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

MEHRDAD ELIE,
Plaintiff and Appellant,

v.

BHN INVESTMENTS, LLC, ET AL.,
Defendants and Respondents.

A145338

(Sonoma County
Super. Ct. No. SCV-251555)

Mehrdad Elie appeals from an order vacating a default judgment he had obtained against “Unknown Persons,” pursuant to the motion of respondents BHN Investments, LLC (BHN) and OPK Ranch, LLC (OPK) under Code of Civil Procedure section 663.¹ Elie argues that respondents lacked standing to proceed under section 663, the court exceeded its authority under the statute by making new factual findings, and the order violates his constitutional rights. We will reverse the order.

I. FACTS AND PROCEDURAL HISTORY

A. Elie’s Complaint

On April 26, 2012, Elie filed a “Verified Complaint to Establish Abandonment of Easement, To Quiet Title, and For Declaratory Relief” against JP Morgan Chase Bank NA (Chase) and “All Persons Unknown, Claiming Any Legal or Equitable Right, Title, Estate, Lien, or Interest in the Property Described in the Complaint Adverse to Plaintiff’s Title, or Any Cloud on Plaintiff’s Title Thereto” (All Persons Unknown).

¹ Except where otherwise indicated, all statutory references are to the Code of Civil Procedure.

In his complaint, Elie alleged that he owned certain real property on Saint Helena Road in Santa Rosa, Chase owned real property on Saint Helena Road with an assessor's parcel number (APN) of 028-270-008, and Elie's property was burdened with a purported easement in favor of Chase's property, as described in a recorded easement deed attached to the complaint. The complaint asserted common law and statutory claims for abandonment of the easement, quiet title, and declaratory relief.

Also on April 26, 2012, Elie filed a notice of lis pendens, indicating the existence of a claim affecting Elie's property (APN 028-270-005) and Chase's property (APN 028-270-008).

B. The First Judgment (Against Chase)

Elie filed a proof of service representing that the complaint and notice of lis pendens were duly served on Chase in May 2012. Chase did not timely answer the complaint, and its default was entered. Due to the nature of his claims, Elie was required to present evidence to obtain a default judgment at a hearing, which was held in October 2014.

On October 21, 2014, the court severed Elie's claims against All Persons Unknown and entered a default judgment against Chase as to each cause of action (First Judgment). The judgment was based on a "preponderance of the evidence presented at the [h]earing" and the fact that Chase, having defaulted, was deemed to have admitted all allegations in the complaint. The First Judgment provides that the easement was abandoned, terminated, and of no force and effect, and that the judgment "shall run with the land and be binding on Chase and all of its successors and assigns."

C. The Second Judgment (Against All Persons Unknown)

1. Service of All Persons Unknown By Publication

By ex parte application filed in November 2014, Elie sought leave to serve All Persons Unknown by publication pursuant to section 415.50 and section 763.010, subdivision (b), on the ground that Elie was unaware of their identities despite reasonably

diligent efforts to learn them.² Elie represented that he was aware only of Chase's claim on the easement.

In his declaration in support of the application, Elie stated: "I and others at my direction have made a diligent search and inquiry in an effort to identify any unknown persons claiming any legal or equitable right, title, estate, lien, or interest in my property and have been unable to surmise the identity of any such persons or parties other than JP Morgan Chase Bank (including its predecessors and successors in interest)," whose claims were resolved by the First Judgment. In addition, Elie averred: "At my direction others have performed title record searches of my property and neighboring properties in an effort to identify any potential claims of any legal or equitable right, title, estate, lien, or interest in my property held by unknown parties without success. . . . As a result, despite my diligent inquiry, I am unaware of any 'unknown persons' who claim an interest in my property as described in the complaint."

Similarly, Elie's attorney, Allonn E. Levy, declared that his staff conducted record and title searches on Elie's property and other neighboring properties to identify individuals or entities with potential claims, and he and Elie conducted a physical inspection of the property, but he was aware of no potential claimant other than Chase (and its predecessor and successors).

On November 20, 2014, the trial court granted Elie's request to serve All Persons Unknown by publication. Elie filed a proof of service by publication on December 31, 2014.

² "If upon affidavit it appears to the satisfaction of the court that the plaintiff has used reasonable diligence to ascertain the identity and residence of and to serve summons on the persons named as unknown defendants . . . the court shall order service of publication pursuant to Section 415.50 and the provisions of this article." (§ 763.010, subd. (b).) Subdivision (a) of section 415.50 provides: "A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article"

2. Default and Default Judgment Against All Persons Unknown

A default was entered against All Persons Unknown in February 2015.

On March 17, 2015, the court held a hearing and received evidence in support of Elie's request for entry of a default judgment, and entered judgment against All Persons Unknown (Second Judgment).

The Second Judgment provides that, as a result of their default, Chase and "Unknown Persons" were deemed to have admitted the allegations of the complaint.³ In addition, the court accepted the evidence introduced at the previous hearing on October 21, 2014. The allegations of the complaint having been proven to the court's satisfaction, judgment was entered in Elie's favor on all causes of action. The Second Judgment concludes that "Chase and the Unknown Persons have no right, title, estate, lien, or interest whatsoever in the Easement, or any part of it, adverse to Elie's title to Elie's Property," and decrees that "Elie's title to Elie's Property, and to each and every part of it, be forever quieted against any and all adverse claims of Chase and the Unknown Persons, as well as their successors and assigns be forever barred from asserting any claim whatsoever in or to the Easement, or any part of it, adverse to Elie." The Second Judgment runs with the land and is to be binding on "all Unknown Persons, and all of their successors and assigns."

D. Respondents' Motion to Set Aside The Judgment

On April 1, 2015, about two weeks after entry of the Second Judgment, respondents BHN and OPK (collectively, the LLCs) filed a motion to vacate the "judgment entered in this case on March 17, 2015" (that is, the Second Judgment) and enter a new judgment pursuant to section 663.

1. The LLCs' Motion

The LLCs asserted that they had claims to the easement that the Second Judgment had extinguished, and that, although those claims are of record and known to Elie, Elie

³ The Second Judgment uses the shorthand "Unknown Persons" rather than "All Persons Unknown." Both phrases refer to the same thing.

failed to name the LLCs in the litigation. The LLCs further argued that they had no notice of Elie's lawsuit because Elie did not record his lis pendens with the county. The LLCs claimed they were not bound by the Second Judgment, but requested the court to vacate the judgment "as to all Unknown Parties" and enter a new judgment that "name[s] only JP Morgan Chase" (akin to asking that the Second Judgment be vacated, leaving only the First Judgment).

In support of the motion, the LLCs submitted declarations and documents evincing the LLCs' interests in the easement. Jared Pickard averred that he was a "member and manager" of BHN, and BHN "owns a non-exclusive 60-foot wide right of way, granted by Plaintiff's predecessor, in Deed recorded September 30, 1971 in Book 2569 of Official Records, Page 552, Serial No. M-33652." Mark Pickard submitted a declaration averring that he was a "member and manager" of OPK, which owns the same right of way.⁴

The Pickards' declarations attached purported deeds recorded with Sonoma County. A Grant Deed, recorded on October 3, 2012, indicates that on October 2, 2012, Marilyn H. Johnson granted title to certain parcels of real property, including the easement, to Mark and Jared Pickard. A Quitclaim Deed, recorded on October 30, 2013, indicates that the Pickards quitclaimed their rights to these parcels, including the easement, to BHN. The parcels purportedly bear APNs 028-270-038 and 030-080-009. In addition, a Grant Deed, recorded on February 3, 2015, indicates that on January 28, 2015, Marilyn Johnson granted title to certain parcels to OPK; the legal description of one of the parcels indicates it includes a right to the easement.

The LLCs argued that no lis pendens giving notice of Elie's lawsuit was recorded on parcels APN 028-270-038 and APN 030-080-009. Furthermore, the deeds granting an interest in the easement to the Pickards, and from them to BHN, occurred before Elie and

⁴ The parties refer to the property interest both as a "right of way" and as an "easement." Although there can be a distinction between a right of way and an easement, we will follow the parties' lead in using these labels interchangeably.

his attorney signed declarations stating they had diligently investigated the identity of the owners of affected properties.

The LLCs also submitted evidence of communications between the LLCs and Elie, and their respective attorneys, before and around the time Elie obtained the default judgment against All Persons Unknown. Robert Quail, one of the LLCs' attorneys, averred that he learned in January 2015 that Elie had "filed an action relative to an easement across Mr. Elie's property." On March 10, 2015—a week *before* the hearing on Elie's request to enter a default judgment against All Persons Unknown—another of the LLCs' attorneys, Steven Butler, sent a letter by email and U.S. mail to Elie's attorney, Allonn Levy. Butler's letter referenced and attached an undated but recent letter from Mark Pickard to Elie. In Pickard's letter, Elie was advised that OPK had recently acquired APN 028-270-039, which had ingress and egress rights over Elie's parcel, and OPK wanted to make certain improvements to the easement. In Butler's March 10 letter, Elie's attorney was advised of Butler's position that the Pickards had a legal right of ingress and egress across Elie's parcel and the right to improve that easement. Butler also stated: "We know and understand that Mr. Elie was successful in litigation against Chase Bank in extinguishing the easement rights to one of the parcels in the area due to the taking of a default in litigation initiated by you. However, neither the Pickards, nor their predecessors, were parties to that litigation and their easement rights continue unimpeded."

On March 13, 2015, Quail had a telephone conversation with Levy, in which Quail asserted that the judgment (that is, the First Judgment) did not apply to the LLCs. On March 17, 2015, Quail sent an email to Levy, following up on an email he had sent on March 13. On March 18, 2015—the day after Elie obtained the Second Judgment against All Persons Unknown—Levy sent Quail an email that stated, in part: "When we spoke you had indicated that your position was that our Sonoma Easement case did not apply to your client. I disagreed"

2. Elie's Opposition

Elie opposed the LLCs' motion, arguing primarily that (1) the court had no jurisdiction under section 663 to make fact findings that differed from those made in the Second Judgment without the benefit of discovery or trial; (2) it was unclear whether the Second Judgment against All Persons Unknown bound the LLCs, but section 764.045 did not preclude such enforcement; (3) the LLCs cannot attack the judgment because they had notice of the lawsuit (noting Quail's averment that he became aware of the litigation in January 2015); and (4) the LLCs lacked standing to bring the section 663 motion, because their interest was too attenuated.

Elie also submitted evidence showing that he had recorded a notice of lis pendens with the Sonoma County Recorder in April 2012, nearly three years before entry of the Second Judgment, and before the transfers of the properties to the LLCs. (Although this lis pendens mentioned APN 028-270-005 and APN 028-270-008, it did not mention the LLCs' parcel numbers.) Further, Elie presented evidence that he recorded the First Judgment in November 2014 and the Second Judgment in April 2015.

In a footnote, Elie objected to "the moving declarations in their entirety on the basis of relevance, lack of foundation (with respect to the land transactions), hearsay, and Plaintiff's right to trial, including confrontation and cross-examination."

3. The LLCs' Reply

The LLCs' reply memorandum urged that the Second Judgment was not binding on the LLCs because, in violation of section 405.20, Elie's lis pendens did not contain the names of the LLCs or the predecessor owners of the easement or identify the LLCs' property as affected by the action. The reply also attached an unauthenticated map that purported to show the locations of certain properties.

4. Hearing

At the hearing, Elie argued, among other things, that the LLCs sought factual findings that cannot be made pursuant to section 663, particularly since the LLCs were "non-part[ies]." In addition, Elie argued that since the LLCs had notice of the litigation through their predecessor Johnson, who bought from Chase (the named party in the First

Judgment), and since the LLCs admitted that their counsel was aware of the litigation in January (before the default or the Second Judgment), “it seems that [] would at a minimum raise an estoppel question.”

The LLCs primarily contended that the evidence Elie had submitted (to obtain the order allowing service by publication), purporting to show diligence in ascertaining the identity of All Persons Unknown, was incorrect. Elie’s attorney rejoined that this was a factual question that could not be addressed under section 663.

Elie’s counsel added that he and his client had “not taken the position that the judgment does nor does not affect the other side,” they had not sought to enforce the judgment against the LLCs “at this point,” and counsel did not know whether Elie would or not.

The trial court took the matter under submission.

5. Trial Court’s Order

By written order filed on May 19, 2015, the court granted the “motion to vacate judgment and enter different judgment pursuant to CCP Section 663.” Although it is not clear what judgment the court was vacating or what new judgment it was entering, the grant of the motion suggests that the LLCs were awarded what they requested: the Second Judgment is vacated and replaced with a new judgment binding only Chase—in essence, only the First Judgment remains.

With respect to standing, the court stated: “[LLCs], who were not named in the action, have an immediate, pecuniary, and substantial interest in the judgment. Their easement, which crosses Plaintiff’s property, is currently being improved and is used for access to their property. If Plaintiff’s judgment extinguished moving parties’ easement, as the Plaintiff contends, moving parties rights are injuriously affected by the judgment.”

The court then turned to the merits: “Access to the Plaintiff [and the LLCs] properties is from Saint Helena Road. (See Exhibit “A” to [the LLCs’] Reply.) When Plaintiff’s lis pendens was prepared and recorded, Plaintiff identified his own property (APN 028-270-005) and property owned by JP Morgan Chase and subsequently purchased by Johnson (APN 028-270-008) in that lis pendens. No other parcels, and

significantly not the parcel then owned by Johnson and subsequently owned by [the LLCs], were included in the lis pendens. The lis pendens that was filed and recorded does not contain the names of [the LLCs'] predecessor owner and does not contain a description of [the LLCs'] property. [¶] As a result, the judgment is not binding on [the LLCs]. The recorded lis pendens must contain the names of the parties to the action and must contain a description of the property affected by the action. CCP Section 405.20. Because the lis pendens did not contain the name of [the LLCs'] predecessor owner and did not contain a description of [the LLCs'] property, [the LLCs'] property is not affected by this action. Plaintiff instead appears to claim [the LLCs] fall within the group of “unknown persons”; this is contrary to due process. Allowing such a result would completely frustrate the purpose of recording a lis pendens.”

The court also overruled Elie's objections to the LLCs' declarations. This appeal followed.

III. DISCUSSION

Section 663 provides: “A judgment or decree, when based upon a decision by the court, . . . may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts”

Elie contends the court erred in granting the LLCs' section 663 motion because the court made new findings of fact, the LLCs lacked standing to bring the motion, and the court's order violated Elie's due process rights. We address standing first.

A. The LLCs had Standing to Seek Relief Under Section 663

As mentioned, section 663 provides that a “party aggrieved” may move the court to set aside a judgment. For these purposes, a movant—whether a party to the action or not—is an “aggrieved party” when its “ ‘rights or interests are injuriously affected by the judgment.’ ” (See *Tomassi v. Scarff* (2000) 85 Cal.App.4th 1053, 1057 (*Tomassi*)).

Thus, to have standing to bring a section 663 motion, the movant's interest “ ‘ ‘must be

immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment.” ’ ’ (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.)

In the matter before us, the court ruled that the LLCs had an immediate, pecuniary and substantial interest in the Second Judgment because “[the LLCs’] easement, which crosses [Elie’s] property,” was used for access to the LLCs’ property, and “[i]f [Elie’s] judgment extinguished [the LLCs’] easement, as [Elie] contends, [the LLCs’] rights are injuriously affected by the judgment.”

Substantial evidence supports the court’s conclusion. The Pickards’ declarations and the attached deeds indicated that the LLCs owned the easement on Elie’s property, which was the easement that the Second Judgment had deemed abandoned, terminated, and extinguished. The Second Judgment explicitly bound “Persons Unknown,” the shorthand for all persons unknown (that is, according to Elie’s declaration, anyone other than Chase) who might claim any right, title, estate, lien or interest in Elie’s property. As such, the LLCs were aggrieved by the Second Judgment.

Elie’s arguments to the contrary are unpersuasive. He argues that the LLCs’ evidence of their ownership of the easement was inadmissible, and the court erred in overruling his objections to the Pickards’ declarations on the grounds of relevance, hearsay, “lack of foundation,” and Elie’s “right to trial.” However, the Pickards’ statements that the LLCs owned the easement were obviously relevant to whether the LLCs were aggrieved by the extinguishment of that easement. And these statements, which the Pickards claimed to make from their own personal knowledge as members and managers of the LLCs, were neither hearsay nor wholly without foundation. Although the Pickards did not explicitly aver that the deeds attached to their declarations were true and correct copies of the originals recorded with Sonoma County, it was not an abuse of discretion for the court to conclude that, taken as a whole, the evidence was sufficient to meet the threshold for admissibility.

Next, Elie argues that the effect of the Second Judgment on the LLCs was too insubstantial for them to be aggrieved parties under section 663, based on *Tomassi*, *supra*, 85 Cal.App.4th at p. 1053. Elie’s reliance on *Tomassi* is misplaced.

In *Tomassi*, plaintiffs obtained a judgment against defendants. The defendants' insurer was not a party to the lawsuit, denied coverage, and declined to provide a defense, but nonetheless sought to vacate the judgment under section 663. The court held that the insurer was not sufficiently aggrieved by the judgment, because whether the insurer would be bound by the judgment would depend on whether there was coverage and whether the judgment had been procured by fraud or collusion, which would be determined in a separate coverage lawsuit that the defendants had filed. (*Tomassi, supra*, 85 Cal.App.4th at p. 1058.) Here, by contrast, the LLCs are not insurers who might be liable for a judgment entered against another party if that party later prevails against them in a separate lawsuit; they are directly and substantially affected by the judgment as reputed owners of the very easement to which the judgment quieted title. (See *id.* at pp. 1058–1059 & fn. 5.)

Elie further argues that the court's finding with respect to standing is inconsistent with another of its findings: the court found the LLCs have standing because their "rights are injuriously affected by the judgment" if the "judgment extinguished [the LLCs'] easement," but the court also found that the judgment "is not binding" on the LLCs.

When considered in context, the court's findings are not inconsistent. The court's conclusion in the first paragraph—that there is standing because the Second Judgment would extinguish the LLCs' easement—looked to the face of the judgment to ascertain if its enforcement would aggrieve the LLCs. The court's conclusion in the third paragraph of the order—that the Second Judgment is not binding on the LLCs because the lis pendens did not name them or their property—explained why the court concluded on the merits that the Second Judgment *erroneously* purported to bind the LLCs and had to be vacated. There is no inconsistency precluding the finding of standing.

Lastly, Elie urges that the LLCs have not shown they are aggrieved by the Second Judgment because the LLCs insist they are not bound by it for a different reason—they were not *unknown* to Elie (or at least should not have been unknown to him) and therefore they are not one of the "Persons Unknown" against whom the Second Judgment is entered. There is, indeed, an inconsistency in the LLCs' claim that they are not

“Persons Unknown” but they are nonetheless aggrieved by a judgment against “Persons Unknown,” and this conundrum is compounded by the fact that it is unclear whether they are arguing that they are not parties to the litigation, or they are parties but they were not properly served, or the order authorizing service by publication was improper because Elie knew or should have known of the LLCs’ claims. But none of this necessarily undermines a finding of standing, since the Second Judgment *purports* to extinguish the easement as to *all* persons claiming a right to Elie’s property, whether known (Chase) or unknown (anyone else).

B. Findings of Fact

Under section 663, the court may vacate a judgment if it reached an incorrect legal conclusion from the facts that were found by the trier of fact. (§ 663; *County of Alameda v. Carleson, supra*, 5 Cal.3d at p. 737.) However, section 663 does not authorize the court to make any factual findings that are new, different, or contrary to those that led to the original judgment. (*Glen Hill Farm, LLC v. California Horse Racing Bd.* (2010) 189 Cal.App.4th 1296, 1302 [in ruling on a motion under § 663, the court cannot change any finding of fact in any way]; *Knapp v. Newport Beach* (1960) 186 Cal.App.2d 669, 682 [§ 663 does not authorize court to make additional findings of fact]; *Moklofsky v. Moklofsky* (1947) 79 Cal.App.2d 259, 264 [court may not change findings of fact under § 663, as opposed to § 662].)

Here, the court’s section 663 order was based on the facts that “the parcels, and significantly not the parcel then owned by Johnson and subsequently owned by [the LLCs]” were not included in the lis pendens, and the lis pendens “does not contain the names of [the LLCs’] predecessor-owner and does not contain a description of [the LLCs’] property.” These facts—the LLCs’ ownership of the parcels, the parcels’ inclusion of the easement, the names of the predecessor owner and the parcel numbers, and the omission of the names and parcel numbers from the lis pendens—were not facts established by the Second Judgment. They therefore cannot support an order under section 663. Furthermore, the order’s implicit conclusion that the LLCs had not abandoned the easement (because otherwise the LLCs could not enforce their rights) is

contrary to the finding in the Second Judgment that all those claiming title (Chase and All Persons Unknown) had abandoned the easement.⁵

The LLCs contend that the only facts presented by the section 663 motion that were not already in the “court’s file” were the LLCs’ recorded deeds, which the trial court had to consider anyway to determine the threshold issue of standing. Once the court accepted those facts in the context of standing, they urge, the court needed only to turn to the record to determine whether the facts it had used to support the Second Judgment still did so.

The LLCs provide no authority for the proposition that evidence sufficient to establish standing can also be used to show that the judgment was incorrect for purposes of *section 663*, where that evidence was not before the court when it made its original decision. Furthermore, the question is not simply whether the section 663 motion is seeking to introduce new *evidence*, but whether the order is premised on new factual *findings*; because the court’s order was based on new factual findings, it was in excess of the court’s authority under section 663. (*Knapp, supra*, 186 Cal.App.2d at p. 682.) Elie does not establish any other basis on which to uphold the order.⁶

⁵ Elie also points to the part of the order in which the court asserts that including the LLCs “ ‘within the group of ‘unknown persons’ ” would be “contrary to due process.” Elie contends this statement is inconsistent with the Second Judgment’s implicit determination that “Unknown Persons” had been properly served by publication. It seems more likely that the court’s statement reflects the idea that the LLCs’ due process rights would be violated if they were deemed “Unknown Persons,” or if they were deemed to have been served pursuant to the publication addressed to “Unknown Persons,” since they were actually known or should have been known to Elie. We do not consider the matter further, since we reverse on other grounds.

⁶ Under section 473, a default and default judgment may be set aside. Judgments may be vacated and factual findings may be changed under sections 657 and 662. In some instances, a court may have inherent authority to vacate a judgment that is void on its face. To the extent the LLCs simply sought a determination that the Second Judgment did not apply to them because they were “known” by Elie to have a claim, section 1060 provides for a declaratory relief action by complaint or cross-complaint. But the LLCs did not rely on any of these alternatives in the trial court, and they have not shown that they complied with the procedural prerequisites for relief under the cited statutes. We

The order vacating the judgment and entering a new judgment under section 663 is reversed, because it is based on new factual findings. Since we reverse the order on this ground, we need not and do not address Elie's claim that the order violated his constitutional rights.

III. DISPOSITION

The order is reversed.

express no opinion on whether the LLCs may be entitled to relief under any of these theories, as a party or as an intervenor.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A145338)