Filed 1/10/17 Lee v. Pao CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LIPHAN LEE, Plaintiff and Appellant, v. TIM PAO et. al., Defendants and Respondents.	B268588 Los Angeles County Super. Ct. No. BC562020

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Keosian, Judge. Affirmed in part and dismissed in part.

JK Law Firm and Joshua Phelps, for Plaintiff and Appellant.

West Themis Law, Sally S. Chan and Karen K. Tso, for Defendant and Respondent, Tim Pao.

Hecht Solberg Robinson Goldberg & Bagley, Richard A. Schulman, Talon C. Powers and David M. Gao, for Defendant and Respondent, Mikhail Zeeb.

INTRODUCTION

Plaintiff Liphan Lee sued defendants Tim Pao, Pao's corporation Rockwell, Inc. (collectively, Pao), and Mikhail Zeeb for breach of contract and various forms of misconduct relating to a jewelry-repair franchise. Lee appeals from the judgment entered against him after the trial court sustained Pao's demurrer without leave to amend. His arguments, which concern the interplay between Code of Civil Procedure[1] sections 128.7 and 472, present a question of statutory interpretation. We do not reach that issue, however, because Lee has failed to provide this court with a record sufficient for us to address the merits of his appeal. Because Lee has failed to carry his burden, we affirm the judgment as to Pao.

We also conclude that since Zeeb was not a party to the demurrer, the section 128.7 motion, or the challenged judgment, he is not a proper party to this appeal. We therefore dismiss the appeal as to Zeeb.

PROCEDURAL BACKGROUND

We glean the following procedural history from the limited record before us.

According to the register of actions, Lee filed the initial summons and complaint on October 27, 2014. On April 16, 2015, he filed a first amended complaint. Zeeb filed an answer to the first amended complaint on May 13, 2015, and Pao filed a demurrer on July 31, 2015. Lee did not file an opposition to the demurrer. Zeeb took no position on the matter.

---

[1] All undesignated statutory references are to the Code of Civil Procedure.

Lee represents that on September 1, 2015, Pao served him with a section 128.7 sanctions motion challenging the first amended complaint.[2] On September 18, 2015, Lee filed a second amended complaint. The court held a hearing on the demurrer on September 22, 2015 and took the matter under submission. On September 29, 2015, by written order, the court sustained the demurrer without leave to amend.

The next day, Lee filed a letter brief arguing that the section 128.7 motion gave him the right to file another amended complaint. The register of actions indicates that Pao filed opposition papers. On October 7, 2015, Pao filed a section 128.7 sanctions motion against Lee. Zeeb did not join in the motion for sanctions. On October 16, 2015, Lee filed a motion for leave to file the second amended complaint. Pao apparently filed opposition papers.

In any event, on November 6, 2015, the court entered a formal judgment dismissing the complaint against Pao and Rockwell—but not Zeeb.[3]

---

[2] Lee cites two pages of the clerk's transcript to support this claim—one page of the register of actions, which does not support the statement, and one page of a brief filed by his trial attorney, which contains the same unsworn, unsupported assertions as his appellate brief.

[3] On our own motion, we take judicial notice of this document, which was attached to the Civil Case Information Sheet filed in this court on January 7, 2016. (Evid. Code, § 452, subd. (d)(1), § 453, § 459, subd. (a)(2).) At Zeeb's request, we also take judicial notice of the following documents from the underlying action: the amended order of judgment on first amended complaint, filed January 13, 2016; the minute order of June 3, 2016; and the ruling re: Zeeb's motion for attorneys' fees, filed June 3, 2016. (*Ibid.*)

Lee filed a timely notice of appeal on November 24, 2015.[4]

On December 4, 2015, Lee filed a designation on appeal requesting a clerk's transcript. He designated, and the clerk's transcript on appeal contains, the following documents:

- a second amended complaint;
- the court's written ruling sustaining Pao's demurrer to the first amended complaint;
- Lee's letter brief about the second amended complaint;
- Lee's notice of motion and motion for leave to file a second amended complaint;
- the notice of appeal; and
- the notice designating the record on appeal.[5]

Notably, Lee did not designate, and the clerk's transcript does *not* include, the first amended complaint (the operative pleading), Pao's demurrer to the first amended complaint, the request for judicial notice, the sanctions motion, any documents relating to how or when the sanctions motion was served, Pao's

---

[4] The notice of appeal indicates that Lee is appealing a "[j]udgment of dismissal after an order sustaining a demurrer" entered on September 29, 2015. Without more, an order sustaining a demurrer is not appealable under section 904.1. Here, however, the September order not only sustained the demurrer, but was also a written, signed order of dismissal that constitutes a judgment under section 581d. The notice of appeal was thus timely as to both that judgment and the formal judgment subsequently entered on November 6, 2015.

[5] Though Lee did not request the register of actions in his designation, the court clerk nevertheless included it.

opposition to Lee's letter brief concerning the second amended complaint, or Pao's opposition to Lee's motion for leave to file a second amended complaint.[6]

Nor did Lee elect to include a reporter's transcript or settled statement of the demurrer proceedings at which he claims to have raised the issue presented here. The Judicial Council form Lee used to designate the record, where he checked the box stating: "I elect to proceed: … WITHOUT a record of the oral proceedings in the superior court," contains the following admonition: "I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in determining whether an error was made in the superior court proceedings."

Finally, the court entered judgment in favor of Zeeb on January 13, 2016, several months after the Pao judgment was entered, the notice of appeal from that judgment was filed, and the record was designated. Lee has not separately appealed from that judgment.

---

[6] On April 21, 2016, Lee filed an opposition to Zeeb's motion to dismiss this appeal. Counsel attached a declaration to the opposition that purports to authenticate the section 128.7 motion, and to attach the motion as exhibit C. Even if that were a proper procedure to bring the document before this court—which it is not—there is no exhibit C. (See rule 8. 204(d) ["A party filing a brief may attach copies of exhibits or other materials *in the appellate record* … ."], emphasis added.) That is, the declaration purports to authenticate a document that is not attached.

DISCUSSION

Lee challenges the court's ruling sustaining Pao's demurrer to the first amended complaint without leave to amend. He argues that section 128.7's safe harbor provision, which lets plaintiffs avoid sanctions by withdrawing or correcting a defective pleading, allowed him to file a second amended complaint without seeking leave of the court—even though he had already filed a first amended complaint under section 472. He claims the new complaint mooted the demurrer, which was to the earlier complaint. Therefore, he argues, the court erred in holding a hearing on the demurrer, sustaining the demurrer without leave to amend, again denying leave to amend after sustaining the demurrer, and dismissing the action.

We conclude the record is insufficient for us to address any of these claims. The record *is* sufficient for us to determine that Zeeb is not a proper party to this appeal, however. We therefore dismiss the appeal as to Zeeb.[7]

1. Standard of Review

Our Supreme Court has set forth the standard of review on appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend: The "standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however,

---

[7] Pao invites us to strike Lee's opening brief and dismiss the appeal in its entirety because Lee served him by fax rather than by U.S. mail. Even assuming service was by fax rather than mail, Pao has not demonstrated any prejudice from the form of service. We therefore decline his invitation to strike the brief.

assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

It is also well settled that "[a]ppealed judgments and orders are presumed correct, and error must be affirmatively shown." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502, citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) As the party challenging the court's presumably correct findings and rulings, Lee is required "to provide an adequate record to assess error." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) To the extent the record is inadequate, we make all reasonable inferences in favor of the judgment. (*Id.* at pp. 1295–1296.)

2. The incomplete record is fatal to Lee's appeal.

Lee represents that after filing the demurrer, Pao served him with a sanctions motion under section 128.7. He also represents that his attorney appeared at the demurrer hearing "and informed the trial court of the service of the Motion pursuant to Code of Civil Procedure § 128.7 and the filing of the [second amended complaint] during the statutory safe harbor period. The trial court held that Plaintiff was required to seek leave to amend in order to file a [second amended complaint] and therefore the

[second amended complaint] was a nullity. Thus, despite Plaintiff already having filed a Second Amended Complaint, the trial court sustained the demurrer to the First Amended Complaint without leave to amend and dismissed the action."

Lee contends that he was entitled to amend his pleading as a matter of right because he filed the second amended complaint within the statutory safe harbor period in response to defendants' section 128.7 motion; since the demurrer to the *first* amended complaint became moot upon filing of the *second* amended complaint, he argues, the court erred by sustaining the demurrer without leave to amend. The fatal problem with this argument is that it relies wholly on counsel's representations; it contains no support in the record. (See Cal. Rules of Court,[8] rule 8.204(a)(1)(C) [appellate brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears."], 8.204(a)(2)(C) [appellant's opening brief must "[p]rovide a summary of the significant facts limited to matters in the record."].)

For example, Lee represents that the section 128.7 motion was discussed at a hearing on the demurrer. The record does not support this assertion, however. As we have explained, Lee elected to proceed without either a reporter's transcript or a settled statement. Nor does the clerk's transcript support his contentions. While Lee's appeal rests on the existence and impact of the section 128.7 motion, the service of that motion, and the timing of the service, he cites only one page of the clerk's transcript for the proposition that such a motion even exists. That

---

[8] All undesignated rule citations are to the California Rules of Court.

page, in turn, contains a similar assertion by another one of Lee's lawyers. An unsupported assertion by trial counsel does not, without more, justify the same unsupported assertion by appellate counsel. The problems do not end there, however.

On appeal, the burden of proving a reasonable possibility exists that a complaint's defects can be cured by amendment rests "squarely on the plaintiff." (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) Even assuming Lee was properly served under section 128.7, and even assuming Lee was entitled to file a second amended complaint as a legal matter, it would still be impossible for us to determine whether that complaint would have cured the defects in the first amended complaint, since Lee has elected to proceed on an incomplete record.

For example, we do not have the first amended complaint, the operative pleading to which Pao demurred. We do not have Pao's demurrer to the first amended complaint. We do not have the six prior case filings the court considered when ruling on the demurrer—and do not even know what those documents were. We do not know what arguments were advanced in the demurrer papers or at the hearing on the demurrer. We do not have a reporter's transcript of the demurrer hearing or a settled statement of what occurred. Accordingly, we cannot determine whether any ground of the demurrer was well taken, and cannot determine whether the second amended complaint would have cured whatever defects Pao identified. In short, based on the inadequate record before us, we cannot address the merits of Lee's claim; therefore, he has not carried his burden on appeal. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102 ["appellant … has not met her burden of showing error by an adequate record"]; *Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1412 ["[w]e cannot presume error from an incomplete record"]; *Haywood v. Superior Court*

(2000) 77 Cal.App.4th 949, 955 [because "the record does not contain all the documents … we decline to find error on a silent record …"].)

3. Zeeb is not a proper party to this appeal.

Judgment was entered in favor of Pao on November 6, 2015. The notice of appeal was filed on November 24, 2015. Judgment was not entered in favor of Zeeb until January 13, 2016. Lee did not separately appeal the Zeeb judgment within the normal time to appeal. (Rule 8.104(a)(1)(C).) Thus, Zeeb is not a proper party to this appeal unless the November notice of appeal can be treated as a premature appeal from the January judgment.[9] We conclude it cannot.

We "may treat a notice of appeal filed after the superior court has *announced its intended ruling*, but before it has rendered judgment, as filed immediately after entry of judgment." (Rule 8.104(d)(2), emphasis added.) Here, the notice of appeal was filed after the court "announced its intended ruling" as to Pao—but *before* the court "announced its intended ruling" as to Zeeb. While the demurrer order referred to dismissal of the complaint, it did so in the context of ruling on Pao's demurrer—a demurrer Zeeb did not join. The order explicitly and repeatedly referred to Pao, Rockwell, and their demurrer; it never mentioned Zeeb. In fact, Zeeb had filed an answer to the complaint before Pao even filed the demurrer.

To the extent it was unclear whether the court "announced its intended ruling" by dismissing the complaint in its September 2015 order, the court clarified the issue in

---

[9] In his opposition to Zeeb's motion to dismiss the appeal, Lee contends his notice of appeal relates to all three defendants.

November 2015, when it entered a formal judgment in favor of Pao and Rockwell—but not Zeeb. The court further clarified matters in its June 2016 fee award, where it emphasized that "when the court originally sustained the demurrer on September 29, 2015, it was only as to defendants Pao and Rockwell, not Zeeb. Judgment was not entered as to Zeeb until January 13, 2016." In short, the court itself has repeatedly explained that when Lee filed his notice of appeal on November 24, 2015, it had not yet "announced its intended ruling" as to Zeeb.

For these reasons, the November 2015 notice of appeal cannot be deemed a premature notice of appeal from the January 2016 judgment in Zeeb's favor. Since Lee has not appealed any judgment entered in favor of Zeeb, Zeeb is not a proper party to this appeal. The appeal is dismissed as to Zeeb.

DISPOSITION

The appeal is dismissed as to Mikhail Zeeb. The judgment is affirmed as to Tim Pao and Rockwell, Inc. Mikhail Zeeb and Tim Pao are awarded their costs on appeal. Because Rockwell, Inc. did not participate in the appeal, no costs are awarded to Rockwell.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.