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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARY K. JONES, Plaintiff and Appellant, v. JEAN PAUL NATAF et al., Defendants and Respondents.	B292646 (Los Angeles County Super. Ct. No. SC126863)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Craig D. Karlan, Judge. Affirmed.

Mary K. Jones, self-represented litigant, for Plaintiff and Appellant.

Law Offices of Howard S. Fisher, Alexander J. Fisher, for Defendants and Respondents.

I. INTRODUCTION

Plaintiff Mary K. Jones, an attorney, filed a complaint for unpaid attorney fees against her former clients, defendants Jean Paul Nataf, individually, and as the trustee of the Nataf Family Trust. Following a bench trial, the court granted defendants' motion for judgment and entered judgment in their favor.

On appeal, plaintiff contends, among other things, that the trial court erred by concluding that her fee claims were barred by the statute of limitations and in denying her motion for new trial. We affirm based on the inadequacy of the record.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

On December 27, 2016, plaintiff filed a complaint against defendants asserting a single cause of action for breach of contract and praying for $102,758.53 in unpaid attorney fees. Plaintiff alleged that she and defendants had entered into a legal retainer agreement on May 14, 2007, in which plaintiff agreed to represent defendants in a complaint against Serge Benat and a cross-complaint filed by Benat; plaintiff performed legal services for defendants; and "[i]n September 2016 [plaintiff] learned that [defendants] received payment from Benat of monies owed by

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[1] The following factual and procedural discussion is based upon our review of the partial record on appeal provided in the appellant's appendix. Because, as we explain below, we resolve this appeal on procedural grounds, we omit any summary of the trial evidence, much of which was omitted from the record on appeal.

Benat to [defendants] for the matters litigated at trial and on appeal in Nataf v. Benat."

On April 24, 2017, defendants answered the complaint, asserting, among others, affirmative defenses based on breach of a settlement agreement and the statute of limitations.

On or about March 19, 2018, defendants submitted their trial brief arguing, among other things, that plaintiff's action breached a settlement agreement that resolved any and all issues regarding attorney fees between the parties.[2] On March 27, 2018, plaintiff filed a trial brief asserting that defendants breached an agreement to resolve a portion of the outstanding attorney fees under the retainer agreement between the parties and again requesting over $102,000 in unpaid attorney fees.

On May 15, 2018, the trial court presided over the bench trial in this matter. Prior to testimony, the court marked the parties' respective exhibits for identification. Plaintiff gave an opening statement, testified on her own behalf, and "introduced" exhibits.[3]

In lieu of cross-examination, defendants moved for judgment and, following the parties' arguments, the trial court

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[2] The trial brief in appellant's appendix does not include a filed stamp.

[3] The record copy of the minute order for the trial in this matter is missing the second of two pages. The record copy does not indicate whether plaintiff's exhibits were admitted in evidence. Moreover, as plaintiff concedes, no statement of decision summarizing the trial court's findings and conclusions following the bench trial was requested or prepared.

granted the defendants' motion for judgment "based on the [s]tatute of [l]imitations."

On June 22, 2018, the trial court entered judgment in favor of defendants based on its order granting defendants' oral motion for judgment.

On July 9, 2018, plaintiff filed a notice of intention to move for new trial, and on July 12, 2018, she filed her new trial motion, supporting memorandum of points and authorities, declaration, and exhibits.

On August 9, 2018, plaintiff filed an ex parte application for an order granting an unopposed motion for new trial or, in the alternative, for an order advancing the motion for hearing on or before August 20, 2018. On August 9, 2018, the trial court entered a minute order on plaintiff's "ex[] parte application to advance hearing date on motion for new trial."[4] The order stated that, following argument, the court advanced the May 2, 2019, hearing date and reset the hearing on the motion for new trial for August 24, 2018; ordered defendants' opposition to be filed on August 15, 2018; and ordered plaintiff's reply to be filed by August 20, 2018. That same day, defendants filed a notice of entry of judgment.

On August 13, 2018, defendants filed their opposition to the motion for new trial and request for sanctions with a supporting declaration of their counsel and exhibits.

On August 17, 2018, plaintiff filed a further brief in support of her motion for new trial, arguing that because the motion had not been timely opposed, defendants' opposition should be stricken.

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[4] There is no reporter's transcript of the hearing on the ex parte application in our record.

On August 24, 2018, the trial court entered a minute order for the hearing on plaintiff's motion for new trial[5] stating that, following argument by the parties, the court denied the motion for new trial.

On September 4, 2018, plaintiff filed a notice of appeal from the judgment.

III. DISCUSSION

A. *Appellant Must Present Adequate Record*

Our record on appeal does not include any reporter's transcripts of the relevant trial court proceedings. Moreover, the appellant's appendix is incomplete because crucial documents, such as a statement of decision, were not requested or prepared and pages have been omitted from minute orders of relevant proceedings.

"[A] judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 . . . .) 'In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. "[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented."' (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127 . . . .) This general principle of appellate practice is an aspect of the constitutional doctrine of reversible error. (*State Farm Fire & Casualty Co. v. Pietak*

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[5] The record copy of the minute order for the hearing on the new trial motion is missing the last three of five pages.

(2001) 90 Cal.App.4th 600, 610 . . . .)" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187.)

"'[I]t is appellant's burden to provide a reporter's transcript if "an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court . . ." (Cal. Rules of Court, rule 8.120(b)), and it is the appellant who in the first instance may elect to proceed without a reporter's transcript (Cal. Rules of Court, rule 8.130(a)(4)) . . . .' [Citation.] A reporter's transcript may not be necessary if the appeal involves legal issues requiring de novo review. [Citation.] In many cases involving the substantial evidence or abuse of discretion standard of review, however, a reporter's transcript or an agreed or settled statement of the proceedings will be indispensable. [Citations.]" (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483.)

B. *Inadequate Record Here*

On appeal, plaintiff contends that the trial court erred in entering judgment for defendants and denying plaintiff's motion for new trial because: (1) a February 2012 e-mail exchange between the parties did not create a written or oral settlement agreement between the parties of their fee dispute; (2) a January 2012 oral modification of the parties' original retainer agreement complied with California law; (3) the notice of intention and motion for new trial were timely served and filed; (4) the trial court erred when it allowed defendants to file a late opposition to the motion for new trial; and (5) the trial court erred by not allowing plaintiff to complete her case.

As to plaintiff's first contention that defendants did not intend to create a new contract in February 2012, plaintiff argues that "the finding of a new oral contract is not supported by the testimony of [plaintiff] or the e[-]mails exchanged in February 2012. There is nothing to support a finding of new consideration paid to support a new oral contract." In other words, plaintiff claims that the trial court's findings on the parties' intentions concerning settlement and the existence of consideration were not supported by the trial evidence. But without a transcript or suitable substitute reflecting the trial testimony, the objections and arguments of the parties, if any, or the oral rulings of the court on these issues, we cannot conduct the sufficiency review necessary to address plaintiff's argument.

As to plaintiff's second contention that the parties orally modified their original retainer agreement in January 2012, plaintiff argues that the trial court ignored the "completed performance of the parties as to the modification" and that the parties "intended" to "waive" any requirement that a modification to the retainer agreement be in writing. But these are factual matters based on the testimony, exhibits, and the parties' respective arguments concerning that evidence at trial. Once again, absent a reporter's transcript, a suitable substitute, or a formal statement of decision, we cannot evaluate the merits of these contentions on appeal.

As to plaintiff's third contention that her notice of intention to move for new trial and her new trial motion were timely, plaintiff argues that the trial court misapplied Code of Civil Procedure section 659, subdivision (a)(2) in ruling that her new trial motion was untimely. Our review of this contention is hampered by two deficiencies in the record on appeal. First, the

minute order denying the new trial motion in our record is missing the last three of five pages. Thus, we do not have a complete record of the trial court's findings and conclusions in support of its ruling. Second, there is no reporter's transcript of the trial court's oral pronouncement of its ruling on the motion which prevents us from evaluating the legal and factual basis for the court's ruling.

As to plaintiff's fourth contention that the trial court erred by allowing defendants to file a late opposition to the new trial motion in violation of Code of Civil Procedure section 659a (section 659a), she argues that the court's ruling was an error of law. But, because we do not have a complete record of the trial court's rulings on either the ex parte application or the new trial motion, we cannot determine: (1) whether the briefing schedule on the new trial motion established during the ex parte proceeding was by agreement of the parties; (2) the factual and legal basis, if any, for the trial court's apparent rejection of plaintiff's timing argument at the hearing on the new trial motion; or (3) whether plaintiff was prejudiced even assuming the trial court erred.

In any event, our Supreme Court has concluded that the time deadlines in section 659a for filing papers in support of and opposition to a new trial motion are not jurisdictional. Therefore, the trial court could consider defendants' opposition papers, even assuming that those papers were not timely filed under the statutory deadlines in section 659a. (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 337.)

Plaintiff's final contention that the trial court erred by refusing to allow her to complete her case-in-chief is based on her assertion that the court "stop[ped] her opening statement" and

"instructed" her to "proceed with the evidence," but then "stopped [her] testimony" "[w]ell before [she] completed [it]." Absent a transcript or suitable substitute, there is no support for plaintiff's contention that the court prevented her from completing her testimony or that there was any irregularity in the trial testimony that prejudiced plaintiff.[6]

In sum, by failing to provide a reporter's transcript or suitable substitute, and instead supporting her appeal with a partial appendix, plaintiff has prevented us from reviewing the trial evidence and evaluating her various arguments on appeal. "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct as to all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.]" (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385–386 ["When an appeal is taken on a partial clerk's transcript, the evidence is conclusively presumed to support the judgment"].) Applying this presumption to the record before us, we conclude that none of plaintiff's contentions has any merit.

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[6] In her opening and reply briefs, plaintiff addresses the adequacy of the record and maintains that the record copies of her new trial motion and supporting declaration are sufficient to allow us to review her claims of irregularity in the trial and posttrial proceedings. But the procedures for submitting on appeal a suitable substitute for a reporter's transcript of relevant proceedings are well established by rule; and plaintiff's argumentative and one-sided posttrial submissions do not comply with those procedures. (See Cal. Rules of Court, rule 8.137.)

IV. DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

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KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.