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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KATHERINE BARRESE,

Plaintiff and Appellant,

v.

JACQUES GASTON MURRAY,

Defendant and Respondent.

B242276

(Los Angeles County
Super. Ct. No. SC 096411)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Jacqueline A. Connor and Gerald Rosenberg, Judges. Affirmed.

The deRubertis Law Firm and David M. deRubertis for Plaintiff and Appellant.

Horvitz & Levy, Lisa Perrochet, John A. Taylor, Jr., Katherine Perkins Ross;
Garrard & Davis, Steven D. Davis; and Ronald J. Seeley for Defendant and Respondent.

* * * * *

In 2011, we reversed a jury verdict in favor of Katherine Barrese after concluding that the trial court failed to apply the correct standard in evaluating a motion for new trial. (*Barrese v. Murray* (2011) 198 Cal.App.4th 494 (*Barrese I*)). We directed the trial court to rehear the motion for new trial and decide the case based on the principles discussed in *Barrese I*. We awarded appellate costs to Jacques Gaston Murray, the prevailing party on appeal. After the court granted Murray's motion for new trial the court ordered Barrese to pay Murray's substantial appellate costs. Barrese appeals from the judgment awarding costs. We affirm.

FACTS AND PROCEDURE

The factual background underlying the lawsuit is summarized in *Barrese I*, and is irrelevant to this appeal. The limited facts relevant to the current appeal concern the events following this court's remittitur in *Barrese I*.

On November 20, 2011, Murray filed a memorandum of costs.

On December 5, 2011, the trial court granted Murray's motion for new trial. That same day, the trial court dissolved the appellate bond at the request of Murray. Barrese appealed from the order granting a new trial but later dismissed her appeal.

On December 19, 2011, Barrese moved to tax costs. On April 27, 2012, the court denied Barrese's motion to tax costs and awarded Murray a judgment of costs in the amount \$363,588. This amount includes \$256,380 for the appellate bond and \$94,044 for a letter of credit to secure the bond.

DISCUSSION

As we explain, Barrese's procedural and substantive challenges to the judgment are unpersuasive.

1. Procedural Challenges

Barrese makes numerous procedural challenges to the release of the appeal bond, none of which have merit.

First, Barrese argues that the court erred in releasing the bond because *Barrese I* did not reverse the judgment but instead required the trial court to reconsider the new trial motion. Barrese's argument lacks merit because the trial court *granted* the new trial

motion prior to releasing the bond. Therefore, at the time the bond was released there was no judgment awarded in favor of Barrese and the release of the bond was proper. (Code Civ. Proc., § 995.430, subd. (b) [bond properly released when “[t]he purpose for which the bond was given is satisfied”].)

Next, Barrese argues that the order granting a new trial was not final when the appeal bond was released, and the bond therefore should not have been released. While Barrese appealed from the order granting a new trial, she dismissed the appeal and the order is now final. The issue therefore is moot. Barrese acknowledges that as of August 9, 2012, Murray had the right to recover costs. Barrese cites no authority for the proposition that this court should remand the case to the trial court to reenter the exact same judgment it already entered because such judgment was entered in April 2012 instead of in August 2012.

Finally, Barrese argues that Murray’s right to costs did not accrue until after she dismissed her appeal from the order granting a new trial, and the judgment awarding costs therefore was premature. It would be futile to reverse the judgment and remand to the trial court to wait until an appeal that has already been dismissed is resolved and then to reinstate the judgment. Remand would be a useless act of no benefit to Barrese, and we need not engage in futility.¹ (See *People v. Tuggles* (2009) 179 Cal.App.4th 339, 388.)

2. Substantive Challenges

California Rules of Court, rule 8.278(d)(1)(F) specifies that the following costs are recoverable as costs on appeal: “The cost to procure a surety bond, including the premium, the cost to obtain a letter of credit as collateral, and the fees and net interest

¹ Citing Code of Civil Procedure section 996.110, Barrese argues that the court erred in releasing the appeal bond without a formal motion. She fails to show that she preserved this issue for review by objecting in the trial court, and in any event an early release of the appeal bond accrued to her benefit because it reduced the amount charged for the bond. Additionally, section 996.110 applies to the release of a surety and therefore is inapplicable here.

expenses incurred to borrow funds to provide security for the bond or to obtain a letter of credit, unless the trial court determines the bond was unnecessary”

In awarding these fees, the court determined that the bond was necessary because Barrese did not agree to refrain from enforcement of her judgment until after the appeal. Barrese argues that that the bond was unnecessary (1) because Murray could have deposited cash in lieu of a bond and (2) because Barrese had not taken steps to collect on the judgment. Neither argument has merit. Barrese cites no authority and we find no authority holding that Murray was required to deposit cash in lieu of a bond, assuming he had the financial means to do so. The existence of a nonmandatory alternative does not show the bond was unnecessary. At most Barrese shows Murray could have selected a different method of securing the judgment, not that he was required to do so.

Although there was no evidence Barrese began collecting on the judgment, there was evidence she intended to do so as she opposed Murray’s request for a stay of enforcement. Without evidence that Barrese agreed to forego collection until after the appeal, she cannot show that the bond was unnecessary. Murray was not required to wait until after she began collecting to secure the bond.

Barrese’s reliance on *Jewell v. Bank of America* (1990) 220 Cal.App.3d 934 is misplaced. In *Jewell* the court denied the plaintiffs’ motion to tax costs Bank of America National Trust and Savings Association incurred including appellate bond costs. The plaintiffs challenged the award of costs for the appeal bond, claiming that the bank under federal law could avoid execution without a bond. (*Id.* at p. 937.) The appellate court held that “in considering the motion to tax costs claimed for posting an appeal bond, the trial court was not required to grant that motion *solely* because an alternative procedure to stay enforcement of the judgment was, or would be, available” (*Id.* at p. 941.) Instead the court could consider other factors. (*Ibid.*) Similarly, here the court was not constrained to consider only alternative methods and, under the circumstances, including Barrese’s opposition to a stay of enforcement the court acted in its discretion in concluding that the bond costs were necessary. (*See* *ever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1556-1557 [costs are reviewed for abuse of discretion].)

Finally, Barrese challenges the award of \$94,044 as an expense related to the procurement of the bond. Murray filed a declaration indicating that he was charged \$94,044 to obtain a letter of credit to secure a bond. The trial court must have credited Murray's declaration in awarding such cost. While this amount is admittedly high, California Rules of Court, rule 8.278 allows recovery of funds to obtain a letter of credit, and no evidence indicates that the amount claimed was unreasonable. In short, Barrese fails to demonstrate an abuse of discretion in awarding this cost. (*See* *ever v. Copley Press, Inc., supra*, 141 Cal.App.4th at pp. 1556-1557 [costs are reviewed for abuse of discretion].)

DISPOSITION

The judgment awarding costs is affirmed. The parties shall bear their own costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.