Filed 8/22/13 Hernandez v. Cabrera CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| ARMANDO HERNANDEZ,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARIA CABRERA et al.,<br><br>Defendants and Appellants. | B242654<br><br>(Los Angeles County<br>Super. Ct. No. BC438203) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Rita J. Miller, Judge. Affirmed.

Gilbert & Nguyen and Jonathan T. Nguyen for Defendants and Appellants.

Law Offices of Jacob Emrani, Jacob Emrani and Frederick B. Smith for Plaintiff and Respondent.

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Maria Cabrera and Jose Ventura appeal after a court trial in which the trial court entered judgment in favor of Armando Hernandez on his complaint for negligence in the amount of $270,465.50. Cabrera and Ventura contend that there was insufficient evidence to show that a dangerous condition existed on their property and that they knew of or should have known of the dangerous condition. We affirm the judgment because Cabrera and Ventura have failed to provide an adequate record for review.

## BACKGROUND

On May 21, 2010, Hernandez filed a complaint for negligence against Cabrera and Ventura which alleged as follows. The first cause of action for general negligence alleged that Cabrera and Ventura "negligently maintained their property so that a defective iron gate existed on the property, which created a dangerous condition." Cabrera and Ventura created the dangerous condition and knew of or should have known of the dangerous condition. On June 14, 2008, Hernandez sustained serious and permanent injuries when the iron gate fell on him. The second cause of action for general negligence was alleged separately against Ventura and repeated the allegations of the first cause of action. The third cause of action for premises liability was alleged against Cabrera and Ventura and repeated the allegations of the first cause of action.

Trial was set for January 17, 2012. Neither Cabrera and Ventura nor their counsel appeared at the final status conference on January 6, 2012. An order to show cause (OSC) for sanctions against Cabrera and Ventura for failure to appear on January 6, 2012, and failure to file final status conference documents was scheduled on January 17, 2012, the date of trial.

Although Cabrera and Ventura did not appear at the trial and the hearing on the OSC on January 17, 2012, they were represented by counsel. Their counsel stated that Cabrera and Ventura were in El Salvador attending the funeral of Ventura's mother. The trial court then stated, "Too bad. They've had this trial date for a while." Hernandez's counsel stated he had prepared a "prove-up package supported by a declaration." The trial court stated it wanted to "go through" the prove-up package with counsel. The court

noted that "we might have to have the testimony because this is a trial . . . so I think we're going to have to have witnesses instead of declarations unless [Cabrera and Ventura's counsel] stipulates to that. You're not going to stipulate to that, I assume." Counsel for Cabrera and Ventura then stated, "Your honor, in the interest of judicial economy and my economy and everyone else I would stipulate. I think my client would stipulate if they were here because to be perfectly honest with you, I think they're contemplating filing bankruptcy so I would stipulate." The court then accepted the stipulation. Counsel for Cabrera and Ventura also received a copy of the prove-up package and declaration. The court stated that the issues were the ownership of the iron gate; if and when the iron gate fell on Hernandez; and whether the iron gate was defective or in a dangerous condition. Hernandez's counsel stated that the "[prove-up package] provides further detail to what's in the complaint." The court then silently reviewed the prove-up package, including Hernandez's declaration and pictures of his injuries. The court stated, "I've read his declaration. It's pretty complete. I'm looking at the pictures. I'm looking at pictures of Mr. Hernandez's injuries."

Hernandez then testified. Hernandez stated that the trial court had before it "true pictures of the injuries that [he] suffered as a result of the gate falling on [him]." Hernandez stated that when the gate fell on him, he felt a burning pain in his leg and back, and thought he was going to lose his leg. Hernandez testified as to the bills he incurred for the ambulance and medical treatment. He also testified as to insurance coverage, medical billings, future medical care, pain and suffering, and loss of earnings. Hernandez testified that after medical treatment for his injuries, his right calf had atrophied; he limped; his back hurt; and it was hard for him to bend over. He had run in 19 marathons before his injury, but now he could no longer run a marathon.

When asked by the trial court, counsel for Hernandez and Cabrera and Ventura did not object to the court's estimate of damages. The court concluded that Hernandez was entitled to a final judgment of $270,465.50, stating, "I'm not doing the default judgment

because that's not exactly what we're doing here. We've had a prove-up so I'm just doing a judgment after court trial." The court entered judgment on January 17, 2012.[1]

Subsequently, Cabrera and Ventura substituted counsel. On February 7, 2012, their counsel filed a motion to set aside the judgment under Code of Civil Procedure section 473, contending that the trial court improperly issued a default judgment against Cabrera and Ventura.[2] At a hearing on the motion on May 7, 2012, the court stated, "I didn't enter a default judgment. We had a trial. I did not say they were in default. I had a trial, and they weren't here to put on their case, and, you know, you could argue that they chose not to be here to put on their case or at least one of them chose not to be here to put on their case."

The trial court continued the hearing to allow Cabrera and Ventura additional time to obtain a section 473 declaration of fault from their former counsel. Cabrera and Ventura were unable to obtain a section 473 declaration of fault, and on June 19, 2012, the court denied the motion to set aside the judgment.

Cabrera and Ventura appealed from the judgment entered.

## DISCUSSION

**Cabrera and Ventura failed to provide an adequate record for review.**

Cabrera and Ventura contend that there was insufficient evidence to show that a dangerous condition existed on their property and that they knew of or should have known of the dangerous condition. We affirm the judgment because Cabrera and Ventura have failed to provide an adequate record for review.

"'It is the duty of an appellant to provide an adequate record to the court establishing error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. [Citation.]' [Citation.] This principle stems from the well-established rule of appellate review that a judgment or order is presumed correct and

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[1] It is not clear from the record whether the trial court ruled on the OSC. A minute order of the hearing is not contained in the record.

[2] Undesignated statutory references are to the Code of Civil Procedure.

the appellant has the burden of demonstrating prejudicial error. [Citations.]" (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348.) "This rule 'is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.' [Citation.]" (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494.) In order to avoid the application of this doctrine of implied findings, an appellant must request a statement of decision, which was not done here. (*Ibid*.)

We conclude that Cabrera and Ventura have not provided an adequate record affirmatively proving error. The reporter's transcript shows that after the trial court indicated that the issues at trial included ownership of the gate; if and when the iron gate fell on Hernandez; and whether the iron gate was defective or in a dangerous condition, Hernandez's counsel stated that the prove-up package provided "further detail" in support of the allegations of the complaint. The court then silently reviewed Hernandez's prove-up package and declaration, then stated, "I've read his declaration. It's pretty complete. I'm looking at the pictures. I'm looking at pictures of Mr. Hernandez's injuries." But Cabrera and Ventura failed to designate the prove-up package and declaration on appeal, and thus we cannot review the prove-up package and declaration that were considered by the court at trial. Therefore, Cabrera and Ventura have failed to establish that the court's finding that a dangerous condition existed on Cabrera and Ventura's property and that they knew of or should have known of the dangerous condition was not supported by substantial evidence.

Accordingly, we affirm the judgment of the trial court.

## DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.