsel, viewed the levied funds, themselves, as *insufficient* to fully satisfy the fee and cost order.⁵ Accordingly, Rosen has not demonstrated that he remains aggrieved, in any sense, by the trial court’s November 28, 2011, written order.⁶

⁵ At oral argument, counsel for Rosen and counsel for Moreland both repeatedly mischaracterized the trial court’s “full satisfaction” comment, calling it a factual finding. It was no such thing. It was merely a statement appearing in a tentative decision that was discussed at argument and determined to be incorrect. No such statement appeared in the court’s written order. Whether Rosen is entitled to procure another writ of execution and to make an additional levy is not an issue before us. We note that on April 17, 2012, according to the trial court docket, the September 19, 2011, writ of execution was returned “partially satisfied.” The “partial” satisfaction notation is apparently due to the sheriff first applying the levied funds to the postjudgment interest Rosen had not sought in the writ, leaving seemingly insufficient funds to fully satisfy the principal amount of the fee and cost order. (*Lucky United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125, 139 [“Payment on a judgment is allocated first to accrued interest on the principal amount, and then to the principal.”].) However, the trial court withheld \$3,025.80 from plaintiffs’ deposit for postjudgment interest. Whether at that point, the fee and cost award was fully satisfied is not before us. We also hasten to add that “full satisfaction” of the trial court fee and cost award that was appealed and affirmed is comprised of payment of the amount of fees and costs awarded (the principal amount) and postjudgment interest on that principal amount. The fees and costs Rosen later incurred in challenging the amount of the deposit, and for which he is presently seeking an award in the trial court, are *not* part of the underlying fee and cost award that was appealed and affirmed, and any future award of these additional fees and costs has no bearing on whether the underlying award has been satisfied in full.

⁶ To the extent Rosen is asking this court to address whether he is entitled to the additional attorney fees and costs he seeks in connection with objecting to the amount of the plaintiffs’ deposit and opposing their motion for release of it, his request is patently premature. These issues are presently pending before the trial court. (See *Griset v. Fair Political Practices Commission* (2001) 25 Cal.4th 688, 696 [“A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment.”]; *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1226–1227 [“A court may not issue rulings on matters that are not ripe for review.”].)

DISPOSITION

The appeal is dismissed. The parties to bear their own costs on appeal.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.