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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE GRANT LAW CORPORATION,

Plaintiff, Cross-defendant, and
Respondent,

v.

VALLEY OUTDOOR, INC.,

Defendant, Cross-complainant, and
Appellant.

G045854

(Super. Ct. No. 30-2008-00114005)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Richard W. Luesebrink, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to Cal. Const., art. VI, § 6.) Affirmed.

Crawford Weinstein and Daniel A. Crawford for Defendant,
Cross-complainant, and Appellant.

Law Offices of Michael G. York and Michael G. York for Plaintiff,
Cross-defendant, and Respondent.

Valley Outdoor, Inc. (Valley Outdoor), appeals from the postjudgment order awarding The Grant Law Corporation (GLC) its attorney fees in GLC's collection action. Valley Outdoor contends the trial court lacked jurisdiction to consider GLC's attorney fees motion because the order denying GLC's prior attorney fees motion due to lack of standing was on appeal. We reject Valley Outdoor's contention and affirm the order.¹

FACTS AND PROCEDURE

In June 2009, GLC filed a complaint against Valley Outdoor seeking payment of approximately \$42,000 in attorney fees for services rendered to Valley Outdoor by GLC, primarily by attorney Gary D. Grant (Grant) its sole owner, in a number of legal matters. Valley Outdoor filed a cross-complaint against GLC seeking \$5 million in damages for legal malpractice. A jury returned a verdict in GLC's favor on the complaint and against Valley Outdoor on the cross-complaint. On January 20, 2011,

¹ After this matter was fully briefed, argued, and taken under submission, GLC informed the court Valley Outdoor is currently a suspended corporation and as such lacks capacity to prosecute this appeal. We invited Valley Outdoor to file a response addressing its current corporate status and the effect of its corporate status on the appeal, but it did not respond. Although GLC is correct that a suspended corporation may not prosecute or defend an action or appeal from an adverse judgment (*Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1306), we also note, "A plea that a corporation lacks capacity to maintain an action because its corporate powers have been suspended for nonpayment of taxes "is a plea in abatement which is not favored in law, is to be strictly construed and must be supported by facts warranting the abatement" at the time of the plea. [Citations.]' [Citation.] Pleas in abatement do not challenge the justness or merits of a plaintiff's claim, but rather object to the place, mode, or time of asserting a claim. [Citation.] [¶] Corporate incapacity is nothing more than a legal disability, depriving the party of the right to come into court and represent its own interests. As such, lack of capacity is not a jurisdictional defect and is waived if not properly raised. [Citation.]" (*Center for Self-Improvement & Community Development v. Lennar Corp.* (2009) 173 Cal.App.4th 1543, 1552.) Given the late stage in this proceeding at which GLC has raised Valley Outdoor's capacity to prosecute its appeal, and the lack of any evidence concerning *when* Valley Outdoor was suspended, we treat the matter as waived by GLC and, accordingly, deny its motion to abate or dismiss the appeal.

a judgment was entered for GLC awarding it \$32,821 in damages plus costs. Valley Outdoor appealed from the judgment, and in a companion appeal, we affirm the judgment. (*Grant Law Corporation v. Valley Outdoor Inc.* (Sept. 28, 2012, G045166 [nonpub. opn.].)

On March 23, 2011, GLC filed a motion for its attorney fees in the litigation pursuant to the client retainer agreement (hereafter Attorney Fees Motion No. 1). Valley Outdoor opposed the motion on the ground GLC lacked standing to seek the attorney fees in its own right because after the judgment was entered, GLC assigned its rights in the judgment to its owner, Grant. It also contended the amount of the attorney fees sought, \$160,182, was excessive.

On the day the trial court considered Attorney Fees Motion No. 1, GLC attempted to file documents showing Grant had reassigned the judgment to GLC, but the court rejected the documents as untimely. On April 26, 2011, the court denied Attorney Fees Motion No. 1, without prejudice, solely because GLC lacked standing to bring the motion.

On May 6, 2011, GLC filed a second attorney fees motion (Attorney Fees Motion No. 2), which was set for hearing July 8. Valley Outdoor opposed the motion on the ground the fees were excessive. On June 27, 2011, GLC filed a notice of appeal from the trial court's order denying Attorney Fees Motion No. 1, case No. G045440. Valley Outdoor filed supplemental opposition to Attorney Fees Motion No. 2 arguing GLC's appeal of the order denying Attorney Fees Motion No. 1 deprived the trial court of jurisdiction to rule on the second motion.²

² Valley Outdoor failed to include in its appellant's appendix any of the documents relating to GLC's appeal of Attorney Fees Motion No. 1, and has filed a motion to augment the appellate record with the following documents: the notice of appeal in case No. G045440, the order dismissing the appeal in case No. G045440, and Valley Outdoor's supplemental opposition to Attorney Fees Motion No. 2. GLC opposes the motion. We grant the motion to augment the record. (Cal. Rules of Court, rule 8.155 (a).)

On July 29, 2011, the trial court granted GLC's Attorney Fees Motion No. 2, awarding it \$180,000 in attorney fees. At argument and in its minute order, the trial court observed the amount of the fees awarded to GLC was reasonable in view of the "scorched earth litigation" tactics employed by Valley Outdoor throughout this litigation. On November 10, 2011, this court dismissed the appeal in case No. G045440.

DISCUSSION

Valley Outdoor does not dispute that GLC is entitled to recover its attorney fees incurred in the underlying litigation, nor does it challenge the reasonableness of the amount of fees awarded. Its sole argument on appeal is GLC's filing of a notice of appeal from the order denying Attorney Fees Motion No. 1 due to GLC's lack of standing when that motion was filed, deprived the trial court of jurisdiction to entertain a second motion concerning attorney fees once the standing issue was remedied. We conclude the trial court correctly determined it had jurisdiction to consider the second motion.

Code of Civil Procedure section 916, subdivision (a) (section 916), states that, with certain exceptions not relevant here, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." In *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189 (*Varian*), our Supreme Court discussed section 916 in detail. "The purpose of the automatic stay provision of section 916, subdivision (a) 'is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The [automatic stay] prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.' [Citation.]" [¶] To accomplish this purpose, section 916, subdivision (a) stays all further trial court proceedings 'upon the matters embraced' in or 'affected' by the appeal. In determining whether a proceeding is embraced in or affected by the appeal, we must

consider the appeal and its possible outcomes in relation to the proceeding and its possible results. ‘[W]hether a matter is “embraced” in or “affected” by a judgment [or order] within the meaning of [section 916] depends on whether postjudgment [or postorder] proceedings on the matter would have any effect on the “effectiveness” of the appeal.’ [Citation.] ‘If so, the proceedings are stayed; if not, the proceedings are permitted.’ [Citation.]”

GLC’s Attorney Fees Motion No. 1 was denied without prejudice because it lacked standing to file the motion once it assigned the judgment to Grant. Grant reassigned the judgment to GLC, thereby conferring standing on GLC to file the second motion. Valley Outdoor does not dispute GLC had standing to file the second motion. Although the trial court’s ruling on Attorney Fees Motion No. 2, certainly rendered GLC’s appeal from the denial of Attorney Fees Motion No. 1 moot, that does not lead to the inexorable conclusion section 916’s automatic stay prevented the trial court from ruling on the second motion.

In *Varian*, our Supreme Court cautioned, “The fact that the postjudgment or postorder proceeding may render the appeal moot is not, by itself, enough to establish that the proceeding affects the effectiveness of the appeal and should be stayed under section 916. Rather, something more is needed. For example, the trial court proceeding must directly or indirectly seek to ‘enforce, vacate or modify [the] appealed judgment or order.’ [Citation.] Or the proceeding must substantially interfere with the appellate court’s ability to conduct the appeal. [Citation.] [¶] A trial court proceeding also affects the effectiveness of an appeal if the possible outcomes on appeal and the actual or possible results of the proceeding are irreconcilable.” (*Varian, supra*, 35 Cal.4th at pp. 189-190, fn. omitted.)

As GLC points out, a claim may be owned by different persons on different dates. GLC’s standing to seek the attorney fees once the judgment was reassigned to it was not a matter embraced in the ruling that it earlier lacked standing, and there is no

danger the results of the proceedings would have been irreconcilable. Accordingly, the trial court had jurisdiction to entertain the second motion.

DISPOSITION

The postjudgment order is affirmed. Respondent shall recover its costs and attorney fees on appeal.³

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.

³ A party who successfully defends an award of attorney fees is entitled to appellate attorney fees as well. (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388.)