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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARTIN A. ZAHORIK,

Plaintiff and Appellant,

v.

JOHN E. SWEENEY et al.,

Defendants and Respondents.

B237038

(Los Angeles County
Super. Ct. No. BC422888)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest M. Hiroshige, Judge. Affirmed.

Martin A. Zahorik, in pro. per., for Plaintiff and Appellant.

Kirk & Simas and Karen A. O'Neil for Defendants and Respondents John E. Sweeney and Helen C. Sweeney.

Gutierrez, Preciado & House, Calvin House; Davis & Davis, M. Stephen Davis and Matthew S. Davis for Defendant and Respondent Sepulveda Escrow Corporation.

Martin A. Zahorik, in propria persona, appeals from a judgment entered pursuant to Code of Civil Procedure section 631.8, subdivision (a) in favor of John E. Sweeney and Helen C. Sweeney (the Sweeneys) and Sepulveda Escrow Corporation on Zahorik's claim for breach of contract, negligence, and declaratory relief.¹ Zahorik contends that the trial court erred in denying his motion for appointment of a trustee; denying his motion for a discovery referee; denying his motion to amend the complaint to add a fraud cause of action; denying his motion for appointment of counsel; denying his motion for personal appearance at trial; denying his request for a jury trial; and granting Sepulveda Escrow's and the Sweeneys' motions for judgment. In his reply brief, Zahorik contends that he could not provide a reporter's transcript because he is indigent. We affirm the judgment because Zahorik failed to provide an adequate record for review.

BACKGROUND

In 2011, Zahorik filed two notices designating the record on appeal. The first and second requested a clerk's transcript be provided at no cost and stated that Zahorik had attached an application for a waiver of court fees and costs. Beyond the notice of appeal, notice designating record on appeal, and the judgment appealed from, all of which are automatically included in the clerk's transcript, the notices did not request additional documents and none were provided. In the first notice, Zahorik made no designation with respect to oral proceedings. In the second, he declined to designate a reporter's transcript, indicating: "I elect to proceed: [¶] . . . WITHOUT a record of the oral proceedings in the superior court. 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." The notice form contained the option of attaching a copy of a transcript reimbursement fund application pursuant to California Rules of Court, rule 8.130 for indigents, including those representing themselves in propria persona, which Zahorik did not elect to pursue.

¹ Statutory references are to the Code of Civil Procedure.

The record does not contain the complaint or any other pleadings, and as stated, Zahorik elected not to proceed with a reporter's transcript. From the briefs and the scant record, we gather that Zahorik filed a complaint on September 29, 2009, against the Sweeneys for breach of contract and declaratory relief and against Sepulveda Escrow for negligence based on the Sweeneys' purported fraudulent default in 1994 on a \$28,000 loan made by Zahorik, which loan was secured by a second trust deed on the Sweeneys' real property. Zahorik also claimed that Sepulveda Escrow was negligent in failing to foreclose on the Sweeneys' real property at his request on December 6, 2007.

The matter proceeded to trial on September 15, 2011, and Zahorik testified from prison by telephone. After several exhibits were admitted and Zahorik rested his case, the Sweeneys and Sepulveda Escrow made motions for a judgment under section 631.8, subdivision (a), which the trial court granted. The trial court's judgment stated that the parties did not request a statement of decision; Zahorik's claim for breach of contract against the Sweeneys failed because it was filed after the four-year statute of limitations had expired and because Zahorik had "not followed the substantive procedures of . . . Section 726"; and Zahorik's claim for negligence against Sepulveda Escrow failed because it was filed after the two-year statute of limitations had expired and because Zahorik had "failed to establish a *prima facie* case or establish all the necessary elements of a cause of action for negligence against" Sepulveda Escrow.

Zahorik filed a notice of appeal on October 31, 2011.

DISCUSSION

Zahorik has not provided an adequate record for review on appeal

Zahorik contends that the trial court erred in denying his motion for appointment of a trustee; denying his motion for a discovery referee; denying his motion to amend the complaint to add a fraud cause of action; denying his motion for appointment of counsel; denying his motion for personal appearance at trial; denying his request for a jury trial; and granting Sepulveda Escrow's and the Sweeneys' separate motions for judgment pursuant to section 631.8, subdivision (a). We conclude that Zahorik has not provided an adequate record for review and affirm the judgment.

“‘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 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.*)

Zahorik failed to designate any of his motions, oppositions to the motions, or rulings on the motions of the trial court for the clerk’s transcript on appeal. In particular, Zahorik claimed he was an indigent prisoner and filed motions for appointment of counsel and personal appearance at trial, which he says the court denied. But the record does not contain any of the motions or evidence of Zahorik’s indigency. And there is nothing in the record establishing that Zahorik did not agree to testify telephonically. Nor did Zahorik designate the motions for judgment filed by Sepulveda Escrow and the Sweeneys. Thus, we cannot review any moving papers or declarations or documents attached to the moving papers. Therefore, we do not know the basis for the court’s denial of Zahorik’s motions and granting of the motions for judgment. Further, Zahorik did not provide a record on which we can determine whether Zahorik preserved his right to a jury trial.

And Zahorik did not provide a reporter’s transcript of the hearings. “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.” (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

Although Zahorik claims in his reply brief that he could not provide a reporter’s transcript on appeal because he is indigent, there is nothing in the record to support his claim of indigency. And assuming he was indigent, he chose not to file a transcript reimbursement fund application referenced in the notice form designating the record on appeal.

Accordingly, we affirm the judgment of the trial court.

DISPOSITION

The judgment is affirmed.

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MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.