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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

Estate of PAWEI RATAJ, Deceased. MARY GAY PRESLAR-MILLER, as Executor, etc., Petitioner and Respondent, v. BOZENA RATAJ, Objector and Appellant.	E029487 (Super.Ct.No. INP16837) O P I N I O N

APPEAL from the Superior Court of Riverside County. Douglas P. Miller, Judge. Affirmed.

Sergio A. Retamal for Objector and Appellant.

Barbara G. Knox for Petitioner and Respondent.

Objector and appellant Bozena Rataj (the wife) is the estranged wife of decedent Pawel Rataj. She appeals after the trial court denied her motion to set aside an order of the probate court determining that petitioner and respondent Mary Gay Preslar-Miller (Preslar-Miller) succeeded to certain real property of the decedent. The wife contends on appeal

that the court erroneously denied her motion because it considered the facts asserted in Preslar-Miller's opposing papers, and that the court failed to exercise its discretion to consider the wife's petition as an equitable motion for relief under Code of Civil Procedure section 473, subdivision (b). Neither contention has merit. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

According to the wife, she and decedent were married in Poland approximately 25 years before the decedent's death. Two children, a daughter and a son, were born of their union. In 1993, the family immigrated from Poland to the United States. At first, the family lived in Los Altos, California. None of the family could speak English when they first arrived in the United States.

Decedent then moved to the desert where he had obtained work. The daughter and son lived with the decedent. The wife worked and lived in San Jose, California. The wife would visit the family in Southern California once a month.

In 1997, decedent purchased a residence in La Quinta, California. This residence is the property at issue in the probate proceedings. Decedent met Preslar-Miller in 1997. In September of 1997, decedent executed a will purporting to give the La Quinta residence to Preslar-Miller. The will was attested by three witnesses.

Two years later, in November of 1999, decedent died at age 47. Preslar-Miller presented the 1997 will to the probate court in December 1999, petitioning for an order finding her the successor to the La Quinta residence. Notice of hearing on Preslar-Miller's petition was served by mail on the wife in San Jose, and on the daughter and son at the La Quinta house, where they were living at the time.

The wife asserts that Preslar-Miller was a close friend of the family. When the son returned to the United States, after accompanying decedent's body to Poland for burial, he took the notice of hearing on Preslar-Miller's petition to Preslar-Miller and inquired "what this was all about." Preslar-Miller allegedly told the son that the will giving the house to Preslar-Miller was necessary to protect the property; otherwise, the hospital would take the house away to pay decedent's medical bills. Preslar-Miller supposedly told the son to trust her and not to worry about the court proceedings. The family did not need an attorney or to take part in the probate proceedings. Accordingly, no family member appeared at the hearing on Preslar-Miller's petition to confirm her succession to the La Quinta property. The probate court determined, according to the will, that Preslar-Miller was the successor to the La Quinta house.

The daughter and son continued to live in the La Quinta residence until March, 2000, when Preslar-Miller served them with a three-day notice to quit. The court continued the unlawful detainer proceedings to allow the family members time to seek relief from the probate order.

On May 25, 2000, the wife filed a motion to vacate or set aside the probate court's order determining that Preslar-Miller had succeeded to the La Quinta residence. She alleged that extrinsic fraud had prevented her from attending the hearing on Preslar-Miller's petition; that is, the family had relied on Preslar-Miller's representations, as a trusted financial advisor, that the will was simply a device to avoid having the house taken to pay decedent's medical bills, that decedent had wanted the children to inherit the house, that the probate proceedings were merely a formality, and that the family did not need legal

representation to protect their interests. The wife's motion to set aside the order of succession further alleged a meritorious defense to Preslar-Miller's petition: i.e., that the will was a forgery.

Preslar-Miller's opposition to the wife's motion painted a very different factual picture.

Preslar-Miller denied that there was a relationship of confidence and trust between her and the wife. Preslar-Miller pointed out that, within four months after the Ratajes arrived in the United States in 1993, decedent and the wife lived apart in different cities; the wife lived in northern California with a long-time male companion, while decedent lived in Southern California. Decedent met Preslar-Miller in 1994, not 1997, as the wife asserted. Decedent and Preslar-Miller initiated an exclusive, romantic relationship. In fact, decedent was living in Preslar-Miller's home at the time of his death.

When decedent died, the wife refused to permit Preslar-Miller to attend the services, and she instructed the funeral home to refuse any delivery of flowers from Preslar-Miller.

The wife had no community property interest in the La Quinta residence. When decedent purchased the La Quinta residence in 1997, he had the wife execute an interspousal transfer deed indicating that the house was decedent's sole and separate property. Similarly, although Preslar-Miller had initially contributed some of the down payment for the purchase, she also executed a document assigning all her rights and interest in the La Quinta residence to decedent, so that he took title as his separate property.

Preslar-Miller denied making the statements attributed to her, that allegedly dissuaded the family members from protecting their interests in the probate proceedings. Preslar-Miller specifically denied that she had ever told the family that the probate proceedings were to protect their interest in the decedent's estate (i.e., the La Quinta residence), and to protect the property from being taken to pay medical bills.

Preslar-Miller averred that decedent had medical insurance to cover his medical bills, and that the family members were well aware of this coverage. The daughter and son, who lived at the La Quinta house, opened the mail there, and the wife had cashed insurance reimbursement checks. The son had even gone so far as to cause a scene at the hospital, "yelling that his father had good insurance and should be given the best of care."

As to the family's supposed difficulties with the English language, Preslar-Miller pointed out that the son had graduated from high school in the United States, and was a United States citizen; he had had to pass an English proficiency examination as a precondition to citizenship.

Preslar-Miller averred that, although the son had come to her for help with his college applications, she had never discussed the probate proceedings with the son at any time.

After the decedent died, the daughter and son continued to live in the La Quinta residence, without paying any rent. Far from making all the mortgage payments after decedent's death, the wife never made any payments until after Preslar-Miller had taken steps to evict the son and the daughter from the residence. Otherwise, Preslar-Miller had

made the mortgage payments after the decedent's death. Apparently, also, the decedent's property in Poland passed to his children.

Finally, both the wife and the children acknowledged that they had received actual notice of the probate hearing.

The wife's motion came on for hearing on March 1, 2001. The court "didn't find there to be sufficient facts" to show extrinsic fraud. The court found that, although Preslar-Miller "never denied that there was the relationship," e.g., with decedent's children, nevertheless, "in her declaration, [Preslar-Miller] denie[d] that she ever made the statements" attributed to her in the moving papers. The wife's counsel pressed the point that the court should also consider the motion as one for relief under Code of Civil Procedure section 473. The court responded that, "I don't believe that in the moving papers or in the reply that the issues related to 473 were raised. But even assuming they were, the argument of counsel and the basis would, in essence, be the same premise as extrinsic fraud, although the standard might not be as difficult to meet. But I, again, don't find there to be sufficient evidence of that aspect."

Accordingly, the court denied the motion to set aside the order confirming Preslar-Miller as the successor to the La Quinta property. The wife now appeals.

ANALYSIS

I. Appealability

Some question has arisen whether the order appealed from is properly an appealable order. We consider this preliminary question first. Preslar-Miller argues that "this case

presents no exception to the general rule that in probate cases, an order denying relief under Code of Civil Procedure section 473 is not appealable."

As Preslar-Miller asserts, the general rule is that an appeal does not lie from an order denying a motion to vacate or set aside an order or judgment which is itself appealable. Otherwise, there would effectively be two appeals from the same ruling. There is a "well recognized exception to this rule,"[1] however, "where, as here, the motion is based on extrinsic facts which would not appear in the record of the original proceeding which is sought to be vacated."[2] The wife's motion was based on just such facts outside the record. Accordingly, we deem the court's ruling, denying the wife's motion to set aside the probate court's succession order, an appealable order.

II. The Court Properly Considered the Opposing Papers

The wife urges that the court erroneously denied her motion, in that it improperly "permitted the facts stated in [her] declarations to be rebutted by [Preslar-Miller's] counter-declarations." She claims that her moving papers met the three-part test for equitable relief: (1) a demonstration that the movant has a meritorious case, (2) a satisfactory excuse for failing to defend the original action, and (3) due diligence in seeking to set aside the ruling. According to the wife, however, the court denied her motion on the ground that she had not demonstrated she had a meritorious defense to the action, and it

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[1] *Cope v. Cope* (1964) 230 Cal.App.2d 218, 228.

[2] *Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 148, footnote 1, citing *Cope*, *supra*.

could make this determination only by the forbidden means of considering Preslar-Miller's counter-affidavits. The wife has mistaken the import of the rule upon which she relies.

To be entitled to equitable relief from the probate court's order, the wife was first required to demonstrate that she had, at least prima facie, a meritorious defense to *the underlying action from which relief is sought*. The rule follows from the fundamental premise that, "'a valid judgment should not be set aside unless it is made to appear, *prima facie*, that a different result would probably be reached.'"[3] Here, the wife, at least arguably, had such a meritorious defense: she contended that the will in Preslar-Miller's favor was forged, and presented at least some evidence to substantiate that theory.

In addition, as the wife asserts, the court is not permitted to make a determination of the ultimate success of the alleged defense, based solely upon the affidavits opposing the motion for relief. Rather, if all requirements for equitable relief are met, the merits will be determined upon a retrial of the matter after the questioned ruling has been set aside.

But the restriction from considering the opposing affidavits on the merits of the underlying action in no wise precludes the court from considering the affidavits for the purpose of demonstrating, e.g., that there was no reasonable excuse for failing to present the defense upon the original trial of the matter. It was for this permissible purpose, and not the alleged impermissible purpose, that the court considered Preslar-Miller's counter-affidavits below. The court did not base its ruling on a determination whether the will was

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[3] *Uriarte v. United States Pipe & Foundry Co*. (1996) 51 Cal.App.4th 780, 788.

forged; rather, it denied the wife's motion because she failed to prove any extrinsic fraud, or other ground to set aside the ruling.

Although the wife's moving papers asserted that Preslar-Miller had abused a supposed fiduciary relationship with decedent's family members, her affidavits failed to direct the court's attention to certain salient points. The wife failed to mention that she and the decedent had been living apart, each with different partners, for over three years before his death. The court might rightly question the supposed fiduciary trust that the wife could be expected to place in her estranged husband's new partner. The wife had in fact demonstrated marked hostility to Preslar-Miller over the matter of decedent's funeral arrangements; that she would rely on Preslar-Miller's financial advice strained credulity. Preslar-Miller specifically denied making any representations concerning the family's need to obtain representation and appear at the petition to determine succession to the La Quinta property. Preslar-Miller provided notice of the proceedings to all three relatives. The relatives, at all relevant times, had copies of the supposedly forged will, and they said and did nothing. The court was within its discretion to resolve all these credibility matters against the wife, directly bearing upon her allegations of extrinsic fraud.[4]

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[4] See *Ayala v. Southwest Leasing & Rental, Inc.* (1992) 7 Cal.App.4th 40, 44-45.

III. The Court Properly Exercised Its Discretion Under Code of Civil Procedure Section 473

The wife next complains that the court abused its discretion because "the records show that the court failed to exercise any discretion to treat the equitable relief motion as a motion for relief under Code of Civil Procedure section 473 [subdivision] (b)."

This assertion is mystifying, inasmuch as the record clearly reflects the court's exercise of discretion in precisely this manner. Although the court believed the motion had not been brought under Code of Civil Procedure section 473, it nevertheless stated its conclusion that, even if it had, such a motion would be equally unavailing. The court expressly found, "even assuming" the motion were considered under Code of Civil Procedure section 473, "the basis would, in essence, be the same premise as extrinsic fraud, although the standard might not be as difficult to meet." The court found there was insufficient evidence to grant equitable relief, even under Code of Civil Procedure section 473. There was no abuse of, or failure to exercise, discretion.

DISPOSITION

The wife demonstrated no ground to set aside the probate order in Preslar-Miller's favor. The wife's appeal is without merit. The order denying the wife's motion is affirmed.

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/s/ Ward
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ McKinster
J.