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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RAOUL B. CLYMER,

Plaintiff and Appellant,

v.

KEVIN ELDER,

Defendant and Respondent.

E072525

(Super.Ct.No. RIC1702149)

OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge.

Affirmed.

Raoul B. Clymer, in pro. per., for Plaintiff and Appellant.

Ducker Spradling Metzger & Wynne, John C. Wynne, and Cathleen G. Fitch for Defendant and Respondent.

In this case concerning a real estate loan, the trial court granted summary judgment against plaintiff and appellant Raoul B. Clymer.¹ We affirm.

¹ Also pending is plaintiff's petition for writ of error *coram vobis* (case No. E072994), which we ordered to be considered with this appeal. We address the petition by means of a separate order.

I. FACTUAL AND PROCEDURAL HISTORY

In 2005, plaintiff's brother Ben Clymer, through a trust named B&D Clymer Real Estate A Trust, loaned \$3.5 million to Pimlico Ranch, LLC to develop land in Murrieta.² The loan was secured by the land. Pimlico Ranch, LLC defaulted on the loan in 2010.

In 2010, the same year as the default, Ben assigned to Raoul "one half of the interest in the Pimlico Ranch Property and any of his/her rights, chose of action, title and interest in said property" (the "2010 Assignment").³ In 2011, acting on the 2010 Assignment, Raoul initiated a lawsuit against defendant and respondent Kevin Elder, who had an ownership interest in Pimlico Ranch, LLC, and others in federal court, alleging claims for promissory fraud, breach of contract, violations of the federal Racketeer Influenced and Corrupt Organizations Act (or "RICO," 18 U.S.C. § 1961 et seq.), among others.

In January 2012, possibly concerned that the 2010 Assignment failed to give Raoul standing to sue in federal court, Ben assigned all of the trust's beneficial interests in the deed of trust and the promissory note to Raoul (the "2012 Assignment"). Later that year, the district court ruled that the 2010 Assignment was indeed defective, noting in part that the assignor in the 2010 Assignment was "B & D Real Estate Trust LLC," not "B&D Clymer Real Estate A Trust," and that Raoul therefore lacked standing. In a

² For clarity, we refer to the brothers individually by their first name with no disrespect intended.

³ A "chose in action" (or "chose of action") is a "cause of action to recover money damages." (*Potter v. Alliance United Ins. Co.* (2019) 37 Cal.App.5th 894, 907.)

January 2013 order dismissing Raoul’s complaint without leave to amend, the district court ruled that the 2012 Assignment also failed to give Raoul standing, both because it did not “evinced [Ben’s] intent to assign his rights to file a RICO claim” and because it would inappropriately subject Elder to the risk of multiple actions arising from a single contract. The Ninth Circuit affirmed the dismissal in 2016.

In 2013, while the federal appeal was pending, Raoul assigned his interest to Atia Group, LLC (“Atia”). (Oddly, Ben purported to transfer an interest as well, a point we address below.) At the same time as this transfer, Atia signed a document, labeled a “Contingent Agreement,” in which Atia agreed to allow Raoul to retain “all rights assigned as chose in action” to him by Ben. Atia then initiated a nonjudicial foreclosure and, at the foreclosure sale in January 2014, purchased the land that had been securing the loan. Because Atia purchased the land on a full credit bid, the loan was deemed extinguished. (See *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1238.)⁴

⁴ There appears to be some confusion as to who owned what prior to 2013. Raoul, Ben, and Atia apparently believed that (1) Ben owned the promissory note; (2) Raoul and/or Ben owned beneficial interests in the deed of trust; and (3) a simultaneous transfer of all these interests to Atia would be valid. Two things demonstrate this apparent belief. First, there is a 2013 agreement between Ben and Atia in which Atia purchased the loan from Ben, which describes Ben as owning it. Second, there are separate assignments of deed of trust from Raoul and Ben, each to Atia, dated around the same time as the debt purchase agreement. It is not clear what Ben’s purported ownership of the promissory note or trust deed is based on, as the record shows that he assigned his interest to Raoul with the 2012 Assignment. In any event, because the parties do not contend otherwise, we treat the assignments to Atia as valid.

The lien extinguished by Atia’s foreclosure sale was not the most senior lien on the land, but rather was subordinate to one arising from a construction loan. After the foreclosure sale, Atia filed suit against the senior lienholder to determine the payoff amount on that loan. That case eventually settled, and the lienholder reconveyed the trust deed securing that loan. Less than a year later, Atia sold the land to Ben, the original lender on the note at issue in this case.

In 2017, two months after the federal Ninth Circuit upheld the dismissal of his federal complaint, Raoul initiated this state court action against Elder.⁵ The only causes of action in the operative complaint are for breach of contract and unjust enrichment. The complaint alleges that Elder failed to pay the amounts due on the loan and that he wrongfully used the loan proceeds to pay down personal debts or debts of his businesses. Elder moved for summary judgment, contending that Raoul’s lawsuit violated the so called “one action” rule, among other arguments. The trial court held that the one action rule precluded Raoul’s lawsuit and granted the motion. After it had entered a judgment, the trial court heard, and granted, Elder’s motion for attorneys’ fees and entered an amended judgment.

II. DISCUSSION

On appeal, Raoul contends that the trial court misapplied the one action rule. He also contends that he has “pled sufficient facts to claim unjust enrichment,” that his

⁵ GoWireless, Inc. (GoWireless), a business allegedly owned by Elder, was also named as a defendant but later dismissed. Although it was originally named as a respondent, we have dismissed this appeal as to GoWireless.

counsel’s “complete abandonment” constituted a violation of due process, and that the trial court wrongfully awarded Elder attorneys’ fees. We address each argument in turn.⁶

A. *Summary Judgment*

We independently review an order granting summary judgment. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) “In ruling on the motion, the court must ‘consider all of the evidence’ and ‘all’ of the ‘inferences’ reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) “We exercise our independent judgment as to the legal effect of the undisputed facts [citation] and must affirm on any ground supported by the record.” (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.)

“California has an elaborate and interrelated set of foreclosure and antideficiency statutes relating to the enforcement of obligations secured by interests in real property.” (*Black Sky Capital, LLC v. Cobb* (2019) 7 Cal.5th 156, 159.) “Under [Code of Civil Procedure] section 726, ‘there is only “one form of action” for the recovery of any debt or the enforcement of any right secured by a mortgage or deed of trust’; ‘[t]hat action is foreclosure, which may be either judicial or nonjudicial.’” (*Id.* at p. 160.)

⁶ Any point raised by Raoul for the first time in his reply brief is deemed forfeited, as he does not demonstrate good cause for failure to raise it earlier. (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583.) Similarly, we do not consider any arguments based on purported newly discovered evidence. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 102.) Finally, we also do not consider undeveloped legal arguments raised in passing. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

Although the parties focus on the one action rule here as they did before the trial court, we need not reach it, as summary judgment must be affirmed on the more basic principle of standing.⁷

“Standing is a threshold issue, because without it no justiciable controversy exists. [Citation.] ‘Every action must be prosecuted in the name of the real party in interest’ [Citation.] ‘Generally, “the person possessing the right sued upon by reason of the substantive law is the real party in interest.”’” (*Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American Dist. of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445.)

The only signatories to the loan agreement Raoul seeks to enforce are Pimlico Ranch, LLC, which was the borrower, and B&D Clymer Real Estate A Trust, which was the lender. When the agreement was entered into in 2005, only these two entities possessed the right to enforce the agreement. (Notably, the agreement disclaimed any third party beneficiaries.) In 2012, when Ben transferred the trust’s interests to Raoul, Raoul at that point possessed a right to enforce the agreement.⁸ However, Raoul did not

⁷ Although couched as an argument concerning the one action rule, the argument Raoul raises here in his opening brief actually concerns standing. He cites from *Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144 at length and contends that the case applies here. However, “[t]he sole issue in [that] appeal [was] whether a plaintiff who *was* the real party in interest at the time the action is commenced loses her standing as the real party in interest entitled to recover for injury to real property because of the subsequent sale of the property.” (*Id.* at p. 146.)

⁸ The 2010 Assignment appears to have been legally ineffective because the wrong assignor was stated. Even if the 2010 Assignment had been effective, though, the end result here is the same.

bring this state court lawsuit at that time. And in 2013, when Raoul transferred whatever rights he had on the loan to Atia, he lost the right to enforce the agreement. At that point, that right belonged “to somebody else.” (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004.) Because Raoul brought this lawsuit in 2017, well after his assignment to Atia, he lacks standing.

The Contingent Agreement, in which Atia allowed Raoul to retain “all rights assigned as chose in action” to him by Ben, does not compel a different conclusion. “An unqualified assignment of a contract . . . vests in the assignee the assigned contract . . . and all rights and remedies incidental thereto. [Citation.] These incidental rights include certain ancillary causes of action arising out of the subject of the assignment and accruing before the assignment is made.’ [Citation.] If an accrued cause of action, whether in contract or tort, ‘cannot be asserted apart from the contract out of which it arises *or* is essential to a complete and adequate enforcement of the contract, it passes with an assignment of the contract as an incident thereof.’ [Citation.]” (*SMS Financial XXIII, LLC v. Cornerstone Title Co.* (2018) 19 Cal.App.5th 1092, 1099.) When Raoul assigned his loan interests to Atia, he also necessarily assigned to Atia the right to enforce those interests. The ability to enforce the contract (i.e., the repayment of the loan) is, of course, “essential to a complete and adequate enforcement of the contract.” (*Ibid.*) Although the Contingent Agreement may have allowed Raoul to retain other, nonincidental rights (see, e.g., *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 991 [“[f]raud rights are not, as a matter of law, incidental to the transfer

of the promissory note”]), the right to recover on the loan could not have been one of them. The Contingent Agreement is thus more appropriately construed as an express reservation of all nonincidental rights as opposed to a reservation of the right to enforce the contract, and it therefore did not allow Raoul to sue on the loan here.

Similarly, Raoul’s reason for assigning his interests to Atia do not matter. In his opening brief, Raoul states that he assigned the deed of trust to Atia so that “Atia could pursue a payoff demand” from the senior lienholder. However, “[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls [contract] interpretation [citation].” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956.) In other words, whether or not Raoul subjectively intended to allow Atia to foreclose and purchase the land does not matter. His subjective belief therefore has no bearing on whether Raoul has standing.

Summary judgment was also proper on Raoul’s cause of action for unjust enrichment. “The elements of an unjust enrichment claim are the ‘receipt of a benefit and [the] unjust retention of the benefit at the expense of another.’” (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593.) Unjust enrichment may be proper even if a plaintiff has not suffered a corresponding loss. (See *County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 542 [“Where ‘a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust . . . [t]he defendant

may be under a duty to give to the plaintiff the amount by which [the defendant] has been enriched.”].) Here, however, any cause of action for unjust enrichment fails because the record demonstrates that Elder has not, in fact, retained the benefit of the loan proceeds. To the contrary, the loan proceeds were deemed repaid, and the debt extinguished, when Pimlico Ranch, LLC lost the land to Atia on a full credit bid at the foreclosure sale in 2014.⁹ As our Supreme Court has explained, “[a] ‘full credit bid’ is a ‘bid in an amount equal to the unpaid principal and interest of the mortgage debt, together with the costs, fees and other expenses of the foreclosure.’ [Citation.] If the full credit bid is successful, i.e., results in the acquisition of the property, the lender pays the full outstanding balance of the debt and costs of foreclosure to itself and takes title to the security property, releasing the borrower from further obligations under the defaulted note.” (*Alliance Mortgage Co. v. Rothwell, supra*, 10 Cal.4th at p. 1238.) Accordingly, Raoul cannot demonstrate the “unjust retention” of the loan proceeds secured by the land here, and summary judgment was proper.

B. *Abandonment of Counsel*

Raoul, who was represented by counsel in trial court but is representing himself on appeal, contends that trial counsel “completely abandoned him” such that his due process rights were violated. This is unpersuasive for multiple reasons.

⁹ We have assumed, for the sake of argument, that Elder received a benefit from the loan proceeds advanced to Pimlico Ranch, LLC by way of his ownership interest.

First, to the extent that Raoul means to say that his trial counsel, a private party, violated his constitutional rights, the due process clause simply does not apply. “The [due process] [c]ause is phrased as a limitation on *the State’s* power to act, not as a guarantee of certain minimal levels of safety and security. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.” (*DeShaney v. Winnebago County Dept. of Social Services* (1989) 489 U.S. 189, 195-196, italics added.)

Second, Raoul has not shown that he has a right to counsel in a case such as this (i.e., a civil case between private parties for monetary damages) such that any allegedly ineffective assistance of counsel would violate that right. (See, e.g., *Yarborough v. Gentry* (2003) 540 U.S. 1, 5 [“The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when a defense attorney’s performance falls below an objective standard of reasonableness and thereby prejudices the defense.”])

Third, almost all of Raoul’s factual contentions regarding his trial counsel’s inaction lack any citations to the record. “““The appellate court is not required to search the record on its own seeking error.” [Citation.] Thus, “[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived. [Citation.]” [Citations.]” (*Shenouda v. Veterinary Medical Bd.* (2018) 27 Cal.App.5th 500, 514.) For the only two factual contentions that contain

citations to the record, the citations are only to Raoul's writ of error *coram vobis* "generally." We may deem the argument waived on this basis.

And fourth, although cases have held that it is sometimes improper to impute an attorney's neglect to a client, the allegations here—setting aside the lack of record citations—show, at most, that Raoul's counsel took actions that Raoul simply disagreed with. (See, e.g., *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 900 [discussing cases which "have in common . . . a total failure on the part of counsel to represent the client," noting that "[u]nder such circumstances it [is] unconscionable to apply the general rule charging the client with the attorney's neglect"].) Raoul contends, for instance, that trial counsel unwisely dismissed a defendant, dismissed a cause of action, propounded insufficient discovery, failed to propound additional discovery that Raoul "personally [paid] an outside paralegal to draft," and refused to move for reconsideration following summary judgment. If substantiated, however, these actions would show that trial counsel's actions were a far cry from "complete abandonment." Rather, they would demonstrate that counsel was active in determining pursuable strategies and getting the case ready for trial. Raoul's allegations are unlike those in cases where abandonment was found and instead similar to those where abandonment was rejected. (See, e.g., *Holland v. Florida* (2010) 560 U.S. 631, 652 [abandonment where counsel "failed to communicate with his client over a period of years, despite various pleas," among other failures]; *Maples v. Thomas* (2012) 565 U.S. 266, 270-271 [abandonment where counsel failed to (1) inform client facing death penalty of their

departure from law firm and inability to continue serving as his counsel; (2) seek leave to withdraw from the case; or (3) move for substitution of counsel]; *Daley v. Butte County* (1964) 227 Cal.App.2d 380, 391-392 [abandonment found given counsel's "unexplained failure to serve process," "failure to appear at successive pretrial conferences," "failure to communicate with court, client and other counsel; and "holding the substitution of attorneys for more than five months while his client's cause ripened for disaster"]; *Carroll v. Abbott Laboratories, Inc., supra*, 32 Cal.3d at p. 900 ["Though counsel grossly mishandled a routine discovery matter, no abandonment of the client appears"].) Moreover, our own review of the record shows that counsel was far from absent in opposing summary judgment, filing a memorandum of points and authorities and separate statement in opposition to the motion. In sum, the alleged actions and inactions of Raoul's trial counsel do not demonstrate any basis for relief here.

C. Attorneys' Fees

Lastly, Raoul contends that the trial court lacked jurisdiction to, or, in the alternative, abused its discretion in awarding \$392,172.00 in attorneys' fees to Elder. However, because Raoul failed to timely appeal the award, we lack jurisdiction to address the claim.

"A postjudgment order awarding attorney fees is separately appealable. [Citations.] The failure to appeal an appealable order ordinarily deprives the appellate court of jurisdiction to review the order. [Citation.]" (*R.P. Richards, Inc. v. Chartered Const. Corp.* (2000) 83 Cal.App.4th 146, 158.)

“However, when the judgment awards attorney fees but does not determine the amount, the judgment is deemed to subsume the postjudgment order determining the amount awarded, and an appeal from the judgment encompasses the postjudgment order.” (*R.P. Richards, Inc. v. Chartered Const. Corp.*, *supra*, 83 Cal.App.4th at p. 158, citing *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998 (*Grant*)). We refer to this as the *Grant* exception.

The *Grant* exception is limited, however, and the mere fact that a judgment states that a party “shall recover” attorneys’ fees is not sufficient for the exception to apply. If the judgment provides that a party “shall recover” attorney fees but leaves “a blank space for the amount,” and the record shows that “the parties subsequently litigated in a separate postjudgment proceeding not only the reasonableness of the amount of the attorney fees . . . but also the threshold issue of . . . entitlement to such fees,” then the *Grant* exception does not apply. (*Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 692; see also *Nellis Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 1009 [*Grant* exception “does not apply” where the original judgment states a party “shall recover its attorney fees and left a blank space for the amount to be inserted later, but the record shows the trial court made no determination regarding attorney fees before entering judgment”].) What matters is when the record shows the parties litigated, and the trial court determined, entitlement to attorneys’ fees.

Here, an original judgment, filed in February 2019, stated that Elder “shall recover” attorneys’ fees, but then listed the amounts as “TBD” or “to be determined.”

Raoul filed a notice of appeal two months later. But after Elder filed a motion for attorneys' fees and hearings were held, the trial court entered an amended judgment in August 2019. No timely notice of appeal has been filed challenging the order granting the attorneys' fees motion or the amended judgment.

As such, in order for us to have jurisdiction to review the award here, the *Grant* exception must apply. But here it does not, as the record shows that the trial court made no determination as to entitlement of attorneys' fees until it entered the amended judgment. Elder's summary judgment motion, for instance, contains no discussion of attorneys' fees, and neither does the order granting summary judgment. Instead, the issue appears for the first time in Elder's fees motion. We therefore lack jurisdiction to review the award here.

III. DISPOSITION

The judgment is affirmed. Elder is awarded his costs on appeal.

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RAPHAEL
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.