



McIntosh v. Daystar Development

2003 | Cited 0 times | California Court of Appeal | September 29, 2003

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OPINION

Appellants, Daystar Development, Inc. (Daystar) and Bakersfield Grand Canal LLC (BGC), challenge the trial court's denial of their motion to set aside a stipulated judgment. This judgment had been entered pursuant to the settlement of a collection action filed by respondent, Roger McIntosh. Under the settlement agreement, appellants' owner, Yehuda Netanel, promised to make a \$50,000 payment by a specified future date and McIntosh promised not to enforce the approximately \$217,000 judgment against appellants unless appellants were successful in their quest to recover damages from a third party. However, the agreement also provided that upon any party's default, McIntosh would have the right to enforce the judgment without further notice. Netanel defaulted and McIntosh began attempting to collect the judgment from appellants.

Appellants contend that the provision entitling McIntosh to enforce the judgment against appellants upon Netanel's default constitutes an unlawful penalty. However, the default did not increase the amount of the judgment. Rather, the provision merely gave McIntosh the opportunity to collect the existing debt without appellants' cooperation. Thus, no penalty was involved.

Alternatively, appellants argue equity should relieve them from the judgment because Netanel's default was due to a mistake. Such a remedy is within the sound discretion of the trial court. Appellants have not demonstrated the trial court abused this discretion. Consequently, the order shall be affirmed.

STATEMENT OF THE CASE AND FACTS

Between 1995 and 1999, BGC attempted to develop a 65-acre entertainment and shopping center. Regal Cinemas, Inc. (Regal) leased part of the center to build and operate a multiscreen cinema. McIntosh provided the civil engineering services for the entire project.

The project failed when Regal refused to honor its leases. Thereafter, BGC went out of business.



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Daystar was the sole managing member of BGC and Netanel is the president of Daystar.

McIntosh filed a complaint against Netanel and appellants to recover unpaid engineering fees. In November 2000, the parties settled this action on the terms set forth in a written settlement agreement. This agreement was intensely negotiated with both parties being represented by counsel.

To settle the case, Netanel agreed to pay McIntosh \$10,000 at the time the agreement was signed and an additional \$50,000 on or before November 1, 2001. Appellants agreed to pay McIntosh \$217,796.14, together with interest. However, appellants were to make this payment only if BGC obtained a judgment or received any payment on its breach of lease claim against Regal. Further, Netanel agreed to notify McIntosh immediately upon the filing of any action against Regal so that McIntosh could file a lien.

To secure the above payments, Netanel and appellants agreed to stipulate to a judgment in the amount of \$50,000 against Netanel and \$217,796.14, plus interest, against appellants. This judgment was thereafter filed and entered with the trial court. The agreement further provided that "[i]f [defendants] default on any of the payments described herein, [McIntosh] shall have the right to enforce the Judgment without further notice, hearing, or condition. Such Judgment shall be enforceable in all respects against [defendants]."

Netanel did not pay the \$50,000 installment that came due on November 1, 2001. Further, McIntosh was not notified when BGC filed its action against Regal on October 1, 2001. Following Netanel's default, McIntosh applied for writs of execution against Netanel and appellants. McIntosh recovered approximately \$50,000 through a levy on Netanel's bank account and approximately \$3,600 through a levy on Daystar's bank account.

Appellants filed a motion to set aside the judgment and for an order that all money seized from Daystar be returned. This motion did not challenge enforcement of the judgment against Netanel. Rather, appellants opposed McIntosh's attempt to collect on the judgment against them on the ground that it constituted a penalty. The trial court disagreed and denied the motion.

DISCUSSION

1. Enforcement of the judgment against appellants does not constitute a penalty.

Appellants characterize McIntosh's ability to enforce the judgment against them upon Netanel's default as liquidated damages. Appellants further argue that these "liquidated damages" constitute a penalty because the benefit to McIntosh, i.e., being able to enforce the over \$217,000 judgment against appellants, is out of proportion to the harm McIntosh suffered as a result of the \$50,000 payment being late. According to appellants, McIntosh could be fairly compensated by Netanel paying interest on the \$50,000 from the date of default until the date of payment.



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A liquidated damages provision determines damages in anticipation of contractual breach. (Ridgley v. Topa Thrift & Loan Assn. (1998) 17 Cal.4th 970, 977.) However, such a provision is valid only if it bears a reasonable relationship to the range of actual damages that the parties could have foreseen. (Ibid.)

"An amount disproportionate to the anticipated damages is termed a `penalty.'" (Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 931.) A penalty is punitive in nature. It operates to compel performance of an act and usually becomes effective only in the event of default. (Garrett v. Coast & Southern Fed. Sav. & Loan Assn. (1973) 9 Cal.3d 731, 739.) A contractual provision imposing a "penalty" is ineffective, and the wronged party can collect only the actual damages sustained. (Perdue v. Crocker National Bank, supra, 38 Cal.3d at p. 931.)

Here, however, the contract provision at issue does not assess additional damages against appellants. Appellants agreed that they owed McIntosh over \$217,000 and stipulated to entry of the judgment against them. McIntosh merely agreed to forbear from exercising all of his potential remedies against appellants if Netanel made the \$50,000 payment. Thus, Netanel's default did not increase the amount of the judgment. Rather, McIntosh received the right to enforce his judgment against assets other than the Regal claim. Since no additional money or property was forfeited due to Netanel's breach, appellants' argument that they incurred a penalty must fail. Accordingly, the trial court properly rejected appellants' request that McIntosh be ordered to return the money he seized under the levy on Daystar's bank account.

2. The trial court did not abuse its discretion when it refused set aside the judgment on the ground of mistake.

Appellants contend the trial court should have exercised its equitable power to relieve them from the judgment. According to appellants, Netanel's default was the result of a mistake. To support this position, appellants submitted a declaration from Netanel stating that because his former attorneys had not given him a copy of the settlement agreement or reminded him of his duties thereunder, he believed the \$50,000 payment was due on November 1, 2002, rather than November 1, 2001.

The party moving for relief from a judgment has the burden of establishing the basis for that relief. (Parage v. Couedel (1997) 60 Cal.App.4th 1037, 1041.) The trial court's ruling granting or denying such a motion is reviewed for abuse of discretion. (Rappleyea v. Campbell (1994) 8 Cal.4th 975, 981.) Consequently, the appellate court will not interfere with the trial court's exercise of discretion unless there has been a clear showing of abuse. (In re Marriage of Jacobs (1982) 128 Cal.App.3d 273, 284.)

Here, appellants made a claim for relief on the ground that Netanel simply forgot that the \$50,000 payment was due in 2001. The only evidence presented to support this claim was Netanel's self-serving declaration wherein he blamed his attorneys for this oversight.



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Under these circumstances, the trial court acted within its discretion in denying appellants' motion. Appellants did not meet their burden of demonstrating that relief was justified.

DISPOSITION

The order denying appellants' motion to set aside the judgment is affirmed. Costs on appeal are awarded to respondent.

WE CONCUR:

Vartabedian, Acting P.J.

Cornell, J.

