GABRIEL D. GUERRERO, Plaintiff and Appellant, v. CORDOVA ASSOCIATES, INC., Defendant and Appellant.

B194349

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

2008 Cal. App. Unpub. LEXIS 1582

February 27, 2008, Filed

PRIOR HISTORY: [*1]
APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC329607. Jane L. Johnson, Judge.

DISPOSITION: Affirmed; cross-appeal dismissed as moot.

COUNSEL: Glenn Ward Calsada for Plaintiff and Appellant.

Fisher, Sparks, Grayson & Wolfe, Herbert N. Wolfe; Greines, Martin, Stein & Richland, Robert A. Olson, and Alana B. Hoffman for Defendant and Appellant.

JUDGES: EPSTEIN, P.J.; WILLHITE, J., MANELLA, J. concurred.

OPINION BY: EPSTEIN

OPINION

Gabriel D. Guerrero appeals from an order granting respondent Cordova Associates, Inc.'s motion to vacate a judgment in his favor for quasi-specific performance of a contract for the sale of real estate, and from the subsequent entry of judgment in respondent's favor. He argues the order and entry of judgment are void for lack of jurisdiction due to an earlier notice of appeal filed by respondent. He also argues he is entitled to specific performance without having tendered or performed his contractual obligations because respondent anticipatorily breached the contract by attempting to cancel escrow before the escrow period expired. We conclude the trial court had jurisdiction to enter the order and judgment because respondent abandoned the appeal before the court acted. We also conclude [*2] respondent's attempt to cancel escrow did not relieve appellant of his obligation to deposit payment for the property; respondent had deposited a valid grant deed and was

unable to unilaterally revoke that act before the escrow period ended. For these reasons, we shall affirm the order and judgment of the trial court. Respondent's protective cross-appeal from the original judgment is dismissed as moot.

FACTUAL AND PROCEDURAL SUMMARY

Respondent owned five acres of land in Los Angeles, which we refer to as "the property." Between 1991 and 2003, it made several unsuccessful attempts to sell the property. On October 6, 2003, appellant submitted an offer to purchase the property. Between October 6, 2003 and February 27, 2004, appellant and respondent negotiated the terms of the sale and escrow, and on February 27, 2004, they signed identical escrow instructions. [1]

1 The instructions specify the buyer as Southern California Commercial Real Estate, Inc. (SCCRE). Appellant is the president and chief executive officer of SCCRE and the actual buyer. For simplicity, we refer to the buyer as appellant Guerrero.

The purchase price was $ 995,000; appellant had deposited $ 20,000 into escrow and was [*3] to deposit another $ 975,000 by the close of escrow. The instructions provided for an escrow period to close on July 31, 2004. The period was to be extended 60 days if appellant released the $ 20,000 in escrow to respondent within 60 days of February 27, 2004. Appellant did so and the escrow period was extended to September 30, 2004.

Respondent deposited a signed grant deed dated March 2, 2004. Appellant did not deposit the balance of the purchase price and the transaction was not completed, partially due to a dispute arising from complications with the zoning of the property. On August 5, 2004, respondent instructed the escrow officer to draft instructions for cancellation of escrow, and on September 21, 2004 it instructed the escrow officer to cancel escrow.

On January 27, 2005, respondent agreed to sell the property to a third party, and on March 1, 2005, appellant recorded a lis pendens and brought an action against respondent for fraud, breach of contract and specific performance. The lis pendens was expunged on April 21, 2005, and respondent subsequently sold the property.

The case was brought to trial on February 27, 2006. On May 31, 2006, the trial court ruled that respondent [*4] breached the contract but did not commit fraud, and that appellant was entitled to quasi-specific performance and damages. On June 26, 2006, the court entered judgment in his favor.

Respondent moved to vacate the judgment on July 11, 2006. The trial court heard the motion on August 3, 2006. Its tentative ruling was to deny the motion, but the matter was taken under submission. Respondent filed a notice of appeal in the trial court on August 8, 2006. On August 28, 2006, the trial court issued an order granting respondent's motion to vacate, and on September 7, 2006, respondent filed an abandonment of appeal. The trial court notified the parties of the abandonment on September 11, 2006. On September 19, 2006, the trial court re-entered its order vacating the June 26, 2006 judgment and entered a new judgment in favor of respondent.

On October 10, 2006, appellant appealed from the order vacating the June 26, 2006 judgment and from the September 19, 2006 judgment. On November 29, 2006, notice of respondent's protective cross-appeal from the original June 26, 2006 judgment was filed.

DISCUSSION

I

Appellant argues that the trial court's vacation of the June 26, 2006 judgment and subsequent entry [*5] of judgment for respondent are void for lack of fundamental jurisdiction because respondent had filed a notice of appeal before either action was taken. Because the relevant facts are undisputed, this issue presents a question of law, which we independently review. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.)

A trial court loses jurisdiction to vacate a judgment once notice of appeal from that judgment is filed with the court. (Code Civ. Proc., § 916, subd. (a); *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th 630, 641.) This loss of jurisdiction is fundamental and any trial court proceedings on the matter during the pending appeal are void. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196-198.) If the appellant files an abandonment of appeal in the trial court before the record is filed in the appellate court, the appeal is dismissed and the trial court's jurisdiction is restored. (Cal. Rules of Court, rule 8.244(b)(1); *In re Marriage of Dade* (1991) 230 Cal.App.3d 621, 625.)

In this case, respondent filed a notice of appeal on August 8, 2006 and filed an abandonment of appeal on September 7, 2006. Thus, the [*6] trial court lacked jurisdiction to vacate the judgment between August 8, 2006 and September 7, 2006, and its August 28, 2006 order granting respondent's motion during that interim is void. But there is no evidence that the record on appeal was filed with the appellate court before the appeal was abandoned, nor does appellant claim that it was. The trial court's jurisdiction was restored by September 19, 2006, when it re-entered the order granting the motion to vacate and entered judgment in favor of respondent. Neither of these later acts is void. (*In re Marriage of Dade*, *supra*, 230 Cal.App.3d at p. 625.)

II

Appellant argues the trial court erred in granting the motion to vacate because he is entitled to specific performance of the contract. Code of Civil Procedure section 663 provides in part: "A judgment or decree, when based upon a decision by the court . . . may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [P] 1. Incorrect or erroneous legal basis for the decision, [*7] not consistent with or not supported by the facts . . . ."

"This statute provides a remedy when the trial court draws an incorrect legal conclusion or renders an erroneous judgment upon the facts as found by the court . . . . [Citations.]" (*Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471, 479, fn. 7.)

Civil Code section 1439 provides: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by [Civil Code section 1440]." "'In a contract for the sale of real estate the delivery of the deed and the payment of the purchase price are dependent and concurrent conditions [citations].' [Citations.]" (*Fogarty v. Saathoff* (1982) 128 Cal.App.3d 780, 785-786, italics omitted.)

In this case, the escrow instructions required appellant to deposit $ 975,000 into escrow by September 30, 2004. He did not do so. The trial court granted the motion to vacate on the ground that

respondent's September 21, 2004 instruction to cancel escrow [*8] did not relieve appellant from that obligation.

In his reply brief, appellant also argues that he tendered performance by showing respondent financial records indicating he had the necessary funds and telling respondent he was willing to conclude the deal. But appellant has forfeited this argument by not raising it in the trial court. (*Baron v. Fire Ins. Exchange* (2007) 154 Cal.App.4th 1184, 1191-1193.)

Appellant argues respondent anticipatorily breached its obligation under the escrow instructions by attempting to cancel escrow on September 21, 2004, and that such breach relieved appellant of his obligation to deposit the funds before seeking specific performance. Generally, one party's anticipatory breach allows the other party to enforce the contract without performing or tendering performance of its own obligations. (Civ. Code, § 1440.) But the deposit of a grant deed into escrow is an irrevocable act for the duration of the escrow period, and an attempt to cancel that act does not relieve the buyer of his or her obligation to deposit the purchase funds. (*Pothast v. Kind* (1933) 218 Cal. 192, 195; see 3 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 6:20, p. 47, fns. omitted ["As [*9] a general rule, anticipatory breach of the agreement by one party to the escrow does not excuse lack of performance by the other party unless the breach is of such nature that it is clear that performance or a tender of performance by the other party would be useless. Therefore, a party who has neither performed each and every term and required escrow condition nor at least tendered this performance cannot have specific performance of the contract against the other party . . . ."].) Depositing purchase funds after respondent attempted to cancel escrow would not have been a useless act; had appellant done so at any time before the escrow period ended, he would have been entitled to the property.

Appellant argues the deed was invalid because it was not notarized and could not be recorded. But an unrecorded grant deed is valid between the parties. (Civ. Code, § 1217; *Devereaux v. Frazier Mountain Park etc. Co.* (1967) 248 Cal.App.2d 323, 328.)

Appellant argues the escrow instructions required respondent to deposit a recordable deed. We interpret a contractual provision de novo when, as in this case, there is no extrinsic evidence that bears on its meaning. (*WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal.App.4th 525, 532.)

Contrary [*10] to the trial court's initial finding, the escrow instructions do not require respondent to deposit a recordable deed. The instructions provide: "I will execute and deliver any instruments and/or funds which this escrow requires to show title as called for" and "I will hand you necessary documents called for on my part to cause title to be shown as set out herein." The supplemental instructions authorize but do not require recordation. The instructions merely require respondent to deliver documents showing title, and as we have discussed, recordation is not necessary for that purpose. (Civ. Code, § 1217.)

Appellant claims the deed is invalid because it incorrectly vests title. The deed vests title in "Southern California Commercial Real Estate, Inc. and/or assignee," exactly as called for in the instructions. Appellant testified that he agreed to vesting in that form because he wanted to retain flexibility about the type of entity he could form to take title. The escrow agent explained that the deed could not be recorded with title vested in that manner. She asked appellant to specify how he intended to take title, but he did not respond. Respondent could not provide a deed that vested [*11] differently until appellant clarified how he wanted to take title.

A deed that grants title in the disjunctive is void for uncertainty unless the intended grantee can be clearly ascertained. (12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 266, p. 321; *Schade v. Stewart* (1928) 205 Cal. 658, 663-665.) We do not reach the issue whether the intended grantee can be clearly ascertained because appellant is estopped from raising this argument. He assented to--indeed, he sought--the uncertain vesting for strategic reasons and did not clarify how he wanted to take title after he was notified that the vesting was inadequate. Respondent could not cure the defective vesting because appellant did not act. Thus, appellant is estopped from arguing respondent breached its obligation because the deed vests uncertainly. (Civ. Code, § 3516 ["Acquiescence in error takes away the right of objecting to it"].)

Appellant argues the trial court relied on changed factual findings in its order granting the motion to vacate. Appellant claims the court "found" that he had until the close of escrow to inform the escrow officer how he wanted title to vest because the court made a comment to that effect [*12] during closing argument. This isolated comment by the court during trial is not a factual finding.

Appellant argues that the instructions require respondent to provide a residential transfer disclosure statement. He claims to have constructively paid the purchase price because he was the equitable owner of the property when the third party purchased it in 2005. He also argues that the grant deed incorrectly specified the seller because respondent assigned its interest in the escrow to a third party. Finally, he argues that, because the escrow instructions permit the escrow agent to pause escrow proceedings in the event of a dispute between the parties, respondent could anticipatorily breach by requesting the agent to cancel escrow. Appellant raised none of these arguments in the trial court, forfeiting them on appeal. (*Baron v. Fire Ins. Exchange*, *supra*, 154 Cal.App.4th 1184, 1191-1193.)

Appellant contends he did not forfeit his argument that the instructions require a residential transfer disclosure statement because he argued to the trial court that "[b]efore [respondent] could require [appellant] to perform his part of the agreement he must have fulfilled all conditions precedent [*13] imposed upon him and must have been able to fulfill and must have offered to fulfill all conditions concurrent imposed upon him." That general statement recites a legal principle and is not specific enough to preserve this issue for appeal. (*In re Marriage of Crosby & Grooms* (2004) 116 Cal.App.4th 201, 211-212.)

DISPOSITION

The judgment is affirmed. Respondent's cross-appeal is dismissed as moot. Respondent shall have his costs on appeal. Each party shall bear its own costs on cross-appeal.

EPSTEIN, P. J.

We concur:

WILLHITE, J., MANELLA, J.