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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COMERICA BANK,

Plaintiff and Respondent,

v.

GORDON RUNYON,

Defendant;

DONNA M. RUNYON,

Movant and Appellant.

G051364

(Super. Ct. No. 30-2009-00124583)

O P I N I O N

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

Richard G. Elie for Appellant.

Law Offices of Hemar & Associates and Melody G. Anderson for Plaintiff  
and Respondent.

\* \* \*

Appellant Donna M. Runyon was married to Gordon Runyon.<sup>1</sup> During the marriage, respondent Comerica Bank (Comerica) obtained a judgment for breach of guaranty against Gordon, not Donna. Gordon and Donna divorced. Comerica filed a memorandum of costs after judgment, seeking attorney fees incurred in its efforts to enforce the judgment against Gordon. Donna moved to strike or tax costs on grounds Comerica was trying to levy on her alleged homestead. The court denied Donna's motion on grounds she lacked standing to move to tax costs because she is not the judgment debtor. We affirm the court's order.

## FACTS

Comerica's operative complaint against Gordon and some other defendants alleged that in August 2007, Comerica loaned \$474,500 (the loan) to a borrower entity (the borrower) and that, pursuant to a written guaranty (the Guaranty), Gordon guaranteed the borrower's payment of the loan "together with costs and attorneys' fees incurred in the collection thereof and the enforcement of the Guaranty." The complaint further alleged the borrower had defaulted on the loan, and that Gordon and other guarantors had refused to pay any part of the balance owed by the borrower on the loan. The complaint requested, inter alia, reasonable attorney fees. The Guaranty (attached as an exhibit to the complaint) contained an attorney fees clause in which Gordon guaranteed all of the borrower's "existing and future indebtedness" to Comerica under the loan, including "all costs of collecting indebtedness, including without limit reasonable attorney's fees and costs."

Comerica moved for summary judgment, seeking, inter alia, to recover on the Guaranty for the full amount of the borrower's indebtedness, together with "its

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<sup>1</sup>

For convenience and to avoid confusion, we refer to Donna Runyon and Gordon Runyon by their first names. We mean no disrespect.

attorneys' fees and costs incurred in this action . . . ." No opposition was filed by any defendant. In June 2010, the court granted Comerica's summary judgment motion as to Gordon and other defendants.<sup>2</sup>

In July 2010, the court entered judgment in favor of Comerica against Gordon and other defendant guarantors for \$369,500 in principal, \$57,505 in pre-judgment interest, late charges of \$2,406, and unspecified amounts of costs and attorney fees (the Judgment).

In March 2011, Comerica requested issuance of an abstract of judgment against judgment debtor Gordon only. Comerica stated it had settled with two of the other judgment debtors and that a third judgment debtor had received a bankruptcy discharge.<sup>3</sup> In June 2011, at Comerica's request, the court issued an abstract of judgment against Gordon only.

Gordon and Donna subsequently divorced. The judgment of dissolution was entered on September 25, 2013, and specified June 22, 1985 as the date of marriage, and June 22, 2013 as the date of separation.

In July 2014, Comerica filed a memorandum of costs after judgment (the cost memorandum), seeking, inter alia, \$17,795.50 in attorney fees incurred during the period March 2014 through June 2014 and allegedly allowed under Code of Civil Procedure section 685.040.<sup>4</sup> In support of the cost memorandum, Comerica's counsel

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<sup>2</sup> Summary judgment was not granted as to the borrower and Brian Zealear, a defendant guarantor, because Comerica was required to obtain default judgments against them.

<sup>3</sup> As to the remaining judgment debtors (the borrower and the guarantor Zealear), Zealear had passed away in April 2010, and the borrower had filed a bankruptcy petition, prompting Comerica to dismiss its action against the borrower without prejudice.

<sup>4</sup> All statutory references are to the Code of Civil Procedure.

declared that (1) the Judgment remained unsatisfied, (2) the Guaranty and the Judgment provided for recovery of reasonable attorney fees and costs in the event of default, and (3) Comerica had incurred attorney fees in attempting to collect the Judgment. Comerica served the cost memorandum by mail on Gordon, his attorney, and three other judgment debtors.

On August 1, 2014, Comerica posted a notice of levy (the levy notice) on a house in Placentia (the Property). In the levy notice, Comerica specified Gordon as the person notified. The notice stated the “judgment creditor seeks to levy upon property in which the judgment debtor has an interest and apply it to the satisfaction of a judgment,” and identified the judgment debtor as Gordon. At the bottom of the levy notice, in the section of the form stating, “You are notified as,” Comerica checked the box for “a person other than the judgment debtor.” In Donna’s opening brief on appeal, she alleges the cost memorandum was posted on the Property “along with the Sheriff’s levy,” and that the “papers were addressed to ‘occupant.’”

Three days later, Donna filed a motion to strike costs and fees as a “non-party intended intervenor.” Without any evidentiary support, the motion simply made the bare allegation that Donna is Gordon’s “former wife” and “was never a guarantor under the contracts underlying the lawsuit.” The motion also alleged that Comerica’s memorandum of fees and costs “addresses post-dissolution matters for which Donna Runyon owes no obligation.” Concurrently with her motion to strike costs and fees, Donna also filed a motion to intervene and arrest or vacate judgment. The motion to intervene presented unauthenticated copies of the 2013 judgment of dissolution and a different petition for dissolution of marriage filed in October 2009. The motion to intervene made many factual allegations, but failed to present any admissible evidence in support thereof.

Comerica opposed both of Donna’s motions. As to Donna’s motion to tax costs, Comerica argued, inter alia, Donna is not a judgment debtor and therefore lacked

standing to bring the motion to tax costs under section 685.070. (§ 685.070, subd. (c) [“the judgment debtor may apply to the court on noticed motion to have the costs taxed by the court”]).

In Comerica’s counsel’s declaration supporting Comerica’s opposition to Donna’s intervention motion, the attorney declared that Donna and Gordon had repeatedly acted to frustrate Comerica’s efforts to enforce the Judgment. The couple had signed a financial statement under penalty of perjury in support of a claim of exemption, which claim was denied by the court in part because the couple failed to disclose all their assets, including real properties in Placentia, Whittier, and Long Beach, and a boat. Gordon petitioned to dissolve the marriage; on the same day, he recorded interspousal grant deeds transferring to Donna his interest in the Whittier, Placentia, and Long Beach properties. The next day, Gordon filed his first bankruptcy petition, which was dismissed 10 days later for failure to file documents. The next month, Donna filed her own bankruptcy petition, which the bankruptcy court dismissed after finding Donna had filed the petition in bad faith. The next month, Gordon filed a second bankruptcy petition, which was dismissed because he failed to appear at the initial creditors’ meeting. Donna filed a complaint in Orange County Superior Court, seeking to enjoin the levy sale of the Whittier property. The court denied her request for a preliminary injunction, and stayed the case, stating: “Everything that the parties have put before me persuades me that for the last four years these parties and their lawyers — and I particularly refer to the Runyons, but particularly Donna Runyon — have been enamored of filing multiple lawsuits for tactical advantage in one county and the next.”

Donna’s reply to Comerica’s opposition requested that her motion to tax costs be heard at the same time as her motion to intervene. She argued, inter alia, that Comerica’s effort to tax its fees and costs against the Property, in fact sought “to take, tax and appropriate” her property.

The court denied Donna's motion to tax costs on grounds she lacked standing to challenge costs. The court explained that the "substance" of Donna's request did not address "the propriety of the fees and costs alleged," but rather disavowed her responsibility "for fees and cost incurred by Comerica post-judgment because she was not a party to the action, and she is not responsible for the debt of her former husband, Gordon Runyon." Thus, Donna was not "challenging the fees and costs sought," but rather "Comerica's entitlement to any of her assets, as she claims they are not community property."

## DISCUSSION

Donna contends the court's order should be reversed and the trial court should be ordered to grant her motion to strike or tax costs. She argues: "Because Comerica sought levy on property it claimed was community property in Donna's former marriage, Comerica must now concede she has standing to move to strike or tax the Memorandum of Costs . . . ." Donna argues she has a significant interest in the Property.

"Standing is a question of law that we review de novo." (*IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299.)

Whether Donna has standing to move to tax costs is governed by the Enforcement of Judgments Law, a comprehensive statutory scheme contained in sections 680.010 through 724.260 (*Evans v. Paye* (1995) 32 Cal.App.4th 265, 276; see *Bisno v. Kahn* (2014) 225 Cal.App.4th 1087, 1110), whose "[d]etailed statutory provisions govern the manner and extent to which civil judgments are enforceable" (*Imperial Bank v. Pim Electric, Inc.* (1995) 33 Cal.App.4th 540, 546). We review the statutes potentially applicable here.

Under section 685.040, a "judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment." As relevant here, section 685.040 imposes

two requirements for an award of postjudgment attorney fees as costs: (1) the fees must have been incurred to enforce a judgment; and (2) the underlying judgment must include an award for attorney fees pursuant to a contractual provision for attorney fees. (*Jaffe v. Pacelli* (2008) 165 Cal.App.4th 927, 935; *David S. Karton, A Law Corp. v. Dougherty* (2009) 171 Cal.App.4th 133, 145.)<sup>5</sup> Here, Comerica has met both requisites: The Judgment awarded Comerica contractual attorney fees, and Comerica incurred attorney fees trying to enforce the Judgment.<sup>6</sup>

A judgment creditor entitled to costs under section 685.040 “may seek to recover attorney’s fees incurred in enforcing a judgment by filing either a ‘memorandum

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<sup>5</sup> The last sentence of section 685.040 provides that attorney fees incurred in enforcing a judgment are included as costs if the underlying judgment includes an attorney fee award to the judgment creditor pursuant to section 1033.5, subdivision (a)(10)(A). Section 1033.5, subdivision (a)(10)(A) provides that attorney fees authorized by contract are allowable as costs under section 1032. Under section 1032, subdivision (b), a prevailing party is entitled to recover costs in any action or proceeding.

“The last sentence of Section 685.040 provides the authorization for trial courts to award postjudgment attorney fees as costs” (*Jaffe v. Pacelli, supra*, 165 Cal.App.4th at p. 935), and is intended to address the problem that, generally, “when a judgment is rendered in a case involving a contract that includes an attorney fees and costs provision, the ‘judgment extinguishes all further contractual rights, including the contractual attorney fees clause. [Citation.] Thus, in the absence of express statutory authorization, . . . postjudgment attorney fees cannot be recovered” (*id.* at pp. 934-935).

<sup>6</sup> Donna wrongly asserts the Judgment did not award attorney fees. The Judgment did, in fact, award prejudgment attorney fees and costs, but the amount was never determined. “Generally, when a judgment includes an award of costs and fees, the amount of the award is left blank for future determination. [Citations.] After the parties file their motions for costs and any motions to tax costs, the trial court holds a postjudgment hearing to determine the merits of the competing contentions. When the court's subsequent order setting the final amount is filed, the clerk enters the amounts on the judgment nunc pro tunc.” (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 369.) The Judgment followed the generally accepted procedure of leaving the amount of the cost and fee award blank for future determination. When the amount is determined, the clerk “must immediately enter the costs on the judgment.” (Cal. Rules of Court, rule 3.1700(b)(4).) It appears Comerica waived their right to *prejudgment* costs and fees by failing timely to file a cost memorandum.

of costs’ under section 685.070, subdivision (b), or a ‘noticed motion’ under section 685.080, subdivision (a).” (*David S. Karton, A Law Corp. v. Dougherty, supra*, 171 Cal.App.4th at p. 145.)

Section 685.080 provides broadly that the “judgment creditor may claim costs authorized by Section 685.040 by noticed motion.” Thus, a judgment creditor may always proceed by noticed motion under section 685.080 as to any cost authorized under section 685.040.

In contrast, the costs recoverable under the memorandum of costs procedure under section 685.070, are limited to certain types of statutory fees and costs enumerated in subdivision (a) thereof. Those enumerated costs include attorney fees authorized under section 685.040. (§ 685.070, subd. (a)(6).) Section 685.070 establishes a procedure whereby (1) the judgment creditor may claim collection costs which are expressly recoverable under subdivision (a) by filing a memorandum of costs with the court clerk and serving a copy on the judgment debtor (*id.*, subd. (b)); (2) the *judgment debtor* may, within 10 days after being served with the memorandum of costs, apply to the court on noticed motion to have the costs taxed by the court (*id.*, subd. (c) [“the judgment debtor may apply to the court on noticed motion to have the costs taxed by the court”]); and (3) if no motion to tax costs is made within the 10-day period, “the costs claimed in the memorandum are allowed” (*id.*, subd. (d)). Thus, under section 685.070’s express terms, only the judgment debtor may move to tax costs. (*id.*, subd. (c).) And, under section 685.090, subdivision (a)(2), costs are added to and become a part of the judgment if “a memorandum of costs is filed pursuant to Section 685.070 and no motion to tax is made, upon the expiration of the time for making the motion.” Here, Gordon, as the judgment debtor, had standing to move to tax costs, but did not do so.

Donna contends she has standing to protect her interest in the Property. Of course, she does. For example, to the extent Donna claims that all or some of the Property is not subject to the Judgment, she may make a third-party claim under section

720.110, subdivision (a), that her interest is superior to Comerica's judgment lien. Similarly, insofar as Donna is asserting that the specific fees claimed by Comerica in its memorandum of costs were incurred for "post-dissolution matters for which Donna . . . owes no obligation," her claim can be adjudicated under section 701.830 by contesting the appropriate distribution of the proceeds of the execution sale.

But the issue at this juncture is *not* whether and to what extent the Property is subject to the Judgment. Instead, it is whether Comerica's attorney fees could properly be added to the Judgment owed by Gordon to Comerica. Gordon did not contest Comerica's cost memorandum, and the time for him to do so has passed. Under the express terms of section 685.070, Donna lacked standing to do so. The court properly denied Donna's motion to tax costs for lack of standing.

#### DISPOSITION

The postjudgment order is affirmed. Comerica is entitled to costs on appeal.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.