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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SHARON BAUTISTA et al.,

Plaintiffs, Cross-defendants and
Respondent,

v.

JACOB A. VON DUERING et al.,

Defendants, Cross-complainants and
Appellants.

G044852

(Super. Ct. No. 03CC05148)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Steven L. Perk, Judge. Reversed and remanded.

Law Office of Frank W. Battaile and Frank W. Battaile for Defendants,
Cross-complainants and Appellants.

Law Office of Lawrence P. House and Lawrence P. House for Plaintiffs,
Cross-defendants and Respondents.

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Defendant Jacob A. Von Duering and defendant and cross-complainant Shadow Management, Inc. (Shadow; collectively Von Duering and Shadow are referred to as defendants) appeal from an order denying their motion to vacate the judgment the trial court entered in favor of plaintiffs and cross-defendants Sharon Bautista and Limelight Physical Therapy, Inc. (Limelight; collectively Bautista and Limelight are referred to as plaintiffs).

As explained below, the trial court's judgment is void because the court failed to follow the instructions we provided in an earlier opinion reversing the original judgment in this action. Specifically, we directed the trial court to refer the case to the referee the parties selected to hear their dispute so the referee could conduct further proceedings specified in our earlier opinion. The trial court, however, removed the referee and conducted further proceedings in violation of our instructions. (See, e.g., *Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530 (*Karlsen*) [“The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void” (italics omitted)].) We therefore reverse the trial court's order and remand for the court to enter a new order vacating the judgment.

I

FACTS AND PROCEDURAL HISTORY

Bautista is a physical therapist. In January 2002, she and her professional corporation, Limelight, contracted with Shadow to manage their physical therapy practice. Under the “Facilities and Management Services Agreement” (the Agreement), Shadow agreed to provide plaintiffs with office space, equipment, supplies, staffing, and billing services for their practice in exchange for plaintiffs reimbursing Shadow for all expenses it incurred and a percentage of all revenue collected. The Agreement covered a two-year term, but allowed any party to terminate it on 30 days' written notice.

In December 2002, plaintiffs terminated the Agreement and abandoned the practice without any notice. In April 2003, plaintiffs sued defendants, asserting claims for fraud, negligent misrepresentation, conversion, and breach of fiduciary duty.¹ Plaintiffs alleged defendants failed to properly account for and misappropriated funds generated by plaintiffs' practice. Shadow cross-complained against plaintiffs, asserting claims for breach of contract, conspiracy, and conversion. Shadow alleged plaintiffs diverted payments from patients and insurance providers to their own use without reporting the payments to Shadow.²

In May 2004, the parties stipulated to submit their claims for breach of contract and conversion to a binding general reference under Code of Civil Procedure section 638 (all statutory references are to this code unless otherwise noted) and to dismiss all other causes of action with prejudice. Specifically, the parties orally stipulated in open court to “a binding reference before [R]eferee Luis Cardenas The reference will have an accounting to determine the financial aspects of the case, with an agreed upon forensic accountant.’ . . . ‘[T]he parties to whom monies are owed as determined by the accountant and [Referee Cardenas] will be entitled to recover attorney fees and costs, with the amount to be determined by [Referee Cardenas]. Issues related to contract interpretation, if any, will be determined by [Referee Cardenas]. . . .”

Between October 2005 and June 2006, the appointed accountant submitted multiple reports to the referee providing an accounting of the revenue and expenses for

¹ Plaintiffs also named Affinity Sports Firm, LLC, as a defendant and the judgment that defendants attacked through their motion to vacate named Affinity as a defendant. Affinity, however, did not join in the motion to vacate and is not a party to this appeal.

² The clerk's transcript defendants designated did not include either the complaint or cross-complaint. We obtained copies of these pleadings from the trial court and, on our own motion, judicially notice both documents. (Evid. Code, §§ 452, subd. (d), 459, subd. (a); *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 621, fn. 5.)

plaintiffs' physical therapy practice. The accountant's final report concluded Shadow owed plaintiffs approximately \$96,000 for funds it collected but failed to pay to plaintiffs. Shadow objected to the accountant's final report, arguing the accountant failed to credit Shadow for all of the expenses it incurred on plaintiffs' behalf. According to Shadow, plaintiffs owed Shadow approximately \$53,000, plus interest, because the expenses Shadow incurred exceeded the revenue the practice generated before plaintiffs left in December 2002. Shadow also argued plaintiffs were not entitled to any portion of the revenue received after they breached the Agreement and abandoned the practice.

The referee conducted a hearing on the accountant's final report in July 2006. In September 2006, the referee issued his final decision, largely agreeing with Shadow's position. Specifically, the referee "reallocated" the accountant's "numbers" and awarded Shadow, rather than plaintiffs, nearly \$53,000, plus interest, and more than \$83,000 in attorney fees. In October 2006, the trial court entered judgment in Shadow's favor based on the referee's final decision.³

We concluded the referee erred and reversed the judgment with directions in *Bautista v. Von Duering* (Dec. 27, 2007, G037914) [nonpub. opn.] (*Bautista I*). We found the referee's statement of decision failed to provide the legal and factual basis for crediting Shadow with an additional \$62,000 in expenses for 2002 beyond the expenses the appointed accountant credited Shadow for that year. Plaintiffs argued the accountant already credited Shadow with these expenses and the referee's decision therefore credited

³ "In the case of a consensual general reference pursuant to Section 638, the decision of the referee or commissioner upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court." (§ 644, subd. (a).) "The decision of the referee appointed pursuant to Section 638 or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the decision reported has the effect of a special verdict." (§ 645.)

Shadow twice for the same expenses, but we could not decide the issue because the referee failed to explain the legal and factual basis supporting his decision.

We also disagreed with the referee's decision that plaintiffs' breach of the Agreement barred them from recovering any portion of the revenue received after they left the practice. As we independently interpreted the Agreement, its terms allowed plaintiffs to receive their share of any revenue received after they left the practice, provided the revenue was for services they rendered before leaving the practice.

To address these errors, we reversed the judgment and remanded the case with directions for (1) the referee to prepare an amended statement of decision explaining the legal and factual basis for its decision to award Shadow nearly \$53,000; (2) the trial court to ascertain and award any sums plaintiffs are due for revenue received after they left the practice; and (3) the referee to reconsider the attorney fee award, if necessary. We issued our remittitur in early March 2008.

In June 2008, the trial court conducted a case management conference to determine how to proceed with the action based on *Bautista I*. At the hearing, plaintiffs requested the trial court appoint a new referee to carry out *Bautista I*'s instructions. Plaintiffs' counsel explained Referee Cardenas "was the one that caused the problem, and I really don't want him to do it again." In response, the trial court volunteered to serve as the referee and carry out *Bautista I*'s instructions. The court then directed plaintiffs to submit the appellate record and briefs for it to review. Defendants' appellate counsel attended the case management conference, but declined to participate because he claimed to represent defendants on the appeal only.

In September 2008, after receiving copies of the appellate record and briefs, the trial court issued a minute order directing plaintiffs to prepare a proposed judgment and serve a copy on defendants' counsel. Plaintiffs submitted a proposed judgment based on the final report the appointed accountant submitted to the referee in 2006. Specifically, plaintiffs' proposed judgment awarded them more than \$96,000 in damages,

over \$54,000 in interest, and nearly \$83,000 in attorney fees and costs against defendants. The trial court entered plaintiffs' proposed judgment, awarding them \$233,000 without conducting a hearing on the judgment and without providing a statement of decision or any findings to support the judgment. The attorneys that represented defendants on the original reference and appeal claimed they had no obligation to represent defendants in these proceedings and failed to inform defendants of the trial court's actions, despite receiving notice from plaintiffs.

After the trial court entered the new judgment, plaintiffs began efforts to enforce it. Defendants claim they did not learn about the new judgment until June 2009 when plaintiffs served a notice directing Von Duering to appear for a judgment debtor examination. In December 2010, defendants filed a motion to vacate the new judgment. The trial court denied the motion in January 2011 and defendants timely appealed.

II

DISCUSSION

Defendants contend the trial court erred in denying their motion to vacate the new judgment for three reasons. First, they contend the new judgment is void because the trial court exceeded its jurisdiction by entering the new judgment without referring the matter to the referee as *Bautista I* instructed. Second, defendants argue the new judgment was procured through extrinsic mistake or fraud because defendants' counsel abandoned them after we issued *Bautista I*. Finally, defendants contend we should vacate the new judgment against Von Duering because no evidence or findings establish any basis for personal liability against him. We agree the new judgment must be vacated because it is void and therefore do not consider defendants' other arguments.

A. *Void Judgments May Be Vacated at Any Time*

Section 473, subdivision (d), authorizes a court to set aside a void judgment or order. (*Sindler v. Brennan* (2003) 105 Cal.App.4th 1350, 1353 (*Sindler*); *Brown v.*

Williams (2000) 78 Cal.App.4th 182, 186.) Courts also have “inherent power, apart from statute, to correct [their] records by vacating a judgment which is void on its face, for such a judgment is a nullity and may be ignored.” (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239 (*Rochin*)). There is no time limit or reasonable diligence requirement for an attack on a void judgment; the attack may be made at any time. (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 862 (*Heidary*); *Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755, 761.)

A judgment is void on its face if the trial court “lacked personal or subject matter jurisdiction or *exceeded its jurisdiction in granting relief which the court had no power to grant . . .*” (*Sindler, supra*, 105 Cal.App.4th at p. 1353, italics added; *Rochin, supra*, 67 Cal.App.4th at p. 1239; see also *Heidary, supra*, 99 Cal.App.4th at p. 862.) The party challenging the judgment need not show any prejudice. (*Sindler*, at p. 1354.)

B. *The New Judgment Is Void Because It Materially Varies from Our Remittitur in Bautista I*

“A reviewing court has authority to ‘affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had.’ [Citation.]” (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701.) “‘When a judgment is reversed with directions, the appellate court’s order is contained in its remittitur, which revests the jurisdiction of the subject matter in the lower court . . .’ [Citation.]” (*In re N.M.* (2008) 161 Cal.App.4th 253, 264 (*N.M.*)). The remittitur “defines the scope of the jurisdiction of the court to which the matter is returned.” (*Griset*, at p. 701.)

“The trial court must follow the directions of the appellate court and cannot modify or add any conditions to the judgment as directed. [Citation.] Any action that does not conform to those directions is void. [Citations.]” (*N.M., supra*, 161 Cal.App.4th at p. 264; *Karlsen, supra*, 139 Cal.App.4th at p. 1530 [“‘The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not

conform to those directions is void” (italics omitted)]; *Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982 (*Butler*) [“When an appellate court’s reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void” (original italics)]; *Frankel v. Four Star International, Inc.* (1980) 104 Cal.App.3d 897, 902 (*Frankel*) [“[where] a reviewing court has remanded a matter to the trial court with directions “. . . the trial court . . . is bound to specifically carry out the instructions of the reviewing court [A]ny material variance from the explicit directions of the reviewing court is unauthorized and void””].)

“The correct analysis . . . is the determination whether an apparent variance in the trial court’s execution of the appellate ruling is ‘material.’ [Citations.] . . . In analyzing exactly what was intended by the appellate court’s order it is necessary that the order ‘be read in conjunction with the appellate opinion as a whole’ [citation]” (*In re Candace P.* (1994) 24 Cal.App.4th 1128, 1131-1132 (*Candice P.*); *Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 302 (*Bach*) [“language remanding a matter for further proceedings consistent with the decision must be read in conjunction with the appellate opinion as a whole in order to determine the effect of the opinion on remand”].)

Here, the trial court materially varied from each of the three directions we gave in *Bautista I*. First, we “directed” the trial court to “refer the matter to the referee to prepare an amended decision explaining the legal and factual bases for his decision to award defendant \$52,596 for year 2002, including an explanation of how he determined the accountant disallowed defendant’s costs of \$62,032” and, “[i]f the referee determines that its earlier judgment did grant defendant a double recovery of these expenses, the referee shall revise the judgment and the statement of decision accordingly.”

Despite this clear instruction, the trial court did not refer the matter to the referee for any purpose. Instead, the court agreed to plaintiffs’ request that the court act in place of Referee Cardenas as the new referee and issue a new judgment. Not only did

the trial court ignore our instruction to refer the matter to the referee, the trial court, acting as the new referee, also failed to provide a statement of decision explaining the legal and factual basis for the judgment it entered. The trial court simply entered the proposed judgment plaintiffs submitted, which did nothing more than identify the parties and the amount of damages, interest, attorney fees, and costs awarded without providing any explanation.

Plaintiffs contend *Bautista I* directed the trial court to refer the matter to “the referee,” but “did *not* direct the trial court to refer the matter to [Referee] Cardenas.” (Italics substituted for bold face.) This contention borders on the frivolous. Even a cursory review of *Bautista I* reveals that we referred to Referee Cardenas throughout the opinion as “the referee,” rather than by name. More importantly, our dispositional language directed the trial court to refer the matter to the referee “to prepare an amended decision explaining the legal and factual bases for *his* decision . . . , including an explanation of how *he* determined the accountant disallowed defendant’s costs of \$62,032.” (Italics added.) No one other than Referee Cardenas could provide an explanation of the legal and factual basis for *his* original decision.

Plaintiffs also contend the trial court’s decision to act as the referee was justified under section 170.6 because plaintiffs objected to Referee Cardenas continuing to serve as the referee. They are mistaken. Section 170.6 provides each side with one opportunity to remove a judicial officer who is prejudiced against the party, its interests, or its counsel if the party acts promptly after learning the judicial officer will act in the case. Prejudice is established through a “declaration under penalty of perjury, or an oral statement under oath” that the judicial officer is prejudiced against the party, its interests, or its counsel and the party believes it cannot receive a fair or impartial trial or hearing. (§ 170.6, subd. (a)(2).) A timely declaration in the form prescribed by the statute cannot be controverted and the challenged judicial officer must be removed from the case. (*Barrett v. Superior Court* (1999) 77 Cal.App.4th 1, 4.) Section 170.6 authorizes a party

to remove the assigned judicial officer “following reversal on appeal . . . if the trial judge in the prior proceeding is assigned to conduct a *new trial* on the matter.” (§ 170.6, subd. (a)(2), italics added.)

Plaintiffs had no right to disqualify Referee Cardenas under section 170.6 following our decision in *Bautista I* because we did not order a “new trial.” To the contrary, we specifically explained that a new trial was *not* necessary because Referee Cardenas heard all relevant evidence and merely needed to provide a sufficient statement of decision. Section 170.6’s new trial requirement is not satisfied when the appellate court remands the case for the trial court to prepare an adequate statement of decision rather than retry the case. (*Karlsen, supra*, 139 Cal.App.4th at p. 1530 [“We did not remand with directions for the trial court to conduct a new trial. Rather, we directed the trial court to prepare the requested statement of decision to complete the original trial”].)

Even assuming plaintiffs could invoke section 170.6 after *Bautista I*, they failed to properly do so. Plaintiffs did not provide a declaration or statement under oath stating Referee Cardenas was prejudiced against plaintiffs, their interests, or their counsel. Rather, plaintiffs’ counsel’s unsworn statement blamed Referee Cardenas for the reversal and therefore counsel “[did not] want him to do it again.” Plaintiffs’ counsel made no claim that Referee Cardenas was prejudiced.

Furthermore, based on the record before us, the trial court had no authority to remove Referee Cardenas. Section 640, subdivision (a), required the trial court to appoint as referee “the person or persons, not exceeding three, agreed upon by the parties.” The parties agreed upon Referee Cardenas. California Rules of Court, rule 3.906 authorizes a party to move to withdraw its stipulation for appointment of a referee based on a showing of good cause. That rule, however, states that a ruling based on an error of fact or law does not constitute good cause. (Cal. Rules of Court, rule 3.906(a).) The only ground plaintiffs offered for removing Referee Cardenas was

that he either legally or factually erred in reaching his decision. Consequently, plaintiffs provided no authority or grounds for removing Referee Cardenas.⁴

The second instruction we gave the trial court in *Bautista I* was to “ascertain and award any sums due plaintiff[s]” for the period after they left the practice in December 2002. The referee had found plaintiffs’ breach of the Agreement barred them from recovering any revenue received after they left the practice, but *Bautista I* vacated that finding and explained plaintiffs could recover revenue for their services regardless of when defendants received those payments. Unlike our first instruction, this instruction is admittedly ambiguous because it directs the trial court to ascertain and award the sums due plaintiffs. Nonetheless, when read in conjunction with the entire *Bautista I* opinion (*Candace P.*, *supra*, 24 Cal.App.4th at pp. 1131-1132; *Bach*, *supra*, 215 Cal.App.3d at p. 302), this instruction required the referee to make this determination.

As *Bautista I* explains, the parties stipulated to submit their breach of contract and conversion claims to Referee Cardenas under a binding general reference. They did not reserve any issue for the trial court to resolve. Indeed, they even agreed the referee would make an attorney fee award. Nothing in *Bautista I* disqualified Referee Cardenas from continuing to serve as the referee on remand. To the contrary, *Bautista I* specifically directed the trial court to refer the case back to Referee Cardenas for him to determine the amounts due for 2002 and any attorney fee award.

⁴ Defendants contend that section 170.6 does not apply to referees, but that section specifically identifies judges, court commissioners, and referees as judicial officers who may be removed pursuant to its terms. Defendants also contend plaintiffs cannot challenge Referee Cardenas under section 170.6 because they stipulated to him as the referee. Although plaintiffs did stipulate to Referee Cardenas, defendants provide no authority prohibiting plaintiffs from challenging Referee Cardenas under section 170.6 after a reversal on appeal. We need not reach this issue, however, because the reasons discussed above render plaintiffs efforts to challenge Referee Cardenas ineffective.

Plaintiffs rely on the reference to the trial court “ascertain[ing] and award[ing] any sums due plaintiff[s]” in this second instruction. But this ignores the clear and specific directions in the first instruction that the trial court refer the case to the referee for further determinations and explanations. When this second instruction is read in conjunction with the entire *Bautista I* decision, it required the referee to make the determinations it describes. Indeed, it would make little sense for the referee to make the determinations the first instruction required, but for the trial court to make the calculations the second instruction required. Nonetheless, even if we construe this second instruction as allowing the trial court to make the determinations regarding revenues received after plaintiffs left the practice, that does not excuse the trial court’s failure to refer the case to Referee Cardenas for the determinations regarding revenues and expenses for 2002, nor does it prevent the conclusion the new judgment is void because the trial court failed to follow the first instruction.

Our final instruction to the trial court in *Bautista I* was for the referee to “reconsider the attorney fees award, if necessary.” The trial court nonetheless reconsidered the attorney fee award and awarded plaintiffs fees in violation of our instruction that the referee make this determination.

In denying defendants’ motion to vacate the new judgment, the trial court stated that a judgment entered following an appellate court remand is void when the trial court retries the case, but defendants failed to show that the trial court “retried the facts.” The trial court, however, misconstrued the controlling authority. As explained above, any action by a trial court that materially varies from the directions the appellate court gave in reversing the prior judgment or order is void. (*Karlsen, supra*, 139 Cal.App.4th at p. 1530; *Butler, supra*, 104 Cal.App.4th at p. 982; *Frankel, supra*, 104 Cal.App.3d at p. 902.) Under the trial court’s interpretation of the law, it could disregard our instructions and enter a judgment that conflicts with our prior decision so long as the trial court did not retry the facts. That is not the law.

Bautista I unmistakably directed the trial court to refer the case to the referee for further proceedings. By undertaking to conduct those proceedings itself, without any valid basis for removing Referee Cardenas, the trial court materially varied from our instructions and therefore the new judgment it entered is void. We reverse the trial court's order denying defendants' motion to vacate the judgment entered on September 23, 2008, and instruct the court to enter a new order granting defendants' motion and vacating that judgment. The trial court shall then refer the matter to Referee Cardenas to follow *Bautista I*'s directions. We express no view on the underlying issues concerning plaintiffs' entitlement to monies received before they left the practice and the period after they left.

III

DISPOSITION

The order is reversed and the case remanded for the trial court to enter a new order granting defendants' motion to vacate the judgment and for further proceedings consistent with *Bautista I* and this opinion. Defendants shall recover their costs on appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.