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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LON BIKE et al.,

Cross-complainants and Appellants,

v.

MITCHELL S. WAGNER,

Cross-defendant and Respondent.

E053788

(Super.Ct.No. RIC398759)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Gordon R. Burkhart, Judge. (Retired judge of the Riverside Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Gary J. Bryant for Cross-complainants and Appellants.

Dabney Finch for Cross-defendant and Respondent.

I. INTRODUCTION

This appeal follows an earlier appeal and opinion in this action. (*Wagner v. Bike* (Dec. 17, 2009, E046447) [nonpub. opn.].)¹ On this appeal, appellants and cross-complainants, Lon and Sandra Bike (the Bikes) appeal a May 19, 2011, order denying their motion to set aside a judgment issued on June 18, 2008, and entered on September 22, 2008, in favor of respondent Mitchell Wagner and his wife, Mrs. Wagner (the Wagners) on the Bikes' cross-complaint against the Wagners.

The Bikes claim the judgment is void and subject to being set aside at any time. As we explain, the judgment is not void; it was at most voidable, and the Bikes are precluded by principles of estoppel, disfavor of collateral attack, and res judicata from setting it aside by their April-May 2011 motion. We therefore affirm the order denying the Bikes' motion to set aside the judgment.

II. BACKGROUND

In 2003, the Bikes and the Wagners lived on adjoining five-acre parcels in the unincorporated equestrian community of La Cresta. The Wagner parcel was improved with a single-family home which the Wagners purchased and moved into in 1997; the Bike parcel was unimproved. Around February 2003, the Bikes moved several structures onto their property, including a 260-square-foot "fifth wheel," a construction trailer, and

¹ On our own motion, we take judicial notice of our opinion on the prior appeal. (Evid. Code, §§ 452, subd. (d), 459.)

four corrugated metal walk-in storage containers, and began using the fifth wheel as their principal residence.

In August 2003, the Wagners filed a complaint against the Bikes, alleging that the structures on the Bike property constituted private nuisances to the Wagners because they interfered with the Wagners' "quiet enjoyment" of their property and violated applicable land use ordinances and the recorded covenants, conditions, and restrictions (CC&R's) of the La Cresta Property Owners Association (the LCPOA). The Wagners sought compensatory and punitive damages, together with an injunction removing the structures and restraining the Bikes from planting trees or other foliage to obstruct the easterly view from the Wagner property toward Lake Skinner. The Wagners also sued the LCPOA and Mr. Bike in his capacity as chairman of the architectural committee of the LCPOA for breach of fiduciary duty, on the grounds the CC&R's were being selectively enforced and were not being enforced against the Bikes. Mr. Bike's defense was funded by the LCPOA's insurance carrier. Mrs. Bike was represented by separate counsel.²

In June 2006, the Bikes cross-complained against the Wagners, alleging their own cause of action for private nuisance. The Bikes alleged that a chain-link fence and an unscreened water tank on the Wagner property constituted private nuisances to the Bikes. The Bikes also alleged that "Mr. Wagner did on numerous occasions from the summer of 2003 through the summer of 2005 expose his genitalia in such close proximity and at

² The LCPOA cross-complained against the Bikes for equitable indemnity, and further claimed that the metal storage containers, but not the fifth wheel or the construction trailer, violated the CC&R's.

such intervals so that such conduct could not be accidental or negligent,” and that Mr. Wagner intentionally engaged in this conduct “for purposes of creating a nuisance and harassment.” For each alleged private nuisance, the Bikes sought injunctive relief, compensatory, and punitive damages.

The Wagners had a swimming pool in the middle of their five-acre parcel, at an elevation above the Bikes’ parcel and approximately 200 yards from where the Bikes’ fifth wheel was located. Mr. Wagner claimed he showered unclothed with his garden hose, next to his swimming pool and at the corner of his house, and was unaware the Bikes were able to see him. According to Mr. Wagner, the Bikes never said anything to him about being able to see him, but took photographs of him, apparently with a zoom lens while hiding in the bushes on their property. Mrs. Bike claimed Mr. Wagner’s nudity was intentional and became “increasingly lewd.”

In February 2008, the complaint and cross-complaints proceeded to phase one of a bifurcated trial before Judge Kenneth G. Ziebarth, sitting on assignment. In June 2007, the parties stipulated, and the court ordered, that the trial would proceed in as many as four phases. During phase one, all “legal and equitable” issues were to be determined by the court. These included whether any party violated any county land use ordinances and the governing documents of the LCPOA and whether any party was entitled to injunctive relief. Phases two through four of the trial were to be scheduled following the conclusion of phase one.

On the first day of phase one of the bifurcated trial, the court restated the bifurcation order, in pertinent part, as follows: “[A]ll of the initial issues that need to be resolved are either equitable or legal in nature, so that we are going to be proceeding without a jury to start with. [¶] There are some potential damage issues, depending on what the determinations of liability are, and if we reach that stage then of course the parties have a right to have a jury trial, so I will reserve that to all parties, *in the event that that occurs.*” (Italics added.)

In April 2008, the court issued a statement of intended decision on phase one of the trial. Regarding the nudity portion of the Bikes’ private nuisance claim, the court ruled: “The undisputed evidence indicates that Mr. Wagner discontinued the objectionable conduct as soon as he learned that the Bikes objected [to] his being nude next to his swimming pool. The law is clear that an injunction does not lie for past conduct that has been discontinued” Consistent with the bifurcation order, the court did not address whether the Bikes were entitled to damages for Mr. Wagner’s past conduct, that is, his nudity between 2003 and 2005.

The Wagners objected to the statement of intended decision on the ground it did not expressly rule on the Wagners’ cause of action for breach of fiduciary duty, and on the further ground that it referred to the preparation of “partial judgments.” In support of their objection to the preparation of “partial judgments,” the Wagners pointed out that when a factual issue is tried in a bifurcated action, the court must not prepare any proposed judgment until “the other issues are tried, except when . . . a separate judgment

may otherwise be properly entered at that time.” (Cal. Rules of Court, rule 3.1591(a).)³ Instead, the judge trying the final issue must prepare the proposed judgment. (Rule 3.1591(b).)

For their part, the Bikes objected to the statement of intended decision on the ground the court erroneously refused to enjoin Mr. Wagner from exposing himself on his property. The Bikes claimed they would have presented evidence that Mr. Wagner exposed himself on at least one occasion after they filed their cross-complaint in June 2006, but they did not do so because, during trial, the court indicated it was going to enjoin Mr. Wagner from further exposing himself before the Bikes had an opportunity to present such evidence.

The court sustained the Wagners’ objection to the issuance of “partial judgments,” and struck “any reference to the preparation of ‘partial judgments’” from its intended decision. All other objections were overruled; thus, in all other respects the court’s intended decision became its decision.

On June 18, 2008, counsel for Mr. Bike submitted and the court issued a judgment entitled, “Judgment as to All Claims Between Wagners and Bikes.” The judgment was entered on September 22, 2008. The judgment was not a “partial judgment,” and by its terms adjudicated all claims between the Wagners and the Bikes on their complaint and cross-complaint. The judgment provided that the Bikes shall “*take nothing and be*

³ All further references to rules are to the California Rules of Court. In their objections to the intended statement of decision, the Wagners cited former rule 232.5, which was superseded by rule 3.1591 effective January 1, 2007.

awarded no equitable relief by their cross-complaint” against the Wagners, deemed the Wagners the prevailing parties on the cross-complaint, and awarded the Wagners their reasonable attorney fees and costs incurred in defending the cross-complaint. Likewise, the judgment awarded the Wagners “nothing” on their complaint against the Bikes, deemed the Bikes the prevailing parties on the complaint, and awarded the Bikes their reasonable attorney fees and costs incurred in defending the complaint.

The Wagners timely appealed from the judgment. The Bikes did not appeal from the judgment.⁴ On December 17, 2009, this court issued its opinion in the Wagners’ appeal, reversing the judgment in favor of the Bikes on the Wagners’ complaint together with the postjudgment orders awarding the Bikes attorney fees and costs in defending the complaint.

Contrary to the trial court’s rulings, this court determined that the structures on the Bike property constituted nuisances per se and public nuisances as a matter of law because they violated applicable county land use ordinances. We also determined that the structures violated the CC&R’s, and remanded the matter for further proceedings.

On remand, the court was to first determine whether the structures “substantially and unreasonably interfered with the use and enjoyment of the Wagner property,” and

⁴ The register of actions indicates that on November 17, 2008, Mr. Bike appealed from “a certain judgment entered on September 22, 2008,” and dismissed the appeal in February 2009. At oral argument, counsel for the Bikes clarified and counsel for the Wagners did not dispute that the Bikes did not, in fact, appeal from the judgment entered on September 22, 2008. Instead, the Bikes appealed from the postjudgment order awarding the Wagners their attorney fees and costs, and dismissed that appeal in February 2009.

therefore constituted private nuisances to the Wagners. If the court made this determination, it was to then determine “the nature and extent of any damages” the Wagners were entitled to recover as a result of the private nuisances.⁵

In May 2010, following remand, the Wagners entered into a settlement agreement with the insurance carrier for the LCPOA. The insurer agreed to pay the Wagners \$700,000 within 30 days, in exchange for the Wagners’ dismissal of their complaint, including their award of attorney fees against the Bikes, and their release of the Bikes from all claims related to the “incidents described in the [a]ction,” including the Bikes’ attorney fee and cost liabilities to the Wagners.⁶ The agreement did not encompass the Bikes’ cross-complaint against the Wagners, though the cross-complaint had been fully and finally adjudicated in favor of the Wagners at the time the agreement was made.

In June 2010, the Wagners attempted to file a request for dismissal of the entire action, but the request was rejected because there were “open” cross-complaints in the

⁵ We noted that substantial evidence supported the trial court’s determination that the structures did not constitute private nuisances to the Wagners at the time of trial in February 2008, because they were then no longer visible from the Wagner property due to the growth of trees the Bikes planted on their property in 2004. Still, we directed the trial court to determine whether the Wagners were entitled to any damages for private nuisance before the structures were abated or obscured by the growth of trees, if the court determined the structures constituted private nuisances to the Wagners before their abatement. We also noted the Wagners had preserved their right to a jury trial on “[a]ll elements of damages,” if any, they incurred as a result of the private nuisances, if any. We also determined that the Wagners were entitled to proceed on their cause of action against Mr. Bike for breach of fiduciary duty.

⁶ In June 2010, the Wagners filed an Acknowledgement of Satisfaction of Judgment, releasing the Bikes from any liability on the judgment.

action. In July 2010, the Wagners dismissed their complaint only, with prejudice. An OSC (order to show cause) re dismissal of the entire action was set for November 19, 2010. Ultimately, a jury trial on the Bikes' cross-complaint was scheduled for April 14, 2011. The Wagners claimed the Bikes "surreptitiously obtained" the April 14 trial date, and "ambushed" the Wagners "with a call on April 11, 2011 to show up for trial."

In any event, on April 13-14, 2011, the Bikes moved to set aside the judgment and allow their jury trial on the nudity-based portion of their private nuisance claim, as alleged in their cross-complaint, to proceed. The court refused to set aside the judgment and vacated the April 14 jury trial after ruling that "Judge Ziebarth entered a final judgment completely resolving the Wagner complaint against the Bikes and the Bike cross[-]complaint against the Wagners. The trial court concluded that none of the parties were entitled to any relief on the complaint or cross[-]complaint, therefore there are no remaining triable issues."

Then, on April 27, 2011, the Bikes filed a motion to set aside the judgment and vacate the April 14, 2011, order vacating the jury trial on their cross-complaint, on the ground the judgment was void and subject to being set aside at any time. Following a May 19 hearing, the court denied the motion. The Bikes appeal from the May 19 order. (Code Civ. Proc., § 904.1, subd. (a)(2).)

III. DISCUSSION

The Bikes claim the judgment is *void* and, as such, may be set aside *at any time*, including when they moved to set it aside in April and May 2011. The Bikes maintain

the judgment is void because they were deprived of their due process rights to notice, an opportunity to be heard, and a jury trial on whether Mr. Wagner's nudity on his property, while it was still occurring, constituted a private nuisance to them and, if so, whether they were entitled to recover compensatory and punitive money damages for the nuisance. This claim is utterly without merit.

As the Bikes point out, a void judgment may be set aside at any time. (*Adoption of B.C.* (2011) 195 Cal.App.4th 913, 925 [Fourth Dist., Div. Two]; Code Civ. Proc., § 473, subd. (d).) If, however, a judgment is not void but at most voidable, a party must move to set it aside *no later than* six months after it was taken. (*Lee v. An* (2008) 168 Cal.App.4th 558, 563; Code Civ. Proc., §§ 473, subd. (b), 663, 663a.) As we explain, the judgment is not void; it was at most voidable, and the Bikes forfeited any right they may have had to have the judgment declared void by failing to timely appeal from the judgment.

A judgment is void, for example, if the court lacked fundamental authority over the subject matter, question presented, or a party. (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) By contrast, “[w]hen a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by ‘principles of estoppel, disfavor of collateral attack or res judicata.’” (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 661; *Conservatorship of O’Connor* (1996) 48 Cal.App.4th 1076, 1088.)

The Bikes maintain the judgment is void because, pursuant to the parties' June 2007 stipulation and the bifurcation order, the court was without authority, during the February 2008 bifurcated trial on legal and equitable issues, to adjudicate the Bikes' entitlement to damages for Mr. Wagner's nudity on his property before Mr. Wagner ceased the offending conduct. We disagree. The court's full adjudication of the Bikes' private nuisance claim, including the Bikes' entitlement to damages on the nudity portion of the claim, was *at most* an act *in excess* of the court's jurisdiction. (*People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at p. 661.) Thus, judgment was at most voidable, but it was not void.

Further, “[e]rrors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal, and are generally not subject to collateral attack once the judgment is final unless ‘unusual circumstances were present which prevented an earlier and more appropriate attack.’ [Citations.]” (*People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at p. 661.)

Here, there were no unusual circumstances which would have prevented the Bikes from *timely* moving to set aside the judgment (*Lee v. An*, *supra*, 168 Cal.App.4th at p. 563; Code Civ. Proc., §§ 473, subd. (b), 663, 663a.), or *timely* appealing from the judgment.

Indeed, there is no question that the Bikes were fully aware that the judgment fully adjudicated “all claims” between the Wagners and the Bikes on the complaint and cross-complaint, at the time the judgment was issued on June 18, 2008. The Bikes objected to

the court’s statement of intended decision, and counsel for Mr. Bike prepared the judgment, which as noted was entered on September 22, 2008 .

Moreover, the Bikes failed to timely appeal from the judgment. Allowing the Bikes to challenge the judgment after the time for appeal had long since expired, as the Bikes purported to do by their April-May 2011 motion, “would be to declare that every unsuccessful litigant has two appeals, the time of one being fixed by law, the time of the other being fixed by his own convenience” (*Estate of Baker* (1915) 170 Cal. 578, 582.) In other words, principles of estoppel, disfavor of collateral attack, and res judicata precluded the Bikes from setting aside the judgment by their April-May 2011 motion, given their previous opportunity to challenge the judgment by direct appeal. (*People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at p. 661.)

IV. DISPOSITION

The May 19, 2011, order denying the Bikes’ motion to set aside the judgment filed on June 18, 2008, and entered on September 22, 2008, is affirmed. Wagner shall recover his costs on appeal.

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KING
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.