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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

HABBAS NASSERI & ASSOCIATES,

Plaintiff and Respondent,

v.

DAVID AKINTIMOYE,

Defendant and Appellant.

H039730

(Santa Clara County

Super. Ct. No. 1-10-CV169989)

Appellant David Akintimoye, an attorney proceeding in propria persona, purports to appeal from an order denying his motion to vacate the entry of default in an action to recover legal fees he was holding in trust for his client’s former counsel, respondent Habbas Nasserri & Associates. Appellant seeks to overturn an order striking his answer as a terminating sanction and for reversal of the default judgment ultimately entered in respondent’s favor. We are unable to address these issues, however, as defendant has appealed from a nonappealable order. Consequently, we will dismiss the appeal.

Background

The underlying dispute arose from the settlement of a personal injury lawsuit brought by German Gonzalez. On even this one fact the parties diverge.¹ In its first

¹ The differences in the parties’ accounts of the factual and procedural history would not be as problematic as it is but for both parties’ utter disregard of the Rules of Court governing appellate briefs, notably the requirement that all briefs “[s]upport any reference to a matter in the record by a citation to the volume and page of the record where the matter appears.” (See Cal. Rules of Court, rule 8.204(a)(1)(C).) We will not accept as factually accurate any unsupported statement in either party’s brief. Factual

amended complaint (the operative pleading) respondent stated that it initially represented Gonzalez for a contingency fee and settled the case. Appellant, however, alleged in his answer that Gonzalez fired respondent before the case settled and that *he* subsequently settled it. In any event, at some point appellant took over representation of Gonzalez. One of the existing issues at that time was whether liens secured by Gonzalez's medical providers could be ignored and the settlement proceeds paid directly to Gonzalez.

Appellant agreed to hold the fees and costs Gonzalez owed respondent in trust. In reliance on that promise, respondent alleged, it endorsed the settlement checks "to enable [Gonzalez] to obtain his share of the settlement proceeds without delay." Appellant thereafter filed a Chapter 7 bankruptcy petition on Gonzalez's behalf, which, in his view, discharged any debt Gonzalez owed to respondent.

Respondent then brought this action to recover its fees and costs for representing Gonzalez. Its first amended complaint against appellant, filed in April 2011, contained causes of action for intentional interference with contractual relations, breach of contract, and conversion. Respondent sought \$21,832.46 for its fees and costs, punitive damages, a constructive trust, and declaratory relief.

Appellant demurred to the first amended complaint. The superior court, however, overruled all but the second cause of action for breach of contract, and it gave respondent 10 days to amend.

Appellant answered the first amended complaint with his own version of the facts, followed by a general denial and 16 affirmative defenses. In April 2012, respondent moved for an order compelling appellant to respond to written discovery and for an order imposing sanctions.² The motion was accompanied by a declaration from respondent describing appellant's "lack of cooperation, defiance of the discovery law, and total

assertions that refer us only to allegations or arguments made below are not considered facts.

² Respondent's motion to augment the record, filed May 29, 2014, is granted.

failure to meet and confer,” all of which had caused increased attorney time. According to respondent, appellant had given unverified answers to the first set of form interrogatories and requests for production of documents, and those answers were “in many respects incomplete, insufficient, and evasive.” Appellant did not respond to the first set of specially prepared interrogatories or the second set of requests for production of documents. Multiple meet-and-confer letters had also met with no response.

On June 7, 2012 the court granted respondent’s motion in part and denied the request for sanctions. The court gave appellant 20 days to produce verified, “code-compliant” responses to the special interrogatories and requests for production of documents.

Appellant’s subsequent answers to the interrogatories were, in respondent’s view, evasive, “non-responsive and/or ambiguous,” and he still failed to produce the required documents. On August 21, 2012, respondent moved for terminating sanctions on appellant for his failure to comply with the June 7 discovery order. On October 19, 2012, the court granted the motion, striking appellant’s answer and ordering that appellant’s default be entered effective September 14, 2012.

On January 3, 2013, appellant moved to vacate the October 19 order, along with “any default judgment that may be entered before or during the hearing of this motion.” Citing Code of Civil Procedure section 473, subdivision (b),³ appellant argued that his failure to produce the requested documents was “not wil[l]ful but a product of mistake, inadvertence and/or excusable neglect.” On January 7, 2013, the court held a prove-up hearing, followed two days later by a judgment awarding respondent \$21,832.46 plus costs and interest from February 2010.

On May 9, 2013, the court denied appellant’s January 3 motion for relief under section 473. It is from this order that appellant brought the instant appeal.

³ All further statutory references are to the Code of Civil Procedure.

Discussion

At the outset of our review it was immediately apparent that appellant filed his notice of appeal from a nonappealable order. “A trial court’s order is appealable when it is made so by statute.” (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696; see also *Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 [“The right to appeal is wholly statutory.”]) Appellate courts have jurisdiction over a direct appeal only when there is an appealable order or judgment. (*Ibid*; see *Jennings v. Marralle* (1994) 8 Cal.4th 121, 126 [“The existence of an appealable judgment is a jurisdictional prerequisite to an appeal.”].) Accordingly, “it is our duty to consider the question of appealability on our own motion [citation] and to dismiss the appeal if the order is not appealable.” (*Winter v. Rice* (1986) 176 Cal.App.3d 679, 682) We requested supplemental briefing from the parties on whether we had jurisdiction to review this appeal and, if there is jurisdiction, the scope of review.

It has long been settled that an order denying a motion to vacate a clerk’s entry of default is not appealable, just as the entry itself is nonappealable. (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 960; *Winter v. Rice, supra*, 176 Cal.App.3d at p. 682.) Such orders are reviewable only on appeal from the default judgment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981; *Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1146.)

In response to our supplemental briefing request appellant stated that “[t]he order of May 9, 2013 granting default judgment is appealable.” The May 9 order, however, was not a default judgment; it only denied appellant’s motion to vacate both the entry of default and the default judgment he was anticipating in his motion. Defendant did not appeal from the January 9, 2013 default judgment itself but chose instead to appeal from the subsequent order denying his motion to vacate. That order was not appealable.

Similarly, in his opening brief he concedes that an order granting terminating sanctions is not appealable. (See *Good v. Miller* (2013) 214 Cal. App. 4th 472, 475;

Nickell v. Matlock (2012) 206 Cal.App.4th 934, 940.) But he submits that “this court can review the order of terminating sanction because the court below entered a default judgment.” Missing from appellant’s reasoning is the critical fact that he did not appeal from the default judgment. Thus, there is nothing on which to base a review of the court’s imposition of terminating sanctions.

In his supplemental letter brief appellant suggests that he could not have appealed from the default judgment because he was not challenging the jurisdiction of the court to proceed or the sufficiency of respondent’s pleading. He contradicts himself, however, as he acknowledges that the terminating sanction could have been reviewed in an appeal from the judgment. That statement is correct. (See *Nickell v. Matlock, supra*, 206 Cal.App.4th at p. 940.) But again, appellant did not avail himself of this opportunity. That he hypothetically could have obtained review in different procedural circumstances does not make the nonappealable order appealable.

Appellant further suggests that the appellate court may review issues pertaining to the default judgment “from the record of the post-judgment motion to set aside the judgment.” In fact, this was not a post-judgment motion; it was a motion to vacate the *entry* of default and any default judgment that might be entered while the motion was pending. Second, section 906 explains that in an appeal taken pursuant to section 904.1 or 904.2, “the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party.” The statute then cautions, “The provisions of this section do not authorize the reviewing court to review any decision or order *from which an appeal might have been taken.*” (§ 906, italics added.)

Finally, even a postjudgment order is not appealable if it does not raise an issue different from issues arising from an appeal from the judgment; “otherwise it would give a party two chances to appeal the same ruling.” (*Guillemin v. Stein* (2002) 104

Cal.App.4th 156, 161; *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651; see also *Litvinuk v. Litvinuk* (1945) 27 Cal.2d 38, 44 [appeal from denial of motion to vacate an appealable judgment not entertained “when the purpose of the motion was to change the decision of the trial court upon the same facts”].) The issues appellant raises on appeal are not different from those he could have raised in an appeal from the judgment: he challenges the adequacy of service of the statement of damages, the adequacy of the notice setting the location of the motion for terminating sanctions, and the justification for the order of terminating sanctions.⁴ What appellant does not raise on appeal is any issue raised in his section 473 motion—that is, he does not contend that the court abused its discretion in rejecting his claim of “mistake, inadvertence and/or excusable neglect” in failing to produce the required discovery documents. Thus, even if we were to consider the May 9, 2013 order as an appealable postjudgment order, there are no arguments pertaining to the motion and resulting order. There being no cognizable issues in this appeal, it must be dismissed.

Disposition

The appeal is dismissed.

⁴ Respondent’s motion to strike the new issues raised in appellant’s reply brief is moot and is denied on that ground.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

MÁRQUEZ, J.