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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SHERRY L. LUND,

Plaintiff and Appellant,

v.

DOMINIQUE MERRICK,

Defendant and Respondent;

WILLIAM S. LUND,

Objector and Appellant.

G052260

(Super. Ct. No. 30-2011-00464163)

O P I N I O N

SHERRY L. LUND,

Plaintiff and Respondent,

v.

DOMINIQUE MERRICK,

Defendant and Respondent;

WILLIAM S. LUND,

Objector and Appellant.

G052287

(Super. Ct. No. 30-2011-00464163)

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Reversed.

Bohm Wildish, James G. Bohm and Joanne P. Freeman for Plaintiff, Appellant and Respondent Sherry L. Lund.

Grobaty & Pitet, Christopher L. Pitet and Robert K. Peck for Objector and Appellant William S. Lund.

Sheppard, Mullin, Richter & Hampton, Brian M. Daucher and Adrienne W. Lee for Defendant and Respondent Dominique Merrick.

* * *

INTRODUCTION

This is the fourth appeal in a case that puts *Jarndyce v. Jarndyce* in the shade. And, as was true with the interminable Dickensian lawsuit, the legal fees must be voracious but the issues are dwindling.

The original combatants were Sherry Lund, plaintiff, and Dominique Merrick, defendant. Sherry Lund's lawsuit against Merrick was dismissed pursuant to Merrick's anti-SLAPP motion. Since then Merrick has been trying to collect the legal fees awarded to her as a prevailing defendant. This effort has drawn Sherry's husband, William Lund, into the fray, because William has some money coming to him from the settlement of a Los Angeles Superior Court case involving a trust.¹ After three tries, Merrick finally received an assignment order from the Orange County Superior Court allowing her to collect her fee award of approximately \$130,000 from William's trust payments on the ground that the money is community property. Both William and Sherry have appealed from this order.

At the risk of sowing the seeds of appeal number five, we reverse the assignment order. The statute permitting a court to order an assignment restricts this

¹ We refer to William Lund and Sherry Lund by their first names to avoid confusion.

power to an order to the judgment debtor. William is not the judgment debtor; therefore, the court has no power to order him to assign his money to Merrick. In addition, Merrick has not shown that William's trust payments are community property subject to the collection laws in this state.

FACTS

In 2011, Sherry sued Merrick for defamation. Merrick responded with a motion to dismiss under Code of Civil Procedure 425.16, the anti-SLAPP statute.² The trial court denied the motion, and Merrick appealed. We reversed in appeal number one and directed the trial court to enter judgment in Merrick's favor, dismissing the suit.³

Merrick then sought her attorney fees from Sherry under section 425.16, subdivision (c)(1). The trial court awarded Merrick nearly \$200,000, and Sherry appealed. This fee award generated appeal number two.⁴ Merrick's lawyers had neglected to submit any admissible evidence at all regarding the amount of the fees; we reversed the fee award and sent it back so that Merrick could try again. She did, and this time she obtained approximately \$130,000. Mercifully, this fee award was not appealed.

There was a hitch, however. Rather than going after Sherry's assets, Merrick sought to collect from payments due to William from a trust under the jurisdiction of the Los Angeles Superior Court.⁵ She obtained an assignment order (section 708.510) from the Orange County court allowing her to do so and collected the *first* fee award (\$200,000) *before* we had decided appeal number two, the attorney fee award appeal. When the attorney fee order was reversed for lack of evidence, there was no judgment to support the assignment order. Appeal number three was from the

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

³ *Lund v. Merrick* (Aug. 24, 2012, G045654) [nonpub. opn.].

⁴ *Lund v. Merrick* (May 21, 2014, G048210) [nonpub. opn.].

⁵ Pursuant to a settlement agreement, the trustees of the Sharon D. Lund Trust fbo Bradford D. Lund (Sharon Lund Trust) are obligated to pay William \$500,000 per year for life, subject to certain conditions. Sharon Disney Lund is Walt Disney's daughter, Bradford Lund's mother, and William's late wife.

assignment order permitting Merrick to collect William’s money from the trust, which we reversed because the fee order had been reversed.⁶

At this point, Merrick decided to engage in a little self-help. Although the disposition in appeal number three included an order requiring her to return the money she had collected from William’s trust payment,⁷ Merrick sent only part of the money back. She kept the \$130,000 she had been awarded from the second fee motion and sent the balance to William. She then asked the trial court to confirm what she had done, by seeking another assignment order allowing her to collect money from William – money she had, in fact, already collected. Not surprisingly, the judge refused, saying, in effect, “You kept some money even though the Court of Appeal told you to give it all back. I’m not going to ratify this action.”

This brings us to the present appeal, appeal number four. Merrick sent the rest of the money back and applied again for an assignment order allowing her to collect Sherry’s debt from the money owing to William from the Sharon Lund Trust. This time the court granted her request. The court ordered William to assign his payments from the trust to Merrick until her judgment was satisfied, and it ordered the trustees to pay Merrick any proceeds owing to William until the judgment was satisfied. Both William and Sherry have appealed from this order, and the two cases have been consolidated on appeal.

DISCUSSION

William and Sherry are domiciled in Arizona and have been continuously domiciled there since 1999. Both William and Sherry have asserted on appeal that William is not the judgment debtor – Sherry is. They are both correct.

⁶

Lund v. Merrick (Feb. 26, 2015, G049438/G049452) [nonpub. opn.].

⁷

“Any funds paid out pursuant to the assignment order are to be restored to their source.”

I. The Assignment Order

Section 708.510, subdivision (a), provides in pertinent part, “Except as otherwise provided by law, upon application of the judgment creditor on noticed motion, the *court may order the judgment debtor to assign to the judgment creditor . . .* all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments” (Italics added.) Section 680.250 defines “judgment debtor” as “the person against whom a judgment is rendered.” As both William and Sherry have pointed out, William is not the judgment debtor in this case.

We review the interpretation of a statute de novo. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1057.) The assignment statutes do not give the court the power to order someone who is not a judgment debtor to do anything. The unambiguous language of section 680.250 limits a “judgment debtor” to “the person against whom a judgment is rendered.” William does not fit that description, and a court cannot order someone who is not a judgment debtor to assign a right to payment to a judgment creditor.

The sole case Merrick cited to support her argument that she can collect Sherry’s judgment from William is *Cabral v. Soares* (2007) 157 Cal.App.4th 1234 (*Cabral*). *Cabral* concerned a man who was significantly behind on his support payments. (*Id.* at p. 1236.) His ex-wife alleged he had conspired with his sister to alter their mother’s will so that the sister received the portion of the mother’s estate intended for him, thereby putting it beyond his ex-wife’s reach. (*Id.* at p. 1257.) The court held the ex-wife could not challenge the mother’s will or the administration of her estate in a civil proceeding (as opposed to one in probate), but she could plead a cause of action for constructive trust against the sister for the portion of the estate the ex-husband should have received. (*Id.* at pp. 1239-1241.)

The court noted that the ex-wife had an assignment order from the family court, assigning to her the ex-husband's right to payments from any third party, including any payments from his sister or from his mother's estate. (*Cabral, supra*, 157 Cal.App.4th at p. 1239.) Merrick relies on this aspect of the case as providing authority for ordering the trustees of the Sharon Lund Trust to pay William's money to her. It does not. The ex-husband there was the judgment debtor, and an assignment order was properly entered against him. The *Cabral* court did not hold that this order could be used to make someone else a judgment debtor instead of or in addition to the ex-husband.

Weingarten Realty Investors v. Chiang (2012) 212 Cal.App.4th 163 (*Weingarten*) is instructive. In that case, the assignee of a judgment creditor sought to enforce its judgment against property of the judgment debtor that had escheated to the State of California. The superior court ordered the controller (Chiang) to deliver the property to the judgment creditor. The controller refused, on the ground that only an "owner" could recover escheated property. (*Id.* at p. 166.)

The judgment creditor did *not* try to enforce the assignment order against the controller directly. (*Weingarten, supra*, 212 Cal.App.4th at pp. 166-167.) Instead, it proceeded under the provisions of the Unclaimed Property Law, in particular section 1540, which allows "any person" with a right to escheated property to file a claim for it. The court held that the assignee stood in the shoes of the judgment creditor and could therefore assert a claim to the property.⁸ (*Id.* at pp. 167, 170.)

Weingarten throws the flaws in Merrick's argument into sharp relief. As Sherry's judgment creditor with an assignment, Merrick stands in her shoes. She can

⁸ The court noted that the superior court had improperly assigned the subject *property* to the judgment creditor, while the statute permits the assignment of the judgment debtor's *interest* in the property. The court stated, "We presume this is what the court intended and note that no prejudice resulted from the wording of the order because [the judgment creditor] proceeded as if it had only those rights that [the judgment debtor] had to recover the property from the Controller." (*Weingarten, supra*, 212 Cal.App.4th at p. 167.)

assert Sherry's rights, but only those rights. Sherry has no right to any payment from the trustees of the Sharon Lund Trust. Only William has that right.

Merrick argues that the money from the trust is community property and therefore available to pay Sherry's judgment. We discuss community property below. Here we observe only that even if Merrick is correct about the nature of the money, she is confusing the money with the person. The possession of community property money does not make William a judgment debtor, that is, the person against whom a judgment is rendered. And the money from the Sharon Lund Trust becomes community property only when William gets it, not while it is still under the trustees' control. At that point, it would, theoretically at least, be subject to other statutory collection procedures, properly applied. (See *FirstMerit Bank N.A. v. Reese* (2015) 242 Cal.App.4th 408, 414.)

II. Community Property

Merrick argues the money William receives from the Sharon Lund Trust is community property. Therefore she can satisfy Sherry's debt from this money, citing provisions in the Code of Civil Procedure and the Family Code.

Section 695.020, subdivision (a), part of the enforcement of money judgments division, provides, "Community property is subject to enforcement of a money judgment *as provided in the Family Code.*" (Italics added.) Family Code section 910, subdivision (a), provides, "Except as otherwise expressly provided by statute, the *community estate* is liable for a debt incurred by either spouse before or during the marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt." (Italics added.)

The Family Code provides that the "community estate" is liable for the spouses' debts regardless of whether both are parties to the debt or the judgment. (Fam. Code, § 910, subd. (a).) "Community estate" includes both community property and quasi-community property. (Fam. Code, § 63.) Community property is "all property,

real or personal, wherever situated, acquired by a married person during the marriage *while domiciled in this state[.]*” (Fam. Code, § 760, italics added.) Quasi-community property includes property acquired “[b]y either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.” (Fam. Code, § 125, subd. (a).)

Family Code section 910, subdivision (a), cannot be invoked against either William or Sherry. They do not have a “community estate.” They do not have community property under California law, because they have not acquired property while domiciled in this state, as required by section 760. They have lived in Arizona since 1999. They do not have quasi-community property under California law; this statute can be constitutionally applied only if (1) both parties have changed their domicile to California and (2) they seek legal alteration of their marital status after the change. (*Fredericks v. Fredericks* (1991) 226 Cal.App.3d 875, 878; see *In re Marriage of Roesch* (1978) 83 Cal.App.3d 96, 106-107, superseded by statute on other grounds; see also *Addison v. Addison* (1965) 62 Cal.2d 558, 568 [quasi-community property concept applicable only in divorce or separation].) Neither condition applies to William and Sherry. Accordingly, Family Code section 910, subdivision (a), does not provide a mechanism to enforce a judgment against their community estate.

III. Sherry’s Request for Judicial Notice

Sherry has asked us to take judicial notice of the date of death of Sharon Lund (William’s late wife) and of William’s status as a trustee of the Sharon Lund Trust, as evidenced by the trust document. We decline to do so, even if both items are eligible for judicial notice.

The reason for this request for judicial notice is to raise for the first time in this case the notion that the money William receives from the Sharon Lund Trust is his separate property. This issue was not raised below, and we do not entertain factually

based theories raised for the first time on appeal. (See *Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953, 983.)

DISPOSITION

The assignment order is reversed. Appellant Sherry Lund's request for judicial notice is denied. Appellants are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.