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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of SHANNON
ROZA-MIA and DARYN O'DELL
DAVIS.

SHANNON ROZA-MIA DAVIS,

Respondent,

v.

DARYN O'DELL DAVIS,

Appellant.

D059601

(Super. Ct. No. DN143630)

APPEAL from an order of the Superior Court of San Diego County, Gregory W. Pollack, Judge. Dismissed.

Daryn O'Dell Davis appeals the order denying his motion to vacate the default judgment Shannon Roza-Mia Davis obtained against him in this marital dissolution proceeding. Daryn contends that he was never served with the summons or the dissolution petition and that Shannon obtained the default judgment by means of fraud.

We have no jurisdiction to consider Daryn's claims of error, however, because his notice of appeal was untimely, and therefore we dismiss his appeal.

BACKGROUND

Shannon and Daryn married in 1997 and separated in 2006. Shannon petitioned for dissolution of the marriage on October 6, 2006. A copy of the petition and a summons were served on Daryn by certified mail on January 22, 2007. The proof of service filed with the family court attached a postal form signed by Daryn. Daryn never filed a response to the petition.

On January 3, 2008, Shannon requested entry of a default judgment against Daryn. The clerk entered Daryn's default, and the court entered a judgment dissolving the marriage; dividing the parties' property; and incorporating prior orders regarding custody, visitation and support. The clerk mailed notice of entry of judgment to Daryn at the address at which he had been served with the summons and petition, but the notice was returned marked "Return to Sender," "Attempted – Not Known" and "Unable to Forward."

On June 10, 2010, Daryn filed a motion to vacate the judgment on the grounds that he had never been served with the summons and petition and that Shannon had obtained the judgment by fraud. (See Code Civ. Proc., § 473, subd. (d); Fam. Code, § 2122, subd. (a).) The family court held an evidentiary hearing and denied the motion by written order filed December 9, 2010. Daryn was personally served with a copy of the order on December 16, 2010.

Daryn filed a motion for reconsideration of the order denying his motion to vacate the judgment on December 23, 2010. (See Code Civ. Proc., § 1008, subd. (a).) The family court held another evidentiary hearing and denied the motion by written order filed March 14, 2011. A copy of the order was served on Daryn by mail on March 16, 2011.

On March 30, 2011, Daryn filed his notice of appeal.

DISCUSSION

In processing this appeal, we discovered the appellate record was inadequate to allow us to evaluate Daryn's claims of error. Daryn, who was representing himself when he designated the record on appeal, did not include in the record the judgment, his motion to vacate the judgment, the order denying that motion, and other important documents. We therefore requested the family court file and, on our own motion, hereby augment the record to include the file. (Cal. Rules of Court, rule 8.155(a)(1)(A); see, e.g., *Maddox v. City of Costa Mesa* (2011) 193 Cal.App.4th 1098, 1103 [augmenting record to include judgment]; *McCarthy v. Mobile Cranes, Inc.* (1962) 199 Cal.App.2d 500, 501-503 [ordering clerk's file sent up when appellant provided inadequate record].) We also had a concern about the timeliness of Daryn's notice of appeal and solicited supplemental briefs on that issue. (See Gov. Code, § 68081.) Daryn retained counsel and filed a supplemental brief, but Shannon has not filed any briefs in this court. Having reviewed the family court file and considered Daryn's supplemental brief, we conclude we have no jurisdiction to decide the appeal on the merits because Daryn did not timely file his notice of appeal.

There are two requirements for appellate jurisdiction: (1) an appealable order or judgment (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696) and (2) a timely notice of appeal (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674). Daryn satisfied the first requirement: an appealable order. An order denying a motion to vacate a judgment as void for lack of service of process is appealable (*Carr v. Kamins* (2007) 151 Cal.App.4th 929, 933-934), as is an order denying a motion to set aside a judgment in a marital dissolution proceeding on the ground of actual fraud (see *In re Marriage of Varner* (1997) 55 Cal.App.4th 128 [treating order denying Fam. Code, § 2122 motion as appealable]). As we shall explain, however, Daryn did not meet the second requirement of appellate jurisdiction: a timely notice of appeal.

Generally, a notice of appeal must be filed within the earlier of (1) 60 days after service of either a notice of entry of the judgment or order or a file-stamped copy of the judgment or order, or (2) 180 days after entry of the judgment or order. (Cal. Rules of Court, rule 8.104(a), (e); see *Kimball Avenue v. Franco* (2008) 162 Cal.App.4th 1224, 1228; *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 107.) Here, Daryn was personally served with a copy of the order denying his motion to vacate the judgment on December 16, 2010. Under the generally applicable rule, Daryn therefore had until February 14, 2011, to file a notice of appeal from the order. (Cal. Rules of Court, rule 8.104(a)(2).) He missed that deadline by more than a month, because he did not file the notice until March 30, 2011.

The time to appeal may be extended where, as here, a party files a motion to reconsider an appealable order under Code of Civil Procedure section 1008,

subdivision (a). (Cal. Rules of Court, rule 8.108(e).) As long as the reconsideration motion is "valid," the time to appeal is extended until the *earliest* of (1) 30 days after service of an order denying the reconsideration motion or a notice of entry of that order; (2) 90 days after the reconsideration motion was filed; or (3) 180 days after entry of the appealable order. (*Ibid.*; see *Branner v. Regents of University of California* (2009) 175 Cal.App.4th 1043, 1047 [to be "valid," motion need only comply with procedural requirements; it need not be substantively meritorious].) Even if we assume Daryn's motion for reconsideration was "valid," he did not file his notice of appeal within 90 days of the date he filed the motion. (Cal. Rules of Court, rule 8.108(e)(2).) Daryn moved for reconsideration on December 23, 2010, but he did not file his notice of appeal until March 30, 2011 — seven days after the 90-day period had expired on March 23, 2011.

In his supplemental brief, Daryn acknowledges he did not meet the deadline prescribed by rule 8.108(e)(2) of the California Rules of Court for appealing the order denying his motion to vacate the judgment, but contends his appeal was timely if deemed taken from the order denying his motion for reconsideration. "The majority of courts addressing the issue," however, have "conclude[d] an order denying a motion for reconsideration is not appealable, even when based on new facts or law." (*Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576-1577; accord, *Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 158-160; *Branner v. Regents of University of California* (2009) 175 Cal.App.4th 1043, 1050; *Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1458-1459.) Daryn invites us not to follow the majority of cases because of "the unique and egregious facts of this case and substantial denial of his due process rights."

In light of the Legislature's recent codification of the holding of these cases (see Code Civ. Proc., § 1008, subd. (g) ["An order denying a motion for reconsideration made pursuant to subdivision (a) is not separately appealable."]; *Powell*, at p. 1577 [noting Code Civ. Proc., § 1008, subd. (g) was effective Jan. 1, 2012]), we decline the invitation.

At oral argument, Daryn's counsel cited *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473 (*Freeman*) in support of the argument that the order denying Daryn's motion for reconsideration was appealable. In *Freeman*, the defendant appealed an order denying a petition to compel arbitration and a subsequent order denying a motion to reconsider that order. The California Supreme Court stated the order denying the motion for reconsideration was appealable because the motion "was made in part upon new grounds." (*Id.* at p. 477, fn. 2.) *Freeman* is not controlling for several reasons.

First, in *Freeman, supra*, 14 Cal.3d 473, the Supreme Court did not analyze the issue of the appealability of an order denying a motion for reconsideration; and it is not clear the statement in footnote 2 was necessary to the decision, because the defendant had also appealed the original order denying its petition to compel arbitration, which was appealable (Code Civ. Proc., § 1294, subd. (a)). Second, although the Supreme Court has not overruled or disapproved its prior statement in *Freeman*, it has recognized "a split of authority on the appealability of an order denying reconsideration." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140, fn. 5.) As explained in the text, the majority view, recently codified by the Legislature, is that orders denying reconsideration motions are not appealable. Third and finally, even if we were to follow the broader view that an order denying a motion for reconsideration is appealable if the moving party presented

new grounds in support of the motion, we would still lack jurisdiction because Daryn's motion for reconsideration presented no *new* facts or law; it presented only *additional* facts that were available and could have been presented by Daryn when he initially moved to vacate the judgment. (See *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, 1633 [declining to review order denying motion for reconsideration that presented no new facts or law].)

Daryn alternatively requests that if we hold the order denying his reconsideration motion is not appealable, as we do, we deem his appeal to be a petition for writ of mandate challenging the order denying his motion to vacate the judgment. He cites no authority in support of this request, however. Indeed, the law is to the contrary. Relief by writ of mandate should be granted only if the petitioner has no "plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086; see, e.g., *Tevis v. City & County of San Francisco* (1954) 43 Cal.2d 190, 198; *In re Marriage of Patscheck* (1986) 180 Cal.App.3d 800, 804.) A remedy by appeal is generally deemed adequate (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 112-113), and a writ of mandate "will not issue if the petitioner had a right of appeal from the order or judgment in question and permitted the time to lapse without perfecting an appeal" (*Simmons v. Superior Court* (1959) 52 Cal.2d 373, 375; see also *In re Marriage of Patscheck*, at p. 804 ["the remedy by appeal is not made inadequate by a party's having neglected to submit his notice of appeal for filing within the time allowed"]). We may not ignore this rule based on "the unique and egregious facts of this case," as Daryn urges us to do, because the "underlying facts cannot provide a basis for allowing use of an extraordinary

writ to review an appealable judgment or order after the time for an appeal has expired"; if they could, "a writ would be allowed whenever the appellate court disagrees with the result reached by the lower court." (*Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 954-955.) Hence, because the order denying Daryn's motion to vacate the judgment was appealable (see p. 4, *ante*) but Daryn did not appeal that order within the time allowed, we have no power to treat his appeal as a writ petition and thereby review the order denying his motion to vacate the judgment. (*In re Marriage of Patscheck*, at p. 804; *Taper v. City of Long Beach* (1982) 129 Cal.App.3d 590, 606-607.)

In conclusion, although the law prefers resolution of cases on the merits rather than by default (e.g., *Malibu Committee for Incorporation v. Board of Supervisors* (1990) 222 Cal.App.3d 397, 408) and the result in this case may be harsh, the fact remains that Daryn did not file his notice of appeal within the applicable time limit. "'Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.'" (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113; see *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 659 [no jurisdiction to review appealable order when notice of appeal was filed more than 90 days after reconsideration motion was filed].) Accordingly, we lack jurisdiction and must dismiss Daryn's appeal.

DISPOSITION

The appeal is dismissed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.