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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

HOWARD KIWATA, as Trustee, etc.,

Plaintiff and Respondent,

v.

RICHARD KIWATA, Individually and as
Trustee, etc.,

Defendant and Appellant.

A147002, A147459

(San Francisco City and County
Super. Ct. No. CGC-14-542957)

After Richard Kiwata recorded deeds purportedly transferring trust property to himself, Howard Kiwata, his brother, sued to quiet title and for a declaration of ownership. The trial court granted relief and awarded attorney fees against Richard. We affirm the judgment, but reverse the fee award as the trust documents do not support a contractual fee award.

BACKGROUND

Years ago, Richard and Howard’s parents, the Kiwatas, and their aunt and uncle, the Hironakas, acquired property in San Francisco on Collins Street. Each couple initially had a one-half interest in the property.

The Kiwatas transferred their interest into the Kiwata Family Trust, of which Richard became the trustee.

The Hironakas first transferred their interest into the Hironaka Revocable Trust and then, in late 2008 after the death of one of the Hironakas, partly into the Hironaka Family Trust (65.41 percent of the one-half interest) and partly into the Yoshiko

Hironaka Surviving Spouse's Trust (34.59 percent of the one-half interest). Over several years, ending in May 2013, a series of deeds resulted in absorption of the survivor trust's interest into the family trust, such that the Hironaka Family Trust eventually owned all of the one-half interest. Upon the death of both Hironakas, Howard became the trustee of the Hironaka Family Trust, with Richard as successor trustee if Howard can no longer perform trustee duties.

In the meantime, earlier in 2013, Richard recorded two deeds. The first, recorded in February and executed by Richard as trustee, purported to transfer the Kiwata Family Trust's interest in the Collins Street property to the Richard Kiwata Family Trust. However, at his deposition, Richard conceded he never actually created the Richard Kiwata Family Trust. The second deed, recorded in March and executed by Richard as supposed cotrustee, purported to transfer 37.5 percent of the Collins Street property from the Hironaka Revocable Trust to Richard, individually. However, as just described, the Hironaka Revocable Trust by then had no interest in the property (the interest having been transferred in 2008 to the Hironaka Family Trust and Yoshiko Hironaka Surviving Spouse's Trust). Further, according to Howard's trial testimony and the trust documents, Richard was never a trustee of any Hironaka trust.

On December 1, 2014, Howard, as trustee of the Hironaka Family Trust, sued Richard, individually and as trustee of the (nonexistent) Richard Kiwata Family Trust. Howard's verified complaint sought to quiet title to the Collins Street property with a court determination that Richard had no right, title, or interest in the property. Richard's verified answer claimed both transfers were proper, as he was trustee of the Kiwata Family Trust and the Hironakas wished to transfer their interest in the Collins Street property to him.

The case proceeded to trial. Howard presented his evidence, as described above, that both purported transfers were improper and/or legally ineffective. Richard never appeared (despite having been given proper notice).

Howard asked the court to declare both of the deeds Richard had prepared void, in that, as to the February 2013 deed, the Richard Kiwata Family Trust did not exist at all,

and, as to the March 2013 deed, the supposed transferring trust, the Hironaka Revocable Trust, no longer existed and Richard had no power to act for that trust in any event.

The trial court entered judgment that the Collins Street property was “properly vested,” at least at present, as follows: (1) Howard, as trustee of the Hironaka Family Trust, held an undivided one-half interest; and (2) Richard, as trustee of the Kiwata Family Trust, held an undivided one-half interest. It further stated Richard Kiwata, individually, owned no portion of the property. The judgment made no mention of what possible future beneficial interests any person might someday have in the trusts or the property. Finally, the judgment declared Howard the prevailing party for purposes of an award of costs and attorney fees.

Howard filed a memorandum claiming \$4,908.88 in costs and a motion seeking \$22,630 in attorney fees.

Howard pointed to a portion of the Hironaka Revocable Trust as authorizing attorney fees. Though that initial trust no longer existed, it and the later surviving spouse and family trusts derived from the same master founding document. A second amendment to the surviving spouse trust, dated 2010, had added to the master document a no contest clause, prohibiting pleadings and actions without probable cause against the trusts that, among many things, challenge the characterization of property, challenge actions of Howard or any other trustee, challenge the disposition of the Collins Street property, or arise from Richard claiming ownership of the property. The clause further provides that if Richard “without probable cause makes any claim, or any contest as defined above, or otherwise does any of the actions described above, then at the trustee’s discretion, the trustee may charge all attorneys’ fees and other legal expenses in defending any of the actions just described against the gift to” Richard.

Richard, despite his absence from trial, reappeared and objected to the fee motion. The trial court ruled for Howard and ordered Richard to immediately pay Howard, as trustee of the Hironaka Family Trust, the full amount of costs and fees sought.

Richard appeals from both the judgment (case No. A147002) and the cost and fee award (case No. A147459). We consolidated the two appeals for decision.

DISCUSSION

Judgment

Given Richard’s failure to appear at trial, he is, at best, entitled to raise only pure legal issues on appeal from the judgment. (See *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166–167 [failure to appear at trial does not necessarily cut off right to appeal purely legal issues]; *JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.)

Richard contends the judgment should be reversed because he never made a “contest” related to the Hironaka Family Trust. He fails to explain, however, how the relevance of whether he made a “contest” goes to the merits of the judgment. Nor do we perceive any relevance. Further, whether Richard made a “contest” may have entailed factual issues for the trial court to decide based on whatever evidence Richard might have provided. As he did not appear, that is not an issue he can properly raise on appeal.

In any case, given the record before us, we see no legal or factual problems with the trial court’s judgment. Clearly, Richard’s purported 2013 transfers of interests in the Collins Street property were ineffective given that the Richard Kiwata Family Trust (to which he purportedly transferred an interest) never existed and the Hironaka Revocable Trust (from which he purportedly transferred an interest) no longer existed. It is also clear that Richard, himself, has no current, personal ownership interest in the property.

Cost and Attorney Fee Award

Prevailing Party

Richard takes issue with the trial court’s determination that Howard was the prevailing party, both in connection with his challenge to the judgment and to the attorney fee award. The prevailing party determination does not relate in any way to whether the judgment was proper, but it does bear on whether costs and fees were proper.

When “any party recovers other than monetary relief . . . , the ‘prevailing party’ shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides” (Code Civ. Proc., § 1032, subd. (a)(4).) The “party

prevailing on [a] contract shall be the party who recovered a greater relief in the action on the contract.” (Civ. Code, § 1717, subd. (b)(1).) We review a prevailing party determination for an abuse of discretion. (*City of Santa Maria v. Adam* (2016) 248 Cal.App.4th 504, 516; *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894 (*Blickman Turkus, LP*).

Howard filed suit to, in essence, void Richard’s self-dealing and obtain a declaration that Richard has no individual right, title, or interest in the Collins Street property. Howard unequivocally succeeded in these goals. While Richard maintains Howard was actually seeking to gain 100 percent of the property, nowhere does the complaint claim a 100 percent interest. Rather, it alleges an ownership claim by the Hironaka Family Trust and seeks a declaration that Richard, as an individual, has zero interest. While the complaint does assert—erroneously—that the “Kiwata Family Trust never held any interest in the property,” the trial court acted well within its discretion in concluding Howard’s goal was not 100 percent ownership, but a proper determination of ownership to the exclusion of Richard, personally. Furthermore, by the time of trial, it was entirely clear that Howard was not seeking 100 percent ownership, and the trial focused on the invalidity of Richard’s purported transfers.

Fee Award

In addition to the prevailing party issue, Richard contends, as to the fee award, that (1) he did not have proper notice of the basis for fees, because the notice of motion mentioned the revocable trust, not the later trusts; and (2) he did not violate the no contest clause, because he never filed a “pleading” (despite his answer) and his answer was supported by probable cause because it only asserted his true interests in the property (which, as the trial court ruled, is not true). We agree the no contest clause does not provide a basis for fees, but for a different reason than advanced by Richard.

Whether there is a legal basis for a fee award is a question of law we review *de novo*. (*Blickman Turkus, LP, supra*, 162 Cal.App.4th at p. 894.) It is also a question this court can raise on its own initiative, as it does not turn on facts that were not first

presented to a lower court. (See *Bocanegra v. Jakubowski* (2015) 241 Cal.App.4th 848, 857 [new issues of law may be addressed]; see Gov. Code, § 68081.)

A “ ‘[n]o contest clause’ means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.’ ” (Prob. Code, § 21310, subd. (c).) Although no contest clauses that penalize beneficiaries are permitted in California, there are now significant limits on when enforcement is possible.

“[Probate Code s]ection 21311, subdivision (a), of the current law provides in full as follows: ‘A no contest clause shall *only* be enforced against the following types of contests: [¶] (1) A direct contest that is brought without probable cause. [¶] (2) A pleading to challenge a transfer of property on the grounds that it was not the transferor’s property at the time of the transfer. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application. [¶] (3) The filing of a creditor’s claim or prosecution of an action based on it. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.’ [¶] The effect of this statute is to make the trust’s no contest clauses unenforceable unless the beneficiaries’ proposed action is covered by one of the three specified categories of contest.” (*Donkin v. Donkin* (2013) 58 Cal.4th 412, 430.)

We need not decide the extent to which the no contest clause in the Hironaka trusts is valid, enforceable, or, as the parties’ dispute, applicable against Richard here. Even assuming the clause applies, its provisions do not authorize an attorney fee award in the present action.

As recited, the no contest clause prohibits pleadings and actions without probable cause against the trust that, among many things, challenge the characterization of property, challenge actions of Howard or any other trustee, challenge the disposition of the Collins Street property, or arise from Richard claiming ownership of the property. It further provides that if Richard “without probable cause makes any claim, or any contest as defined above, or otherwise does any of the actions described above, then at the trustee’s discretion, *the trustee may charge all attorneys’ fees and other legal expenses in*

defending any of the actions just described *against the gift to* Richard. (Italics added.) The clause, thus, allows the *trustee*, currently Howard, to discretionarily diminish any *gift* to Richard. It does not authorize an award of attorney fees in a court proceeding, let alone, authorize an immediate fee award against Richard individually. In short, the no contest clause is not the equivalent of a contractual attorney fees provision, and the fee award purportedly based on it cannot stand.

DISPOSITION

The judgment is affirmed except as to the award of attorney fees, which is reversed. The parties shall bear their own costs on appeal.

Banke, J.

We concur:

Humes, P.J.

Margulies, J.