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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

WILLIAM J. BRAINARD,

Plaintiff and Appellant,

v.

BRYAN WILLMON et al.,

Defendants and Respondents.

F064347

(Super. Ct. No. CV56801)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

William J. Brainard, in pro. per., for Plaintiff and Appellant.

Michael D. McComber for Defendants and Respondents.

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After plaintiff William J. Brainard filed the present action against defendants Bryan Willmon and Carol Willmon, defendants responded by moving to have plaintiff declared a vexatious litigant and to require the deposit of security. The trial court granted defendants' motion pursuant to Code of Civil Procedure¹ sections 391 to 391.7, and when plaintiff failed to furnish security as ordered, the action was dismissed.² Plaintiff appeals, contending the trial court abused its discretion. We will affirm.

FACTS AND PRODECURAL BACKGROUND

Plaintiff's Complaint

On July 20, 2011, plaintiff commenced the present action, in propria persona, by filing a complaint against defendants and their attorney, Michael D. Macomber, in Tuolumne County Superior Court as case No. CV56801. In the general factual allegations, the complaint alleged as follows: On May 9, 2006, certain real property in the County of Tuolumne (the Property) was purportedly sold or transferred to "Kathleen O. Brainard" by defendants pursuant to a grant deed recorded in the County of Tuolumne. On that same date, defendants recorded a deed of trust on the Property. Four years later, on June 9, 2010, defendants recorded a trustee's deed upon sale that purported to show title in defendants' name pursuant to judicial foreclosure.

Further, according to the complaint, plaintiff recorded a document in 2011 entitled "NOTICE OF INTENT TO PRESERVE INTEREST AND TITLE," which allegedly contained "the evidence of title to the land," consisting of plaintiff's claim that he has the right or title to the property based on a federal land grant referred to as "United States Land Patent Number 2314." A copy of the alleged United States land patent, ostensibly signed by

¹ Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

² In so ordering, the trial court also set aside a clerk's entry of default because defendants' motion was pending and had stayed the action.

President Benjamin Harrison and recorded in 1893, was attached to the complaint, which document reflected that certain acreage was transferred by the United States in 1892 to an individual named Gianbatista Musante. Nothing in the complaint or attachments thereto showed any connection between Gianbatista Musante (or rights he may have possessed) and plaintiff.

The complaint further alleged that defendants regained possession of the Property by evicting plaintiff through use of falsehood and fraud. After plaintiff was evicted by the sheriff's execution of a writ of possession of the Property, defendants (through Mr. Macomber) took steps to have plaintiff's personal property items removed from the Property. Plaintiff was given an opportunity to remove personal property items, including vehicles, but when he did not do so, defendants treated the items as abandoned and had them removed.

The complaint set forth a number of causes of action, apparently on the theory that plaintiff should not have been evicted (i.e., it was his land) and that defendants should not have removed plaintiff's personal property items. The relief sought in the complaint was the recovery of monetary damages.

Defendants' Motion to Declare Plaintiff a Vexatious Litigant

In response to plaintiff's complaint, rather than filing an answer, defendants immediately moved for an order to declare plaintiff a vexatious litigant and to require him to furnish a bond. In support of that motion, defendant Bryan Willmon asserted in his declaration as follows: "On April 25, 2006, I and my wife sold property located at ... in Big Oak Flat, California, to KAY O. BRAINARD. Kay Brainard is the mother of Plaintiff, WILLIAM JAMES BRAINARD. During these discussions, I was told by Kay Brainard that she was purchasing this property for her son. [¶] ... I never entered into a contract with WILLIAM BRAINARD. The only contract entered into was with his mother. [¶] ... In the fall of 2009, Kay Brainard defaulted in her payments for the property. I contacted Dual Arch International which proceeded with a foreclosure of the ... property.

A Trustee's Deed, granting title in this property back to me and my wife, was recorded on June 9, 2010."

According to defendants' motion, starting in December 2009, plaintiff began to file frivolous lawsuits and motions against defendants, all of which were filed by plaintiff in propria persona, and all were determined adversely to plaintiff. Each of these litigation matters related in some way to plaintiff's assertion that he is the owner of the property under a federal land patent. Defendants contended that the present lawsuit fits this same pattern of litigious conduct and harassment directed at defendants.

In addition to the litigation itself, defendants' motion noted that communications from plaintiff boasted of his intention to harass defendants in the future. For example, in a letter that plaintiff sent to defendants' attorney, plaintiff stated: "I'd love to know your billing to Bryan. Please do ask for attorney fees just so I know how much I have cost him in the last 15 months. [¶] Can he go another 15 months or years at your rates? We will find out. Regardless of the Muni case we still have to go to Superior Court for a title action.... [¶] ... [¶] After that it^[1]s a fraudulent foreclosure action. Then after that it^[1]s an offset action. Then after that it^[1]s a mechanic's lien and foreclosure action and all the appeals in between each action. [¶] What do you think years and years of fees from Bryan? Wonder what he's thinking right now because you know I will never quit. [¶] Be a real counselor at law and try to settle before your client is bled to financial ruin" Similarly, Mr. Willmon's declaration in support of the motion included an excerpt from one of plaintiff's emails to an acquaintance, wherein plaintiff stated the following about his litigations versus the defendants herein: "Call Bryan and see how he's doing. Haven't made a payment in over 18 months and still own the property. I 'have him' in the Court of Appeals right now. In the last year I have put him thru hell so to speak by keeping him in court; starting Dec. 3, 2009" (Capitalization omitted.)

Defendants' motion specifically identified five unsuccessful litigations filed by plaintiff, in propria persona, between December 2009 and September 2011. These included:

- (1) *Brainard v. Willmon*, Tuolumne County Superior Court case No. CV55249, filed on December 3, 2009. This case was dismissed following defendants' successful demurrer.
- (2) *Brainard v. Willmon*, a civil adversary proceeding filed in United States Bankruptcy Court case No. 10-09015-E. This case was dismissed on September 24, 2010.
- (3) *Brainard v. Willmon*, United States District Court case No. 1:10 CV 01126-OWW-SMS. This case was dismissed on September 24, 2010.
- (4) Appeal filed by plaintiff of denial of motion to quash service in *Willmon v. Brainard*, Tuolumne County Superior Court case No. CVL55835. Motion to dismiss appeal was granted on December 10, 2010.
- (5) *Brainard v. Provost, etc. Willmons, et al.*, United States District Court case No. 2:11- CV-00850- MCE-DAD. This case was dismissed on May 13, 2011.

Plaintiff's Motion in Response

Plaintiff did not file an opposition to defendants' motion to declare him a vexatious litigant. Instead, plaintiff filed a request to the superior court clerk for entry of defendants' defaults and moved for judgment on the pleadings. The clerk entered the defaults as requested on October 3, 2011. Plaintiff's motion for judgment on the pleadings was filed on the ground that defendants had not filed an answer or other defensive pleading. Plaintiff's motion sought an order granting him restoration of the Property, plus damages in the amount of \$211,000. Defendants responded by pointing

out to the trial court that their defaults should be set aside because the vexatious litigant motion automatically stayed the action. (§ 391.6 [stay of proceedings].)

Hearing and Order

The hearing on defendants' motion to declare plaintiff a vexatious litigant was held on October 13, 2011. Plaintiff did not appear at the hearing and, as noted above, he did not file opposition. The trial court set aside the defaults entered by the clerk, and then proceeded to grant defendants' motion. Plaintiff was ruled to be a vexatious litigant under section 391. Furthermore, the trial court held there was no probability that plaintiff would prevail on the merits and, therefore, plaintiff was ordered to post a security in the sum of \$20,000 within 60 days. It was further ordered that "this case will be dismissed pursuant to [section] 391.4 upon Plaintiff's failure to post the required security." Finally, on December 14, 2011, the trial court on its own motion also entered a prefiling order against plaintiff pursuant to section 391.7.

On December 15, 2011, after the time expired to post security and plaintiff had failed to comply, the case was dismissed with prejudice. Plaintiff's timely appeal followed.

DISCUSSION

I. Standard of Review

"A court exercises its discretion in determining whether a person is a vexatious litigant. [Citation.] We uphold the court's ruling if it is supported by substantial evidence. [Citations.] On appeal, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment. [Citation.]" (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219; accord, *Golin v. Allenby* (2010) 190 Cal.App.4th 616, 636.) Similarly, a court's decision that a vexatious litigant does not have a reasonable probability of success is based on an evaluative judgment in which the court is

permitted to weigh evidence. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 785-786 (*Moran*).)³ A trial court’s conclusion that a vexatious litigant must post security does not, as with a demurrer, terminate the action or preclude a trial on the merits. Rather, it merely requires the party to post security. Accordingly, if there is any substantial evidence to support a trial court’s conclusion that a vexatious litigant had no reasonable probability of prevailing in the action, it will be upheld. (*Moran, supra*, at pp. 784-786; *Golin v. Allenby, supra*, at p. 636.)

II. Vexatious Litigant Statute

“The vexatious litigant statute (§§ 391-391.7) was enacted in 1963 to curb misuse of the court system by those acting in propria persona who repeatedly relitigate the same issues. Their abuse of the system not only wastes court time and resources but also prejudices other parties waiting their turn before the courts. [Citations.]” (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1008.) The statute provides a “means of moderating a vexatious litigant’s tendency to engage in meritless litigation.” (*Bravo v. Ismaj, supra*, 99 Cal.App.4th at p. 221.) “The statute defines a “vexatious litigant,” provides a procedure in pending litigation for declaring a person a vexatious litigant, and establishes procedural strictures that can be imposed on vexatious litigants. A vexatious litigant may be required to furnish security before proceeding with the pending litigation; if that security is not furnished, the litigation must be dismissed. (§§ 391.3, 391.4.)” (*Singh v. Lipworth* (2005) 132 Cal.App.4th 40, 44, quoting *In re Bittaker, supra*, at p. 1008.)

³ In *Moran*, the Supreme Court held that “[i]n assessing whether a vexatious litigant has a reasonable probability of success on his claim ... the trial court [may] weigh the evidence presented on the motion,” and is not required to “assume the truth of [the] plaintiff’s alleged facts and determine only whether the claim is foreclosed as a matter of law.” (*Moran, supra*, 40 Cal.4th at p. 782, fn. omitted.) On this issue, *Moran* overruled *Devereaux v. Latham & Watkins* (1995) 32 Cal.App.4th 1571. (*Moran, supra*, at p. 785, fn. 7.)

A court may declare a person to be a vexatious litigant who, in “the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been ... finally determined adversely to the person ...” (§ 391, subd. (b)(1).) The term “litigation” means “any civil action or proceeding, commenced, maintained or pending in any state or federal court.” (§ 391, subd. (a).) Litigation includes an appeal or civil writ. (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1216.) A case is finally determined adversely to a plaintiff if he does not win the action he began, including cases which are voluntarily dismissed by a plaintiff. (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 779; *In re Whitaker* (1992) 6 Cal.App.4th 54, 56.)

At the time of the proceedings below, section 391.1 provided as follows regarding a motion to furnish security: “In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant.” Section 391.3, subdivision (a), sets forth the basis for granting the motion: “[I]f, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix.” If security is ordered by the court, and is not furnished by the plaintiff, “the litigation shall be dismissed as to the defendant for whose benefit [the security] was ordered furnished.” (§ 391.4.)

III. Trial Court Correctly Determined Plaintiff to be a Vexatious Litigant

Defendants’ motion included evidence that plaintiff is a vexatious litigant. The declarations of Mr. Macomber and Mr. Willmon, and the certified court records

submitted with defendants' motion, as summarized above, clearly established that plaintiff commenced "at least five litigations," in propria persona, that were resolved against him during the relevant seven-year period. (§ 391, subd. (b)(1).) Accordingly, substantial evidence supported the trial court's determination of plaintiff's vexatious litigant status pursuant to section 391, subdivision (b)(1). Plaintiff's appeal apparently argues that there were only four prior litigations, since his unsuccessful appeal should not count. Contrary to plaintiff's argument, the law is clear that filing of appeals and civil writs qualify as a separate litigation under the statute. (*McColm v. Westwood Park Assn.*, *supra*, 62 Cal.App.4th at p. 1216; accord, *In re R.H.* (2009) 170 Cal.App.4th 678, 691-695.) We hold the trial court correctly found plaintiff to be a vexatious litigant.

IV. Order Requiring Security Was Not an Abuse of Discretion

As noted, a court may require a vexatious litigant to furnish security as a condition of prosecuting a pending lawsuit if it determines, after hearing the evidence upon the motion, that "there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant." (§ 391.3, subd. (a).) In support of defendants' motion, the declaration of Mr. Willmon averred that he and his wife sold the Property to plaintiff's mother, Kay Brainard, who indicated to them she was acquiring the Property for her son's benefit, but when she later defaulted, defendants took back title to the Property through judicial foreclosure. This constituted substantial evidence that any interest or expectancy plaintiff may have had in the Property was derived from or subsumed under his mother's purchase from defendants, and would be subject to defendants' deed of trust. Additionally, as to any claims based on the personal property items left on the Property, Mr. Macomber stated in his declaration that when he called plaintiff to find out when plaintiff would like to retrieve any personal property items he wanted, plaintiff responded that "he didn't want anything" from the Property. Plaintiff

did not oppose defendants' motion, did not appear at the hearing and did not present any contrary evidence or argument.⁴

In passing, we note that although exhibits attached to plaintiff's complaint made reference to an alleged federal land patent issued in 1892 to an individual by the name of Gianbatista Musante, nothing in the complaint or attachments thereto showed any connection between Gianbatista Musante (or rights he may have possessed) and plaintiff. And even if a Mr. Musante once owned the land as indicated in the alleged federal land patent, plaintiff failed to intelligibly explain, either in the trial court or in the present appeal, how that fact could conceivably assist plaintiff in this case. (See, e.g., *Virgin v. County of San Luis Obispo* (9th Cir. 2000) 201 F.3d 1141, 1143, quoting *Oneida Indian Nation v. County of Oneida* (1974) 414 U.S. 661, 676-677 [“Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts”].)

We conclude the trial court correctly concluded that plaintiff did not have a reasonable probability of prevailing in the litigation. The order requiring plaintiff to furnish security under sections 391.1 to 391.3 was supported by substantial evidence and was not an abuse of discretion.

V. Other Issues

Finally, plaintiff argues the trial court erred in setting aside the defaults entered by the clerk, and that it should have addressed plaintiff's motion for judgment on the pleadings. Not so. As the trial court's order correctly stated, the action was stayed pursuant to section 391.6, and thus the defaults should not have been taken and were correctly set aside. Plaintiff has failed to demonstrate any error or abuse of discretion in regard to the trial court's decision to set aside the defaults or its refusal to reach the judgment on the pleadings while the action was stayed.

⁴ Also, we note that plaintiff's appeal did not include a transcript of the hearing.

DISPOSITION

The orders and judgment of the trial court are affirmed. Costs on appeal are awarded to defendants.

Kane, J.

WE CONCUR:

Gomes, Acting P.J.

Franson, J.