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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AMERICAN CONTRACTORS INDEMNITY COMPANY, Defendant and Appellant.	E031426 (Super.Ct.No. 99NF2727) ORDER MODIFYING OPINION AND DENYING REHEARING, NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on October 8, 2003, be modified as follows:

1. Section 4. of the opinion entitled Discussion, beginning on page 4, is deleted and the following section is inserted in its place:

4. Discussion

ACIC argues that the trial court lacked jurisdiction to enter the summary judgment until October 6, 2001, at the earliest, and that the February 15, 2001, summary judgment was therefore void. We disagree. We conclude that the summary judgment was not

void, but voidable, and that ACIC's collateral attack on the summary judgment was barred by the doctrines of estoppel and disfavor of collateral attack.

A. *Standard of Review*

"'An order denying a motion to set aside a forfeiture is appealable.' [Citations.] The resolution of a motion to set aside a bail forfeiture is within the trial court's discretion and should not be disturbed on appeal unless an abuse of discretion appears in the record. [Citation.]" (*People v. Legion Ins. Co.* (2002) 102 Cal.App.4th 1192, 1195.)

"The following general rule must be applied whenever courts are called upon to construe the laws governing bail bonds: '"The law traditionally disfavors forfeitures and this disfavor extends to forfeiture of bail. [Citations.] Thus . . . sections 1305 and 1306 dealing with forfeiture of bail bonds must be strictly construed in favor of the surety to avoid the harsh results of a forfeiture." [¶] The standard of review, therefore, compels us to protect the surety . . . .'" (*People v. American Contractors Indemnity Co.* (2001) 91 Cal.App.4th 799, 805.)

B. *The Prematurely-Entered Summary Judgment was Not Void, Only Voidable*

Sections 1305 and 1306, have long been considered "jurisdictional prescriptions." (*County of Los Angeles v. Ranger Ins. Co.* (1999) 70 Cal.App.4th 10, 16 (*Ranger Ins.*).) "[S]ections 1305 and 1306 must be strictly followed or the court acts in *excess of its jurisdiction.* [Citation.]" (*People v. International Fidelity Ins. Co.* (2001) 92 Cal.App.4th 470, 473, italics added.)

"Jurisdiction means different things in different situations." (*National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1723, citing *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 287 (*Abelleira*).) "The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional. . . . And, as a practical matter, accuracy in definition is neither common nor necessary. Though confusion and uncertainty in statement are frequent, there is a surprising uniformity in the application of the doctrine by the courts, so that sound principles may be deduced from the established law by marshaling the cases and their holdings in this field." (*Id*. at p. 291.)

"Just as 'jurisdiction' has different meanings [citation], a 'lack of jurisdiction' can take different forms and have different consequences. 'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' [Citation.]" (*People v. National Automobile & Casualty Ins. Co.* (2000) 82 Cal.App.4th 120, 125 (*National Automobile*), quoting *Abelleira, supra,* 17 Cal.2d at p. 287.)

"'But in its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations.' [Citation.] It is also applied more broadly 'to a case where, though the court has jurisdiction over the subject matter and the parties in the

fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' [Citation.]" (*National Automobile, supra,* 82 Cal.App.4th at p. 125, quoting *Abelleira, supra,* 17 Cal.2d at p. 288.)

"Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in *excess of jurisdiction* . . . ." (*Abelleira, supra,* 17 Cal.2d at p. 291, latter italics added.) More specifically, "when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction . . . ." (*Id*. at p. 290, quoting *Rodman v. Superior Court* (1939) 13 Cal.2d 262, 270.)

Following *Abelleira* and its progeny, a number of courts have held that actions in excess of jurisdiction, i.e., acts in derogation of statutory or similar prescriptions, are not void, but only voidable, where the court retains jurisdiction in the "fundamental sense." (E.g., *Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1087-1088 (*O'Connor*), citing *Abelleira, supra,* 17 Cal.2d at p. 288 and *Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 725-726; accord, *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 Cal.App.4th 1011, 1021-1022 (*Bell*); *White v. Renck* (1980) 108 Cal.App.3d 835, 839-840.) We note, however, that a court lacks jurisdiction in the "fundamental sense" when it acts in derogation of statutory prescriptions that are fundamental or critically important to the proceedings. In these

cases, whether the acts are termed "in excess of jurisdiction" or "without jurisdiction," the ensuing judgment or order is void. (E.g., *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493-495 (*Becker*); *Burtnett v. King* (1949) 33 Cal.2d 805, 807-808 (*Burtnett*).)[2]

But not all statutory prescriptions are so fundamental or critical to the proceedings that their violation renders an ensuing judgment or order void. (E.g., *O'Connor, supra,* 48 Cal.App.4th at pp. 1087-1092; *Bell, supra,* 36 Cal.App.4th at pp. 1021-1022.) "[S]ome acts in excess of jurisdiction are more serious and objectionable than others." (2 Witkin, *supra,* Jurisdiction, § 323, p. 899.) In these cases, attacks on the judgment or

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[2] In *Becker*, a default judgment was held *void* to the extent it exceeded the relief demanded in the complaint. (*Becker, supra,* 27 Cal.3d at p. 495.) The judgment was entered in violation of Code of Civil Procedure section 580, which provides that "[t]he relief granted to the plaintiff, if there is no answer, cannot exceed that which he or she shall have demanded in his or her complaint . . . ." The court observed that "[t]he notice requirement of [Code of Civil Procedure] section 580 was designed to insure *fundamental fairness*." (*Becker, supra,* at p. 494, italics added.) Similarly, in *Burtnett*, the court observed that "[t]he essence of the policy underlying [Code of Civil Procedure] section 580 . . . is that in default cases, defendant must be given notice of what judgment may be taken against him—a policy underlying all precepts of jurisprudence and protected by our constitutions. If a judgment other than that which is demanded is taken against him, he has been deprived of his day in court—a right to a hearing on the matter adjudicated." (*Burtnett, supra,* 33 Cal.2d at p. 808.) Thus, in *Burtnett* as in *Becker*, the entry of a default judgment in violation of Code of Civil Procedure section 580 was held void. (*Burtnett, supra,* at p. 807.) Both decisions are based on the fundamental importance of notice to the validity of a default judgment, and a defendant's constitutional due process rights. "Due process requires that a person whose rights are to be adjudicated be given adequate notice so that he can exercise his right to be heard." (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 6, p. 551, quoting Rest.2d, Judgments, § 2.)

order are barred where equitable doctrines apply. (*O'Connor, supra,* at pp. 1092-1096; *Bell, supra,* at pp. 1022-1025.)

Here, the trial court had jurisdiction in the "fundamental sense" over the parties and the subject matter of the bail bond. The trial court's erroneous entry of the February 15, 2001, summary judgment *one day early*, in violation of section 1306, subdivision (a), was not a fundamental defect in the proceedings that would render the summary judgment void, regardless of equitable considerations. As a result of the error, ACIC suffered no prejudice, nor was it deprived of any constitutional or statutory rights. If ACIC had produced the defendant before the extended appearance period expired, the forfeiture would have been discharged and the bond exonerated. Thus, the premature entry of the summary judgment rendered the judgment voidable, not void.

C. *ACIC's Attack on the Summary Judgment is Barred by the Doctrines of Estoppel and Disfavor of Collateral Attack*

"'When, as here, the court has jurisdiction of the subject, a party who *seeks or consents* to action beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction. [Citations.] Whether he shall be estopped depends on the importance of the irregularity not only to the parties but to the functioning of the courts and in some instances on other considerations of public policy. A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when "[t]o hold otherwise would permit the

parties to trifle with the courts."'" (*Bell, supra,* 36 Cal.App.4th at p. 1023, quoting *In re Griffin* (1967) 67 Cal.2d 343, 347-348, italics added.)

"The 'estoppel' principle is particularly compelling where, as here, what is involved is a collateral attack." (*Bell, supra,* 36 Cal.App.4th at p. 1024.)[3] "[W]hen a direct avenue of attack (such as appeal) is available, collateral attack on a judgment 'in excess of jurisdiction' is seldom, if ever, allowed." (*Id*. at p. 1023.) It is not allowed "unless exceptional circumstances precluded an earlier and more appropriate attack."[4] (*Id*. at p. 1024, quoting what is now 2 Witkin, *supra*, Jurisdiction, § 323, pp. 899-900.)

Under the foregoing authorities, a party's *consent* to an action beyond the court's power may be inferred from the party's failure to timely object to the action, or silence. The party's silence gives rise to "almost a presumption of negligence" (2 Witkin, supra,

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[3] "A motion to vacate or set aside the judgment, if made after the statutory time has elapsed for direct attack by motion, or if made on grounds or procedure not authorized by the statutes governing direct attack, is a collateral attack." (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 8, p. 516.)

[4] "'If there is jurisdiction of the subject matter and the parties, one who complains of the act is usually before the court. He has an opportunity to object, or to have the judgment or order reviewed by the usual methods of direct attack, such as new trial or appeal. He may also in many situations use the extraordinary writs of prohibition, mandamus or certiorari to directly attack and prevent or annul the unauthorized act. In brief, there are adequate methods of direct attack on such judgments, and there is almost a presumption of negligence on the part of the aggrieved party who fails to seek these normal remedies and later raises the objection by collateral attack.'" (*Bell, supra,* 36 Cal.App.4th at p. 1024, quoting what is now 2 Witkin, *supra,* Jurisdiction, § 323, pp. 899-900.)

Jurisdiction, § 323, p. 899) or culpable conduct. In these cases, the doctrines of estoppel and disfavor of collateral attack are joined.

For example, in *O'Connor,* a probate court issued an order appointing a successor conservator and letters of conservatorship in derogation of Probate Code sections 1820 et. seq. and 2680 et. seq. (*O'Connor, supra,* 48 Cal.App.4th at pp. 1083-1084.) After the orders were issued, the successor conservator embezzled funds from the conservatee's estate. (*Id*. at p. 1085.) A surety company that issued a bond to the conservator claimed it was not liable on the bond, because the orders were issued in violation of the statutory prescriptions. (*Id*. at p. 1086.)

The *O'Connor* court held that the surety's attack on the orders was barred, in part because the surety "manifested its consent to the procedure by which [the conservator] was appointed . . . and that such conduct estops [the surety] from challenging the validity of [the conservator's] appointment." (*O'Connor, supra,* 48 Cal.App.4th at p. 1092.) The court further held that the surety's attack was barred by the doctrine of disfavor of collateral attack. (*Id.* at p. 1095.) The holding was based on the surety's conduct in (1) issuing the bond without reviewing the conservator's petition for appointment, (2) accepting the bond premium and issuing the bond without following its usual policies, and (3) declining to participate in the surcharge proceeding whereby the conservator's liability was established. (*Id*. at p. 1092-1095.)

As noted, ACIC's motion to set aside the summary judgment was filed on January 7, 2002, 94 days after the extended appearance period expired on October 5, 2001. In its

January 7, 2002, motion, ACIC argued that October 6, 2001, was the *earliest date* the trial court had jurisdiction to enter summary judgment. (§ 1306.) It follows that the *latest date* the trial court could have entered summary judgment was January 3, 2002, or 90 days after October 6, 2001,[5] four days *before* ACIC filed its January 7, 2002, motion to set aside or void the summary judgment.

Here, too, ACIC "manifested its consent" to the premature entry of the summary judgment by failing to object to it in the trial court until nearly a full year after its entry. The prematurely-entered summary judgment was appealable.[6] But rather than directly appeal the summary judgment as entered in violation of sections 1305 and 1306, ACIC waited nearly a year, until January 7, 2002, to attack it on the same ground. Nothing prevented ACIC from attacking the summary judgment earlier, either in the trial court or on a direct appeal. Without question, ACIC had notice of the summary judgment shortly after it was entered.

Thus, ACIC waited to attack the summary judgment until it could argue that the trial court no longer had jurisdiction to enter summary judgment on the bond. ACIC's delay in attacking the summary judgment was an attempt to "trifle with the courts."

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[5] The trial court exceeded its jurisdiction by extending the appearance period by more than 180 days. (§§ 1305, subd. (i) & 1305.4.) This does not change our analysis regarding the premature entry of summary judgment on the bond, however.

[6] A summary judgment on a bail bond is appealable, where the surety claims summary judgment was not entered with the surety's consent, i.e., in accordance with the prescriptions of sections 1305 and 1306. (*County of Los Angeles v. Surety Ins. Co.* (1985) 164 Cal.App.3d 1221, 1224.)

(*National Automobile, supra,* 82 Cal.App.4th at p. 126.) Accordingly, the trial court properly denied ACIC's motion to void the summary judgment.[7]

ACIC argues that it should not be estopped from collaterally attacking the summary judgment, because it did not engage in any "culpable conduct." ACIC notes that "the *doctrine* [*of invited error*] has not been extended to situations wherein a party may be deemed to have induced the commission of error, but did not in fact mislead the trial court in any way—as where a party '"'endeavor[s] to make the best of a bad situation for which [it] was not responsible.'"' [Citation.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 (*Norgart*).) ACIC's reliance on *Norgart* and the doctrine of invited error is misplaced. The doctrine of disfavor of collateral attack is a distinct application of the estoppel doctrine. *Norgart* did not involve a collateral attack on a voidable judgment or order.

Two recent cases have held that a summary judgment is void if entered before the appearance period expires. These are *People v. Ranger Ins. Co.* (2002) 99 Cal.App.4th 1229, 1235, and *People v. International Fidelity Ins. Co., supra,* 92 Cal.App.4th at page 475. We respectfully disagree with these decisions.

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[7] Respondent argues that the trial court did not have jurisdiction to set aside the forfeiture and exonerate the bond after October 5, 2001, when the appearance period expired. Therefore, respondent argues, the trial court was without jurisdiction to grant ACIC's January 7, 2002, motion to set aside the summary judgment, discharge the forfeiture, and exonerate the bond. A surety must seek relief from forfeiture before the appearance period expires. (§§ 1305, subds. (c)-(e) & 1306, subd. (a).) It does not follow, however, that the surety may not challenge a voidable, prematurely-entered summary judgment, after the appearance period expires.

As we have explained, not all actions taken in derogation of statutory prescriptions render an ensuing judgment or order void, regardless of equitable considerations. In our view, the premature entry of a summary judgment on a bail bond, in violation of section 1306, is not a fundamental defect in the proceedings. It is insufficient to render the summary judgment void, particularly where, as here, the surety suffered no prejudice as a result of the summary judgment's premature entry.

To be sure, it has often been observed that "[f]ailure to follow the jurisdictional prescriptions in sections 1305 and 1306 renders a summary judgment on the bail bond void. [Citations.]" (*Ranger Ins., supra,* 70 Cal.App.4th at p. 16.) But courts have also acknowledged that some actions in derogation of statutory prescriptions, or actions in excess of a trial court's jurisdiction, are not to be equated with a lack of subject matter jurisdiction, or jurisdiction in the fundamental sense. (See, e.g., *National Automobile, supra,* 82 Cal.App.4th at pp. 125-126.)

The present case is fundamentally distinguishable from *People v. Topa Ins. Co.* (1995) 32 Cal.App.4th 296, 301. There, summary judgment on a bail bond was entered *after* the 90-day period prescribed in section 1306, subdivision (c), expired. The court held that the summary judgment was void, because bail was exonerated on the 91st day following the expiration of the appearance period, and there was "simply no basis for any extension of this time period in statute or case law." (*Id.* at pp. 301, 303; accord, *People v. Silva* (1981) 114 Cal.App.3d 538, 547.) Here, however, the summary judgment was entered *before* the expiration of the appearance period. The bail was never exonerated.

Thus, unlike the surety in *Topa Ins.*, ACIC could not have detrimentally relied on the exoneration of the bail. Further, ACIC suffered no other prejudice due to the premature entry of the summary judgment.

As this court has observed, "[t]here are times when there are good reasons for form to triumph over substance, but this is not one of them." (*People v. American Bankers Ins. Co.* (1991) 227 Cal.App.3d 1289, 1296.) This observation is particularly applicable here.

There is no change in the judgment.

The petition for rehearing is denied.

/s/ King
J.

We concur:

/s/ Richli
Acting P.J.

/s/ Gaut
J.