NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of VIRGINIA KING SUPPLE and LAWRENCE J. KAUFMAN.

LAWRENCE J. KAUFMAN,

Appellant,

v.

LANCE S. SPIEGEL,

Respondent.

B143723

(Super. Ct. No. WED052764 consolidated with No. SC038078)

APPEAL from an order of the Superior Court of Los Angeles County, Richard Neidorf, Judge. Reversed and remanded.

Bruce Adelstein; Rosman & Germain and Daniel L. Germain for Appellant.

Michael Brourman for Respondent.

Lawrence J. Kaufman (Kaufman) appeals a postjudgment order in marital dissolution proceedings denying his motion to compel Lance S. Spiegel (Spiegel), the attorney for his former wife, Virginia King Supple (Supple), to pay Kaufman $29,902 that Spiegel allegedly wrongfully converted.

Pursuant to the dissolution judgment, Kaufman had a $115,856 lien on the proceeds from the sale of the family residence, and Spiegel, as Supple's trial attorney, was aware of the lien. Supple had no right to use any portion of the lien amount to pay her attorney fees, and Kaufman is entitled to recover from Spiegel said funds which Spiegel received from Supple. Therefore, the order is reversed with directions.

FACTUAL AND PROCEDURAL BACKGROUND

Kaufman and Supple were married on February 29, 1988. In October 1988, Kaufman purchased a house in Culver City for $398,000. Kaufman sold other real property he owned before his marriage and used about $243,000 of his separate property funds for the down payment. By 1989, marital problems developed and the parties separated, although they continued living together.

On February 23, 1990, Supple filed a petition for dissolution of marriage. In November 1992, the parties negotiated an agreement, hereafter the 60/40 agreement, which stated in relevant part: " 'Currently the house is titled to [Kaufman] (75%) and [Supple] (25%) and this agreement will give [Supple] 40% interest in the house (with the remaining 60% to [Kaufman]). The value of the house is, by agreement, $420,000. The 40/60 split is based on [Supple] assuming the balance of the loan on the house, effective January 1, 1992. . . .' " (Italics omitted.)

Pursuant to the 60/40 agreement, the parties executed and recorded an interspousal transfer deed conveying an undivided 60 percent interest to Kaufman and an undivided 40 percent interest to Supple, as tenants in common. In addition, pursuant to the agreement, Supple made the mortgage payments.

On March 29, 1994, Supple filed an amended petition for dissolution. In November of that year, Supple stopped making the loan payments, and the following month she moved out of the house.

In September 1995, Kaufman filed an action against Supple for breach of the 60/40 agreement, alleging, inter alia, she had failed to make the loan payments required by the contract. By stipulation, the contract action was consolidated with the marital dissolution proceeding.

By the time of trial, the value of the property had declined from $420,000 to $285,000, the property had fallen into foreclosure, and the loan balance was approximately $135,000.

Various issues were litigated at trial. With respect to the interpretation of the 60/40 agreement, Kaufman argued that Supple was entitled to 40 percent of the sale price and she was obligated to pay the entire loan balance out of her proceeds. Supple, in turn, did not urge a contrary interpretation of the 60/40 agreement and simply argued the agreement was unenforceable.

1. *The dissolution judgment.*

The trial court rejected Supple's contention the contract was unenforceable and held the 60/40 agreement was valid and binding. The trial court found the equity in the

property was $150,000, Supple's 40 percent interest in the equity was $60,000 and Kaufman's 60 percent share was $90,000. Thus, the trial court interpreted the 60/40 agreement to mean the $150,000 *equity* in the property was to be divided on a 60/40 basis, contrary to Kaufman's contention that the $285,000 value of the property was to be divided on a 60/40 basis with Supple responsible for paying off the entire loan out of her 40 percent share. The trial court's rationale, which no one had argued, was that " '[s]ince the property was encumbered by a deed of trust to the mortgage lender for which they were each liable, the reasonable interpretation is that each party owned his or her respective interest subject to the mortgage lien *and their relative interests were their share of the equity.*' (Italics added.)"

The trial court awarded possession and ownership of the property to Supple. To buy out Kaufman's interest, the trial court ordered Supple to pay Kaufman $90,000 for his 60 percent share of the $150,000 equity in the property. The trial court also directed Supple to pay Kaufman $25,856, representing the sum he paid on behalf of Supple's mortgage obligation. Thus, the judgment of dissolution, filed November 12, 1996, directed Supple to pay Kaufman the total sum of $115,856.

With respect to the equalizing payment, the judgment further stated: "In the event [Supple] decides to sell the real property, *then the amount of $115,856.00 shall be a lien against the real property and shall be paid [to Kaufman] after costs of sale and the first mortgage. . . . The Court retains jurisdiction over the sale and sale proceeds to effect the intent of this Judgment.*" (Italics added.)

The record reflects Spiegel represented Supple at trial and Spiegel drafted the judgment. Thus, he was aware of the contents thereof.

2. *The prior appeal: the amount of the equalizing payment is increased.*

Kaufman appealed, contending, inter alia, the trial court miscalculated the value of his interest in the property, and pursuant to the contract, Supple assumed the sole responsibility for paying off the loan, and therefore, Kaufman was entitled to $171,000, not $90,000, for his 60 percent share of the $285,000 property.

In an unpublished decision (*Kaufman v. Supple,* No. B109039) filed December 22, 1998, this court agreed with Kaufman that the parties had agreed their respective interests in the property were to be 60 percent and 40 percent, and that Supple would be solely responsible for the loan obligation. Therefore, under the 60/40 agreement, Kaufman was entitled to 60 percent of the property's value of $285,000, or $171,000, rather than the $90,000 ordered by the trial court. Accordingly, we increased the amount of the equalizing payment by $81,000. Instead of the $115,856 payment ordered by the trial court, this court modified the judgment to require Supple to pay Kaufman the sum of $196,856. As modified, the judgment was affirmed.

3. *Events during the pendency of the prior appeal.*

As indicated, the judgment of dissolution was entered on November 12, 1996. On May 21, 1997, Supple sold the house for $300,000 and received $146,068 in proceeds from escrow. At that time, the "best case" scenario for Supple was that the judgment would be affirmed, entitling Kaufman to $115,856 plus interest. Notwithstanding the lien on the sale proceeds as set forth in the judgment, Supple did not make any payment to

Kaufman at that time and instead, used the money for her own purposes. On June 2, 1997, 12 days after escrow closed, Supple used $24,461 to repay various personal loans, and $24,902 to pay Spiegel for attorney fees. Of the remaining $96,705, Supple deposited $90,000 into her credit union account. [1]

In a postjudgment proceeding on July 9, 1997, Spiegel misstated what had been done with the proceeds. The trial court inquired whether Kaufman had been paid yet. Spiegel replied, "No. What happened is the house sold. *We are holding onto his share of the money.*" (Italics added.)

Thereafter, Kaufman's attorney, Redmond P. McAneny, repeatedly wrote to Spiegel requesting that the funds be turned over to McAneny's trust account to be held in trust for the parties pending resolution of the appeal.

In response, Spiegel wrote: "You are incorrect in your understanding regarding the proceeds due Mr. Kaufman pursuant to the judgment. I am not holding them in trust or otherwise."

McAneny replied: "[O]n July 9, 1997, at a court hearing you specifically told the court that you were holding onto the money. . . . As you are now informing me, that you are not holding this money, could you please inform me who is."

Spiegel wrote back: "Neither my client nor I have any obligation with respect to where the funds are maintained and, in fact, my client has the right to use the funds at this time without restriction."

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1 The disposition of the sale proceeds is enumerated in Supple's responses to interrogatories.

Thereafter, Kaufman retained attorney Bruce Adelstein, who wrote Spiegel demanding that Supple make payment forthwith. Adelstein advised Spiegel: "[A] money judgment is generally enforceable during the pendency of an appeal. (Code of Civ. Proc., § 917.1, subd. (a)(1).) Enforcement can be stayed by a bond, undertaking, deposit, stay of enforcement, or writ of supersedeas, but none of those [is] present here." Moreover, "Mr. Kaufman, not Ms. Supple, is appealing the judgment, and Mr. Kaufman is arguing that the judgment should be *increased*. If he is successful in his appeal, a judgment for a greater amount will be entered; if not, the existing judgment will remain in effect. In either case, Ms. Supple will owe Mr. Kaufman at least the amount of the existing judgment."

Faced with the continued refusal to pay, Kaufman began enforcement proceedings. On July 20, 1998, Kaufman served judgment debtor interrogatories on Supple, asking her to identify, inter alia, all transfers of the proceeds.

On September 2, 1998, Supple had her credit union issue two cashier's checks: one for $85,000 payable to Adelstein's client trust account, and one for $5,000 payable to Spiegel for his attorney fees.

Thereafter, on December 11, 1998, in a supplemental set of interrogatory responses, signed by Spiegel and verified by Supple, Supple stated the final $5,000 had been used for "living expenses." In fact, as indicated, the $5,000 had been disbursed by cashier's check to Spiegel as payment for attorney fees.

On December 22, 1998, this court issued its opinion modifying and affirming the judgment.

4. *Supple's attempt to have her obligation to Kaufman discharged in bankruptcy.*

In January 1999, Supple filed a Chapter 7 bankruptcy petition, seeking to discharge her debt to Kaufman. On April 12, 2000, following a trial, the bankruptcy court denied Supple a discharge.

5. *Kaufman's enforcement motion against Spiegel.*

On May 5, 2000, Kaufman filed the subject motion to compel Spiegel to pay $29,902 in assets that Spiegel allegedly wrongfully converted from the sale proceeds, as well as interest thereon, and attorney fees and costs as sanctions pursuant to Code of Civil Procedure section 128.5. [2] Kaufman argued, inter alia: the original judgment directed Supple to pay Kaufman $115,856 from the proceeds of the sale of the property and provided Kaufman with a lien on those proceeds; Spiegel took $29,902 from the proceeds, knowing that Kaufman had not been paid; Spiegel falsely represented to the trial court that "we" are holding Kaufman's share of the proceeds pending the appeal; Spiegel repeatedly refused to pay Kaufman his share of the proceeds, refused to account for the funds and asserted legally frivolous positions.

In opposition, Spiegel asserted, inter alia, the funds from the sale were paid directly to Supple, and she had total control over their disbursement.

On June 21, 2000, the matter came on for hearing. From the outset, the trial court focused on Spiegel's intent, stating: "You're going to have to convince me for sanctions that Spiegel had an evil intent and that he knew and orchestrated that your client would

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

not get a dime. [¶] If you can prove that to me, then maybe you have something to speak about. It seems to me a lawyer does work, the wife gets the house, the house is sold. There is enough money from the proceeds for the wife to pay the husband his share and to pay the attorney the attorney's share. The attorney takes his money and then the wife does not pay husband. Now you want to hold the attorney on the hook for the wife's misdeeds?"

Spiegel was sworn and testified. Spiegel acknowledged: "The only thing I had reason to believe was that I had been paid from those proceeds, but the proceeds I understood then in July of 1997 and up until the time in September of '98 when the $85,000 was paid, I believed that it was under my client's control, and she had the ability to make that payment."

With respect to Spiegel's statement at the July 9, 1997 hearing that "[w]e are holding onto [Kaufman's] share of the money," Spiegel asserted: "I used the editorial 'we' rather than 'she.' " As for the second payment of $5,000 to Spiegel for attorney fees, contrary to the interrogatory response stating the $5,000 was used for "living expenses," Spiegel stated: "I don't remember that sufficiently to be able to respond to it. . . . I can only tell you there was no intention on my part . . . ."

The trial court focused on Spiegel's mental state at the time he received the funds. Analogizing to the criminal law, the trial court observed: "In criminal we have a theory. It's called deliberate ignorance, which is not a defense in criminal. So someone says, 'Here, I'll give you ten gran[d] to carry this package from Mexico to the U.S.' You don't know if it's diamonds or gold or marijuana. You don't want to know, but you have a

strong suspicion there's something wrong with it and you carry it across. Deliberate ignorance is not a defense. . . . [¶] . . . [¶] . . . It smells. It just smells."

Spiegel's attorney interjected: "I think the court also has to remember it requires guilt beyond a reasonable doubt. So if the court is going to apply that standard in pulling this out, I think it's also going to have to also eliminate any reasonable doubt in the court's mind rather than saying 'it smells'. . . ."

The trial court denied Kaufman's motion, stating: "It was close." The trial court elaborated: "You know, the attorney gets money from the client, probably has a strong suspicion it came from the money from the house. At that time there was enough money left to pay and to pay the judgment and the rest of it. It's somewhat deceptive, but it's insufficient."

Kaufman filed a timely notice of appeal from the order. [3]

CONTENTIONS

Kaufman contends: he continues to have a valid lien on the funds that Spiegel took; Spiegel converted Kaufman's funds; and Spiegel must pay Kaufman the proceeds he took, interest on those proceeds, and attorney fees and costs as sanctions.

DISCUSSION

1. *Jurisdictional issues.*

As a preliminary matter, Kaufman's motion against Spiegel was properly before the trial court. Kaufman's motion in no way impinged on this court's appellate

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3 The order is appealable as an order after judgment. (§ 904.1, subd. (a)(2).)

jurisdiction in that the motion was not brought until after resolution of the appeal. Further, in the dissolution judgment, the trial court expressly "retain[ed] jurisdiction over the sale and sale proceeds to effect the intent of this Judgment."

Although Spiegel's respondent brief challenges the family court's jurisdiction to entertain Kaufman's motion against him, Spiegel waived this objection by making a general appearance. [4] Spiegel submitted to the family court's jurisdiction, opposed Kaufman's motion on the merits and failed either in his papers or at the hearing to argue the trial court lacked jurisdiction. Thus, the trial court had both subject matter jurisdiction over the proceeds and personal jurisdiction over Spiegel.

Finally, we observe Kaufman's motion against Spiegel did not contravene the principle that attorneys do not owe a duty of care to adverse third parties in litigation. (*Wasmann v. Seidenberg* (1988) 202 Cal.App.3d 752, 755.) The rule is that "[o]nly when third parties are the intended beneficiaries of an attorney's services are they entitled to bring actions for professional negligence. [Citations.]" (*Ibid.*) Here, however, Kaufman was not suing Spiegel for professional negligence. Rather, Kaufman brought the motion against Spiegel to enforce his lien. The enforcement motion was *not* based on Spiegel's role as counsel. The motion was brought simply to enforce a lien against a transferee who took property with knowledge of the lien.

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[4] "A general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act. [Citations.] 'If the defendant "raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general . . . ."

We now turn to the merits of the appeal.

2. *Pursuant to the dissolution judgment, Kaufman had a lien on the sale proceeds.*

Kaufman's motion contended the dissolution judgment provided him with a lien on the sale proceeds. As indicated, the dissolution judgment provided at paragraph 6: "In the event [Supple] decides to sell the real property, then the amount of $115,856.00 shall be a lien against the real property and shall be paid after costs of sale and the first mortgage." Spiegel, however, takes the position that Kaufman only had a potential judgment lien which he failed to record and perfect, and not an actual equitable lien. Spiegel is mistaken.

An equitable lien is created expressly by a judgment. (*People v. One 1960 Ford* (1964) 228 Cal.App.2d 571, 577.) An equitable lien "is not judicially recognized until a judgment is rendered declaring its existence . . . ." (*Hise v. Superior Court* (1943) 21 Cal.2d 614, 627.) " 'An equitable lien, like a constructive trust, is a remedy designed to enforce restitution so as to prevent unjust enrichment. [Citation.]' [Citation.]" (*Fidelity National Title Ins. Co. v. Miller* (1989) 215 Cal.App.3d 1163, 1174.) Here, the judgment expressly imposed a lien of $115,856 on the sale proceeds in favor of Kaufman in the event of a sale of the property. Thus, pursuant to the judgment the sale proceeds were subject to Kaufman's lien.

Nonetheless, Spiegel contends Kaufman was required to record a judgment lien pursuant to section 697.310 to protect his judicially declared lien. The argument is

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[Citation.]' [Citation.]" (*Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1756-1757.)

meritless. Section 697.310, pertaining to the enforcement of money judgments, provides "a judgment lien on real property is created . . . by recording an abstract of a money judgment with the county recorder." (§ 697.310, subd. (a).) Section 697.310 enables a judgment creditor to transform a money judgment into a lien on the real property sought to be attached, by recording an abstract of the judgment with the county recorder. (*Aldasoro v. Kennerson* (S.D.Cal. 1995) 915 F.Supp. 188, 190.) Here, however, Kaufman already had a *judicially imposed lien* on the sale proceeds. The lien applied to the proceeds of sale, rather to the real property, which had been sold and which was not sought to be attached. Spiegel's theory that Kaufman was required to record the judgment to perfect it against Spiegel is a red herring.

The dissolution judgment imposed a lien of $115,856 on the proceeds of sale. Further, Spiegel had actual notice of said lien, as he represented Supple at trial and drafted the judgment. Also, it is uncontroverted the sale proceeds were the source of the $29,902 in issue that Supple paid to Spiegel as attorney fees. In addition, Spiegel admitted in his testimony he knew he had been paid from those proceeds, stating "[t]he only thing I had reason to believe was that I had been paid from those proceeds."

Spiegel's defense was simply that he believed Supple had sufficient funds to pay both him and Kaufman. However, Spiegel's asserted belief in that regard has no bearing on whether the sale proceeds were subject to the lien imposed by the dissolution judgment. Similarly, the trial court's focus on Spiegel's state of mind, i.e., whether Spiegel had an "evil intent," missed the mark. The pertinent issues, which the trial court overlooked, were the existence of the lien and Spiegel's knowledge thereof.

Because the sale proceeds were subject to a lien in the sum of $115,856, Spiegel had notice thereof, and Spiegel knowingly accepted the sum of $29,902 from Supple, which sum had been derived from the sale proceeds, Kaufman is entitled to recover that sum from Spiegel.

3. *No merit to Spiegel's defenses to Kaufman's conversion claim.*

In addition to a lien theory, Kaufman's motion asserted Spiegel had converted $29,902 of the sale proceeds. We now address this ground for recovery.

a. *General principles.*

"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages. . . . [¶] *Conversion is also a strict liability tort.* ' " 'The foundation for the action for conversion rests neither in the knowledge nor the intent of the defendant. . . . [Instead], "the tort consists in the breach of what may be called an absolute duty; the act itself . . . is unlawful and redressible as a tort." ' " . . . ' [Citation.] *Therefore, questions of good faith, lack of knowledge and motive are ordinarily immaterial.*" (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 543-544, italics added.)

b. *Spiegel's defenses.*

(1) *Spiegel's state of mind is irrelevant.*

Because conversion is a strict liability tort (*Oakdale Village Group, supra*, 43 Cal.App.4th at p. 544), the trial court erred in basing its decision on Spiegel's asserted

state of mind or lack of "evil intent." Spiegel's defense that he assumed Supple had retained sufficient funds to pay Kaufman was an irrelevancy.

(2) *No merit to contention Kaufman waived his rights to the escrow proceeds.*

Spiegel contends Kaufman waived any conversion claim by failing to object or to prevent Supple from taking possession of the sale proceeds upon the close of escrow.

To constitute a waiver, there must be an existing right, knowledge of the right, and an actual intention to relinquish the right. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, superseded by statute on other grounds, as stated in *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668.) Whether there has been a waiver is a question of fact. (*Bickel, supra,* at p. 1052.)

The record reflects that three times before the close of escrow, Kaufman filed a lis pendens against the property; each time the lis pendens was expunged. Regardless of the legal propriety of those filings, they reflect anything but an actual intention by Kaufman to relinquish his rights. Further, the trial court did not find Kaufman waived his right to collect the proceeds by failing to obtain the funds from escrow. Therefore, Spiegel's waiver argument is unavailing.

(3) *No merit to Spiegel's contention he was paid with unencumbered funds.*

Spiegel further contends Kaufman failed to establish a conversion because Kaufman failed to prove Spiegel was paid from funds on which Kaufman had a lien. As indicated, Kaufman's lien was for $115,856. According to the settlement statement,

5. *Remand for sanctions under section 128.5.*

Kaufman's motion also sought attorney fees and costs pursuant to section 128.5. As indicated, the trial court essentially found Spiegel's "evil intent" was not established, and on that basis ruled against Kaufman. Kaufman concedes the trial court never reached the sanctions issue, but argues the record establishes his entitlement to sanctions as a matter of law, and therefore this court should so find and merely remand for a calculation of the amount of attorney fees and costs.

Although Kaufman presents a strong argument in support of sanctions, we decline to usurp the discretion of the trial court by ruling on the sanctions issue in the first instance. Instead, we remand the matter to the trial court to rule on Kaufman's request for sanctions guided, inter alia, by the discussion in this opinion.

DISPOSITION

The order is reversed and the matter is remanded with directions to enter an order directing Spiegel to pay Kaufman $29,902.05, plus interest in the amount determined by the trial court. In addition, the trial court shall redetermine Kaufman's motion for sanctions, guided, inter alia, by the discussion herein. Kaufman shall recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.