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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

NADIA ALPAY,

Plaintiff and Appellant,

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. et al.,

Defendants and Respondents.

A137454

(Contra Costa County
Super. Ct. No. MSC1100807)

Nadia Alpay appeals a judgment entered after the trial court ruled against her in this action to quiet title and awarded attorney fees to defendants Novastar Mortgage, Inc. (Novastar) and Mortgage Electronic Registration Systems, Inc. (MERS).¹ She contends this judgment was improper because the trial court never set aside an earlier default judgment against defendants, that Novastar and MERS were not entitled to relief from the default because they were not injured, that the judgment was invalid because it failed to include a legal description of the property at issue, that the court improperly awarded the property to a third party, and that the trial court erred in awarding attorney fees. We shall affirm the judgment.

¹ Cal-Western Reconveyance Corporation (Cal-Western) was also named as a defendant in this action. It appears that Cal-Western later filed a declaration of nonmonetary status agreeing to be bound by any nonmonetary judgment imposed by the court. The complaint also included Doe defendants; Alpay later filed an amendment to the complaint substituting the name of Deutsche Bank National Trust Company for Doe 1. The record does not show that this amendment was served on Deutsche Bank National Trust Company.

I. BACKGROUND

Alpay obtained a loan from Novastar in 2006 to refinance the purchase of real property located at 3753 Painted Pony Road, El Sobrante, California (the property), and executed a promissory note and deed of trust secured by the property. The deed of trust described MERS as “a nominee for [Novastar] and [Novastar’s] successors and assigns,” and named MERS as the beneficiary under the security instrument.

Alpay defaulted on her loan, and a notice of default was recorded in 2009. The notice of default was executed by Cal-Western, which was described in the notice as either the original trustee, the duly appointed substituted trustee, or the agent for the trustee or beneficiary under the deed of trust.² On June 6, 2011, a document was recorded assigning MERS’s interest in the deed of trust to Deutsche Bank National Trust Company, as Trustee for Novastar Mortgage Funding Trust, Series 2006-6 (Deutsche Bank). The property was sold at a trustee’s sale on June 23, 2011, and Deutsche Bank took title to the property.

Meanwhile, plaintiff brought this action on May 2, 2011, alleging that as a result of defects in the foreclosure process, the foreclosure was illegal. She sought an order quieting title and showing plaintiff to be the owner of the property in fee simple, cancellation of the foreclosure documents, and monetary damages.³ MERS and Novastar did not answer the complaint, and their defaults were entered at Alpay’s request.

On October 17, 2011, plaintiff filed a request for a default judgment against MERS and Novastar, and the matter was set for a hearing on October 25, 2011. Novastar had noticed a hearing for the same date on its motion to expunge a lis pendens against the property. The trial court issued tentative rulings for both hearings. As to the motion to expunge the lis pendens, the tentative ruling stated, “Dropped from the calendar. Default

² A notice of trustee’s sale of the property was recorded on June 9, 2009, and a second notice of trustee’s sale was recorded on October 26, 2010. The reason for the delays in carrying out the trustee’s sale is not entirely clear from the record.

³ The complaint alleged four causes of action: quiet title, cancellation of foreclosure documents, abuse of process, and unfair business practices.

has been entered against defendants which has not been set aside.” As to the request for default judgment, the tentative ruling stated, “Plaintiff may proceed to judgment pursuant to [Code of Civil Procedure] 585 [pertaining to default judgments] without hearing.” On October 25, in the absence of opposition, the court adopted the tentative rulings as the orders of the court.

On the same date, Novastar and MERS brought a motion to vacate the defaults entered against them. The trial court denied the motion on December 13, 2011. Two days later, the court entered a default judgment against MERS and Novastar, awarding no monetary judgment but cancelling the documents clouding title to the property, specifically the notice of default, notices of trustee sale, and any trustee sale deed.

Novastar and MERS brought a motion on December 27, 2011 to vacate the default judgment and to set a date for an evidentiary hearing. They made the motion under Code of Civil Procedure⁴ section 473, subdivision (d), on the ground that the judgment was void. Novastar and MERS relied on the newly decided case of *Harbour Vista, LLC v. HSBC Mortgage Services Inc.* (2011) 201 Cal.App.4th 1496 (*Harbour Vista*), to argue that the judgment failed to comply with section 764.010, which prohibits default judgments in quiet title actions and requires the court to hear evidence of the plaintiff’s title and the defendants’ claims.

The trial court issued a tentative ruling on the motion to vacate the judgment and set a hearing date that stated, “Denied—there is no valid legal basis on which the court should grant the relief sought.” On February 27, 2012, after a hearing, the court reversed course and issued an order stating: “1. The tentative ruling is set aside. [¶] 2. This matter is set for an evidentiary hearing as requested by defendants pursuant to [Code of Civil Procedure] 760.010 [*sic*] on Friday, April 6, 2012”

Evidentiary hearings took place on several dates between April and August 2012. The trial court then entered judgment “confirming that title remains vested in [Deutsche

⁴ All undesignated statutory references are to the Code of Civil Procedure.

Bank],” and awarding contractual attorney fees and costs to Novastar and MERS as the prevailing parties under the note and the deed of trust.

II. DISCUSSION

A. Effect of Original Default Judgment

Plaintiff contends the original default judgment is still in effect, and therefore the court did not have authority to issue the second judgment against her. For their part, MERS and Novastar contend that either the trial court implicitly vacated the default judgment in its February 27, 2012 order, or that the default judgment was void on its face. The resolution of this issue involves the application of a statute to undisputed facts, and we review the question de novo. (*Groth Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 Cal.App.4th 60, 65.)

Plaintiff argues the trial court’s February 27, 2012 order setting aside its tentative ruling did not vacate the default judgment because it failed to satisfy the requirements of section 663a, which governs certain motions to set aside the judgment. Section 663a, subdivision (a) provides in part: “A party intending to make a motion to set aside and vacate a judgment, *as described in Section 663*, shall file with the clerk and serve upon the adverse party a notice of his or her intention, designating the grounds upon which the motion will be made, and specifying the particulars in which the legal basis for the decision is not consistent with or supported by the facts, or in which the judgment or decree is not consistent with the special verdict” (Italics added.) Subdivision (b) establishes time limits for the court to rule on such a motion and provides that the motion is not determined until an order ruling on the motion is either entered into the permanent minutes of the court or signed by the judge and filed with the clerk.⁵ Plaintiff contends

⁵ Under section 663a, subdivision (b), “the power of the court to rule on a motion to set aside and vacate a judgment shall expire 60 days from the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or 60 days after service upon the moving party by any party of written notice of entry of the judgment, whichever is earlier, or if that notice has not been given, then 60 days after filing of the first notice of intention to move to set aside and vacate the judgment. *If that motion is not determined within the 60-day period, or within that period, as extended, the effect*

the trial court did not rule on the motion to vacate the judgment within the statutory time period and that the motion was therefore denied by operation of law.

The problem with plaintiff's argument is that section 663a, and its procedural requirements, did not apply to the motions to vacate the first judgment. By its terms, section 663a applies only to motions brought under section 663. And section 663 does not apply to all motions to set aside a judgment; rather, it authorizes a court, upon motion, to set aside a judgment and enter another and different judgment on either of the following grounds: "1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts . . . [¶] [or] 2. A judgment or decree not consistent with or supported by the special verdict."

Defendant's motion, however, was not brought pursuant to section 663 on one of these two enumerated bases; rather, it was brought pursuant to section 473, subdivision (d) on the ground that the judgment was void. Section 473, subdivision (d), authorizes a court to "set aside any void judgment and order." A judgment is void when the court had no power to enter the default or the default judgment. (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 862 (*Heidary*)). It is well established that a void judgment is subject to attack at any time. (*Lee v. An* (2008) 168 Cal.App.4th 558, 563–564; *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1320; *Heidary, supra*, 99 Cal.App.4th at p. 862.) As a result, the motion and the trial court's power to rule on it was not subject to the time limits of section 663a.

We agree with defendants that the effect of the trial court's February 27, 2012 order was to set aside the default judgment. Judgment had been entered against defendants purporting to finally adjudicate the rights of the parties. Defendants contended in their motion that the effect of the judgment was to quiet title and that the

shall be a denial of the motion without further order of the court. A motion to set aside and vacate a judgment is not determined within the meaning of this section until an order ruling on the motion is (1) entered in the permanent minutes of the court, or (2) signed by the judge and filed with the clerk." (Italics added.) The record does not disclose whether or when the notice of entry of judgment was served on defendants.

judgment was void because under section 764.010, they were entitled to an evidentiary hearing before a judgment quieting title was entered against them. After first indicating in a tentative ruling that the motion was denied, the trial court set aside the tentative ruling and set the matter for an evidentiary hearing “as requested by defendants pursuant to [Code of Civil Procedure] section 760.010 [*sic*].” This was in apparent reference to section 764.010, which prohibits default judgments in actions to quiet title and requires the court to hear evidence of the defendant’s claims. Defendants were then allowed to appear and present evidence at the evidentiary hearing. The only reasonable conclusion from this course of events is that the trial court implicitly set aside the default judgment in order to allow an evidentiary hearing.⁶ (See *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1443 [deeming trial court to have implicitly vacated default judgments where it clearly intended dismissal of actions to have that effect].)

Moreover, we agree with defendants that the trial court was not authorized to enter the original default judgment. Section 764.010 is part of the chapter of the Code of Civil Procedure governing actions to quiet title. (§ 760.010 et seq.) It provides: “The court shall examine into and determine the plaintiff’s title against the claims of all the defendants. *The court shall not enter judgment by default but shall in all cases require evidence of plaintiff’s title and hear such evidence as may be offered respecting the claims of any of the defendants*, other than claims the validity of which is admitted by the plaintiff in the complaint. The court shall render judgment in accordance with the evidence and the law.” (Italics added.)

The court in *Harbour Vista* examined the effect of this statute in a procedural posture similar to that faced by the trial court here. A defendant in a quiet title action failed to answer the complaint, and the plaintiff took its default. (*Harbour Vista, supra*,

⁶ Defendants took the position below that the court’s February 27, 2012 order acted to vacate the original default judgment. Plaintiff contended the trial court had not set aside the default judgment, but appeared to agree that if a new judgment were issued, it would supersede the default judgment. The trial court did, of course, issue a new judgment. Even if we did not deem the February 27 order to implicitly vacate the default judgment, we would deem the later judgment to do so.

201 Cal.App.4th at p. 1500.) By the time the defendant appeared at a case management conference, the plaintiff had lodged its prove-up documents for a default judgment. (*Ibid.*) The defendant indicated it intended to file a motion to set aside the default, but on the same day as the conference, the trial court entered a default judgment quieting title in favor of the plaintiff. (*Id.* at pp. 1500–1501.) The trial court later denied the defendant’s motion to set aside the default and to vacate the judgment. (*Id.* at p. 1501.)

The Court of Appeal reversed the judgment of the trial court and held “the court *did not have the authority to enter a default judgment* in this situation.” (*Harbour Vista, supra*, 201 Cal.App.4th at p. 1500, italics added.) It noted that the statutory language, “[t]he court shall not enter judgment by default” was “unequivocal,” and went on: “Moreover, unlike the ordinary default prove-up, in which a defendant has no right to participate [citation], before entering *any* judgment on a quiet title cause of action the court must ‘in all cases’ ‘hear such evidence as may be offered respecting the claims of any of the defendants’ (§ 764.010). Although the statute does not spell out who offers this evidence among the three possible candidates—the plaintiff, the court, or the defendant—the only sensible alternative is the defendant. [Citation.]” (*Harbour Vista, supra*, 201 Cal.App.4th at p. 1502.) The court also concluded that the language of section 764.010 requiring the court to “examine into and determine the plaintiff’s title,” and to “hear such evidence as may be offered respecting the claims of any of the defendants,” required an open-court hearing. (*Id.* at pp. 1506–1508.) Accordingly, the court stated, “[i]t follows that [the defendant] should not have had to move to set aside the default judgment; the judgment should not have been entered.” (*Id.* at p. 1508.)

Following *Harbour Vista*, the court in *Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 947 (*Nickell*), agreed that “the unambiguous language of section 764.010 precludes a traditional prove-up in quiet title actions and imposes an absolute ban on a ‘judgment by default’ in such actions.”

Both *Harbour Vista* and *Nickell* disagreed with an earlier case, *Yeung v. Soos* (2004) 119 Cal.App.4th 576 (*Yeung*), upon which Alpay relies. *Yeung* concluded that section 764.010 does not prohibit default judgments in quiet title actions, but merely

requires a higher standard of evidence at the prove-up hearing. (*Id.* at pp. 580–581; *Harbour Vista, supra*, 201 Cal.App.4th at pp. 1502–1503; *Nickell, supra*, 206 Cal.App.4th at p. 947.) We agree with *Harbour Vista* and *Nickell* that the language of section 764.010 (“[t]he court shall not enter judgment by default . . .”) is unambiguous in prohibiting default judgments in actions to quiet title. The trial court therefore lacked authority to enter the default judgment, which resolved the quiet title cause of action by cancelling the documents that clouded title to the property. (*Harbour Vista, supra*, 201 Cal.App.4th at p. 1500.) Accordingly, the original default judgment entered in this case was void.⁷

Alpay attempts to avoid the rule of *Harbour Vista* on the ground that defendants here had the opportunity to contest the tentative ruling dropping the original November 2011 default prove-up hearing from the calendar, and that they had the opportunity to file evidence with the court in the form of affidavits and recorded instruments when seeking to set aside their defaults. *Harbour Vista*, however, holds unequivocally not only that default judgments are prohibited, but also that under section 764.010, “a quiet title judgment requires a hearing in open court.” (*Harbour Vista, supra*, 201 Cal.App.4th 1496, 1507.) No such hearing took place here. Rather, the court allowed Alpay to “proceed to judgment pursuant to [Code of Civil Procedure] 585 [relating to default judgments] without hearing.”

Alpay also tries to distinguish *Harbour Vista* on the ground that the defendant there appealed the default judgment; by failing to do the same, they argue, MERS and Novastar have lost their opportunity to contest its validity. However, since the trial court

⁷ Alpay relies on *Yeung* to argue that the judgment was not void. In *Yeung*, the defendant had moved to vacate a default judgment, but conceded that unless the judgment was void, his motion was untimely. (*Yeung, supra*, 119 Cal.App.4th at p. 581.) Having concluded section 764.010 did not prohibit default judgments (*ibid.*), the Court of Appeal held that although the trial court did not conduct an evidentiary hearing after the default, “the improper procedure did not deprive the trial court of the power to enter the judgment. The procedure was merely erroneous. The judgment is not void on this ground.” (*Id.* at p. 582.) As we have explained, we agree with *Harbour Vista* and *Nickell* that section 764.010 *does* bar default judgments in quiet title actions.

in effect granted their motion to vacate the judgment by its February 27, 2012 order, there was no need for Novastar and MERS to appeal the default judgment. Alpay's efforts to distinguish *Harbour Vista* fail.⁸

B. Injury to Defendants

Alpay contends MERS and Novastar were not entitled to move to vacate the default judgment because they did not establish they suffered any injury. According to Alpay, the default judgment merely cancelled instruments in which they no longer claimed any interest.

For this contention, Alpay relies on section 473, subdivision (d), which provides, "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, . . . and may, on motion of either party after notice to the other party, set aside any void judgment or order." She also relies on section 475, which provides in pertinent part, "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect the said party complaining or appealing sustained and suffered substantial injury There shall be no presumption that error is prejudicial, or that injury was done if error is shown."

Alpay fails to cite any evidence in the record to show that MERS and Novastar were not injured by the default, and has accordingly waived the point. (*Nickell, supra*, 206 Cal.App.4th at p. 947; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003.)

⁸ On March 4, 2014, MERS filed a request for judicial notice of an opinion of the Appellate Division of the Contra Costa County Superior Court in an unlawful detainer action by Deutsche Bank National Trust Company against Alpay, dated February 4, 2014. We deny the request.

Moreover, Alpay's legal argument is unconvincing. The portion of section 473, subdivision (d) that authorizes a court to set aside a judgment as void does *not* require that the party seeking such an order be injured. In any case, we reject the notion that a defendant that has incurred costs and attorney fees is not injured by a judgment against it.

C. Legal Description of Property

Alpay contends the judgment is void because it does not contain a legal description of the property. The second judgment provides in pertinent part, “[T]his Court hereby enters judgment denying plaintiff’s claim to title ownership of the property commonly known as 3753 Painted Pony Rd., El Sobrante, Ca. 94803. Judgment is hereby entered confirming that title remains vested in [Deutsche Bank], pursuant to the Trustee’s Deed Upon Sale recorded on 7/5/2011 in the Contra Costa Recorder’s Office as Document #2011-0131618-00.” The referenced trustee’s deed, in turn, describes the property as “LOT 121, AS SHOWN ON THE MAP OF SUBDIVISION 5039, FILED AUGUST 10, 1978, IN MAP BOOK 215, PAGE 27, CONTRA COSTA COUNTY RECORDS. [¶] The street address and other common designation, if any, of the real property described above is purported to be: [¶] 3753 PAINTED PONY ROAD [¶] EL SOBRANTE CA 94803.”

It is well established that “the description in a judgment affecting real property should be certain and specific, and that an impossible, wrong, or uncertain description, or no description at all, renders the judgment erroneous and void. [Citation.] . . . [T]he judgment may be aided by intendments and additional data drawn from the pleadings and other parts of the records, or even, in some cases, by extrinsic documentary evidence. We do not see how a judgment can be pronounced a nullity for uncertainty of description unless the court can see that nothing is described.” (*Newport v. Hatton* (1924) 195 Cal. 132, 156; see also *Daluiso v. Boone* (1969) 269 Cal.App.2d 253, 262.)

Alpay does not persuade us that the judgment is a nullity because “nothing is described.” The judgment identifies the street number, city, and state at which the property is located, and refers to a recorded trustee’s deed upon sale. That deed, which is part of the record, provided the same street address and described the property by its lot

number on a specified subdivision map, and described where the map was located in the Contra Costa County records. While it might have been preferable to include the full legal description in the judgment, the judgment provides enough information so that the property in question can be identified with certainty.

D. Judgment in Favor of Non-Party

The second judgment stated: “[T]his Court hereby enters judgment denying plaintiff’s claim to title ownership of the property Judgment is hereby entered confirming that title remains vested in [Deutsche Bank]” Alpay contends the judgment was improper because the trial court lacked authority to award the property to Deutsche Bank, which did not appear in this action.

The relevant procedural history is as follows: Alpay filed this action on May 2, 2011, and included Doe defendants. It appears that MERS’s interest in the deed of trust was not assigned to Deutsche Bank until several weeks after this action was filed, and Deutsche Bank did not take title to the property until June 23, 2011. Alpay filed an amendment to the complaint in September 2011 substituting the name of Deutsche Bank for Doe One. The record does not indicate that the amendment was served on Deutsche Bank, and Deutsche Bank made no appearance.

Alpay argues the judgment’s reference to Deutsche Bank runs afoul of the rule of *Schaefer v. Dinwiddie* (1919) 44 Cal.App. 405 (*Schaefer*). There, the plaintiff brought a quiet title action against the defendant, who cross-complained against the plaintiff and a second cross-defendant who had not been named in the original complaint. (*Id.* at pp. 405–406.) The record did not show that the second cross-defendant was served or filed an answer, but she appeared at trial with counsel. The trial court entered judgment against both the plaintiff and the cross-complainant, and in favor of the second cross-defendant, adjudging her the owner and in possession of the premises and quieting her title to the property against the other parties. (*Id.* at p. 406.) The Court of Appeal reversed the judgment. In addition to ruling the trial court had erred on the merits, the appellate court concluded that since the second cross-defendant had not filed any

pleading, she was without standing to obtain affirmative relief, and the trial court lacked jurisdiction to enter judgment establishing her title to the land. (*Id.* at p. 408.)

We are not persuaded that the judgment here, denying plaintiff’s claim to title and “confirming that title remains vested in [Deutsche Bank]” constituted “affirmative relief” for Deutsche Bank for purposes of *Schaefer*. Rather, the effect of the court’s rule was primarily to deny *Alpay*’s claim to the title of the property.

Moreover, as we have already discussed, section 764.010 requires the court, “in all cases,” to “hear such evidence as may be offered respecting the claims of any of the defendants,” and “render judgment in accordance with the evidence and the law.” This requires the court to hear the evidence even of defendants who have defaulted. (*Harbour Vista, supra*, 201 Cal.App.4th at p. 1504.) Although Deutsche Bank did not appear at the evidentiary hearing, the court received evidence of its interest in the property, and it was authorized to decide the case based upon that evidence.

Policy considerations support this result. Section 762.060, subdivision (b) requires the plaintiff to “name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property.” *Alpay* contends she did not name Deutsche Bank in her complaint because the sale had not yet occurred when she filed this action. However, it appears that she was already aware of Deutsche Bank’s interest in the property: the original March 3, 2009 notice of default directed her to contact “DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR [¶] NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2006-6 [¶] C/O CAL-WESTERN RECONVEYANCE CORPORATION.” In June of the same year, plaintiff filed an action in propria persona against Deutsche Bank, Novastar, and Cal-Western alleging the foreclosure against the property was unlawful and seeking a restraining order or preliminary injunction.⁹ The complaint in that action

⁹ MERS asked the trial court to transmit to this court a copy of this complaint, which was admitted as an exhibit at the evidentiary hearing. The appeals clerk of the Contra Costa County Superior Court has informed us that the clerk’s office was unable to locate the exhibits, and there was no record of them having been returned to the parties.

alleged that on June 1, 2009, a notice of trustee sale was executed naming Deutsche Bank as beneficiary.¹⁰ To allow a plaintiff to escape the judgment that an owner retains title to property by the simple expedient of failing to name or serve the owner would risk inviting abusive litigation tactics.

E. Forfeited Arguments

In an argument devoid of citation to either legal authority or the record, Alpay contends the trial court erred in awarding defendants their contractual attorney fees as the prevailing parties. “When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]” (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785; see also *Nickell, supra*, 206 Cal.App.4th at p. 947 [points not supported by evidence or authority are forfeited].)

In her reply brief, Alpay argues that the second judgment was incorrect on the merits because there had been an “obviously unauthorized trustee sale.” As a general matter, we do not consider arguments made for the first time in a reply brief. (*People v. Whitney* (2005) 129 Cal.App.4th 1287, 1298.) Moreover, Alpay fails to support her argument with citations to the record, and has accordingly forfeited it. (See *Nickell, supra*, 206 Cal.App.4th 934, 947.)

F. Request for Sanctions

In its respondent’s brief, Novastar asks us to award sanctions for a frivolous appeal. The request does not comply with California Rules of Court, rule 8.276, which requires a motion with a supporting declaration. The request is denied. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919; *FEI Enterprises, Inc. v. Yoon* (2011) 194 Cal.App.4th 790, 807.)

In its request for transmittal, MERS included a copy of the exhibit, and we have no reason to doubt its authenticity. In any case, it is not necessary to our resolution of this issue.

¹⁰ That action was dismissed without prejudice in August 2010.

III. DISPOSITION

The judgment is affirmed.

Rivera, J.

We concur:

Ruvolo, P.J.

Reardon, J.