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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.

DONNA M. RUNYON,

Movant and Appellant;

GORDON RUNYON,

Defendant.

G051972

(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 Movant and Appellant.

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

* * *

Appellant Donna M. Runyon is the former wife of Gordon Runyon.¹ During the Runyons' marriage, respondent Comerica Bank (Comerica) obtained a judgment for breach of guaranty against Gordon only, not Donna.

A prior appeal in this case involved Donna's motion to strike or tax costs after Comerica filed a memorandum of costs after judgment, seeking attorney fees incurred in its efforts to enforce its judgment against Gordon. (*Comerica v. Runyon* (Jan. 7, 2016, G051364) [nonpub. opn.] (*Comerica I*)). In that appeal, Donna argued Comerica was trying to levy on her alleged homestead. (*Ibid.*) We affirmed the court's denial of Donna's motion to strike or tax costs on grounds she lacked standing because she is not a judgment debtor. (*Ibid.*)

In the current appeal, Donna challenges the court's denial of her motion to intervene and to arrest or vacate Comerica's judgment.² For the reasons discussed below, we affirm the court's order.

FACTS

Factual and Procedural History Prior to Donna's Motion to Intervene and Arrest or Vacate Judgment

Comerica's operative complaint against Gordon and some other defendants alleged (1) that it loaned \$474,500 (the loan) to a borrower entity (the borrower); (2) that Gordon and other guarantors had guaranteed the borrower's payment of the loan; (3) that the borrower had defaulted on the loan; and (4) that Gordon and the other guarantors had

¹ For convenience and to avoid confusion, we refer to Donna Runyon and Gordon Runyon individually by their first names and collectively as the Runyons, even though they are now divorced. We mean no disrespect.

² The order is appealable. (*In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 498; *Noya vs. AM. Coulter Trucking* (2006) 143 Cal.App.4th 838, 841(*Noya*)).

refused to pay the borrower's balance on the loan. (*Comerica I, supra*, G051364.) Gordon and some other defendants answered the operative complaint on September 30, 2009. In June 2010, the court granted Comerica's summary judgment motion. Shortly thereafter, Comerica settled with two of the judgment debtors (James Facciuto and the Facciuto Family Trust) for \$50,000. The court entered judgment in favor of Comerica against Gordon and other defendant guarantors for almost \$430,000. As to the borrower, however, the court ruled that, due to the borrower's default, Comerica would have to obtain a default judgment against it. The borrower filed a voluntary petition in bankruptcy court. In September 2010, Comerica settled with judgment debtor Steven Kissen for \$50,000.

In March 2011, Comerica requested the court to issue an abstract of judgment against judgment debtor Gordon only. Comerica stated it had settled with Kissen, Facciuto, and the Facciuto Family Trust, and that another judgment debtor (Kline) had received a bankruptcy discharge. The court granted Comerica's request and ordered the court clerk to issue an abstract of judgment against Gordon only.

In July and August of 2011, Comerica recorded the abstract of judgment in Orange County and Los Angeles County, respectively.

In February 2013, in response to Comerica's levy on a bank account, Gordon filed a claim of exemption to the enforcement of Comerica's judgment, claiming the exempt funds were necessary for his and Donna's support. A financial statement, signed by Donna and Gordon under penalty of perjury, stated they had no real estate equity and only one car (a 1999 Nissan Frontier). But six months later, on August 5, 2013, in connection with their pending divorce, Donna and Gordon signed a marital settlement agreement which divided their community property as follows: Donna received real properties located in Placentia, Long Beach, and Whittier, California, and in Gresham, Oregon; Gordon received a truck and a boat to be used as his primary residence; and to equalize the property division, Donna was to pay Gordon "a monthly

equalization payment of \$3,000.00 for life.” The agreement acknowledged there was no separate property to confirm to either Donna or Gordon. That same day, Gordon transferred to Donna his interest in the real properties, and on September 25, 2013, the judgment of dissolution of the Runyons’ marriage was entered.

On August 1, 2014, Comerica posted a notice of levy on the house in Placentia, specifying Gordon as the person notified. (*Comerica I, supra*, G051364.)

Donna’s Motion to Intervene and Arrest or Vacate Judgment

Three days after the notice of levy was posted on the Placentia property, Donna filed a “motion for post-judgment intervention to arrest or vacate the final judgment in this action” (the motion) on the following grounds. (1) Under Family Code section 916, subdivision (a)(2), “her separate property received in the division of [the Runyons’] property as part of their divorce is free of” Comerica’s claims. (2) She was never an obligor or guarantor and had “initially” separated from Gordon in September 2008. (3) The parties to the lawsuit had agreed expressly or impliedly to make a “secret settlement” whereby Comerica would levy on Donna’s separate property to satisfy the defendants’ debts. Comerica sought an abstract of judgment against Gordon only in order to raid Donna’s “post-separation and post-dissolution assets” Had Donna known of the secret plan, “she would have been represented by counsel in her divorce case.” At the time the guarantees were made, Comerica had a security interest in the borrower’s reported assets worth several million dollars, but “[t]hose assets remain untouched.” And (4) Code of Civil Procedure section 387 permits a party whose rights are being adversely affected to intervene in a case and seek relief from an adverse judgment being enforced against her.³

³ All statutory references are to the Code of Civil Procedure unless otherwise stated.

Besides section 387, Donna additionally based her motion, at least in part, on two other statutes. She argued section 473 permits a collusive judgment to be

Despite the motion's assertion of a "secret plan" to raid Donna's assets, neither Donna nor her counsel, nor anyone else for that matter, filed a declaration in support of Donna's motion to intervene. Instead, the motion attached several unauthenticated exhibits. Exhibit 1 consisted of unauthenticated copies of the 2013 judgment of dissolution of the Runyons' marriage and a different petition for dissolution of marriage filed in October 2009. Exhibit 2, which, like Exhibit 1, is unauthenticated, consisted of the court clerk's September 3, 2010 "Notice to Filing Party," returning papers to Comerica with the handwritten inscription, "Put all Debtors"; an abstract of judgment dated July 20, 2010, listing Janet A. Kline, Steven Kissen, and Gordon as judgment debtors; and Comerica's "Brief re: Abstract of Judgment" filed March 3, 2011. Thus, although Donna's motion to intervene made many factual allegations, she failed to present any admissible evidence in support of her motion.

Comerica's Opposition to Donna's Motion

Comerica opposed Donna's motion. Comerica argued Donna's motion was untimely; she lacked standing; section 473 is inapplicable; and Donna had failed to offer any evidence in support of her motion.

In Comerica's counsel's declaration supporting Comerica's opposition to Donna's motion, the attorney declared that Donna and Gordon had repeatedly acted to frustrate Comerica's efforts to enforce its judgment. In February 2013, 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

arrested, vacated, or set aside to the extent it impairs the rights of an innocent third party. On appeal, she does not mention section 473. Second, her motion stated that section 877.6 permits a judgment to be vacated, and a levy against third parties to be prohibited, based on a secret agreement between co-obligors and the plaintiff. In her appellate briefs, she mentions section 877.6 twice, merely stating that no reasonableness or good faith hearing was held with respect to the Kissen and Facciuto settlements.

assets, including the properties in Whittier, Long Beach, and Oregon, and the boat. On August 5, 2013, 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. On September 29, 2013, Donna filed her own bankruptcy petition, which the bankruptcy court dismissed after finding Donna had filed the petition in bad faith; the bankruptcy court barred her from filing another bankruptcy petition for 180 days. In October 2013, Gordon filed a second bankruptcy petition, which was dismissed.

The Hearing on Donna's Motion

At the March 3, 2015 hearing on Donna's motion, her attorney argued that co-defendants Kissen and Facciuto (with whom Comerica had settled) owned assets and should be "sharing the burden of this judgment." Donna's attorney argued Donna should be allowed "to intervene and finally go after the Facciuto's and Kissen." He argued "it's very hard to put on evidence like this," and proffered his notebook "with the timeline" to the court. He stated, "[Y]ou asked for evidence. I'm bringing it to you."⁴

Comerica's counsel argued its judgment was joint and several, and therefore Comerica was entitled to collect its judgment from any one or more of the judgment debtors. Comerica's counsel argued that, while Donna might have "contribution rights against the other judgment debtors," she had no right to intervene and

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According to Donna's opening brief, the notebook contained copies of a grant deed recorded May 19, 2005 conveying the San Juan Capistrano property from the Facciuto Family Trust to James Facciuto; a deed of trust recorded May 19, 2005 on the San Juan Capistrano property securing a lender's loan of \$715,000 to James Facciuto; a related substitution of trustee; a grant deed recorded November 3, 2009 conveying the San Juan Capistrano property from the Facciuto Family Trust to Linda Facciuto; and a grant deed recorded November 3, 2009 conveying the San Juan Capistrano property from Linda Facciuto to her personal trust.

vacate the judgment; rather, Donna could directly sue Facciuto, Kissen, and/or Gordon if she so desired.

Donna's counsel responded that Donna stood ready to sell her Oregon property to resolve the case. Comerica's counsel rejoined that Donna had been saying this for 18 months. The court agreed that Donna had talked about the Oregon property before, but "nothing's ever happened," and that it would be better for Donna if she sold the Oregon property in lieu of her family home.

The Court's Ruling

The court denied Donna's motion. The first independent basis for the denial was that the motion was untimely. The court found the complaint had been served on Gordon (then Donna's husband) at the Placentia home in August 2009. The marital dissolution judgment was not entered until September 25, 2013. "In other words, it appears Donna has been, or should have been, well aware of this litigation since August 2009." The marital settlement agreement "identifies all community property of the marriage and does not identify any separate property of Donna during the marriage." "Given that they were married during the pendency of this litigation and only had community property, it strains credibility to believe Donna was ignorant of this litigation and its possible adverse effect on their assets" The court cited *Noya, supra*, 143 Cal.App.4th 838, as having "what can be considered to be an even stronger fact pattern establishing Donna's lack of any diligence in seeking leave to intervene and prejudice not only to Comerica, but also to the other defendants with whom Comerica entered into settlements[,] if leave is granted to intervene."

The court also doubted that Donna had standing to intervene, since she is a non-party whose only "involvement is that Comerica seeks to levy against her Placentia property and force its sale to satisfy the judgment against Gordon and co-defendants."

The court concluded: “To the extent Donna seeks to direct how Comerica chooses to enforce the judgment and against whom, the request for leave to intervene is denied.”

As to the aspect of Donna’s intervention motion which sought to arrest, set aside, or vacate the judgment, the court stated, inter alia, that Donna had raised her “marshaling” contention as a “*new legal theory*” for the first time in her reply.

DISCUSSION

Donna contends that under section 387, subdivision (b), she has a right to intervene in a proceeding where her property is “being adjudicated or taken from her.” She asserts she “has a property interest in the litigation at hand” and that no other party can or will adequately represent her interests. She argues “the sale of her property would significantly impair her interest in it and ability to defend against the claim.” She concludes she “is entitled to intervene to assert all of her equitable rights, including a marshaling order, or equitable setoff . . . or any such other rights as pleaded below and argued [in her opening brief], including a complete discharge of the obligation [citation].”

Comerica’s brief correctly observes that Donna’s opening brief does not address the first independent basis on which the court denied her intervention motion, i.e., that her motion was untimely.

In her reply brief, Donna responds her motion was timely because she moved to intervene only three days after Comerica posted a notice of levy and memorandum of costs on her homestead in Placentia, and the court subsequently granted Comerica’s ex parte application for an order for Gordon and Donna to show cause why the Placentia property should not be sold. She cites no legal authority in support of her position that her motion was timely.

Although we might have chosen to treat as waived Donna’s argument her motion was timely, we address it on the merits.

Section 387 governs intervention. Subdivision (a) of section 387 governs permissive intervention and provides in relevant part: “*Upon timely application*, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention . . . is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court . . .” (Italics added.) Subdivision (b) of section 387 governs mandatory intervention and provides: “If any provision of law confers an unconditional right to intervene or if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person’s ability to protect that interest, unless that person’s interest is adequately represented by existing parties, the court shall, *upon timely application*, permit that person to intervene.” (Italics added.)

Thus, the requirement of timely application applies to both compulsory and permissive intervention.⁵ (§ 387 (a), (b).) We review the court’s denial of Donna’s

⁵ Because we conclude Donna’s motion was untimely, we do not address her contention that intervention was compulsory in her case, except to note a distinction between the statutory language of subdivisions (a) and (b) of section 387 as to the requisite “interest” held by an intervenor. Subdivision (a) gives the court discretion (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) [¶] 2:414, p. 2-87.) to permit intervention “in the *action or proceeding*” by a person with “an interest in the *matter in litigation*” (§ 387, subd. (a), italics added). Subdivision (b) applies more narrowly to a person with “an interest relating to the property or transaction which is the subject of the *action*.” (*Id.*, subd. (b), italics added.) Comerica’s *action* here concerns its loan to the borrower which was guaranteed by Gordon and other guarantors. The *action* had nothing to do with the property upon which Comerica now seeks to execute upon its money judgment.

motion for an abuse of discretion.⁶ (*Noya, supra*, 143 Cal.App.4th at p. 842; *Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386.)

We also bear in mind that the issue of timeliness is one of fact. In early cases where intervention was denied due to the movant's lack of diligence in filing the motion, "the two elements of laches (delay and prejudice) were present." (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 225, p. 300.) The "existence of laches is generally a factual question, and the trial court is given great discretion in determining whether to apply laches to bar relief." (*Committee to Save Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1266 [involving plaintiffs' action for injunctive relief].) "The key question is whether [the opposing party has] demonstrated prejudice, making it unjust to grant relief to" the requestor. (*Ibid.*; *Truck*

⁶ Donna attempts to elevate this case to one of constitutional dimension requiring de novo review, arguing that her homestead may not be taken without due process of law. Of course, this assertion assumes a lack of due process, which quite clearly there was not. During Gordon and Donna's marriage, a money judgment was rendered against Gordon. Gordon had appeared in the action, had been accorded the right to defend, and was thus afforded due process. Under California's law of community property, Gordon and Donna's community estate became liable for the debt (Fam. Code, § 910, subd. (a)), although Donna bore no personal liability. Comerica then imposed a judgment lien upon the community real property by the recordation of the abstract of judgment. (§ 697.310, subd. (a).) Two years later, when Gordon transferred his community property interest in the real estate to Donna as her separate property, the judgment lien survived the transfer, i.e., the entire former community estate remained encumbered by the judgment lien, even though the entire property was now Donna's separate property. (§ 697.390, subd. (a); Fam. Code, § 916, subd. (a)(2) ["Nothing in this paragraph affects the liability of property for the satisfaction of a lien on the property"].) This straightforward application of long-standing California community property law does not implicate Donna's due process rights. Her community property became lawfully encumbered during marriage — it remains lawfully encumbered as her separate property. Unless Donna were able to mount a successful constitutional challenge to all of these statutes governing Comerica's right to levy on the former community property (which she does not), her due process argument fails.

Ins. Exchange v. Superior Court (1997) 60 Cal.App.4th 342, 351 [timeliness not a bar to intervention when direct interest is demonstrated and opponent shows no prejudice].)

In *Noya*, *supra*, 143 Cal.App.4th 838, the plaintiffs reached a final settlement with all the defendants over three and one-half years after the filing of the complaint. (*Id.* at pp. 840-841.) “[M]ore than two months after the settlement was reported to the court,” the insurer of a defendant sought to intervene. (*Id.* at p. 841.) “The trial court denied the motion as untimely because it was made after the matter had settled and [the insurer] had failed to show good cause for the delay.” (*Ibid.*) On appeal, the insurer claimed “it had no reason to seek intervention at an earlier juncture” (*Id.* at p. 842.) The appellate court affirmed the judgment (*id.* at p. 845): “The trial court did not abuse its discretion when it denied [the insurer’s] application for intervention as untimely. Although no statutory time limit is placed on motions to intervene, it is significant that [the insurer] took no steps to participate in the litigation until several years had passed and a comprehensive settlement agreement had been reached Allowing [the insurer] to intervene at this late juncture could delay or impede the resolution reached by those parties.” (*Id.* at p. 842.)

Here, too, the court did not abuse its discretion by denying Donna’s intervention motion on grounds of untimeliness. Compared to *Noya*, where the intervention motion was filed two months after final settlement of the action, in the instant case, Donna filed her intervention motion more than four years after entry of judgment. Based on the evidence before it, the court found Donna should have been aware of Comerica’s action when Comerica served its complaint on Gordon (Donna’s then husband) at their shared residence in August 2009, especially because all of the Runyons’ assets were community property according to the Runyons’ marital settlement agreement. That Donna actually knew of the judgment no later than February 2013 is evidenced by her co-signing, under penalty of perjury, a false financial statement in response to Comerica’s levy on a bank account. Given that Comerica long ago achieved

a final judgment and, since then, has spent years trying to execute on its judgment, there can be no doubt that Comerica would be prejudiced by Donna's late intervention in the action with the expressed goal of arresting or vacating Comerica's judgment.

The court did not abuse its discretion by denying Donna's intervention motion.

DISPOSITION

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

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.