Filed 5/12/17 Marriage of Hettinga and Loumena CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of WYLMINA E. HETTINGA and TIMOTHY P. LOUMENA.	H039331 (Santa Clara County Super. Ct. No. 1-05-FL127695)
PACIFIC ALMADEN INVESTMENTS, LLC, Appellant, v. TIMOTHY P. LOUMENA, Respondent.	

This appeal arises from an order to sell property issued in a dissolution action that began in 2005 between Wylmina Hettinga (Hettinga) and respondent Timothy Loumena (Loumena). During the course of the proceedings, the court ordered the family home sold as community property. Hettinga, in violation of a court order, and in breach of her fiduciary duty, transferred her interest in the property to appellant Pacific Almaden Investments, LLC (Pacific Almaden). Pacific Almaden is allegedly a shell entity used by Hettinga for a variety of fraudulent purposes, including obstructing court orders and getting around her vexatious litigant status. After the trial court ordered Pacific Almaden to be joined to the family law proceeding, the court expunged a lis pendens recorded by

Pacific Almaden and directed that the property be sold. Pacific Almaden appeals, arguing that the trial court should have continued the hearing where it ordered the property sold because Pacific Almaden's time to respond to the summons had not expired. Respondent moves to dismiss the appeal on equitable grounds and because the appeal is moot. We deny the motion to dismiss and affirm the order, finding that the trial court had jurisdiction to issue the order at the time of the hearing.

FACTUAL AND PROCEDURAL BACKGROUND[1]

The marriage between Hettinga and Loumena was dissolved in 2007, with the court reserving jurisdiction over all other issues. In 2008, the trial court found that the family home, located at 21251 Almaden Road, San Jose CA 95120 (the property), should be treated as community property and issued sanctions in the amount of $102,000 against Hettinga, for a multitude of abusive behavior, including her "failure to cooperate in the disposition of the family residence, the principal asset of this community." The court admonished Hettinga that further abuses would lead to further sanctions. In appeal numbers H032608 and H033027, (*In re Marriage of Wylmina and Timothy Loumena* (H032608/H033027, Feb. 8, 2011) [nonpub. opn.]), this court affirmed those orders in substantial part, but recognized Hettinga's separate property claim against the property in the amount of $21,700.[2]

---

[1] A full recitation of the factual and procedural background in the ongoing family law proceedings can be found in this court's prior opinions in case numbers H032608 and H033027.

[2] On the court's own motion, we will take judicial notice of the trial court's statement of decision, filed July 25, 2014. Although, respondent includes the statement of decision in his appendix, the statement of decision is not properly part of the record on appeal as it was filed more than a year after appellant filed its notice of appeal. However, because the factual and procedural background in this matter is both convoluted and complex, and because the record provided by the parties fails to provide the background necessary to fully understand and resolve this appeal, we must take judicial notice of the trial court's statement of decision. This 21-page document, meticulously lays out the

In 2009, the trial court deemed Hettinga to be a vexatious litigant, issued a prefiling order pursuant to Civil Code of Procedure section 391.7, and ordered her to post security in the amount of $100,000 in favor of Loumena. As we described in a prior appeal, despite the 2009 vexatious litigant order, "[Hettinga's] vexatious conduct has never abated. She attempted to transfer her interest in the community residence to a corporation and filed a lis pendens on the property. She failed to pay child support, filed about 50 unsuccessful requests for family court orders, filed 18 appeals, and was found guilty of contempt after repeatedly violating restraining orders. Hettinga also filed five state lawsuits and two federal lawsuits against Loumena." (*In re Marriage of Wylmina and Timothy Loumena, supra*, H041589 [p. 2].)

When, by 2011, the family home was still not sold, Loumena moved for an order for the sale of the home. The trial court held a hearing on September 1, 2011, and, in an order dated March 27, 2012, directed Loumena to facilitate the sale of the property. Hettinga again refused to cooperate with the March 27 order. Unbenownst to the court and Loumena, Hettinga had already quitclaimed the property to Pacific Almaden on March 29, 2011. Pacific Almaden filed an unlawful detainer action against Loumena, and on July 6, 2011 secured an eviction notice. On August 29, 2011, Pacific Almaden also filed an action in partition in the trial court, and recorded a lis pendens. The record before us does not reveal the status of those matters.

In May 2012, Loumena filed a "Motion to Effectuate Sale" of the home. On September 18, 2012, the motion came on calendar. The court ordered Pacific Almaden and Tim Tibbott joined to the action, and ordered Loumena to serve them by service of summons forthwith. The court continued the Motion to Effectuate Sale until December 4, 2012, to allow for service on Pacific Almaden.

---

history of the family law proceeding as well as all the related judicial and nonjudicial matters surrounding this proceeding which has dragged on for more than 12 years.

Pacific Almaden is a limited liability company formed in September of 2009. On October 24, 2011, Pacific Almaden merged with The 21251 Almaden Inventment LLC (noteably, 21251 is the address of the property at issue). The certificate of merger was signed by Timothy Tibbott as sole member and Joel Hettinga, sole member. Timothy Tibbot was Hettinga's live-in boyfriend and Joel Hettinga is her brother. the statement of information filed with the Secretary of State on December 7, 2012 listed Mark Sanger as CEO and Timothy Tibbott as a manager. Hettinga listed herself as an "administrator" and signed the filing. On April 30 2013, a new statement of information was filed with the Secretary of State, listing Jack Loumena as CEO. Jack Loumena is Loumena and Hettinga's son, a minor at the time of the filing.

Loumena served Pacific Almaden on October 5, 2012 by personally serving the summons and the court's September 18, 2012 order on "Jane Doe" occupant at the address listed on the Secretary of State's website, and by mailing these documents to the same address.[3] Loumena's continued motion to effectual sale, filed on May 25, 2012 and originally heard on September 18th, came on for hearing on December 4, 2012. Loumena appeared with counsel. Hettinga appeared representing herself. Neither Mr. Tibbott nor any representative of Pacific Almaden appeared. In an order filed on January 23, 2013, the court found that Mr. Tibbott and Pacific Almaden were validly served by substitute service pursuant to Code of Civil Procedure section 415.20. The court ordered the lis pendens recorded in Santa Clara County against the subject property expunged. The court modified it September 1, 2011 order to sell the property by directing Loumena to be the sole lister of the property, authorizing the clerk to sign on behalf of Pacific Almaden and Timothy Tibbot if they refused to sign, and by ordering

[3] The address used for service was the address listed on an undated Business Entity Detail printout, purporting to be from the Secretary of State. While this document appears in the Appellant's Appendix on appeal, there is no evidence that it was part of the record below. As an undated, unauthenticated printout, it is also not a proper subject of judicial notice.

the proceeds to be placed in a blocked account until further order of the court. Finally, the court ordered the parties to refrain from doing "anything, directly or indirectly, to transfer, encumber, hypothecate, conceal or in any way dispose of any portion of the [property]," except for Loumena's efforts to sell the property. On March 25, 2013, Pacific Almaden filed a notice of appeal from the January 23, 2013 order effectuating the sale of the property.

Nothing in the record before us conclusively establishes when and how Pacific Almaden first appeared in this action. However, on May 14, 2013, Pacific Almaden recorded and filed an amended lis pendens on the property, and on May 16, 2013 it filed an objection to Loumena's request for a temporary emergency order to effectuate the sale of the property. After the emergency hearing, the court found that it had retained jurisdiction to effectuate its previously ordered sale of real property on an ex parte basis, ordered the amended lis pendens expunged, and directed the pending sale of the property to proceed. Although Hettinga and Pacific Almaden refused to cooperate in signing the documents necessary to complete the court-ordered sale of the community residence, the clerk of the court signed the escrow documents and the property was finally sold in May 2013. "[T]he proceeds of $494,957.73 were deposited in a trust account pending further court order. Hettinga made an unauthorized withdrawal of most of this money. Loumena's attorney had to go to great lengths to have this money restored to the account. Hettinga also took all of the funds in the children's trust accounts." (*In re Marriage of Wylmina and Timothy Loumena, supra,* H041589 [p. 2].)

While the appeal was pending, Loumena filed a motion to dismiss the appeal. On May 20, 2014, we ordered the motion considered with the appeal, and ordered the appeal to proceed to briefing.

DISCUSSION

On appeal, appellant presents an appendix consisting of 29 pages, which falls far short of providing a record sufficient to explain the complex and convoluted factual and

procedural history of this case. Its brief, consisting of two paragraphs of facts and three paragraphs of argument, cites no authority other than references to three Code of Civil Procedure, dealing with service of summons. Of the three sections cited, two are inapplicable to this case. Its only claim on appeal is that the trial court should have continued the December 4th hearing, because appellant had until December 10th to respond to the summons that was served by substitute service. Appellant's claim on appeal fails. Although appellant had not yet appeared in the family law matter, the court had jurisdiction to issue the order.

Standard of Review

"The granting or denying of a continuance is a matter within the court's discretion, which cannot be disturbed 'on appeal except upon a clear showing of an abuse of discretion.' " (*Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 448, citing *People ex rel. Dept. Pub. Wks. v. Busick* (1968) 259 Cal.App.2d 744, 749.) Such decisions will be upheld unless a clear abuse is shown, amounting to a miscarriage of justice. (*Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 858, 863, as modified (Jul. 8, 2008)*; Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170; *In re Marriage of Young* (1990) 224 Cal.App.3d 147, 153.)

The Trial Court Did Not Err in Proceeding with the December 4th Hearing.

On September 18, 2012, at the hearing on respondent's motion to effectuate sale, the trial court ordered Pacific Almaden joined to the action and directed Loumena to serve a summons on Pacific Almaden. Loumena had the option of personally serving the summons on the registered agent for Pacific Almaden pursuant to Code of Civil Procedure section 415.10, or, in lieu of personal delivery, Loumena could serve Pacific Almaden by substitute service pursuant to Code of Civil Procedure section 415.20, subdivision (a). The latter section permits service on a corporate entity by leaving copies of the summons at its usual place of business during business hours and then mailing the

summons to the same address. (Code of Civ. Proc., § 415.20, subd. (a).) On October 5, 2012, Loumena served the summons and court orders of September 18, 2012 by leaving them with an unknown person at the address listed for Pacific Almaden in its the corporate filings with the Secretary of State. Loumena then mailed the same documents to that address on October 30, 2012. In its January 23, 2012 order, the trial court found that Pacific Almaden and Mr. Tibbott were validly served by substitute service as provided under section 415.20. Appellant does not contest the validity of service.

Pursuant to Code of Civil Procedure section 415.20, subdivision (a), substitute service was deemed complete 10 days after October 30th, or November 9, 2012. Pacific Almaden had 30 days thereafter to respond, or until December 10, 2012. (Code of Civ. Proc., § 412.20, subd. (a)(3).) Although the court affirmatively found that service was valid, there were no discussions on the record about the timing of service or whether Pacific Almaden's time to respond had expired. Since, neither Pacific Almaden, nor Mr. Tibbott appeared at that hearing, no jurisdictional objection or request for continuance was made before or at the hearing. (Code Civ. Proc., § 418.10, subds. (a) & (b).)

Appellant contends that the trial court failed "to allow time for appellant to respond as provided by law" by not continuing the hearing to a date after the time to respond had expired. Appellant provides no authority or argument as to why this is reversible error. In fact, even though appellant's time to respond had not expired, the court had jurisdiction to issue the order at the December 4, 2012 hearing. A summons is the process by which a court acquires personal jurisdiction over a defendant in a civil action. (*MJS Enterprises, Inc. v. Superior Court* (1984) 153 Cal.App.3d 555, 557.) Jurisdiction over a party attaches at the time the summons is served, not when the time to respond has expired. (Code Civ. Proc. § 410.50; *Baker v. Anderson* (1981) 119 Cal.App.3d 1000, 1003.) Appellant was deemed served on November 9, 2012.

Therefore, the court had jurisdiction over appellant as of November 9th, well before the December 4, 2012 hearing.

Had appellant appeared specially to object to jurisdiction or to request a continuance, and had the court denied such a request, our conclusion may be different. But under these circumstances, where appellant knew about the hearing date from the papers served with the summons, but elected to neither appear nor to request a continuance, we find that the trial court, vested with jurisdiction as of November 9, 2012, did not err in moving forward with the December 4th hearing as scheduled.

Additionally, 44 days elapsed between the expiration of the time to respond expired on December 10th, and the written order issued on January 23d. Nothing in the record shows that appellant took any steps at any time *after* the hearing to object to the court's exercise of jurisdiction, to move for reconsideration of the order, or to request a new hearing. To the contrary, appellant appeared and filed an opposition to the May 16, 2013 ex parte hearing on Loumena's request for an emergency order to effectuate the sale ordered on January 23d. Nothing in that opposition challenges the court's jurisdiction to issue the underlying January 23d order or contends that the court abused its discretion in proceeding with the hearing on December 4th.

Instead of addressing the continuance issue raised in the opening brief, respondent contends that appellant has made a general appearance in the case, and therefore is barred from complaining about the court's jurisdiction. It is well settled that a general appearance prior to judgment is a consent to the exercise of personal jurisdiction and a waiver of objections based on defective service of process. (Code Civ. Proc., § 410.50, subd. (a); *In re Vanessa Q.* (2010) 187 Cal.App.4th 128, 135.) However, in arguing that appellant made a general appearance, respondent relies on post-appeal appearances and documents filed in this ongoing litigation after March 25, 2013: appellant's participation in the May 2013 ex parte hearing, the November 2013 and June 2014 hearings on the reopened proceedings. These appearances and documents that postdate the notice of

appeal were not before the trial court at the time the order on appeal was entered and are not properly part of the record. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.) Respondent's reliance on them is inappropriate. Although appellant appeared generally in the family law matter a few months after the order on appeal was filed, nothing in the record before us demonstrates unequivocally that appellant appeared generally prior to the entry of the order on appeal, or when the first general appearance occurred. Respondent's argument is of no import.

It is also the case that the subject and contents of the January 23d order directing the sale of the property have been reaffirmed multiple times since appellant appeared generally and appellant has fully participated in those proceedings. Thus, even if appellant should have been allowed to participate in the initial hearing on December 4th, it cannot show any prejudice that accrued from the January 23d order. The property was not actually sold until after appellant's general appearance and participation in the May ex parte hearing.

Where the court had jurisdiction to hold the hearing; where appellant at no time before or after the hearing objected to the hearing proceeding on December 4th or asked for a continuance; and where appellant attended and fully participated in subsequent hearings that reaffirmed the court's January 23d order; we cannot find that the trial court abused its discretion in not continuing the December 4th hearing until a time after appellant's statutory time to respond had expired. The order must be affirmed.

The Motion to Dismiss Must Be Denied.

Having found that the order on appeal should be affirmed, we will nonetheless address respondent's motion to dismiss because it sounds in equity. He asks that the appeal be dismissed as abusive and moot. This appeal, he claims, is yet another attempt to obfuscate and to thwart the resolution of the issues pending in family court. Respondent contends that the involvement of Pacific Almaden in the family law matter is merely Hettinga's latest attempt to disrupt the disposition of the property and proceeds.

He also argues that both Pacific Almaden and Hettinga have made extensive abusive use of court process, and, consequently, should not be allowed to complain about notice or opportunity to appear at the hearing. Finally, respondent argues that because the property has been sold since the filing of the notice of appeal, the appeal is moot because it can provide no remedy for Pacific Almaden. Although respondent's frustration with Hettinga's years of delay and obstruction is understandable, none of his contentions is a basis to dismiss the appeal.

I. Pacific Almaden's Participation in the Action and the Appeal Are Not a Basis to Dismiss the Appeal

According to respondent, Pacific Almaden is a shell company that Hettinga uses to get around the vexatious litigant order and to obstruct the trial court's orders regarding the disposition of community assets. Respondent urges this court to dismiss the appeal because Pacific Almaden is not the proper appellant. Our review of the record does tend to support the conclusion that Hettinga is the puppet master of Pacific Almaden. She listed herself as an administrator of the entity in filings before the Secretary of State. All the agents and officers listed in these filings are either her family members or her "live in boyfriend." She even listed her minor son, Jack, as an officer, without the permission of Loumena, Jack's custodial parent.

At the December 4th hearing, Hettinga took the position that she no longer has any interest in the house proceeds because she had transferred her interest to Pacific Almaden. The transfer of her community interest in the property to Pacific Almaden, without the knowledge or consent of the court or Loumena, are more than suspect. The trial court found that the transfers violated the automatic temporary restraining orders pursuant to Family Code section 2040 and violated Hettinga's fiduciary duty to Loumena under Family Code sections 1101, 1102 and 2102.

Despite these facts known to the trial court and explicit findings of wrongdoing and improper transfer, the trial court has never, at least in the record before us,

invalidated Pacific Almaden's interest in, or claim to, the property and its proceeds. Nor has the trial court ever found that Pacific Almaden is the alter ego of Hettinga. There is nothing in the record before us that would allow us to conclude that Pacific Almaden's interest, although highly suspect, is a sham. In fact, the trial court recognized Pacific Almaden's claim when it ordered it joined to the action, and again in its July 25, 2014 statement of decision. As a properly joined party to the action below, challenging the trial court's jurisdiction to hold the December 4th hearing, Pacific Almaden is a "proper appellant."

Respondent's frustration with Hettinga's obstructionist antics is understandable. As we have already found in past appeals filed by Hettinga, she has been uncooperative in the disposition of the property since the property trial in 2008. Between 2008 and 2011, she was sanctioned and ordered to cooperate more than once. After 2011, when the court finally ordered the property sold, Hettinga again created chaos to obstruct the sale of the property by leasing it to a third party and transferring it to Pacific Almaden. Respondent is correct that Hettinga has had more than ample opportunity to respond to the orders for the sale of the property. Nevertheless, at the time of the December 4th hearing, Pacific Almaden had not. Pacific Almaden has engaged in a variety of litigation regarding the property. It has filed an unlawful detainer action and an action for partition. A finder of fact may even be able to ascribe some knowledge of the family law proceedings to Pacific Almaden, given that Hettigna is a listed "administrator" on the corporate filings. However, Pacific Almaden was not made a party to the family law action until just before the hearing on the motion, so this was their first opportunity to participate in and respond to the family law order directing the sale of the property. Respondent's reliance on Pacific Almaden' participation and activities after the December hearing is misplaced. Unless and until the trial court finds that Pacific Almaden is the alter ego of Hettinga, or otherwise invalidates Pacific Almaden's claim to the proceeds of the property, we cannot find that Pacific Almaden has had ample

opportunity to participate prior to December 4th. The record before us does not provide a basis to find Pacific Almaden's participation in the action improper or its appeal so abusive that we would order the appeal dismissed on those grounds.

II. **The Appeal Is Not Moot**

Finally, respondent argues that the appeal must be dismissed as moot because the property has been sold to third party *bona fide* purchaser, and any finding of error would have no practical effect because such a sale cannot be undone. "It is settled that 'the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. [Citations.]' [Citations.]" (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132.) If, because of subsequent events, an appellate decision can have no practical impact or provide the appellant any effective relief, the appeal is moot. (*La Mirada Avenue Neighborhood Assocation of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586, 590; *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.) When a case becomes moot pending an appellate decision, the reviewing court must dismiss the appeal. (*La Mirada Avenue Neighborhood Assocation of Hollywood v. City of Los Angeles*, *supra* at p. 590.)

In an appeal from an order directing sale of real property, the intervening sale of the property renders the appeal moot. (*First Federal Bank of California v. Fegen* (2005) 131 Cal.App.4th 798, 800-801.) Both the order on appeal and the subsequent ex parte order filed in May 2013 directed the sale of the property to a third party buyer, and the property has been sold. Additionally, the order on appeal for the sale of the property has been reaffirmed multiple times in subsequent orders filed after appellant generally appeared. Any decision by this court regarding the January 23d order cannot offer appellant any remedy or relief regarding the sale of the property.

This does not render an appeal from the January 23d order moot because the question of mootness must be decided on a case-by-case basis. (*In re Hirenia C.* (1993) 18 Cal.App.4th 504, 518.) Those cases where courts have found an appeal moot after the sale of the property are cases where the central issue in the action is the propriety of the sale itself. (See *First Federal Bank of California v. Fegen, supra*, 131 Cal.App.4th at pp. 800-801.) This is an ongoing family law matter with many issues and varying interests. While the sale of the property is the central issue for Pacific Almaden, as a joined party, the distribution of the proceeds is intertwined with a variety of other legal and equitable issues, which have been, and continue to be the subject of ongoing litigation. In addition to directing the sale of the property, the order on appeal made numerous other findings and directives regarding the proceeds of the sale, retention of jurisdiction, further anticipated actions by the court, and restrictions on the parties. As the July 2014 statement of decision makes clear, the issues regarding the respective rights in the property proceeds remain unresolved to this day. An issue is not moot if the purported error infects the outcome of subsequent proceedings or when material questions remains for the court's determination. (*In re Dylan T.* (1998) 65 Cal.App.4th 765, 769; *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1548.) Because of the ongoing proceedings below, we feel it important to lay to rest any notion that the trial court abused its discretion or exceeded its jurisdiction by moving forward with the December 4th hearing. Any error could arguably infect the ongoing subsequent proceedings. Conversely, our finding of no error removes any cloud that appellant contends exists. The appeal is not moot.

DISPOSITION

The respondent's motion to dismiss is denied. The January 23, 2013 order is affirmed.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.