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Appendix A: Feb. 14, 2018 “final” decision by the Cal. Supreme Court denying Kinney’s petition for review of the Nov. 30, 2017 sanction order in Cal. Court of Appeal Nos. B272408 and B276290 [e.g. appeal of attorney’s fee “cost” order based on unenforceable pre-petition contracts in favor of debtor Michele Clark for Kempton v. Clark, Los Angeles County Superior Court No. BC354136 after Clark’s Chapter 7 bankruptcy in 2010 and discharge in 2012]; see Cal. Supreme Court No. S246379 [En Banc] 1

Appendix B: Nov. 30, 2017 order re sanctions by the Justices of the Calif. Court of Appeal, Second Appellate District, Division One, after it had dismissed Kinney’s appeal and had improperly expanded the vexatious litigant law [e.g. to include Kinney’s attorney], which is contrary to Cal. Code of Civil Procedure (“CCP”) Secs. 391 et seq. and to Cal. Supreme Court decisions; and contrary to discharged debtor Clark’s 2010 Chapter 7 bankruptcy and her now-extinguished contractual obligations under now-unenforceable pre-petition contracts (e.g. the 2005 real estate purchase contract between “seller” Michele Clark and “buyers” Kinney and Kempton) 2

APPENDIX A:

Supreme Court
FILED
FEB 14 2018
Jorge Navarrete Clerk

Deputy

Court of Appeal, Second Appellate District,
Division One – Nos. B272408, B276290

S246379

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CHARLES KINNEY,
Cross-complainant and Appellant,

v.

MICHELE R. CLARK,
Cross-defendant and Respondent,

AND CONSOLIDATED CASE.

The request for judicial notice is granted.
The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX B:

Court of Appeal –
 Second Dist.
 FILED
 NOV 30, 2017
 Joseph A. Lane, Clerk
Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE
 OF CALIFORNIA
 SECOND APPELLATE DISTRICT
 DIVISION ONE

CHARLES KINNEY,
 Cross-complainant
 and Appellant, **B272408**
 (Los Angeles County
 Super Ct No BC354136)

v.

MICHELE R. CLARK,
 Cross-defendant
 and Respondent,

_____)
)

CHARLES KINNEY,
 Cross-complainant
 and Appellant, **B276290**
 (Los Angeles County
 Super Ct No BC354136)

v.

MICHELE R. CLARK,
 Cross-defendant
 and Respondent,

WILLIAM M. RUBENDALL,
 Objector.

_____)

BACKGROUND

On November 1, 2017, this court issued its opinion in this consolidated matter, dismissing (1) cross-complainant Charles Kinney's appeal from a March 17, 2016 post-judgment attorney fees award in favor of cross-defendant Michele Clark (appellate case No. B272408), and (2) Kinney and his attorney William M. Rubendall's appeal from an order imposing monetary sanctions on them for filing a frivolous motion for reconsideration of the March 17, 2016 fee award (appellate case No. B276290). (*Kinney v. Clark* (Nov. 1, 2017, B272408/B276290) [nonpub. opn.])

In our opinion in this matter, we concluded the appeal from the March 17, 2016 fee award was frivolous because this court and several other state and federal courts had addressed and rejected the contentions Kinney reasserted in this appeal, as outlined in our recent published decision in a prior appeal in this action, *Kinney v. Clark* (2017) 12 Cal.App.5th 724. (*Kinney v. Clark, supra*, B272408/B276290, pp. 7-11.) We further concluded the appeal from the order imposing monetary sanctions on Kinney and Rubendall for filing a frivolous motion for reconsideration of the March 17, 2016 fee award was itself frivolous because the underlying motion was not a motion for reconsideration but a rehashing of issues that have been decided already by the trial court, this court, the bankruptcy court, the federal district court and the Ninth Circuit Court of Appeals. (*Id.* at pp. 11-12.) fn. 1

Rubendall is the attorney who, on behalf of Kinney (in both appeals) and himself (appellate case No. B276290), filed the notices of appeal and opening and reply briefs. On August 4, 2017,

Rubendall filed an association of counsel in appellate case number B272408, notifying this court that attorney Cyrus Sanai would conduct the oral argument. On October 6, 2017, Rubendall also filed an association of counsel in appellate case number B276290, notifying this court that Sanai would conduct the oral argument. Sanai requested the maximum amount of time (30 minutes) for oral argument in each case. On October 18, 2017, we issued an order consolidating these two appeals for oral argument and decision.

On October 24, 2017, Sanai appeared at oral argument on behalf of Kinney and Rubendall in this consolidated matter. Sanai did not argue the issues raised below or in the appellate briefs. He acknowledged during his oral argument that this court already had rejected those arguments in our published decision, *Kinney v. Clark, supra*, 12 Cal.App.5th 724, which was final by the time of oral argument in these consolidated appeals. Instead; Sanai spent his 30 minutes of argument time discussing an issue not before this court: he asserted that this court's 2008 decision affirming the trial court's sustaining of Clark's demurrer to Kinney and Kempton's cross-complaint for unmerchantable title was wrongly decided. (*Kempton v. Clark* (June 30, 2008, B200893) [nonpub. opn.].) He urged us to "invite" Kinney to file a writ petition challenging the 2008 decision. fn. 2 We declined to do so. (*Kinney v. Clark, supra*, B272408/B276290, at p. 12, fn. 12.)

On November 2, 2017, we issued an order to show cause, notifying Kinney, Rubendall and Sanai that we were considering imposing sanctions on all three of them for filing and/or

prosecuting a frivolous appeal in this consolidated matter. (Cal. Rules of Court, rule 8.276(c).)

On November 16, 2017, Rubendall, on behalf of Kinney, filed a petition for rehearing in this consolidated matter. On notice that he was facing sanctions for filing and maintaining these frivolous appeals, Rubendall repeated in the petition for rehearing the meritless arguments Kinney has been making for years about why he believes Clark is not entitled to attorney fees in this action. As set forth above, numerous federal and state courts, including this one, have rejected these arguments over and over again. (*Kinney v. Clark, supra*, 12 Cal.App.5th 724.)

The oral argument on the order to show cause regarding sanctions was held on November 27, 2017. Kinney, Sanai, and Clark's counsel appeared. Rubendall waived oral argument, joining in the arguments of Kinney and Sanai.

DISCUSSION

On its own motion, this court may impose sanctions when an appeal is frivolous or taken "solely to cause 'delay.'" (Cal. Rules of Court, rule 8.276(a)(1).) An appeal is frivolous "when it is prosecuted for an improper motive - to harass the respondent or delay the effect of an adverse judgment - or when it indisputably has no merit - when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) An appellate court may impose sanctions on a party or attorney not only for filing a frivolous appeal, but also for maintaining or prosecuting a frivolous appeal. (*Cohen v. General Motors Corp.* (1992) 2 Cal.App.4th 893, 896

[imposing sanctions against appellant's attorney for maintaining an appeal that was not frivolous when filed but became "totally and completely without merit" after the appellate court rendered an opinion in an earlier appeal arising from the same litigation].)

Courts "impose a penalty for a frivolous appeal for two basic reasons: to discourage further frivolous appeals, and to compensate for the loss that results from the delay." (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 33.)

As set forth in *Kinney v. Clark, supra*, 12 Cal.App.5th 724, Kinney has been challenging Clark's entitlement to attorney fees under a real estate purchase agreement for about nine years. He continues to raise the same arguments in response to each successive award of attorney fees, ignoring the numerous state and federal court decisions that have rejected these arguments. The appeals were frivolous when Rubendall filed them on Kinney's behalf (for all of the reasons state and federal courts have set forth in rejecting Kinney's attempts to prevent Clark from enforcing her right to attorney fees). Moreover, Rubendall and Kinney continued to prosecute these consolidated appeals, even after we rejected the arguments Kinney raised here in our published decision in a nearly identical appeal, *Kinney v. Clark, supra*, 12 Cal.App.5th 724, decided May 17, 2017 (and modified on June 14, 2017). On August 16, 2017, more than two months before oral argument in this matter, the California Supreme Court denied Kinney's petition for review of our published decision (case No. 8242796). Sanai filed that petition for review on Kinney's behalf.

In opposition to the order to show cause, Rubendall argues this court should not sanction him because he did not have the authority from Kinney to dismiss these consolidated appeals. But he did have the option to stop assisting Kinney in prosecuting these frivolous appeals, and he failed to take it. He did not ask this court to withdraw as counsel of record. In fact, he continues to assert meritless arguments on behalf of Kinney in this matter (e.g., the petition for rehearing, filed November 2, 2017).

Kinney has exhibited an unwillingness to refrain from filing and maintaining frivolous appeals. In his declaration in opposition to the order to show cause regarding sanctions, Kinney explained, "I have been, and am still, unwilling to dismiss my appeals until I am allowed my day in court with testimony from witnesses and with cross-examination, and I have so instructed my attorneys." As explained above, Kinney had his day in court a decade ago.

In an attempt to discourage further frivolous appeals and to compensate Clark for loss resulting from the delay in collecting her attorney fees in this action, we order Kinney personally to pay sanctions in the amount of \$10,000, payable to Clark in full upon issuance of the remittitur in this matter. *fn. 3* We order Rubendall (State Bar No. 80616) personally to pay sanctions in the amount of \$5,000, payable to Clark in full upon issuance of the remittitur in this matter. We direct the clerk of this court to send a copy of this order to the State Bar of California. *fn. 4*

We believe these sanctions are necessary to deter Kinney and Rubendall from persisting in the filing and prosecution of frivolous appeals.

We have decided not to impose sanctions on Sanai. He did not file the notices of appeal or appellate briefs in this consolidated matter. Although we disapprove of his conduct in appearing at oral argument and raising a new, unbriefed issue that he conceded was not before the court in these consolidated appeals, he has not come before this court repeatedly raising the same meritless arguments over and over again as Kinney and Rubendall have done.

_____/s/_____/s/_____/s/_____
 ROTHSCHILD, P. J. CHANEY, J. JOHNSON, J.

Footnotes:

1 We incorporate into this order the facts and argument set forth in our opinions in *Kinney v. Clark, supra*, 12 Cal.App.5th 724 and *Kinney v. Clark, supra*, B272408/B276290.

2 Sanai cites *Moore v. Kaufman* (2010) 189 Cal.App.4th 604 (*Moore*), a case in which this Division of the Court of Appeal invited an appellant challenging a contempt order to file a petition for writ of mandate challenging the underlying judgment requiring her to pay attorney fees. (*Id.* at p. 614.) The underlying judgment was void as to the appellant because it required her to pay attorney fees after her client's complaint was stricken under the anti-SLAPP statute (Code Civ. Proc., § 425.16), but the statute did not authorize an award of attorney fees against the plaintiffs counsel. (*Moore, supra*, at p. 614.) This Division concluded the appellant could

challenge the void judgment "in defense of [a] contempt proceeding" based on the appellant's "refusal to answer questions at her judgment debtor examination." (*Id.* at pp. 612, 614.) *Moore* was a unique case in which the issue of the imposition of attorney fees against the appellant attorney was not litigated in the trial court, but yet the judgment nevertheless included an attorney fees award against the appellant. Here, the trial court sustained Clark's demurrer without leave to amend, finding Kinney's cross-complaint to be legally deficient, and this court affirmed the judgment. Because Kinney had a full and fair opportunity to argue his position, we have no cause to invite him to file a petition for writ of mandate challenging the 2008 decision.

3 These sanctions are in addition to the sanctions we ordered Kinney to pay in appellate case number B265267. (*Kinney v. Clark, supra*, 12 Cal.App.5th at pp. 741-743.)

4 Kinney was disbarred for his conduct in this and other property dispute litigation. (*Kinney v. Clark, supra*, 12 Cal.App.5th at p. 727, fn. 1.) His State Bar number is 66428.