

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/31/06

DEPT. WEA

HONORABLE LINDA K. LEFKOWITZ

JUDGE

T. MCDONALD

DEPUTY CLERK

HONORABLE
6.

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

J. DANZO

Deputy Sheriff

NONE

Reporter

3:00 pm

SC036340

Plaintiff

Counsel

NO APPEARANCE

FREDERIC GOLDMAN ET AL

VS

Defendant

ORENTHAL JAMES SIMPSON ET AL

Counsel

NO APPEARANCE

C/W SC031947 VERDICT 2-10-97

NATURE OF PROCEEDINGS:

COURT'S RULING ON SUBMITTED MATTER

Case Name: Frederic Goldman v. Orenthal James Simpson

Case No. SC036340

NOTICE OF RULING AND RULING:

Plaintiff, Frederic Goldman, prevailed by jury verdict in the instant wrongful death action involving the death of his son. 1 Various post-judgment enforcement matters have been undertaken over time by plaintiff subsequent to the judgment. Defendant is domiciled in the State of Florida. See Declaration of Orenthal James Simpson. Plaintiff has expressed an inability to successfully utilize post-judgment enforcement remedies against a judgment now estimated at \$38,000,000, including interest, given the extra-jurisdictional domicile of the defendant and various Florida statutes limiting post-judgment enforcement. By the instant motion, plaintiff seeks the outright transfer/assignment of defendant's right of publicity. See Cal. Civ. Code 3344; 3344.1. He seeks an order directing defendant to simply sign over a document conveying the right, title and interest in his right of publicity over to plaintiff so that plaintiff may commercially exploit it as he sees fit..." Plaintiff's Consolidated Reply, p. 2:12-14. Respecting the breadth of authority provided to the court, and the strong interest of the Plaintiff and the State of California in enforcing its judgments, the court has

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considered the issue of law and denies the motion.

A. The court's jurisdiction to rule upon the issue raised: Defendant interposes a two-pronged opposition by filing both opposition to the motion and a separate Motion to Dismiss for Lack of Jurisdiction. Addressing the preliminary jurisdictional issue, the court finds it has jurisdiction over the person of the defendant and thus denies any claim that this court lacks fundamental jurisdiction to proceed upon the issue raised.

First, California Civil Code Section 410.50, subd.(b), provides that once jurisdiction has attached in an action, jurisdiction over the parties and subject matter continues through subsequent proceedings and is not defeated by a party's subsequent residence or domicile beyond the otherwise applicable jurisdiction of the court. See, e.g., Maxwell v. Cooltech, Inc. (1997) 57 Cal.App.4th 629, 632-633; see also Civ. Code Section 681.10, subd.(a), 683.010, authorizing enforcement of money judgments. Second, even in the absence of express case law relating section 410.50, subd.(b) in the context of post-judgment enforcement, the issues raised in defendant's motion to dismiss result in a general appearance in the matter.

It is well-settled that whether an appearance is general or special does not depend upon the intent

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of the party, but upon the relief sought in that appearance. If a defendant files an objection upon grounds the court has not acquired jurisdiction over his person, it is deemed a special appearance. If, on the other hand, one appears and seeks relief only available to a party active in the case, one is deemed to have made a general appearance for all purposes. Milstein v. Ogden (1948) 84 Cal.App.2d 229, 232.

Turning to the motion in the instant case, although it is characterized as grounded in jurisdiction, it relies exclusively upon the provisions of Civil Code § 946. That section has been construed as merely a "choice of law" provision which generally provides that the law of a person's domicile governs the disposition of personal property. See, e.g., Cairns v. Franklin Mint Co. (C.D.Cal, 2000) 120 F.3d 1139 (9th Cir. 2002), holding that Section 946 required application of the law of Great Britain to resolve a post-mortem claim of infringement of Princess Diana's right of publicity by a Fund established by her heirs and others under Civil Code § 3344.1. The court held that creation of a post-mortem descendible right of publicity under § 3344.1 did not alter the default choice of law provision established by § 946. Cairns cannot be extended to defeat this court's jurisdiction to rule upon the issue before it.

B. California Enforcement of Judgments Law and the Right of Publicity:

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There is no question but that the instant case has remained one of lasting public attention. For this reason, it should be understood at the outset that the issue raised by the plaintiff is one of pure law. It is no way dependent upon a determination of the perceived equities of either side, or a review of the facts presented at trial. Quite to the contrary, the determination of whether post-judgment enforcement remedies may properly include the transfer of publicity rights to a prevailing plaintiff could have, in theory, been raised by any plaintiff holding a judgment against any defendant perceived as holding financially viable publicity rights. The right of publicity, means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities. *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 824, legislatively superseded by Civil Code §3344.1, which provides for a continued post mortem right of publicity accruing to the celebrity's successors, heirs and others upon the death of the holder. Other than that both sides appear to agree that Mr. Simpson's name or likeness meets this definition, 2 any perceived uniqueness of this case, or its facts or parties, has little or no bearing upon the courts analysis.

Neither side has cited, and the court's research has

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failed to locate, any California law expressly addressing the instant issue. Plaintiff places principal reliance upon Pacific Bank v. Robinson (1881) 57 Cal. 520, 524, in which the Court held that a judgment debtor could be compelled to wholly assign his rights in a patent to a receiver for purposes of satisfying the judgment. Id., at p. 522. The Pacific Bank court found no distinction between tangible and intangible property, commenting in dicta that, the principle as well as the policy of the law is, therefore, to subject every species of property of a judgment debtor to payment of his debts. Id. Analogizing the right of publicity to other intangible rights, notably patent rights, plaintiff argues that Pacific Bank is dispositive.

Pacific Bank has never been expressly overruled. The most recent California citation to the case appeared in 1958 in Burrows v. Jorgenson (1948) 158 Cal.App.2d 644, 650-651. Burrows did not address the propriety of assigning intangible property in its entirety, but for the more limited purpose of affirming the authority of a court to appoint a receiver in the post-enforcement context to conserve profits (there, rental income) pending the decision of a court upon the purported fraudulent transfer of leaseholds aimed at shielding them from enforcement of a default judgment. The absence of recent citation to Pacific Bank is of likely significance. In 1982, in response to apparent defects, conflicts, and inadequate coverage in the area of post-judgment

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enforcement, the California Law Revision Commission, Tentative Recommendation proposed a comprehensive revision of the law governing enforcement of judgments in California. Accordingly, effective July 1, 1983, the California Legislature repealed existing law and enacted a revised, comprehensive statutory scheme which became operative on July 1, 1983. Code of Civil Procedure Section 708.510 was enacted as a part of the new statutory scheme. The parties have not provided any information regarding a predecessor statute.

Section 708.510 authorizes the court to order a judgment debtor to assign to the judgment creditor or a receiver, all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments, including, but not limited to the following types of payments à: (3) Commissions; (4) Royalties; (5) Payments due from a patent or copyright...." Principles of statutory construction mandate that the court not insert that which the Legislature has chosen to omit. In re Reeves (2005) 35 Cal.4th 765, 789. Seen in this light, it is significant that rather than authorizing outright transfer or assignment of a particularized intangible, the statute speaks in more limited terms of assignment of the right to payment. Neither side has provided the court with decisional law definitively construing the statute, nor provided legislative history surrounding the phrase. Research has disclosed a federal trial

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court decision rejecting a request for outright assignment of a patent in a post-judgment enforcement case, finding the constraints of °708.510 more appropriate than the Pacific Bank approach when applied to the context of the "sums certain" inherent to the judgment enforcement context. Sleepy Hollow Inv. Co., No. 2 v. Prototex, (N.D. Cal.2006) 2006 Lexis 35479.

Sleepy Hollow can be distinguished by the relatively small sum of the involved judgment, easily satisfied by assignment of sums over a limited period of time, and apparently devoid of post-judgment enforcement choice of law issues. However, the decision brings to the fore implicit questions about the practical difficulties of mandating assignment of the right of publicity in the context of a money judgment. For example, should the assignee further assign or undertake a license, or on his own enter into a business venture involving the commercial use of the celebrity's business -and fail- how is the court to assess whether the celebrity should be credited against the judgment under such circumstances; Is it not necessary that the court assume an auditing role in monitoring credits against the judgment; would the assignee be entitled to file actions against third parties believed to infringe upon the commercial use of the celebrity's likeness, and how are costs assessed in the event of a loss through settlement or at trial; is the assignee a fiduciary responsible for prudent decision-making? Even

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assuming the propriety of appointing a receiver to undertake some of the court's monitoring and audit function, as authorized by Pacific Bank, which side pays the cost of a receiver? Is the assignment of the right of publicity routinely available as a post-judgment enforcement remedy, or must there be a preliminary showing that all other means of enforcement have been exhausted? Does such transfer overrule the choice of law provisions provided by Section 946? What of the impact of such a ruling upon public personalities of impeccable repute, who might equally be impacted by so broad a reading of the post-judgment enforcement remedies, even in cases unaccompanied by claims of punitive damages? In sum, such substantial issues of practical complexity appear more to validate the wisdom of Section 708.510 than to support the relief requested. Accordingly, and understanding the concerns of a prevailing plaintiff claiming defendant's circumvention of obligations, the court finds that California Enforcement of Judgments Law as currently enacted does not provide a vehicle for the relief requested.

C. A living celebrity's right of publicity under California law:

"Except as otherwise provided by law, all property of the judgment debtor is subject to enforcement of a money judgment." California Code of Civ. Proc., Section 680.010. Plaintiff's motion is based upon

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the concept that Defendants right of publicity is "an intangible property right". Motion at p.3:13; 3:16-17. Although assignable during lifetime, and thus bearing at least one characteristic of a property right, the nature of the publicity right during the lifetime of the celebrity is equally characterized by privacy rights which mitigate against court-enforced transfer of the right to obtain commercial profit from his or her likeness. Plaintiff has provided the court with an extensive body of extra-jurisdictional case authority and treatises surrounding the right, particularly as it has developed from an inter vivos right to one descendible after death. Appendix of Non-California Authority, Exs. 1-10. However, under California decisional law there are critical distinctions between the nature of the inter vivos right of publicity, and its post mortem survival legislatively created by enactment of Section 3344.1. And in this regard the post-mortem the court is less guided by extra-jurisdictional law and commentary, than by the decision of the California Supreme Court in *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, superseded by legislation as to survival of the right upon death of the celebrity. Civil Code Section 3344.1. 3 *Lugosi* held that in the absence of statutory authority [later enacted in Section 3344.1], the protectible right to exploit an artist's likeness had to be exercised during lifetime and did not descend to one's heirs or successors. In so doing,

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the California Supreme Court undertook an analysis of the character of the inter vivos right of publicity which is relevant to the instant case.

The court focused not upon the concepts of property rights, but more exclusively upon what it considered a common law right "embraced in the law of privacy." 4 Id. at p. 819. While conceding that Lugosi could have established and/or licensed use of his identity for business purposes, his right to do so - or not to do so - was a "personal" right. Id., at pp. 820-821. It rejected the trial court's ruling and cases holding that "name and likeness are 'property'" and, as articulated in Justice Mosk's concurring opinion, determined that Lugosi simply had the right to control the commercial exploitation of his likeness. Id. at p. 824. It is thus the unfettered use, the inability of the judgment debtor celebrity that implicates the zone of privacy. It is thus worthwhile to note that there are celebrities who have never permitted any commercial use of their fame (See, e.g., Midler v. Ford Motor Co. (9th Cir. 1988 849 F.2d 460, 462; Dustin Hoffman v. Capital Cities/ABC, Inc. (C.D.Cal.1999)157 F.3d 686) raising questions regarding whether their right to refuse commercial exploitation should be nullified in a judgment debtor context.

At least two commentators cited by Plaintiffs have jointly characterized the Lugosi decision as a "searching analys[is] of the policy issues

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involved." 23 Cardozo Arts & eng. L.J.71, (2005) Westfall, David and Landau, David, "Publicity Rights as Property Rights", but notes it, and others with similar analyses were not "widely followed" in the post-mortem context. But see Auto Equity Sales, supra at fn.3 It should be recognized, however, that unlike other jurisdictions, California's right of privacy does not emanate merely from common law and the penumbra of rights arising from now-famous law review article authored by Justice Brandeis and Samuel Warren in, "The Right to Privacy", 5 Harv. L.Rev. 220,. Rather, the right of privacy is of direct constitutional magnitude under Article I, Section 1 of the California Constitution and has been held to be broader and more protective of privacy than its federal counterpart. American Academy of Pediatrics v. Lundgren (1997)16 Cal.4th 307, 326. For this reason, it is not surprising that the California Supreme Court distinguished the personal right of a celebrity during his or her lifetime from the "property right" which accrues to certain described survivors of the celebrity upon death. Section 3341.1. Extending Lugosi to its fullest, at least one commentator has expressly warned against "turn[ing] a man into a commodity and mak[ing] him serve the economic needs and interest of others... against his will." Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" 39 N.Y.U. L.Rev. 962, 1000-03 (1964), cited in Plaintiff's Ex. 4, 23 Cardozo Arts & Ent. L.J. at fn.43. It is perhaps for this reason

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that there is an absence of California decisional law finding the waiver of all aspects of a celebrity's life, even in the face of broad public rebuke. (Plaintiff's Ex 12, Law & Contemp. Problems (1954) Nimmer, Melville "The Right of Publicity").

This case may undoubtedly be subject to perceptions of equity that appeal to a contrary outcome. This point was argued in hearing upon the motion. Exhibits were proffered to the court, without objection, that indicate Mr. Simpson has, in fact, exploited his fame by such ghoulish activities as appearing at a "slasher" convention which exhibited videos and other forms of communication glorifying acts of violence not dissimilar from those which caused the death of plaintiff's son. But to base transfer of the right of publicity upon the post-judgment inequitable conduct of the judgment debtor "celebrity" raises substantial procedural-if not constitutional issues-- involving due process rights to further hearing upon the equity issues, etc. For example, at least one law review commentary relied upon by plaintiff support of the concept suggests that there may well be a need to sever the judgment creditor's right to sell, license and use the identity of the celebrity from the continued individual right of that celebrity to engage freely in actual "performance", indicating substantial "involuntary servitude" issues in permitting a judgment creditor to, in effect, "manage" the performer's appearances. Jacoby and

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Zimmerman, "Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity", 77 New York University Law Rev. 1322 (2002).

But however one side or the other to this litigation may be viewed by some, the court has attempted to determine an issue of law based upon the limited statutory and decisional law in this area. Having done so, the court finds the neither the law, nor the limits of this court's equity jurisdiction, support outright transfer of a judgment debtor's inter vivos right of publicity. For all the reasons stated below, and with respect to the authorities and briefing presented by both sides in this matter, the court here denies Plaintiff's motion; defendant's motion based upon Section 946 is dismissed as moot in light of the court's ruling. 1 As requested, the court has taken judicial notice of the court record in this action. Evid. Code section 451, subd. (a).

2 Plaintiff has requested the court take judicial notice of apparent internet reproductions of news articles and advertising photographs of commercial "pay-per-view" and video material bearing Mr. Simpson's likeness. The truth of the content of such material is not a proper subject for the taking of judicial notice. See Zelig v. County of Los Angeles, (2002) 27 Cal.4th 1112, 1141.

3 See Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, upholding principles of stare decisis requiring inferior tribunals to follow

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decisions of courts of superior jurisdiction.
4 See Justice Moskss subsequent decision in Comedy
III Productions, Inc. v. Gary Saderup, Inc. (2001)
25 Cal.4th 387, citing Lugosi as creating a "common
law right derived from the law of privacy"
identified by Dean Prosser in his seminal article on
the subject. (Prosser, Privacy (1960) 48 Cal.
L.Rev. 383, 389.) In other respects, the parties
have not relied upon, nor will the court thus
address, the tension between a protectible right of
publicity and First Amendment free speech issues
which were the hallmark of the Comedy III
Productions decision.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the
above-entitled court, do hereby certify that I am not
a party to the cause herein, and that this date I
served Notice of Entry of the above minute order of
10-31-06 upon each party or counsel named below by
depositing in the United States mail at the courthouse
in Santa Monica, California, one copy of the
original entered herein in a separate sealed envelope
for each, addressed as shown below with the postage
thereon fully prepaid.

Date: October 31, 2006

John A. Clarke, Executive Officer/Clerk

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