S232582

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVE RYAN
Plaintiff & Appellant,

vs.

MITCHELL ROSENFELD, et al.,
Defendants & Respondents.

AFTER AN ORDER OF INVOLUNTARY DISMISSAL BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FOUR, APPEAL NO. A145465
ON APPEAL FROM ORDER/ JUDGMENT OF SAN FRANCISCO SUPERIOR COURT
CASE NO. CGC-10-504983, HONORABLE CYNTHIA M. LEE, TRIAL JUDGE

OPENING BRIEF ON THE MERITS

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STATEMENT OF ISSUES

"Is the denial of a motion to vacate the judgment under Code of Civil Procedure section 663 separately appealable?" (Order, April 27, 2016.)

INTRODUCTION

In enacting section 663 as one of the few forms of post-trial motions, the legislature has created a practical mechanism for litigants to challenge the trial court's judgment in the trial court. By allowing the parties to pursue such relief before seeking appellate intervention, this statutory remedy promotes efficiency by providing trial judges with the opportunity to fix errors, ideally eliminating the need for prosecuting a full-blown appeal.

In this case, however, the Court of Appeal invoked one line of authority that essentially punished appellant Steve Ryan for his failure to appeal the underlying judgment on time. Dismissing Ryan's timely appeal from the denial of his post-judgment motion to vacate, the Court of Appeal held that allowing an appeal from the denial of the section 663 motion would give Ryan two bites at the apple in challenging the judgment. While this line of authority has some superficial appeal, it should be abrogated by this Court in order to have a bright line rule allowing appeals from the denial of statutory motions to vacate under section 663. Doing so would be fully consistent with statutory law allowing appeals from the denial of JNOV motions, another situation where the same dual-opportunity-to-appeal concern could be raised. Otherwise, the existing confusion over the appealability of the denial of section 663 motions may continue to create traps for the unwary, precluding review on the merits.

On a more fundamental level, the Court of Appeal's non-appealability view is wrong for multiple reasons. First, an order denying a statutory motion to vacate should be appealable under Code of Civil Procedure section 904.1, subdivision (a)(2) as an order after final judgment. Second, appealability of the denial of section 663 motions is particularly justified because the denial of such a motion is frequently based on materials that were not available to the trial judge when rendering the underlying judgment. An appeal from the judgment would be ineffective in such cases because an appeal reviews the correctness of the challenged judgment as of the time of its rendition, not based on subsequent events. Moreover, as a practical matter, the record in an appeal from the judgment often does not include the materials presented to the trial judge in connection with a subsequent motion to vacate. As a result, an appeal should be allowed in silent-record scenarios such as the one faced by appellant Ryan.

Adoption of Ryan's view also promotes efficiency by eliminating the need for the parties to fight over classifying the trial court's judgment as void or *ex parte* – two other exceptions applied under the non-appealability view – in order to deem the denial of a motion to vacate appealable.

Finally, appealability is necessary to protect the rights of non-parties who may need to file a motion to vacate the judgment under section 663 in order to become parties, thus giving them the opportunity to reach the appellate court, irrespective of the conduct of the parties. While this ground does not apply in this particular case, it illustrates the negative repercussions of applying the Court of Appeal's view in other cases.

To summarize, the Court should hold that an order denying a motion to vacate under section 663 is independently appealable, irrespective of the filing/timeliness of an appeal from the underlying judgment.

PROCEDURAL HISTORY

A. The Parties File Various Sets of Pleadings Against One Another.[1]

Plaintiff Steve Ryan filed this action, seeking damages and the dissolution of a real estate partnership against various defendants. (CT 67:11-14.) [2] The complaint, filed in October of 2010, was amended in June of 2012, after orders to show cause regarding service of the complaint were issued/continued several times. (CT 1-2.)

Within three and a half months after Ryan filed his amended complaint, defendants answered (CT 2-3), followed by two sets of cross-complaints against Ryan. (CT 3.) After Ryan succeeded in striking portions of the cross-complaints (CT 4), he answered the cross-complaints (CT 4-5), rendering the case at issue in February of 2013. (CT 5.)

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[1] Given the narrow, jurisdictional issue on which this Court granted review, the procedural discussion under the first two headings in this section is not critical as to the appealability issue. However, due to the numerous litigation activities preceding the dismissal of Ryan's case, certain filings are discussed here to provide a broader picture of the entire lawsuit.

[2] The defendants include Mitchell Rosenfeld, Sachiko Rosenfeld, Moejoe Properties, LLC and Michael Sorantino. (CT 87:1-3 [identifying defendants and their counsel in order prepared by defense counsel].) Unless individually referenced otherwise, we refer to them collectively as "Rosenfeld."

B. The Parties Engage in Various Litigation Activities After the Pleading Stage and Before the Final Trial Date.

The original trial date of September 9, 2013 was continued by the Court to December 2, 2013 based on Ryan's objection to the initial date. (CT 5.) The parties continued litigating the case by filing/opposing discovery and dispositive motions. (CT 5-6.)

In October of 2013, Ryan filed a motion to continue the trial when his original attorney substituted out of the case (CT 7), followed by another discovery dispute. (CT 7-8.) As soon as the trial date was continued to March 3, 2014 (CT 8), all of the defendants substituted their counsel in November of 2013. (CT 9.)

The Court subsequently denied defendants' motion for summary judgment as to all causes of action. (CT 10.) Within a week after losing their dispositive motion, defendants once again substituted their counsel in January of 2014. Specifically, defendant Mitchell Rosenfeld became counsel of record for himself and the three remaining defendants. (CT 11.) Likewise, plaintiff Ryan, having been in pro per from October 2013 (CT 7), substituted in attorney Ian Kelley as his counsel in January of 2014. (CT 11.)

After filing a motion to disqualify Rosenfeld (CT 11) based on his prior representation of Ryan as a client, Ryan filed a motion to continue the trial in February of 2014. (CT 12.) In addition to granting Ryan's disqualification motion while allowing Rosenfeld to represent himself in pro per (CT 13), the court also continued the trial from March 3, 2014 to October 20, 2014. (CT 12-13.)

In March of 2014, defendants substituted in their fourth attorney as counsel of record, with the exception of Mitchell Rosenfeld (the third counsel of record) who continued to represent himself in pro per. (CT 13; CT 87:3.)

C. The Trial Court Denies the Requests Presented by Ryan's Trial Counsel to Withdraw.

On September 19, 2014, thirty one days before the trial, Ryan's counsel filed an ex parte application to obtain a hearing date on his motion to withdraw as counsel of record. (CT 13; 19-23.) A separate ex parte application was filed four days later, seeking permission to withdraw. (CT 24-26.) Ryan filed a response, urging the court to deny the withdrawal request. (CT 27-31.)

On September 25, Ryan's former counsel filed a formal motion to withdraw, [3] asking the Court to continue the trial. (CT 32-41.) In addition to citing an "erosion of the attorney-client relationship" (CT 36:8), the motion argued that defendants had "failed to appear at their depositions" without seeking a protective order (CT 36:23-24), thus precluding Ryan from being ready for trial. (CT 40, ¶ 3.) Ryan did not oppose the request for withdrawal as long as the trial would be continued so that he can obtain new counsel. (CT 42.) The court denied the motion to withdraw on September 30. (CT 14.)

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[3] The Court had shortened the time for entertaining the request to withdraw as a formal motion. (CT 35:23-24; CT 14.)

D. Ryan's Requests for Trial Continuance, Based on His Wife's Suicide Attempt and His Own Medical Conditions, Are Denied. The Case Proceeds to Trial While Ryan Is Hospitalized in Mexico.

On October 3, Ryan's counsel of record filed an ex parte application to shorten time for a motion to continue the October 20 trial date. (CT 47-63.) The record also reflects that a separate motion to continue the trial was filed the same day. (CT 64-76.) In seeking a continuance, Ryan cited a family emergency, explaining that his wife had a nearly fatal, self-inflicted drug overdose that precluded Ryan from assisting his attorney to prepare for trial. (CT 59, ¶¶ 5-6; CT 72, ¶¶ 5-6.) Ryan's attorney informed the Court that his ability to prepare the case for trial was impeded by his client's absence. (CT 70, ¶ 3.) Ryan's own declaration, dated October 2, explained that Ryan had traveled to Mexico where his family lived, so that he could take care of his children while his wife was hospitalized in Mexico. (CT 72, ¶¶ 3-6.)

The request to continue the trial was denied on October 16. (CT 15.) Ryan's writ petition, seeking a stay of the trial, was denied the next day. (CT 85.)

On October 20, the date of trial, Ryan's counsel filed a trial readiness statement (CT 77-84), confirming that Ryan was unable to proceed to trial while renewing the request to continue the trial. (CT 78.) Counsel also submitted reports from Ryan's doctor regarding Ryan's own hospitalization in Mexico in connection with his chest pains and other medical/psychological issues affecting Ryan at that time. (CT 79-82.)

E. The Trial Court Grants Defendants' Motion to Dismiss at the Time of Trial, Adopting Their Failure-to-Prosecute Theory.

At the time of the trial on October 20, the trial judge denied the request to continue the trial presented by Ryan's counsel. (CT 87.) Having found that neither Ryan nor his counsel was ready for trial, the court dismissed the case as having been abandoned. (*Id.*) Citing Code of Civil Procedure sections 583.410, subdivision (a), and 583.420, subdivision (a)(2)(A), the Court also held that Ryan had failed to comply with its order issued on the same day (October 20) to litigate the case, thereby dismissing Ryan's action with prejudice. (CT 87.)

F. Ryan Seeks Reconsideration of the Dismissal Order.

On November 4, 2014, Ryan filed a motion for reconsideration of the order of dismissal while proceeding in pro per. (CT 90-117.) Ryan submitted medical papers (CT 104-114), explaining that he was unable to attend the trial due to his hospitalization at the time of trial in Mexico. (CT 98, ¶5; CT 106 & 110 [admission on October 18]; CT 98:19-20 [discharge on October 23].) [4]

Having then filed a substitution of attorney form identifying himself as in pro per (CT 152), Ryan also filed reply papers in support of his reconsideration motion (CT 154-160), challenging the adequacy of his attorney's representation in litigating the case. (CT 155-157.) The Court denied the motion as untimely on December 18 (CT 16; 184), presumably

[4] Ryan amended his notice of the reconsideration motion to change the hearing date on this motion (CT 118-119), attaching another copy of the motion as an exhibit to the amended notice. (CT 120-150.) In addition, after the trial court had already dismissed Ryan's case, the Court of Appeal summarily denied the writ petition in which Ryan had requested a trial continuance. (CT 151.)

based on Ryan's acknowledgment that he had received notice of entry of the dismissal order on October 24 by fax. (CT 124:25-26.)

G. Ryan Files His Statutory Motion to Vacate the Judgment of Dismissal.

On December 23, Ryan filed a motion to vacate the judgment, invoking Code of Civil Procedure sections 663 and 473. (CT 161-175.) In addition to arguing that the dismissal order was void on its face based on defendants' failure to file a dismissal motion (for failure to prosecute) 45 days before presenting such a request at the time of trial (CT 162), Ryan argued that he had been abandoned by his counsel. (CT 163-166.) Ryan also argued that his own hospitalization and his wife's medical conditions also satisfied the excusable neglect criteria under section 473. (CT 162-163.)

After Ryan filed his reply papers (CT 176-180), the court continued the February 2015 hearing on this motion (CT 181) so that Ryan can comply with a local rule governing courtesy copies. (CT 181, 16 [citing wrong rule].) The hearing was continued again so that the motion can be presented to the same judge that had dismissed the case. (CT 16-17.) The motion was ultimately denied on May 11, 2015 at an unreported hearing. (CT 182.)

Confirming that the motion was denied under both sections 663 and 473, the court ordered defendant Rosenfeld to prepare an order. (*Id.*) The signed order reflects that the motion under section 663 was denied as untimely. (CT 186.) Although the signed order includes additional grounds for denial of relief (lack of changed circumstances and proper representation by former counsel), those grounds refer to the denial of the

motion under section 473. (*Id.*) The single order denying these two motions was signed on May 22, 2015. (*Id.*)

H. Ryan Files His Notice of Appeal Shortly After the Denial of His Statutory Motion to Vacate. The Appeal Is Dismissed.

On June 12, 2015, about a month after the hearing on the motion to vacate, Ryan filed his notice of appeal, identifying the "order denying motion to vacate order dismissing plaintiff's action, and order of dismissal." (CT 190 [capitalization omitted].) Ryan also filed a Civil Case Information Statement with the Court of Appeal, stating that the appeal is from a judgment of dismissal and an order under subdivisions (a)(3) through (a)(13) of section 904.1 of the Code of Civil Procedure. [5]

Rosenfeld subsequently filed a motion to dismiss the appeal. The Court of Appeal granted the motion, deeming the appeal to be untimely from the October 24, 2014 dismissal order. (Exhibit attached to PFR.) The Court of Appeal also held that the order denying the statutory motion to vacate was not appealable, citing three authorities in the penultimate paragraph of the dismissal order that address section 663 motions. Although the Court of Appeal did not explicitly question appealability issues in connection with relief sought under section 473, it did not address the merits of the request for such relief.

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[5] Although the form should have identified subdivision (a)(2) of this statute, this error is irrelevant; the notice of appeal itself identified the denial of the motion to vacate as one of the two items being appealed (CT 190). (See *Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 251 [Judicial Council form notice of appeal was deemed sufficient, even though appellant erroneously checked the box indicating the appeal was based on section 904.1, subdivisions (a)(3)-(13) rather than subdivision (a)(2), the correct provision].)

Ryan's rehearing petition was summarily denied by the Court of Appeal.

I. This Court Grants Ryan's Petition for Review, Specifying the Issue to Be Briefed.

In granting review, this Court limited the issues accepted for review as quoted above.

LEGAL DISCUSSION

I. An Order Denying a Statutory Motion to Vacate Under Code of Civil Procedure Section 663 Is Appealable Based on Multiple Grounds.

A. The Denial of a Statutory Motion to Vacate Is Appealable As a Post-Judgment Order Under Section 904.1, Subdivision (a)(2).

Over a hundred years ago, this Court held that an order denying a motion to vacate a judgment under section 663 is appealable as an order made after judgment, under statutory law allowing appeals from post-judgment orders. Citing former section 963 of the Code of Civil Procedure,[6] the Court reviewed the denial of plaintiff's post-judgment motion to vacate under section 663 in *Bond v. United Railroads of San Francisco* (1911) 159 Cal. 270, 272-273.

Applying the appealability provision currently codified in section 904.1, subdivision (a)(2), this Court explained that former section 963 allowed appeals from "any special order made after final judgment." (*Bond*,

[6] Unless noted otherwise, all statutory references below refer to the Code of Civil Procedure.

at p. 273.) Unequivocally holding that an order denying a section 663 motion is "one of that kind" (*ibid.*), the Court rejected the defendants' non-appealability argument.

While the plaintiff had appealed both the judgment and the denial of the motion to vacate in *Bond*, this Court subsequently expanded *Bond*'s application. In *California Delta Farms, Inc. v. Chinese American Farms, Inc.* (1927) 201 Cal. 201, the "defendant did not appeal from the judgment, but made a motion, pursuant to the provisions of section 663 of the Code of Civil Procedure, to have the judgment vacated and set aside and another and different judgment entered[.]" (*Id.* at p. 202.) Rejecting the respondent's non-appealability argument while applying *Bond*, this Court held that "notwithstanding the obvious fact that on an appeal from a judgment which the court below refuses to set aside, the very same matters may be reviewed, and a reversal can be ordered and the court below directed to enter the judgment which the findings justify, it seems definitely settled that our law gives a separate appeal from an order made by the court on the motion referred to in sections 663 and 663a." (*Id.* at p. 203 [internal citation omitted].)

This Court later confirmed the appealability of the denial of motions to vacate under section 663, even where the appellant misses the deadline to appeal the judgment. In *Socol v. King* (1949) 34 Cal.2d 292, the appellants tried to appeal both the judgment and the denial of their section 663 motion. (*Id.* at pp. 293-294.) After dismissing the appeal from the judgment as untimely (*id.* at pp. 294-296), this Court held that "does not, however, leave an appellant who has failed to take a timely appeal from the judgment completely remediless." (*Id.* at p. 296.) Rejecting respondent's argument that "there can be no appeal from an order of denial of a motion to vacate when the same grounds are available on an appeal from the judgment" (*id.*

[citation omitted]), this Court explained that other decisions "have established the rule that an order of denial of a motion to vacate under section 663 is appealable, notwithstanding that the same grounds could be urged on an appeal from the judgment." (*Id.* at p. 297 [collecting cases].) The Court ultimately held that the denial of the motion to vacate was appealable as a post-judgment order. (*Id.*)

This Court subsequently reiterated the appealability of an order denying a section 663 motion. In *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, the Court confirmed that "an order denying a motion to vacate made pursuant to Code of Civil Procedure section 663 has been held to be appealable." (*Id.* at p. 663 [citation omitted].) While the Court ultimately dismissed the appeal from the judgment as untimely, *Hollister* was another example among "long-established precedent" holding that "an order denying a statutory motion to vacate judgment (CCP §§ 473, 473.5, 663) is appealable as an order after final judgment." (Eisenberg, et al., Cal. Practice Guide: Civil Appeals & Writs (Rutter Group 2015) ¶ 2:171 [italics omitted; parentheses in original].)

Finally, the denial of a motion under section 663 is appealable because "the Legislature has established specific requirements for a motion to vacate" under this statute. (*People v. Totari* (2002) 28 Cal.4th 876, 886.) Given the legislature's decision to afford appellants "a means to obtain relief by way of a statutory postjudgment motion to vacate, the 'no second appeal' rule loses its urgency and a denial order qualifies" as a post-judgment appealable order. (*Id.* at pp. 886-887 [invoking the equivalent appealability statute in criminal cases, authorizing appeals from post-judgment orders affecting defendants' substantial rights].)

B. Applying These Authorities to This Case, the Denial of Ryan's Statutory Motion to Vacate Is Appealable As a Post-Judgment Order.

Based on the case authorities discussed above, the trial court's order denying Ryan's motion to vacate under section 663 is appealable under section 904.1, subdivision (a)(2), as a post-judgment order entered after a final judgment. The dismissal order entered on October 24, 2014 (CT 87) constitutes a judgment because it was signed and filed in this case. (See §581d ["All dismissals ... in the form of a written order signed by the court and filed in the action ... shall constitute judgments"].)

Although Ryan failed to appeal the October 24 dismissal within 180 days after its entry (Cal. Rules of Court, rule 8.104(a)(1)(C)), that does not preclude an appeal from the denial of his motion to vacate. The latter was independently appealable. (See *Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 282 ["where the law makes express provision for a motion to vacate -- as under section 473, 473a and 663, 633a of the Code of Civil Procedure -- an order denying such motion is regarded as a 'special order made after final judgment' and as such ... appealable"; also noting that the motion to vacate was allowed under federal statute governing that case].)

Because Ryan filed his notice of appeal (CT 190) within a month after entry of the order denying his motion to vacate (CT 185-186; 182), his appeal is timely as to the order denying his motion to vacate, irrespective of his failure to appeal the dismissal on time. Even if his "appeal from the judgment must be dismissed for untimely filing, [an] appeal from the order denying the motion to vacate the judgment still lies." (*Howard v. Lufkin* (1988) 206 Cal.App.3d 297, 299; accord, *Carr v. Kamins* (2007) 151

Cal.App.4th 929, 931, 933 & fn. 1 [although appeal from judgment was dismissed as untimely, denial of motion to vacate was appealable, resulting in reversal where void "judgment was obtained in violation of appellant's constitutional right to due process of law"].)

Finally, even if the issues that can be raised in an appeal from the judgment are identical to those raised in the motion to vacate, that does not preclude appealability. (See, e.g., *Brun v. Bailey* (1994) 27 Cal.App.4th 641, 651, fn. 5 [*because* the underlying order was appealable, "the denial of [section 663] motion to vacate is also appealable"; noting that the issues presented by both orders were "identical"; abrogated by statute on other grounds as stated in *Plunkett v. Spaulding* (1997) 52 Cal.App.4th 114, 143; but see *Lovett v. Carrasco* (1998) 63 Cal.App.4th 48, 51, fn. 1 ["Because [underlying] order is appealable, an order denying a motion to vacate it is not appealable"; no indication whether the motion was filed as a statutory one under section 663 or on another basis].)

C. In Addition, While Some Cases Have Deemed Orders Denying Motions to Vacate to Be Non-Appealable, the Silent-Record Exception Under This View Provides Another Basis for Appealability Here.

In *Pignaz v. Burnett* (1897) 119 Cal. 157, this Court observed that some courts had deemed an order denying a motion to vacate to be non-appealable. (*Id.* at pp. 162-163.) Rejecting the notion that such cases represent a universal ban against appealability, the Court limited their application, explaining that "[t]he only possible reason for refusing to entertain appeals in those cases was that the party aggrieved had already had an opportunity to appeal from the same ruling, and cannot extend his time for taking an appeal by making the court repeat its ruling." (*Id.* at p.

163.) Confirming Ryan's position, this Court held that the non-appealability rule adopted by the Court of Appeal in Ryan's case "cannot apply where no appeal could be taken from the first order, or when such an appeal would be vain for *lack of a record* showing the rights of the aggrieved party." (*Ibid.* [emphasis added].)

Likewise, in *Title Ins. & Trust Co. v. California Dev. Co.* (1911) 159 Cal. 484, this Court confirmed that the general ban against non-appealability under this line of authority is subject to various exceptions. For example, an order denying a motion to vacate is appealable if "the appellant was not a party to the proceeding resulting in the original judgment or order, and for that reason could not appeal therefrom, or that such original judgment or order was made ex parte, and the party complaining did not have notice in time to appeal, or *had no opportunity to make* a bill of exceptions or *other record* which would present his real grounds of objection." (*Id.* at p. 488 [emphasis added].) This Court also rejected Rosenfeld's view that the appealability of the prior judgment that is the subject of the motion to vacate precludes an appeal from the denial of the subsequent motion to vacate. The Court explained that the cases surveyed had allowed a direct appeal from the underlying judgment but, by allowing the appellant to file a subsequent appeal, the courts were "*relieving* the appellant from the rule of practice ... that an order refusing to vacate a prior appealable order, although described as appealable by the statute, could not be made to take the place of an appeal from the original order." (*Ibid.* [emphasis added].) [7]

[7] Although the Court ultimately deemed the order appealed in that case to be non-appealable, the rationale for dismissing that appeal does not apply here. (*Id.* at p. 494.) The appeal in *Title Ins.* was from a pre-judgment order denying a motion to vacate an order appointing a receiver. (*Id.* at pp. 486-487.) Although the interlocutory order appointing the receiver was

Consistent with Ryan's view, this Court has recognized the right to appeal the denial of a statutory motion to vacate a judgment in criminal cases, even if the underlying judgment was issued more than a decade before the motion to vacate was filed. In *Totari, supra,* 28 Cal.4th 876, for example, this Court deemed an order denying a motion to vacate based on lack of advisement of the immigration consequences of a plea to be appealable. While the statute in question allows defendants to file a motion to vacate the judgment based on this ground (Pen. Code, § 1016.5), this Court deemed "the trial court's denial of defendant's section 1016.5 motion to vacate, brought 13 years after imposition of judgment" to be appealable. (*Totari*, at p. 881.)

The Court explained that there are "various exceptions to the above general rule of nonappealability, such as when the record on appeal would not have shown the error [citations], when the final judgment that is attacked is void [citations], or when clarification of the law is deemed important in the court's discretion [citation]." (*Id.* at p. 882.) Addressing the silent-record exception invoked by Ryan here, the Court reasoned that "an appeal from the judgment would have afforded no relief for it would not have brought up a record showing the error of which defendant complained." (*Ibid.*) While *Totari* involved a criminal case, the Court observed that the same rule applies outside the criminal context. "In civil cases," the court confirmed, "it has become an established rule that an appeal lies from the denial of a statutory motion to vacate an appealable

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appealable (*id.* at p. 487), the appeal from the ultimate judgment would necessarily subsume an appeal from the denial of the motion to vacate. (See *id.* [citing former section 956, currently section 906].) Because section 906 does not apply here to Ryan's *post*-judgment motion to vacate, this rationale does not apply here.

judgment or order." (*Id.* at p. 887, fn. 5 [citing 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 154, p. 218].)

As discussed below, a separate appeal is necessary in silent-record cases because "[n]ewly revealed facts, or the hitherto unrevealed *impact* of known facts, may demonstrate that the moving party was effectually deprived of a meaningful opportunity to defend against the original motion" to dismiss for failure to prosecute the lawsuit. (*Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 388 [applying this rule to denial of section 473 motion where plaintiff failed to appeal the dismissal entered based on her failure to prosecute; emphasis added].) Accordingly, "an appeal from an order refusing to vacate a judgment will lie when the record available to the appellate court on such appeal raises issues which are not disclosed or could not be disposed of on appeal from the judgment itself." (*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 668-669 [order denying section 473 motion to vacate judgment entered pursuant to statutory offer under section 998 is appealable]; quoting *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 359.)

D. Applying the Silent-Record Exception to This Case, the Trial Court's Order Denying Ryan's Statutory Motion to Vacate Under Section 663 Is Appealable Here.

Even if Ryan had appealed the dismissal of his lawsuit as soon as the dismissal was entered, that would not have helped him in challenging the dismissal based on the grounds *subsequently* presented in his motion to vacate the dismissal. For example, in seeking to establish abandonment-by-counsel (CT 163-166), Ryan's version of the events leading to the dismissal painted a different picture than what had previously been argued in his behalf. (CT 163.) "The trial judge, in ruling on the motion to dismiss, had

no knowledge of the [alleged] facts of attorney neglect on which plaintiff relied, and an appeal from the judgment of dismissal would not have brought those facts before the appellate court for review." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 200 [internal citation omitted].) Because such materials (CT 163-166) were not available to the trial judge at the time of the dismissal of Ryan's case (CT 170), an appeal from the dismissal order would not have been helpful here. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 400, 405 [recognizing that an appeal reviews the correctness of the challenged order or judgment "as of the time of its rendition" and that the court will consider evidence that post-dates the order or judgment only in "exceptional circumstances"].) Consequently, as a practical matter, the silent-record exception – or, more accurately, the "unavailable-record" exception as its functional equivalent – applies here.

To summarize, the appealability of the judgment of dismissal is beside the point because "the record on appeal would not have reflected [Ryan's] side of the story. Under these circumstances, where a direct appeal from the dismissal is relatively ineffectual, the order refusing to vacate the dismissal is appealable." (*Daley, supra,* 227 Cal.App.2d at p. 389; accord, *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1815-1816 [although plaintiff abandoned his appeal from the judgment of dismissal for failure to timely prosecute his case, order denying statutory motion to vacate under section 473 was nonetheless appealable; post-dismissal invocation of section 473 as a basis to set aside the dismissal "tendered a 'hitherto unrevealed impact of known facts'" as contemplated by *Daley*].)

Accordingly, given the silent-record exception discussed above, the Court of Appeal erred by dismissing Ryan's appeal.

II. The Arguments Against Appealability Do Not Justify Precluding an Appeal from the Denial of a Statutory Motion to Vacate. Conversely, Appealability Is Necessary to Protect Appellants, Both as Parties and Non-Parties.

A. The Court Should Abrogate Prior Decisions That Have Created Confusion on the Appealability Issue.

Rosenfeld will argue that an order denying a statutory motion to vacate should not be appealable by invoking *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865. In that case, this Court "dismissed an appeal from an order denying a CCP § 663 motion to vacate, stating without discussion that the order was nonappealable." (Eisenberg, Cal. Practice Guide: Civil Appeals & Writs, *supra*, ¶ 2:173.) "However, *Clemmer* neither overruled nor, indeed, even mentioned the long line of precedent establishing the 'statutory motion exception,' and thus can be viewed as an 'anomaly' not affecting that precedent." (*Ibid.* [citing cases].)

To eliminate the existing confusion created by *Clemmer*, this Court should abrogate that decision to the extent that it suggests such orders are not appealable while explicitly restoring the "long line of cases" deeming such orders as appealable. (*Howard, supra,* 206 Cal.App.3d at p. 301 [collecting such cases].) *Clemmer*'s comment about the non-appealability of such a ruling "may be characterized as dicta inasmuch as earlier in the opinion, the *Clemmer* court considered and affirmed the trial court's order denying the section 663 motion to vacate the judgment." (*Howard,* at p. 302 [citing *Clemmer*, *supra*, 22 Cal.3d at p. 888].) "Additionally, the precedential value of *Clemmer* is doubtful. Without discussion of the established rule, and in a statement superfluous to the opinion, the court contradicted a long standing judicially created rule of civil procedure."

(*Howard,* at p. 302 [assigning "little weight" to *Clemmer* and deeming the denial of section 663 motion appealable]; cf. *Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 272-273 [declining to follow Supreme Court dicta that did not reflect "compelling logic" and appeared implicitly overruled by subsequent Supreme Court dicta].) [8]

B. The Court Should Reinstate the Bright Line Rule That the Denial of a Statutory Motion to Vacate Is Appealable, Even If the Deadline for Appealing the Judgment Has Expired.

To further minimize disputes regarding the appealability issues presented here or the validity/applicability of the various exceptions judicially adopted, this Court should reject the non-appealability arguments raised by Rosenfeld. There is no reason to punish an appellant by completely precluding review of the underlying judgment and a post-judgment order on a motion to vacate when the appeal is defective only as to the former (e.g., by missing the deadline to appeal the judgment). Appellants in such cases should be allowed to obtain appellate review of the denial of a *statutory* motion to vacate, even if the judgment itself is no longer reviewable.

The practice followed in federal courts is instructive in this regard. "The denial of a motion to vacate under FRCP 60(b) (mistake,

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[8] Likewise, this Court should overrule other cases construing *Clemmer* to preclude such an appeal. (See *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 822 [dismissing appeal from order denying invalid JNOV motion by refusing to treat it as the denial of section 663 motion based in part on the court's rationale that it was "compelled to follow *Clemmer*"]; *Neufeld v. State Bd. of Equalization* (2004) 124 Cal.App.4th 1471, 1476, fn. 4 [appeal from denial of section 663 motion not separately appealable after *Clemmer*].)

inadvertence, excusable neglect, etc.) is a separately appealable final order" in federal courts. (Goelz et al, Federal Ninth Circuit Civil Appellate Practice (Rutter Group 2015) ¶ 2:557 [citing *Stone v. I.N.S.* (1995) 514 U.S. 386, 403]; parentheses in original.) "Such appeal brings before the court only the order denying the motion, not the merits of the underlying judgment." (Goelz, *supra*, at ¶ 2:557a [citation omitted].)

Other courts have rejected the notion that the failure to perfect an appeal from the underlying judgment precludes an appeal from post-judgment orders denying a motion to vacate, even where the record on appeal was not silent. For example, where the judgment debtor fails to challenge the amount of post-judgment interest identified in the judgment in its initial appeal from the judgment (despite its ability to so), it can challenge it as a void order in a subsequent appeal from a post-remittitur motion compelling the judgment debtor to pay the allegedly unlawful interest rate. (See *311 South Spring Street Co. v. Department of General Services* (2009) 178 Cal.App.4th 1009, 1014 ["Because of State's claim that the portion of the judgment awarding postjudgment interest in excess of 7 percent is void, the [post-remittitur] order is appealable"].) The bright line test advocated by Ryan – allowing an appeal even if the deadline to appeal the judgment has passed – eliminates the need for the parties to fight over the fine distinctions between void and voidable orders in classifying the trial court's dismissal order here.

Our position is further supported by the fact that courts have broadened other exceptions to the non-appealability rule that was invoked in this case as a basis for dismissal of Ryan's appeal. (See, e.g., *Estate of Baker* (1915) 170 Cal. 578, 582 [denial of motion to vacate appealable where the appellant "is not formally a party, or in which, if a party, he has not received due notice, so that as to him the judgment or appealable order

is made *ex parte*"]; see also *Kalenian v. Insen* (2014) 225 CA4th 569, 579 [appeal lies from an order denying a motion to vacate on equitable grounds in "peculiar and unusual situation where a litigant was assured by court staff that a hearing would not proceed and it did," effectively resulting in an ex parte order, exacerbated by the clerk's violation of his statutory duty to notify the parties as to the ruling].) While Ryan is not invoking the ex parte exception here, these cases are fully consistent with our view.

To summarize, because "the question whether an order is appealable goes to the jurisdiction of an appellate court, which is not a matter of shades of grey but rather of black or white" (*Farwell v. Sunset Mesa Property Owners Ass'n, Inc.* (2008) 163 Cal.App.4th 1545, 1550), "bright lines are essential." (*In re Baycol Cases* (2011) 51 Cal.4th 751, 761.) Under Ryan's proposed bright line rule, the denial of a motion to vacate under section 663 is appealable, even if the appellant has missed the deadline for appealing the judgment.

C. Appealability Is Also Necessary to Protect the Rights of Third Parties So That They Are Not Left at the Mercy of the Parties in Other Cases.

Motions under section 663 may be filed by non-parties whose appellate rights should not be dictated by the conduct of the parties. While this factor does not apply here, the Court should take into account the negative implications of adopting Rosenfeld's view in other cases.

For example, filing such a motion can confer standing on non-parties to appeal the underlying judgment. (See, e.g., *County of Alameda v. Carleson* (1971) 5 Cal. 3d 730, 735, 737-738 [non-party whose motion to vacate the judgment was stricken and who was denied the right to intervene appealed "from the entire proceedings"; by moving to vacate, it became a

party and obtained standing to appeal the judgment]; see also *Gray v. Begley* (2010) 182 Cal.App.4th 1509, 1512-1513, 1526 [after defendant withdrew post-judgment motion "to vacate the judgment under ... sections 663 and 473" to obtain section 877 setoff, pursuant to a seemingly collusive agreement with the plaintiff, insurer was entitled to intervene and file "its own motion to vacate the judgment and apply the setoff"].) Under Rosenfeld's non-appealability view, however, precluding an appeal from the denial of a motion under section 663 would also preclude non-parties from reaching the Court of Appeal. Because this Court has been "understandably reluctant to recognize a category of orders effectively immunized by circumstance from appellate review" (*In re Baycol Cases, supra,* 51 Cal.4th at p. 758), Rosenfeld's view should be rejected to avoid such negative implications in other cases.

CONCLUSION

The Court of Appeal's order dismissing the appeal should be reversed. Based on the appealability of the trial court's order, this Court should transfer the case to the Court of Appeal to review the merits of Ryan's motion under section 663. (Cal. Rules of Court, rule 8.528(c).)

Given the narrow jurisdictional issue granted review, such a post-decision transfer by this Court would allow the Court of Appeal to address other issues beyond the scope of review. Such issues include whether Ryan was alternatively entitled to relief under section 473 (irrespective of section 663) and/or whether the trial court or the Court of Appeal should have treated Ryan's motion as another type of post-trial motion.

Respectfully submitted,

DATED: August 8, 2016

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CERTIFICATE OF WORD COUNT

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DATED: August 8, 2016

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18. I am not a party to this action. My business address is 555 S. Flower Street, Suite 2900, Los Angeles, CA 90071.

On **August 8, 2016**, the foregoing document described as **OPENING BRIEF ON THE MERITS** is being served on the interested parties in this action by true copies thereof enclosed in sealed envelopes addressed as follows:

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Noemi Santiago

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