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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PATRICK DUFF, Plaintiff and Appellant, v. DAVID R. WELCH et al., Defendants and Respondents.	B254772 (Los Angeles County Super. Ct. No. BC431965)

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

Patrick Duff, in pro. per., for Plaintiff and Appellant.

Fredman Lieberman Pearl and Howard S. Fredman, for Defendants and Respondents David R. Welch and D|R Welch Attorneys at Law, P.C.

Patrick Duff appeals from the judgment entered after a bench trial on his claims for legal malpractice, breach of contract and breach of fiduciary duty against David Welch and his law firm, D|R Welch Attorneys at Law, P.C. Duff contends the trial court violated his constitutional right to a jury trial by denying his requests for relief from his inadvertent waiver of a jury. Duff also contends the court erred in finding the law firm's representation had been limited in scope prior to his execution of a retainer agreement expanding the representation and that the trial judge's membership in the same bar organization as Welch constituted impermissible bias. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

1. *Duff's Engagement of Welch and the Law Firm*

Duff, owner of a marijuana dispensary, leased two suites from his landlord, Burrito King, Inc., and its 50 percent owner, Julian Montoya. The lease required Duff to maintain the necessary licenses to operate the dispensary. Notwithstanding this express condition of the lease, Montoya received notices from the federal Drug Enforcement Agency and the City of Los Angeles that the continued operation of the illegal dispensary could result in the loss of his property. When Montoya presented these notices to Duff, Duff agreed to vacate the property within 30 days.

Duff attempted to rescind his agreement to leave after he learned Montoya had negotiated a new lease with House of Kush, a competitor Duff believed was also unlicensed. Duff began a campaign against Montoya and Burrito King, picketing, distributing leaflets and urging a boycott of the restaurant. Duff told Montoya and employees of Burrito King that he was going to "burn down" the restaurant. Montoya engaged counsel, who obtained a temporary restraining order against Duff pending a hearing set for June 24, 2009. Montoya also served Duff with a three-day notice to quit based on the non-curable creation of a nuisance.

After meeting Welch at a "THC convention," Duff told him about the restraining order and the notice to quit. Welch said he could represent Duff but needed him to come

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[1] Because Duff has failed to provide a reporter's transcript of the trial, we draw our statement of the facts from the pleadings and the trial court's statement of decision.

to his office to discuss the facts. On June 15, 2009 Burrito King filed verified unlawful detainer complaints against Duff, which were served the following day. Duff contacted Welch and made an appointment for 2:00 p.m. on June 18, 2009 at the law firm's office. Duff failed to keep the appointment. Welch told Duff he would represent him without charge in connection with the restraining order, but would not represent him in the unlawful detainer actions without a signed retainer agreement, verifications for any answers and the deposit of filing fees, which Welch was not willing to pay on Duff's behalf. Welch also warned Duff about the short response times in unlawful detainer actions.

On June 23, 2009 Welch spoke with Montoya's lawyer about terms for resolving the dispute. Welch told Duff to appear at the June 24 hearing on the restraining order and to bring a check for his retainer. Duff appeared at the hearing, and the parties agreed to continue the hearing. Montoya also agreed to dismiss the unlawful detainer cases, on which defaults had been entered that morning, if Duff returned the keys by June 28, 2009. Welch confirmed the settlement by e-mail after the hearing.

Duff, however, changed his mind and refused to vacate the units. He executed a retainer agreement with respect to both proceedings on June 28, 2009 and paid the Welch firm a retainer fee of $2,000. He was unsuccessful in both proceedings: A restraining order was issued against him based on Montoya's testimony; and the court refused to vacate his defaults on the unlawful detainer actions.

The trial court in this action expressly found the unlawful detainer judgments would not have been entered against Duff had he abided by the settlement agreement negotiated by Welch. Further, the court found the law firm had not undertaken representation of Duff in those actions at the time the defaults were entered.

2. *Duff's Waiver of a Jury Trial*

Duff retained counsel and filed the instant lawsuit against Welch and his firm in February 2010. The case was initially set for a jury trial on February 22, 2011; the case management order stated, "Plaintiff has demanded jury and will post jury fees." The trial

date was continued to July 5, 2011, and the Welch defendants posted jury fees in June 2011 and again in December 2011. Duff never posted jury fees.

On August 29, 2011 Duff's then-counsel submitted a declaration in support of a response to an order to show cause why the parties had not complied with the court's pretrial orders regarding final status conference and jury trial that stated, "Plaintiff did not comply with the Order because Plaintiff did not post jury fees, waiving jury. . . . [¶] . . . I believed that the defense had also waived jury and that the matter would be tried to the Court." On January 6, 2012 Duff's attorney filed a substitution of attorney, naming Duff in propria persona.

The trial date was continued to May 29, 2012. After the Welch defendants filed an affidavit pursuant to Code of Civil Procedure section 170.6,[2] the trial date was vacated, and the case reassigned. The court then set the case for jury trial on July 24, 2013.

On June 28, 2013 following the hearing on the Welch defendants' motion for summary judgment (which was denied), the court ruled Duff had waived his right to a jury trial by failing to post the jury fee of $150. (See § 631, subd. (f)(5).) The court denied Duff's oral motion for relief from the jury waiver. At the final status conference on July 24, 2013, the court continued the trial date to September 10, 2013 and instructed Duff to file a noticed motion if he wished the court to reconsider the order.

Instead of filing a noticed motion, however, Duff waited until September 10, 2013 and presented an ex parte application seeking relief from the previous order. The court again instructed Duff a written, noticed motion was required to obtain relief. On September 12, 2013 Duff again filed an ex parte motion seeking reinstatement of a jury trial. He filed another on September 20, 2013. The court denied the application and ordered that any further ex parte applications seeking reversal of Duff's waiver of a jury trial would result in the imposition of sanctions pursuant to section 177.5.

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[2] Statutory references are to this code.

Notwithstanding these directions, Duff failed to file a noticed motion and instead made an oral application for relief from waiver on October 2, 2013, the first day of trial. The request was denied.

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion in Denying Duff's Requests for Relief from His Waiver of the Right to a Jury Trial*

While the right to a jury trial is guaranteed by the California Constitution (Cal. Const., art. I, § 16), that right may be waived or forfeited, among other reasons, by failure to deposit advance fees required by section 631, subdivision (b). (See § 631, subd. (f)(5).) Section 631, subdivision (b), provides: "At least one party demanding a jury on each side of a civil case shall pay a nonrefundable fee of [$150], unless the fee has been paid by another party on the same side of the case. . . . Payment of the fee by a party on one side of the case shall not relieve parties on the other side of the case from waiver pursuant to subdivision (f)."[3] Pursuant to subdivision (c)(3)—the provision applicable to cases filed before July 1, 2011—jury fees must have been deposited at least 25 calendar days before the date initially set for trial.

There is no dispute Duff failed to timely post jury fees. Section 631, subdivision (g), however, provides a limited escape clause: "The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury." Duff contends the trial court abused its discretion in denying his request for relief from waiver of his right to a jury trial.

A request for relief from waiver must be made at the earliest opportunity. (See *Gonzales v. Nork* (1978) 20 Cal.3d 500, 507-509.) In ruling on the request the trial court may consider such factors as prejudice to the parties from granting relief, the need to reschedule the trial if relief were to be granted, and the timeliness of the request. (*Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1704; see *March v. Pettis*

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[3] At the time Duff filed his complaint, this provision was found at section 631, subdivision (d)(5). The current version of the statute took effect on September 17, 2012. (See Stats. 2012, ch. 342, § 1.)

(1977) 66 Cal.App.3d 473, 480 ["[i]n exercising its discretion, a court is entitled to consider many factors, including the possibility of delay in rescheduling the trial for a jury, lack of funds, timeliness of request and prejudice to all the litigants"].) "A court does not abuse its discretion where any reasonable factors supporting denial of relief can be found even if a reviewing court, as a question of first impression, might take a different view." (*Gann*, at p. 1704.)[4]

Duff argues the court erred in denying his June 28, 2013 oral request for relief from his inadvertent failure to timely post jury fees in the absence of any demonstration of prejudice to Welch and his firm.[5] (See *Tesoro Del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638-639 [affirming trial court's exercise of discretion to excuse inadvertent failure to post jury fees when no prejudice to other parties]; *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104 ["crucial focus is whether any prejudice will be suffered by any party or the court if a motion for relief from waiver is granted"].) But prejudice is a factual issue to be considered by the trial court after an opportunity has been provided for the opposing parties to demonstrate why relief should not be granted.

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[4] Welch suggested at oral argument that a trial court could properly consider a party's self-represented status in determining whether to grant relief because conducting a jury trial is more difficult when one of the parties is self-represented. Welch is incorrect; a court may not consider the representation status of a litigant and weigh that status to deny otherwise proper relief. Canon 3(B)(8) of the Code of Judicial Ethics requires a judge to "manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law." The comments to the Canon add, "[W]hen a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard." Welch's suggestion is inconsistent with the Canon and finds no support in existing authority.

[5] Duff's former counsel's statement that she believed both sides had waived a jury and the case would be tried to the court, offered in response to the court's order to show cause regarding failure to prepare for a jury trial, belies Duff's claim the failure to post fees was inadvertent or due simply to his self-represented status and lack of familiarity with court rules. (See *March v. Pettis, supra,* 66 Cal.App.3d at p. 479 ["[n]one of the decisions supports the contention that a party who has expressly waived a jury trial should thereafter be granted a jury trial as an absolute right"].)

Here, the trial court repeatedly instructed Duff to file a noticed motion if he wanted to request reinstatement of his right to a jury trial. This was not an empty gesture: It was intended not only to allow Duff to offer grounds for relief but also to provide the Welch defendants an opportunity to demonstrate prejudice, if any, resulting from his tardy request. Duff's failure to comply with this directive weighs heavily in our evaluation of the trial court's decision to deny relief. In addition, the Welch defendants have indicated that granting the request would have required them to file additional in limine motions, thus potentially delaying the start of trial, and that, by the day of trial when Duff made his final oral motion for relief, expert witnesses for both sides were present in court and would have been seriously inconvenienced by any further continuance. Those are all reasonable factors supporting the trial court's decision to proceed with a bench trial in this matter. (See *March v. Pettis, supra*, 66 Cal.App.3d at p. 480.)

2. *The Trial Court's Finding the Welch Defendants' Representation of Duff Prior to June 28, 2009 Was Limited in Scope Is Unreviewable on This Record*

"With the exception of a court appointment, the relationship of lawyer and client is created by contract." (*Houston Gen. Ins. Co. v. Superior Court* (1980) 108 Cal.App.3d 958, 964.) "Although the [attorney-client] relationship usually arises from an express contract between the attorney and the client, it may also arise by implication." (*Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444; see *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729.) "No formal arrangements are necessary to establish an attorney-client relationship [citation], especially where . . . the existence of the relationship is demonstrated and reinforced by the attorney's own conduct." (*Davis v. State Bar* (1983) 33 Cal.3d 231, 237.)

The trial court concluded Welch's agreement to represent Duff for purposes of opposing the restraining order and his subsequent negotiations with Montoya's counsel gave rise to an attorney-client relationship as to those matters, but the scope of that representation was limited to that case and did not extend to the obligation of filing answers to the unlawful detainer actions. Although Duff challenges that ruling, we are

unable to consider his arguments because the record does not contain a transcript of the trial.

Judgments and orders are presumed correct on appeal, and the appellant bears the burden of overcoming that presumption by affirmatively demonstrating reversible error. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Rappenecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256, 266.) "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.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

The nature of a limited scope arrangement is defined by the agreement between counsel and client. In the absence of a trial transcript, we presume the testimony at trial established the terms of the agreement, including the terms and scope of the representation, and was sufficient to prove the Welch defendants' representation of Duff prior to June 28, 2009 was limited to the restraining order proceeding.

3. *Duff's Claim of Bias Is Forfeited, Untimely and Lacks Merit*

Finally, Duff contends the trial judge was biased (and apparently should have recused himself) because he was a member of the same bar association as Welch. Duff's claim is utterly without merit. Common membership in a professional organization is not a prohibited relationship (see § 170.1, subd. (a)(2), (5)) and, standing alone, certainly does not demonstrate a probability of actual bias. (*See People v. Freeman* (2010) 47 Cal.4th 993, 1000 [the due process clause does not require judicial disqualification upon the mere appearance of bias].) Indeed, the only conceivable ground for disqualification Duff asserts is that "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial" (§ 170.1, subd. (a)(6)(A)(iii))—that is, the appearance of bias. The factual premise for asserting disqualification on this basis is frivolous: Such

professional relationships are frequent in the legal world and create no appearance of impropriety. (See *In re Marriage of Fenton* (1982) 134 Cal.App.3d 451, 457.)

Moreover, Duff had an obligation to raise this concern, if he truly entertained it, "at the earliest practical opportunity after discovery of the facts constituting the ground for disqualification" of the judge. (§ 170.3, subd. (c)(1).) Duff never moved to disqualify the trial court under section 170.1, nor, from the record we have on appeal, did he raise his bias claim at any time in the trial court. It has been forfeited. (*People v. Samuels* (2005) 36 Cal.4th 96, 114 [failure to raise issue of purported judicial bias before trial court "waives claims of statutory or constitutional error"]; see *People v. Williams* (1997) 16 Cal.4th 635, 652 [claim of appearance of bias under § 170.1, subd. (a)(6)(A), must be raised in trial court or is forfeited]; see generally *People v. Freeman, supra,* 47 Cal.4th at p. 1000 ["'[u]nder our statutory scheme, a petition for writ of mandate is the *exclusive* method of obtaining review of a denial of a judicial disqualification motion'"]; *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265, fn. 22 [forfeiture rule generally applies in all civil and criminal proceedings; failure to timely assert a right or to object to its infringement in the trial court precludes raising the issue on appeal].)

DISPOSITION

The judgment is affirmed. The Welch defendants are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. FEUER, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.