MONARCH BAY TERRACE PROPERTY OWNERS ASSOCIATION, Plaintiff and Respondent,

v.

ROBERT GREY JOHNSON, JR., Defendant and Appellant.

G043518, G043881

California Court of Appeal, Fourth District, Third Division

October 19, 2011

NOT TO BE PUBLISHED

Appeal from a judgment and orders of the Superior Court of Orange County, Richard J. Beacom, Judge (Retired Judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and Jane D. Myers, Temporary Judge (pursuant to Cal. Const., art. VI, § 21).

Law Offices of Randall S. Waier and Randall S. Waier for Defendant and Appellant.

Abbes, Portales & Reynoso and Alejandro Portales for Plaintiff and Respondent.

OPINION

BEDSWORTH, ACTING P. J.

This is a case about a tree – a pretty litigious tree it seems, for this is not its first time in court. Robert Grey Johnson, Jr., the custodian of the tree, actually settled the earlier dispute with respondent Monarch Bay Terrace Property Owners Association (Monarch Bay), and now wishes to avoid the enforcement of that settlement. He has enlisted the aid of poet Joyce Kilmer, an avowed lover of trees, in his effort to convince this court he should not be required to "top" the tree that some of his neighbors characterize as an impediment to their ocean views, even though he earlier agreed to do that very thing. Unfortunately for Johnson, we can't simply assume, as he does, that even Kilmer would necessarily characterize his tree as enhancing, rather than detracting from, an ocean view.[1] All we know is that Kilmer thought trees were more lovely than *poems* – indeed, as Johnson points out, Kilmer's famous poem "Trees, " begins with the line "I think that I shall never see a poem lovely as a tree" – but as far as we know, he offered no poetic comparisons between the aesthetic values of trees and oceans.

In any event, this case is not about whether Johnson *should be* required to top his tree – or whether Kilmer would have approved of his doing so. It's about whether Johnson's voluntary *agreement* to do it is legally enforceable, even though he doesn't want to do it anymore. It is.

Johnson asserts two primary bases for challenging the stipulated judgment which arose out the prior settlement. First, he claims the court was without jurisdiction to enter an order enforcing the parties' settlement pursuant to Code of Civil Procedure section 664, because Monarch Bay's motion was brought more than one year after the date of the settlement, in violation of a provision requiring that the case be dismissed no later than one year after the settlement date. And second, Johnson claims that the terms of the judgment as entered are materially different from those he stipulated to. Neither argument is persuasive.

Contrary to Johnson's assertion, the settlement agreement does not actually require that the case be dismissed within a year after the settlement date – or at all. Instead, what the provision Johnson relies upon does is *prohibit dismissal* of the case for a period of time. But even if settlement had imposed a deadline or dismissal of the case, Johnson would have waived any right to rely upon it by failing to enforce it prior to entry of judgment. Until the case was actually dismissed – which this one never was – the court retained jurisdiction to enter judgment.

And Johnson's argument concerning the specific terms of the judgment simply ignores the fact that, as part of the settlement agreement, he expressly stipulated to *the exact terms* of the judgment to be entered against him if he failed to comply with his obligations under the settlement agreement. That proposed "judgment pursuant to stipulation" was attached as an exhibit to the "stipulation for judgment" which Johnson signed in connection with the settlement. To the extent he is unhappy with its terms, it is too late for Johnson to raise that issue now. That being said, however, we note (and Monarch Bay concedes) there are some minor differences between the terms of the stipulated judgment, and the judgment actually entered. The only one of those differences Johnson actually complains about is that the stipulated judgment calls for a "fine" of $250, and "prejudgment attorneys' fees" of $500, while the judgment as entered bumps up those amounts to $500 and $2, 000, respectively. Because the record makes clear that the judgment form was actually prepared by Monarch Bay's counsel, and not by the court itself, we conclude the alterations reflect a "clerical error, " rather than any intention on the court's part to alter any terms of the stipulated judgment. Consequently, the judgment is corrected to reflect the stipulated amounts of the fine and attorney fees, and as corrected, it is affirmed.

Finally, Johnson also challenges the court's award of attorney fees incurred by Monarch Bay in enforcing

the settlement agreement. We conclude there is no basis for reversal of the award. The parties specifically provided in their stipulated judgment for an additional award of attorney fees incurred by Monarch Bay "in enforcement of the stipulation, " which would equate to the fees expended to obtain entry of the stipulated judgment. Nor did the court err by including in its award the fees Monarch Bay incurred in its first motion to obtain entry of judgment. The court explicitly denied the first motion "without prejudice, " thus signaling that the issue of whether Monarch Bay was entitled to such a judgment was yet to be determined – in other words, that neither party had yet won nor lost the fight. The court's fee award, entered after Monarch Bay ultimately prevailed, was consistent with that approach: One fight, one victor – and to the victor went the spoils.

FACTS

Monarch Bay is a homeowners' association for a community located in Dana Point. Johnson is the owner of a home located in that community. Monarch Bay and Johnson became embroiled in a dispute concerning Johnson's alleged installation of various "unapproved" trees on his property, and his failure to properly trim and maintain numerous trees, to ensure they were not impeding either the sidewalks adjacent to his property, or the ocean views of his neighbors.

On May 13, 2008, the parties entered into an agreement to settle their dispute. The terms of the settlement are quite detailed, spanning a six page settlement agreement, an eight page "stipulation for entry of judgment, " and a seven page "judgment pursuant to stipulation." In general, the parties agreed that Johnson would henceforth abide by Monarch Bay's "Covenants, Conditions and Restrictions" (CC&R's) and seek prior approval of any plantings on his property, and that Monarch Bay's board of directors would have "sole discretion" to determine the proper height of any planting, or whether any new or existing planting constitutes a view impediment or a nuisance – and that it's decisions would be "final." The parties also agreed Johnson would remove certain trees as specified in the agreement, trim or top other trees, as necessary, to maintain them at roof-top level; and pay a fine of $250, plus $500 in attorney fees to Monarch Bay. The settlement agreement also provided that one particular tree, a Canary pine, would be topped only an additional three feet from its height on the date of settlement, and be allowed to remain above roof-top level "so long as it doesn't impede views." The parties agreed that the Canary pine "will be inspected" nine months after the date of settlement, to determine whether it creates any view impediments; and if it does, it would be further trimmed – but only if a "neutral arborist" (paid by Monarch Bay) determines that doing so would not permanently injure the tree.

The parties also stipulated to the precise terms of a judgment, which the court could enter against Johnson "ex parte with 10 days notice if the Court determines that Johnson has not complied with the terms of the Agreement and Stipulation in full." Johnson expressly agreed to waive any right to appeal from the judgment, if entered. Additionally, the parties agreed that any additional fees and costs incurred by Monarch Bay in connection with the entry of a judgment against Johnson would be "borne by Johnson, " while any fees incurred by Johnson, if he "prevail[ed], " would be paid by Monarch Bay. Finally, the agreement specified that "[t]he Lawsuit shall not be dismissed until all performance under this Agreement has been completed or one year from the date of this agreement, whichever is earlier."

In the immediate wake of the settlement agreement, Johnson removed and trimmed trees in accordance with the agreement. However, when Monarch Bay inspected his property approximately nine months after the settlement, it determined that he had failed to properly maintain the trimming of his existing trees, and also that the Canary pine appeared to be impeding the views of his neighbors. Monarch Bay then concluded that Johnson was in breach of his obligations under the settlement agreement, and prepared a motion to seek entry of judgment in accordance with the settlement agreement.

Monarch Bay's motion for entry of judgment was filed on June 9, 2009, just over one year after the settlement date. Johnson opposed the motion, arguing that he was in compliance with the terms of the settlement agreement, but that Monarch Bay had breached it by "fail[ing] to inspect the Canary pine within the nine month period of the agreement." Johnson also argued that Monarch Bay had provided no evidence that further trimming of the Canary pine would not endanger it, and that the stipulated judgment was too "vague" and lacking in objective standards to be enforceable. He did not argue that the court lacked jurisdiction to enforce the settlement agreement because more than a year had passed since it was entered into.

The court denied Monarch Bay's motion, without prejudice, because it lacked sufficient supporting evidence to establish Johnson's breach of the agreement. Specifically, the court noted that it did not include any declaration from a neutral arborist, and was supported by other declarations which included hearsay. The court explained that its denial without prejudice "gives [Monarch Bay] another chance to collect the information you need, and then we'll check it out." Johnson offered no objection to this plan, asking the court instead if the matter could be recalendared as an evidentiary hearing.

On August 28, 2009, Johnson filed a motion for an award of fees as the "prevailing" party on the motion for entry of judgment. Without expressing any opinion on the issue of whether Johnson had "prevailed, " the court denied the motion after concluding that Johnson had, in

effect, represented himself in defending the motion (see *Trope v. Katz* (1995) 11 Cal.4th 274).

Monarch Bay refiled its motion for entry of judgment on October 27, 2009, supported by additional evidence, including the declaration of a neutral arborist, and declarations of neighbors attesting to view impairment. Also included with the moving papers was a copy of the stipulated judgment which the court was being asked to enter. Johnson again filed opposition, but again failed to indicate any objection to the timing of the motion, or the court's jurisdiction to grant it.

After hearing oral argument on the motion, the court took the matter under submission and subsequently granted the motion. The court signed and entered judgment in favor of Monarch Bay on December 29, 2009, and the judgment entered was the form proposed by Monarch Bay, and was set forth on lined pleading paper which bore the name and address of Monarch Bay's counsel in the left margin of every page other than the one bearing the caption. Unfortunately, the terms of the proposed and entered judgment differed in three respects from the terms stipulated to by the parties: first, the stipulated judgment called for a fine of $250, and attorney fees of $500 to be paid by Johnson, while the judgment as entered imposed a $500 fine and $2, 000 in fees; second, the stipulated judgment stated that Monarch Bay could obtain further orders to enforce the judgment "upon ex parte application on 10 days written notice, " while the judgment itself simply stated that Monarch Bay could obtain such orders "upon ex parte notice"; and third, paragraph 2.B.10 of the stipulated judgment requires trimming of a specific juniper tree, while the judgment itself omits any such requirement.[2]

Johnson then filed a motion styled a "Motion for New Trial, to Set Aside and Vacate Judgment, Enter a New and Different Judgment, and/or Reopen the case." Again, Johnson failed to raise any objection to the timing of Monarch Bay's motion for entry of judgment, or the court's power to grant it. He also failed to object to any inconsistency between the precise terms of the judgment stipulated to and the judgment actually entered. The court treated Johnson's motion as one seeking reconsideration of the order enforcing the settlement agreement and entering judgment, which it denied.

Monarch Bay filed two different motions for an award of fees incurred in its successful pursuit of the judgment; one motion covered the expenses incurred in enforcing the settlement and obtaining entry of judgment, and the second motion sought the fees incurred in opposing Johnson's motion for reconsideration. The motions were heard together on April 8, 2010, and the court granted the first, awarding $55, 034 to Monarch Bay for its efforts to obtain entry of the judgment. However, Monarch Bay's second fee motion, for the expense of opposing Johnson's motion for reconsideration, was denied.

I

"Code of Civil Procedure section 664.6 (section 664.6) is designed to enable the court to enforce settlements. It permits '"a court, via a summary proceeding, to finally dispose of an action when the existence of the agreement or the terms of the settlement are subject to reasonable dispute, something not permissible before the statute's enactment."' (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 432, fn. 1, 439.) The section was amended in 1993 to expressly permit courts to retain jurisdiction after dismissal to enforce the terms of the settlement, if requested to do so. (Stats. 1993, ch. 768, § 1; *Wackeen v. Malis, supra,* at pp. 432, fn. 1, 433.)

'"[A] judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment [citations], [but] nothing in section 664.6 authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon." [Citation.]' (*Hernandez v. Board of Education* (2004) 126 Cal.App.4th 1161, 1176, 25 Cal.Rptr.3d 1.).... [¶] 'In a statutory settlement proceeding, we review the trial court's determination of factual matters for substantial evidence. To the extent we engage in the proper interpretation of section 664.6, however, we exercise our independent review. [Citation.]' (*Elnekave v. Via Dolce Homeowners Assn., supra*, 142 Cal.App.4th at p. 1198, 48 Cal.Rptr.3d 663.) Thus, 'the determination of whether the statutory requirements were met is a question of law which we review independently[.]' (*Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 544, 128 Cal.Rptr.2d 485.)" (*In re Clergy Cases* (2010) 188 Cal.App.4th 1224, 1236-1237.)

Additionally, as Monarch Bay points out, when a party waives the right to appeal as part of a stipulated judgment, the only issues that may be raised on appeal are whether the judgment was authorized by the parties' stipulation, or whether it is void for lack of jurisdiction by the trial court. (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 359; *Cadle Co. II, Inc. v. Sundance Financial, Inc.* (2007) 154 Cal.App.4th 622, 624.) With these principles in mind, we turn to Johnson's arguments.

II

Johnson's primary contention on appeal is that the court lacked jurisdiction to summarily enforce the parties' settlement agreement under section 664.6, one year after the date the parties entered into the agreement. It is Johnson's position that the terms of the settlement agreement *obligated* Monarch Bay to dismiss the action no later than one year after the settlement date, and the mere existence of such an obligation – even though not performed – deprived the court of jurisdiction to consider any motion to enforce the

agreement filed after the date of that contemplated dismissal. We cannot agree.

There are several problems with Johnson's argument. First, and most significant, is that the provision in question does not actually require Monarch Bay to dismiss the action one year of the settlement, as Johnson contends. What the provision says is that the lawsuit "*shall not be dismissed*" until one of two things occurs: either the settlement agreement is fully performed, or a year passes. In other words, what the provision does is *prohibit* dismissal of the case for a fixed period of time. It does not, however, require that a dismissal be sought thereafter.[3]

Of course, Johnson relies upon other evidence, outside the four corners of the written settlement agreement – including Monarch Bay's comments to the court at the time the settlement was announced – to suggest that the provision actually was intended to obligate Monarch Bay to seek dismissal of the case no later than one year after the date of the settlement. But such an argument, which necessarily requires the court to analyze the parole evidence, and to consider any additional evidence that might have been offered by Monarch Bay to aid in the interpretation of the disputed provision, was waived when Johnson failed to assert it at the trial court level.[4]

Interpretation of a contract, when based upon the credibility of extrinsic evidence, presents and issue of fact (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395) – and such issues must be raised in the trial court or be deemed waived on appeal. "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.)

But even if Johnson had not waived the argument, and assuming further that the provision had been interpreted by the court – after a fair hearing in which both sides had the opportunity to offer evidence on the point – as requiring Monarch Bay to dismiss the case within a year of the settlement, such an interpretation would still not obligate either the trial court, or us, to pretend the case had actually been dismissed one year after the settlement. It wasn't. And until the case is *actually* dismissed, the court retained jurisdiction to adjudicate it. "When a dismissal *has properly been filed*, the trial court loses jurisdiction to act in the case." (*Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App.4th 538, 542, italics added.)

Instead, Johnson's remedy for Monarch Bay's failure to dismiss the case would have been to file his own motion, prior to the entry of judgment, for an order dismissing the case in accordance with what he contended were the terms of the settlement agreement. And by failing to seek such an order – even after Monarch Bay filed its motion for entry of judgment – Johnson waived enforcement of the alleged provision. It is well settled the parties can waive a time limitation they themselves have imposed, and the court is not obligated to enforce it, sua sponte, when they do not. "Like any other contractual terms, timeliness provisions are subject to waiver by the party for whose benefit they are made." (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1339.) In this case, Johnson's failure to enforce the purported one-year limitation on the time the case could remain pending – and to instead address the motion for entry of the stipulated judgment on the merits – amounted to a waiver of the benefits of that provision. Because in the absence of a dismissal, the case remained pending, and thus the court retained jurisdiction to decide whether entry of the stipulated judgment was proper.[5]

III

Johnson's next complaint is that the terms of the judgment entered against him are inconsistent with the terms of the settlement agreement itself, and thus that the judgment "impermissibly rewrites" the agreement. In the main, we find this contention to be disingenuous, because as Johnson must be aware, the stipulation for entry of judgment he entered into as part of his settlement agreement with Monarch Bay specifies *the precise terms* of the judgment to be entered against him if he violated the terms of that settlement. With one exception, every item he objects to as being an "impermissible rewrite" is included in those terms.

Among other things, the judgment he stipulated to specifically provides for a mandatory *permanent* injunction against him, his heirs, assigns and successors in interest on the property, and obligates them to maintain the property in accordance with the terms of the settlement. It allows Monarch Bay to enforce the permanent injunction by motion, and provides that the court would retain jurisdiction over the dispute, for purposes of enforcing the injunction. Having stipulated to the inclusion of such terms in the judgment to be entered against him if he violated the settlement agreement – and having explicitly waived the right to appeal the judgment – Johnson cannot now be heard to complain its terms unfairly bind him "in perpetuity, " are inconsistent with the one-year enforcement term he claims was set forth in the settlement agreement, [6] are too uncertain, [7] or are otherwise unenforceable.[8]

Johnson agreed to all of those judgment terms, and could have avoided their imposition by simply complying with his obligations under the settlement agreement.

The judgment Johnson stipulated to also provides that the Canary pine "will be topped but allowed to

remain above roof level so long as it doesn't impede views. If, however, the Canary pine does impede views, it will be maintained at that non-impeding height in perpetuity." Johnson argues this provision is also inconsistent with the settlement agreement, which provided that the tree would "be trimmed to remove the view impediments[, but only] so long as a neutral arborist (paid for my Monarch Bay) *agrees thatsuch topping will not permanently injure the tree*." (Italics added.) There are two problems with this complaint. First, as we have already explained, Johnson agreed to the precise language in the judgment, without including the conditional tree-saving clause included in the settlement agreement. He is stuck with it. And second, Johnson fails to acknowledge that the difference in language between the settlement agreement and the judgment with respect to the Canary pine might reasonably reflect a deliberate choice by Monarch Bay to preserve the Canary pine, even if it impeded views, only so long as Johnson fulfilled his obligations under the settlement agreement – while reserving the right to have it removed if he did not. There is nothing "inconsistent" in such an approach. If Johnson wanted to retain the benefits of the more favorable terms contained in the settlement agreement, and avoid the harsher provisions of the stipulated judgment, he should have taken more care to comply with those settlement terms.

Only one of the complaints Johnson asserts about the content of the stipulated judgment has merit. The only one of those differences Johnson actually complains about is that the stipulated judgment calls for a "fine" of $250, and "prejudgment attorneys' fees" of $500, while the judgment as entered bumps up those amounts to $500 and $2, 000, respectively.

Monarch Bay acknowledges this difference, and explains in its brief that the alteration was the product of a simple mistake – Monarch Bay inadvertently supplied the court with a proposed judgment which reflected the terms of an earlier draft of the stipulated judgment. However, as Johnson points out, that explanation is not actually supported by any evidence in the record.

But without regard to counsel's explanation of *why* the court was supplied with an incorrect version of the judgment to be entered, the record makes clear that's what happened. The judgment entered was clearly prepared by Monarch Bay's counsel, and not by the court itself, as it is contained on lined pleading paper with counsel's then-firm name in the left margin of the pages. Both the judgment stipulated to, and the one entered, are seven pages long, highly detailed, and the two versions are exactly identical except for the minor differences we have identified. It would have been a time-consuming chore for the court to compare the two versions line by line, to ensure that no differences existed, and very little reason for the court to suspect that such scrutiny was necessary. After all, Johnson himself apparently saw no need to do so, and thus did not himself notice the differences or bring them to the attention of the court.

More important, other than a handwritten notation on the caption page reflecting a change in the judge presiding, and the courtroom, the judgment entered reflects *no changes* from the typed version submitted by counsel. In particular, the incorrect numbers for the fine and attorney fee awards were not reflective of any change made by the court – it simply entered the judgment which already included the incorrect numbers already included in the proposed judgment submitted by Monarch Bay. Moreover, Monarch Bay made no request that the court increase any of the numbers in the stipulated judgment, and there is simply no basis to infer that the court would have chosen to do so on its own. In short, it is clear the court did not *intend* to alter the provisions agreed to by the parties, but instead intended to enter the judgment in the exact form they had stipulated to.

Under these circumstances, we have no trouble concluding that the differences between the amounts of the fine and attorney fees specified in the judgment the parties stipulated to, and the amounts included in the judgment as entered, reflect a mere "clerical error, " rather than any intention on the court's part to alter the judgment terms. Thus, it is proper to merely correct the judgment, nunc pro tunc, so that it is consistent with the court's intended ruling, rather than reverse it. "A court can always correct a clerical, as distinguished from a judicial error which appears on the face of a decree by a nunc pro tunc order. [Citations.] It cannot, however, change an order which has become final even though made in error, if in fact the order made was that intended to be made.... 'The function of a nunc pro tunc order is merely to correct the record of the judgment and not to alter the judgment actually rendered—not to make an order now for then, but to enter now for then an order previously made. The question presented to the court on a hearing of a motion for a nunc pro tunc order is: What order was in fact made at the time by the trial judge?'" (*Estate of Eckstrom* (1960) 54 Cal.2d 540, 544; *Hamilton v. Laine* (1997) 57 Cal.App.4th 885, 890.)

Here, it is clear the court's intended order was to simply enter the stipulated judgment, in the exact form agreed to by the parties, and not to alter it. Consequently, we conclude it is proper to simply correct paragraph 4 of the judgment, to reflect that the fine assessed against Johnson is $250, and the amount of "pre-judgment" attorney fees assessed as part of the settlement is $500. As corrected, the judgment stands.

IV

Finally, Johnson also makes a brief, albeit multi-pronged, attack on the award of attorney fees made to Monarch Bay.

Johnson first contends there is a fatal inconsistency between paragraph four of the judgment, which provides for Monarch Bay to be awarded "pre-judgment" attorney fees in a specified amount -- $500 is the amount actually stipulated to, and $2, 000 is the amount mistakenly include in the judgment as entered – and paragraph five, which entitles Monarch Bay to recover "attorney fees and costs... incurred in enforcement of the Stipulation, including the fees and costs incurred in bringing the ex parte application to do so."

However, we find nothing confusing or contradictory about these attorney fees provisions. As with other aspects of the parties' resolution of the litigation, their settlement allowed for one set of consequences if Johnson fully performed his obligations specified in the settlement agreement – including the payment of $500 toward Monarch Bay's attorney fees incurred in the litigation – and a different set of consequences if he did not. Thus, the parties' agreement specifically provided that Johnson would have to pay the $500 in "pre-judgment" attorney fees without regard to whether Monrarch Bay ever felt it necessary to pursue entry of the stipulated judgment, and then also provided that "any *additional* attorneys' fees and costs incurred in connection with judgment being entered against Johnson in connection with breach of the Stipulation or this Agreement shall *also be* borne by Johnson." (Italics added.) The fact that those "additional" fees would also technically qualify as "pre-judgment" fees is of no consequence. They are clearly identified as an addition to the fee award provided for in the settlement.

Johnson also objects to the fact that Monarch Bay's fee award includes fees it incurred in connection with its first motion to obtain entry of judgment. Johnson contends that Monarch Bay lost that effort when its motion was denied without prejudice – rather than *continued –* and thus it should not be allowed to claim any fees relating to that initial effort.

We cannot agree. When the court explicitly denied the first motion "without prejudice, " it clearly signaled that the issue of whether Monarch Bay was entitled to entry of the stipulated judgment – in other words, whether Johnson was in breach of the settlement agreement – was yet to be determined. The court was letting the parties know that *neither* of them had yet won nor lost that fight. At some point, the court would be obligated to determine whether Johnson had performed his obligations under the settlement agreement, which would entitle him to dismissal of the action, or if he had not, which would entitle Monarch Bay to entry of judgment. And it would be at that point, and not before, that the prevailing party would be known.

The court's approach was entirely consistent with the terms of the parties' settlement, which required a final resolution of the dispute before any entitlement to fees could be ascertained. Specifically, the settlement agreement provided that Monarch Bay would be entitled to an award of additional fees incurred "*in connection with* judgment being entered, " – which makes it clear that while Monarch Bay had a broad entitlement to recover the fees associated with that effort, no award could be made until the issue is ultimately decided – while Johnson would be entitled to an award of fees if he "prevail[ed]." Clearly, Johnson could not be viewed as having "prevailed" in either the case as a whole, or in his specific opposition to the entry of judgment, if that judgment is ultimately entered against him.

As explained in *Estate of Drummond* (2007) 149 Cal.App.4th 46, 51, when determining whether a party has prevailed in litigation for purposes of an agreement to shift fees, "courts should respect substance rather than form." Further, the *Drummond* court denied a party's claim for fees after a successful motion to dismiss a case on the ground that it was required to be pursued as a compulsory cross-complaint in a different forum, the court noted that "prevailing on the contract... implies a strategic victory at the end of the day, not a tactical victory in a preliminary engagement." (*Id.* at p. 51.)

Thus, the court here could not properly ascertain which of these parties would be entitled to a fee award until it decided the ultimate issue of whether Johnson had actually breached the settlement agreement; i.e., whether entry of judgment or dismissal of the action was the appropriate final outcome. When it ultimately determined that Johnson had breached the agreement, and thus that entry of judgment against him was appropriate, the resolution of that fee issue became clear: Monarch Bay was entitled to recover its fees, and Johnson was not.[9]

And having determined that Monarch Bay was the party entitled to recover its fees, the court also properly determined that Monarch Bay was entitled to recover *all of those fees* – including those incurred in preparing its initial motion. Not only did the parties' agreement entitle Monarch Bay to recover any fees incurred "in connection with" the entry of judgment, which reflects an intention to be inclusive rather than exclusive in awarding fees, but it's also clear that Monarch Bay's second motion to enforce was simply a revised and enhanced version of its initial motion. As such, the work done on the initial motion played a substantial part in the success of the second motion, and thus could reasonably be viewed as merely an aspect the work done on that successful motion. The court did not err in treating it as such.

Paragraph four of the judgment entered herein is corrected to reflect that Johnson is obligated to pay Monarch Bay a fine of $250, and prejudgment attorney fees of $500, as stipulated to by the parties. In all other respects, the judgment is affirmed. The attorney fees award in favor of Monarch Bay is affirmed. Monarch Bay is to recover its costs on appeal, and may apply to

the trial court for an additional award of fees incurred on appeal.

WE CONCUR: ARONSON, J., IKOLA, J.

Notes:

[1] Johnson also assumes, erroneously, that Joyce Kilmer was a woman. His full name was Alfred Joyce Kilmer.

[2] Johnson has complained about only the first inconsistency – the differences in the amounts of the fine and attorney fees imposed.

[3] Moreover, we note that the stipulation for entry of judgment contains two separate provisions relating to dismissal. Although, paragraph 6.I of the stipulation simply mirrors the prohibition on dismissal contained in the settlement agreement – "The Lawsuit shall not be dismissed until all performance under this Agreement has been completed or one year from the date of this agreement, whichever is earlier" – paragraph 6.H expressly prohibits any dismissal prior to Johnson's full compliance with the terms of settlement: "The Lawsuit shall not be dismissed until all performance under this Stipulation and the Agreement has been completed."

Although Johnson contends these provisions are contradictory, and thus demonstrate that the entire agreement is too uncertain to be enforceable, we disagree. Initially, we must point out that agreements are not rendered unenforceable simply because they are imperfectly drafted. In such cases, the first task is to resolve ambiguities and inconsistencies, in accordance with settled principals, to ascertain the parties' true intent. It is only when there is no way to do so, and no alternative but to conclude the parties failed to reach an agreement on material terms, that we would deem the agreement to be unenforceable. (See *Lindsay v. Lewandowski* (2006) 139 Cal.App.4th 1618.)

This is not such a case. These dismissal provisions are contradictory only to the extent that one arguably *implies* that dismissal of the case would be *permissible* a year after the settlement was reached, while the other explicitly requires the case to remain pending until the settlement is fully performed. And since no one made any attempt to dismiss the case, that alleged inconsistency is moot in any event.

In our view, the significance of the second dismissal provision in the stipulation – explicitly prohibiting dismissal of the case until Johnson performed his obligations under the settlement – is that it essentially precludes Johnson's assertion that the dismissal provision in the settlement was intended to impose a *requirement* that the case must be dismissed within a year of settlement, even if Johnson had not yet fully performed his obligations under the agreement. It would be difficult, to say the least, to *infer* from one provision a requirement that the case be dismissed within a year of settlement – when it doesn't actually say that – when another provision of the parties' agreement *explicitly* prohibits any such dismissal unless the settlement is fully performed.

[4] Among other things, Johnson notes that in a form "notice of settlement" filed with the court, Monarch Bay represented that the settlement was "conditional, " and filled in the blank after the statement "A request for dismissal will be filed no later than (date):" with "May 13, 2009" – one year after the settlement date. Johnson suggests this notice implies some sort of *promise to him* by Monarch Bay to dismiss the case by May 13, 2009 – the promise that cannot be found in the settlement agreement itself. However, the notice form is intended to provide notice *to the court*, not to Johnson (who presumably is already aware of the settlement), thus even if it could be construed as a promise, the party aggrieved by its breach would be the court, not Johnson. Additionally, Johnson ignores the provision in the notice form which also states that the deadline for filing such a dismissal is actually "*45 days after* the date specified, " and that the date may be further extended by the court for "good cause." Taken as a whole, the notice cannot be construed as offering anything more than a target date for dismissal. In any event, that notice, which was filed with the court the day after the settlement was reached in this case, was not itself part of the settlement, and there is no evidence Johnson relied upon it for anything.

[5] Johnson's related argument, that Monarch Bay was equitably estopped from enforcing the settlement agreement by motion more than one year after it was entered into, fails for essentially the same reasons: i.e., the provision doesn't actually say what Johnson claims, and he waived the issue by failing to raise it at the trial court level. Additionally, Johnson fails to explain how his express waiver of the right to appeal the stipulated judgment does not bar this particular claim on appeal.

In any event, Johnson also fails to support his conclusory assertion that it was "unconscionable" for Monarch Bay to enforce the settlement by motion in October of 2009, even though it had purportedly agreed to dismiss the case in May of 2009. Johnson himself acknowledges that Monarch Bay had the right to enforce the agreement by motion prior to the claimed dismissal deadline, or to enforce the agreement at a later point by filing a separate action. And since Johnson does not claim to have been prejudiced by either the delay, or the summary nature of the motion proceeding – and did not even register any objection to the motion procedure at either of the two times Monarch Bay invoked it – we fail to see how the trial court would have been obligated to view Monarch Bay's decision to proceed in that manner as unconscionable.

[6] The judgment's provision for unlimited enforcement

is not, in any event, inconsistent with what Johnson claims was the limited term of the settlement agreement. The judgment was to be entered only if Johnson failed to comply with his obligations under the settlement agreement. Thus, its entry was to be a *consequence* of Johnson's breach. Nothing prohibited the parties from agreeing that such a judgment would impose additional obligations which Johnson would be spared if he fulfilled his settlement obligations.

[7] Johnson's uncertainty claim focuses on the assertion that it is impossible to tell "what the parties meant by 'view' or 'view impediment, ' as those terms are used in the judgment. Of course, that's a concern Johnson waived by stipulating to the terms of the judgment. In any event, it's a concern we do not share. What the parties meant by those terms is crystal clear to us, because Johnson gave Monarch Bay's board of directors "sole discretion" to "resolve all questions regarding proper height of any planting, whether existing or added, and *whether any planting causes a view impediment* …, " and he agreed that its decisions "are final." (Italics added.) Consequently, what the parties meant by "view impediment" is whatever the Monarch Bay board decides, in its exercise of discretion, is a view impediment – Johnson gave the board the power to make that call. And should he disagree with their decision, his only recourse would be to establish that the board's exercise of its discretion was carried out in bad faith.

[8] Johnson's other claim of unenforceability centers on the assertion that a contract requiring a continuing series of acts and which demands cooperation between the parties cannot be specifically enforced. (*Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300.) He argues that the stipulated judgment in this case amounts to such an agreement, and its entry amounts to a prohibited order of specific performance. We are unpersuaded. Significantly, the cases Johnson relies upon do not involve parties who stipulated to the entry of the requested relief – and thus waived the right to challenge the court's order granting it, as Johnson did here.

But more important, we do not agree that the judgment in this case requires the parties to cooperate in a continuing series of acts, or that enforcing it would necessarily impose any significant burden on the trial court. In essence, the judgment here requires Johnson to comply with certain requirements relating to the maintenance of his property, and gives the Monarch Bay board of directors substantial authority to make a "final" decision concerning whether he is in compliance. If he is not, Monarch Bay can request the court to issue an order enforcing Johnson's obligations. The court has no involvement unless such a request is made, and there is nothing in the judgment which necessarily requires it to engage in any ongoing supervision. *Ekstrom v. Marquesa at Monarch Beach Homeowners Association* (2008) 168 Cal.App.4th 1111, is instructive. In that case, the court rejected a similar claim involving the propriety of enforcing a homeowners' association's ongoing obligation to enforce its CC&R's for the benefit of certain residents. As the court first noted, "[t]he judgment is sufficiently clear as to what the Association must do. It must comply with its obligations by exercising its discretion 'in good faith' to determine which trees obstruct the Plaintiffs' views and it must then undertake the procedures outlined in the CC&R's to enforce the CC&R's as to those trees." (*Id.* at p. 1126.) The court then explained why the court did not err in retaining jurisdiction to oversee enforcement of the judgment: "It is pure speculation as to whether legal action against any homeowner will be necessary. And whether the Association should ultimately seek injunctive relief against any tree owner will have to be judged by the facts in existence at that time." (*Ibid.*) This case occupies a similar posture. By its terms, the stipulated judgment here does not require the court to do anything beyond retaining jurisdiction. Only if Monarch Bay determines that Johnson is in violation of the judgment, and asks the court to take some action to enforce the judgment, will the court be faced with the prospect of more intimate involvement in an ongoing dispute between these parties. At that point, the parties – and the court – should consider how much involvement is appropriate. Until that happens, though, assessing the alleged burden this stipulated judgment would place on the court is also "pure speculation."

[9] Because we determine that Johnson never prevailed for purposes of obtaining a fee award, we need not address his other challenge to the fee award – that the court also erred in concluding he was not entitled to any fee award for opposing Monarch Bay's initial motion because he essentially represented himself in opposing Monarch Bay's initial motion to enforce the settlement agreement (*citingTrope v. Katz, supra*, 11 Cal.4th at p.274.) The best that can be said of Johnson's efforts in the trial court was that he temporarily *delayed* Monarch Bay's victory – much like a party who successfully opposes a motion for summary judgment. Just as that party would not be characterized as "prevailing" for purposes of obtaining a fee award (see, *Presley of Southern California v. Whelan* (1983) 146 Cal.App.3d 959, 960 [success in reversing a summary judgment on appeal was not "prevailing" for purposes of a fee award, because the action was ongoing and the reversal of the summary judgment was an interim state of the litigation]), Johnson never "prevailed" here. The only instances in which a party who obtains a purely procedural victory in an otherwise ongoing dispute can be declared to have "prevailed" for purposes of a right to recover fees is when the victory qualifies as "an appealable order or judgment in a discrete legal proceeding." (*Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 807.) The denial of Johnson's fee award did not qualify as such, and if it had, we'd be forced to note that he waived his right to

appeal it in any case, by failing to file a timely notice of appeal.
