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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LAURENCE L. GRABOWSKI,

Defendant and Appellant,

v.

RUTAN & TUCKER,

Plaintiff and Respondent.

G044438

(Super. Ct. No. 00CC14365)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
John C. Gastelum, Judge. Reversed.

Larry R. Marshall (Pro Hac Vice); Thomas Whitelaw & Tyler, J. Russell
Tyler, Jr. and Carolyn N. Ko for Defendant and Appellant.

Rutan & Tucker, Stephen A. Ellis and Hanni Pichel for Plaintiff and
Respondent.

The law firm Rutan & Tucker (Rutan) obtained a default judgment against Laurence L. Grabowski (Grabowski) after he failed to pay his legal fees or honor his promissory note to pay legal fees. Approximately five years later, Rutan learned Grabowski was going to receive a large settlement arising out of litigation involving a business dispute against his brother, Patrick Grabowski, and other family members (hereafter collectively referred to as Patrick). Rutan filed a notice of lien in the pending family business dispute (hereafter the Orange County Litigation). After the court ordered the parties to prepare a final judgment in that case, Rutan filed a “motion for order for satisfaction of [the] judgment lien.” The court granted the motion over Grabowski’s and Patrick’s objections. A few months later, Grabowski filed a motion to set aside the default and default judgment claiming it was void because he was not properly served with a summons and complaint. The court denied Grabowski’s motion and again determined the lien was valid.

In this appeal, Grabowski challenges the order granting Rutan’s motion for an order to satisfy the lien. In a separate appeal, Grabowski disputed the later order denying his motion to set aside the default. (*Grabowski v. Rutan & Tucker* (February 24, 2012) G044968 [nonpub. opn.] (*Grabowski I*.) In both appeals, Grabowski challenged the validity of the default judgment that formed the basis of the lien. In our concurrently filed opinion, *Grabowski I, supra*, we considered and rejected this argument as lacking merit. That analysis is incorporated by reference into this opinion.

The remaining issue to be considered in this appeal was raised for the first time in Grabowski’s reply brief. He argued there was one other reason to set aside the order granting satisfaction of the lien. Namely, he suggested that because the parties failed to prepare a final judgment in the Orange County Litigation case, the court could not issue an order for satisfaction of the lien “under the judgment” under Code of Civil

Procedure section 708.470.¹ Although we could disregard Grabowski's improper argument made for the first time in his reply brief (*Greenlining Institute v. Public Utilities Com.* (2002) 103 Cal.App.4th 1324, 1329, fn. 5), we will exercise our discretion and consider it because Rutan will not be prejudiced, having addressed the issue in the respondent's brief.

The order granting the motion for satisfaction of the lien is reversed and remanded. On remand, the trial court shall enforce its previous order requesting Patrick to prepare a final written judgment, and thereafter it can issue the order for satisfaction of the lien "under the judgment" pursuant to section 708.470, subdivision (a).

I

We judicially notice our concurrently filed opinion (*Grabowski I, supra*, G044968 [nonpub. opn.]), and adopt and incorporate by reference the facts delineated and discussion contained therein. (Evid. Code, §§ 452, 459.) Suffice it to say, several years ago Rutan filed a lawsuit and obtained a default and default judgment against Grabowski based on his failure to pay legal bills.

On April 16, 2010, Rutan entered a notice of lien in the Orange County Litigation action between Grabowski and Patrick. As required by section 708.410, Rutan filed and served the notice of the lien and a copy of its default judgment by mail to all the parties. On April 20, 2010, the trial court (Judge Josephine S. Tucker) granted Patrick's section 664.6 motion for an order to enforce a 2007 oral settlement agreement between Grabowski and Patrick in the Orange County Litigation.

According to the parties, the terms of the settlement awarded Grabowski \$400,000 immediately plus another \$2 million in \$10,000 monthly installments. However, our record does not contain direct evidence of settlement and Judge Tucker's order did not discuss the terms of the settlement. Rather, the April 20, 2010 minute order

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

stated: “Judgment will be entered in accordance with the terms of the oral settlement. Moving parties are to prepare the judgment containing the terms of the oral agreement that was placed on the record. [¶] The request for an order of fees and costs to be deducted from the settlement is denied.” As permitted by section 664.6, the court noted it retained jurisdiction over the parties to enforce the settlement until full performance. The court explained Patrick’s motion for an order for attorney fees and costs required evidence there was a breach of the settlement agreement. Moreover, the court noted there was no evidence establishing the amount of fees and costs incurred.

Several months later, on July 12, 2010, Rutan filed a motion for an order for satisfaction of the lien under section 708.470. Both sides of the Orange County Litigation opposed the motion. Patrick’s opposition noted the motion was premature. He advised the court that no party had prepared the written judgment and consequently there was “no judgment upon which Rutan can satisfy its lien.” In addition, Patrick asserted Grabowski was not entitled to any money until he performed all the terms of the settlement agreement. Alternatively, he argued the hearing on Rutan’s motion should be rescheduled to coincide with the hearing on his motion regarding allocation of the settlement proceeds. He explained his accounting fees and attorney fees should have priority over Rutan’s judgment lien.

Grabowski filed a separate opposition to the motion. He also argued the motion was premature due to the lack of a written judgment. In addition, he asserted Rutan’s default judgment was void because Grabowski was never personally served with Rutan’s complaint.

On September 7, 2010, the trial court (Judge John C. Gastelum) granted the motion for an order for satisfaction of the lien. In its ruling the court stated, “The opposition argument overlooks the fact that the [c]ourt previously heard defendants’ motion to enforce the settlement, brought under . . . section 664.6. (Section 664.6 specifically authorizes a motion for an order ‘enter[ing] judgment pursuant to the terms

of the settlement’) . . . Grabowski’s argument that the default judgment on which the lien is based is ineffective . . . because service was never made on him and it was ‘rejected’ by the Missouri court . . . has no merit. The judgment is good in California regardless of whether it was entered as a sister state judgment in Missouri. If . . . Grabowski seeks to have it set aside for lack of jurisdiction, he will have to make the appropriate motion in this court.”

Grabowski appealed the court’s ruling. Several months later he prepared and filed in superior court a motion to set aside the default and default judgment due to improper service. We affirmed the trial court’s denial of this motion in *Grabowski I, supra*, G044968 [nonpub. opn.].

II

A. The Default Judgment

We need only briefly touch on Grabowski’s argument the default and default judgment were void on their face. To begin with, Grabowski devotes his entire opening brief to this issue but it seems he has forgotten the procedural history of this case. His appellate brief and appendix improperly contain information and documents that were not before the trial court when it considered Rutan’s motion for an order for satisfaction of the judgment. As properly noted by Rutan, the court rejected Grabowski’s jurisdictional challenge because it was not properly supported. Grabowski did not file a motion to set aside the default and default judgment until several months later.

In any event, we have considered and rejected this jurisdictional argument in *Grabowski I, supra*, G044968 [nonpub. opn.]. We incorporate by reference our analysis and conclusion on this issue. We conclude Rutan’s “other evidence” Grabowski received the summons and complaint were sufficient and the resulting default judgment was valid on its face.

B. No Final Judgment in the Orange County Litigation

It is undisputed Judge Tucker ordered the entry of judgment in accordance with the terms of the settlement pursuant to section 664.6. She specifically ordered Patrick to prepare the final judgment. Patrick did not comply with the court's order, and it appears from this record that neither side prepared a final judgment. As we will explain, this omission requires reversal of the trial court's order but our reversal should not be viewed as an endorsement of such dishonest and unfair litigation tactics. The Legislative scheme is clearly designed to protect judgment creditors, and we do not condone the waste of taxpayer money and judicial resources created by such attorney gamesmanship.

There is no dispute Rutan obtained a valid lien in the pending Orange County Litigation. Pursuant to section 708.410, Rutan filed a notice of lien to protect its interest in any award or money of property awarded in Grabowski's favor. Section 708.410, subdivision (a), provides, "A judgment creditor who has a money judgment against a judgment debtor who is a party to a pending action or special proceeding may obtain a lien . . . to the extent required to satisfy the judgment creditor's money judgment" Subdivision (d), explains, "For the purpose of this article, an action or special proceeding is pending until the time for appeal from the judgment has expired or, if an appeal is filed, until the appeal has been finally determined."

The lien provides Rutan with several important benefits. Relevant to this case, "One purpose of the lien is to establish and preserve the judgment creditor's priority to the money and property the judgment debtor may receive from the pending action. [Citation.]" (*Oldham v. California Capital Fund, Inc.* (2003) 109 Cal.App.4th 421, 430.) In addition, the legislative scheme expressly prevents certain types of collusion that could result in harm to the judgment creditor's interests. For example, if the lien is not satisfied or released, the judgment debtor may not enter into any compromise, dismissal, settlement, or satisfaction of the pending action, and may not enforce any judgment

recovered in the action, without the judgment creditor's written consent or a court order. (§ 708.440, subd. (a).) If a settlement is structured to evade a judgment creditor's lien, the court may exercise its discretion and refuse to approve the settlement.

Section 708.470 permits the judgment creditor to seek an order for satisfaction of the lien, giving the judgment creditor further protection. Section 708.470, subdivision (a), provides, "If the judgment debtor is entitled to money or property under the judgment in the action . . . and a lien created under this article exists, upon application of any party to the action or special proceeding, the court may order that the judgment debtor's rights to money or property *under the judgment* be applied to the satisfaction of the lien created under this article as ordered by the court." (Italics added.) Once the judgment creditor applies for and receives an order stating it has rights "under the judgment" then section 708.470, subdivision (b), provides the court can order the party having control of the property to satisfy the lien "[if] the *judgment* determines the judgment debtor has an interest in property." (Italics added.) If that party should improperly transfer property that was subject to the lien, the court can order that party to directly pay the creditor damages. (§ 708.470, subd. (c).)

Obviously, the above statutory provision requires entry of a written judgment. Specifically, the statute requires a final judgment determination the judgment debtor has an interest in property that can be applied to the satisfaction of the lien. In this case, Judge Gastelum properly recognized Judge Tucker had ordered a judgment be entered in accordance with the terms of the settlement. However, she did not enter a formal judgment. Instead, Judge Tucker ordered Patrick to prepare the judgment setting forth the rights of the parties for her signature. When Rutan filed its motion, Judge Gastelum should have either issued his own written judgment, or enforced the prior court order that Patrick prepare the judgment, before ordering satisfaction of the lien from property purportedly awarded to Grabowski.

We recognize the parties do not dispute Grabowski was entitled to money under the terms of their oral settlement. Nevertheless, we cannot construe Judge Tucker's minute order as being the final judgment in the action. Because the rights of each party were resolved by an oral settlement, and not a jury verdict or court trial, the minute order does not actually reflect the conditions of payment or what items are recoverable in the action. Contrary to Rutan's contention, this case is not analogous to cases where the parties have prematurely appealed from the order granting the section 664.6 motion. (See *Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1183 [appellate court can entertain a premature appeal].) While in those cases an appellate court can amend the section 664.6 order to include an appealable judgment to facilitate review of that order, the same cannot be said for the review of what is essentially a postjudgment order. Simply stated, we cannot create the legal fiction of a final judgment to affirm Judge Gastelum's order for satisfaction of a lien.

We reverse the order for satisfaction of a lien as being prematurely entered. We note a lien filed under section 708.410 remains pending in an action until the time for appeal expires or an appeal is finally determined. (§ 708.410, subd. (d).) Because the judgment has not yet been entered in this case, the lien will retain its priority, determined according to the date the notice of lien was filed. (Civ. Code, § 2897.)

When this case is remanded, the trial court must either enforce the prior order that Patrick prepare a written judgment, or the trial court can issue its own final judgment setting forth all the settlement terms and rights of the parties. Thereafter, the court may re-enter the order for satisfaction of the lien.

III

The order is reversed and the case remanded for further proceedings. Respondent's motion requesting this court take judicial notice of several court documents is denied as they were not necessary to decide the appeal. In the interests of justice, each side shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.