Filed 8/11/16 McNulty v. Ottosi CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOSEPH F. MCNULTY, Plaintiff and Appellant, v. LINDA GOLLA OTTOSI, et al., Defendants and Respondents.	B264239 (Los Angeles County Super. Ct. No. LC088640)

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

Law Office of Loren Nizinski, Loren Nizinski and Beverly Swanson, for Plaintiff and Appellant.

Law Offices of F. James Feffer, F. James Feffer, for Defendants and Respondents.

Plaintiff and appellant attorney Joseph Felix McNulty appeals from a portion of a judgment in favor of defendants and respondents attorney Paul Ottosi (Ottosi) and former client Johanna Ramos.[1] McNulty and Ottosi failed to obtain several clients' written consent to their fee-splitting agreement as required under Rules of Professional Conduct of the State Bar of California rule 2-200 (rule 2-200). On appeal, McNulty contends: 1) the trial court should have found Ottosi was equitably estopped to rely on rule 2-200 to avoid paying fees to McNulty; 2) there is no substantial evidence to support the trial court's finding that the retainer agreement between Ramos and McNulty was not enforceable; 3) the trial court applied the wrong standard to determine malice for the purpose of punitive damages; and 4) the trial court abused its discretion by declining to award costs. We conclude there is substantial evidence to support the finding that McNulty failed to obtain written consents from his clients and was not prevented from doing so by Ottosi. Substantial evidence also supports the finding that McNulty's retainer agreement with Ramos is unenforceable, because Ramos substituted attorneys. The court applied the correct standard to determine the issue of malice. We do not have jurisdiction to review the order granting Ottosi's motion to tax costs, because the notice of appeal does not encompass the order ruling on costs, and the appellate record is inadequate to review the court's exercise of discretion in any event. Based on these conclusions, we affirm.

FACTS

McNulty and Ottosi met in a support group led by Dr. Bryan Ryles in November 2006. They became friendly and entered into an oral agreement to split fees on cases that

[1] Paul Ottosi passed away after his respondent's brief was filed. Linda Golla Ottosi (trustee), in her capacity as trustee of the P. and L. Ottosi Living Trust, substituted in as the successor in interest of his estate. Ramos has not filed a respondent's brief on appeal.

McNulty referred to Ottosi and cases they worked on together.

McNulty and his girlfriend fought in December 2006. Neighbors called the police and McNulty's girlfriend was arrested for domestic battery. McNulty asked Ottosi to recommend a bail bondsman in order to arrange bail. No charges were ever filed as a result of the incident.

On August 24, 2007, Ramos executed a written retainer agreement with McNulty to represent her in an employment discrimination action. She agreed to pay 33.3 percent of any settlement prior to an action being filed, and 40 percent after an action was filed. She also agreed to reimburse all costs expended for investigators or experts. Ramos and McNulty went to the Department of Fair Employment and Housing (DFEH), where they filed a complaint on September 17, 2007.

McNulty became concerned Ottosi might not honor their oral agreement to split fees. He had one client sign a written consent to the fee-splitting agreement. Ottosi eventually paid McNulty his share of fees in that case, so McNulty never mentioned the client's written consent.

McNulty worked on a case for client Pauline Cobian with Ottosi. Cobian's case was resolved in mediation. The settlement required Ottosi to loan funds to the client, which would be repaid from the sale of certain property, but Ottosi refused to provide any funds. McNulty substituted in as attorney in place of Ottosi, and McNulty completed the work in the case. Ottosi believed he was entitled to $19,585 for his work on the Cobian case through February 2008, which he expected to receive when the property was sold.

When Ramos notified McNulty when she received a right-to-sue letter from the DFEH, he told her that Ottosi would be taking over her case. Ramos signed a retainer agreement with Ottosi at some point. The agreement with Ottosi is dated September 14, 2007, but it is undisputed that this date is incorrect. Ramos believed Ottosi was her attorney from that point forward.

McNulty and Ottosi executed a written fee-splitting agreement on October 28, 2008. Fees for certain referrals would be split 45 percent to McNulty and 55 percent to Ottosi, including the cases of Franklin, Brackenrage, Ramos, Collier, and Godfrey.

Ottosi would receive one-third of the proceeds, plus reimbursement of costs that were not separately chargeable to the client, for the cases of Lara, Manzano, Donatelli, Cobian, Whitehouse, and another case. The initial contact in each of these cases was with McNulty, who then brought in Ottosi.

McNulty was suspended from the practice of law for 60 days at the end of 2008. At some point, Ottosi and McNulty had a falling out. Ottosi stopped speaking to McNulty about developments in their cases, including the cases involving Ramos, Brackenridge, Collier, and Lara. McNulty presented Brackenrage and Manzano with written consents to the fee-splitting agreement, but the clients refused to sign. He did not have contact information for Collier. McNulty did not believe he was required to obtain written consent from the other clients listed in the fee-splitting agreement, because he had written retainer agreements with those clients.

McNulty eventually retrieved the files for Franklin, Godfrey, and Whitehouse from Ottosi. He sought assistance from attorney Loren Nizinski to resolve the cases. Attorney fees received from Godfrey were divided among Ottosi, McNulty, and Nizinski. Ottosi was not reimbursed for costs that he expended in connection with Whitehouse.

Ottosi received a small amount for attorney fees in the Donatelli case and paid a portion to McNulty in accordance with their agreement. Ottosi collected $7,000 in the Manzano case and paid a portion of the fees to McNulty. The client believed Ottosi owed her money from the settlement, so she substituted McNulty back into the case.

Ottosi testified at trial that no attorney fees were received in connection with the Brackenrage or Collier cases. Ottosi settled the cases of Lara and Ramos without sharing any of the fees with McNulty. Lara settled for $20,000. Ottosi collected attorney fees of $5,000 and did not pay any of the fees to McNulty.

In September 2009, Ramos settled her case for $220,000, of which forty percent went to attorney fees. McNulty learned of the settlement from Ramos. Ramos told him that Ottosi was her attorney. Ottosi refused to pay any portion of the attorney fee to McNulty.

In a support group meeting, McNulty mentioned that he and Ottosi were having

differences. Dr. Ryles asked them to come in a few minutes before the next group meeting on September 30, 2009, to try to resolve their differences. During their private meeting with Dr. Ryles, Ottosi said to McNulty, "How about if I tell the group that you beat your girlfriend?" As a result of the acrimony between the attorneys, it was determined that McNulty and Ottosi could no longer attend the same group meeting. McNulty was the more recent member, so he was required to transfer to a different group. McNulty was required to explain the need for the transfer to a committee.

PROCEDURAL HISTORY

McNulty filed a complaint against Ottosi and Ramos on February 18, 2010, and an amended complaint on October 12, 2010. He alleged a single cause of action against Ramos for breach of contract, and causes of action against Ottosi for breach of contract, fraud, conversion, intentional interference with contractual relations, breach of fiduciary duty, accounting, constructive trust, declaratory relief, and slander per se.

McNulty filed for bankruptcy on March 8, 2011. In the context of the bankruptcy proceedings, Cobian paid $40,000 owed to McNulty for attorney fees to the bankruptcy trustee.

On November 6, 2013, Ottosi filed a cross-complaint against McNulty. The cross-complaint alleged causes of action for breach of contract, account stated, quantum meruit, an accounting, and declaratory relief.

A bench trial began on December 16, 2014. At the conclusion of McNulty's case-in-chief, the trial court granted Ottosi's motion for judgment under Code of Civil Procedure section 631.8 as to all of the causes of action against Ottosi, except slander per se. The trial court found it was uncontested that there was intent to split fees, but there was no written consent from any of the clients at issue. Although a party may be estopped from asserting the lack of a written consent if there is evidence that the party took an affirmative act to prevent the execution of a consent agreement, there is no evidence that Ottosi prevented the execution of consent agreements in this case. Ramos

did not remember telling McNulty that Ottosi said not to sign a consent agreement or he would fire her as a client. The court was not convinced by the evidence that Ottosi prevented the clients from executing consents, nor did the court find Ottosi had any affirmative obligation to obtain signed consents. Ottosi agreed to a fee-splitting agreement and reneged on his word, but no attempt was made to obtain the clients' signatures, and therefore, under rule 2-200, the agreement was not enforceable by either party. Ottosi's conduct could not support the causes of action other than slander per se.

Ramos brought a motion to dismiss the cause of action against her, which the trial court construed as a motion for nonsuit. The court found virtually all of the work in her case was performed by Ottosi. Ottosi breached an agreement with McNulty, but Ramos was not liable. A de facto substitution of attorney took place without a writing. Therefore, the court granted the motion for nonsuit as to the cause of action against Ramos.

As to Ottosi's cross-complaint, the trial court found the Cobian and Whitehouse cases were included in the fee-splitting agreement between McNulty and Ottosi, which was unenforceable. The court granted McNulty's motion for nonsuit as to the causes of action in Ottosi's cross-complaint.

Trial resumed on the cause of action against Ottosi for slander per se. McNulty raised the issue of punitive damages in closing argument. The court did not have jurisdiction to award punitive damages, because there was no evidence of Ottosi's financial condition. McNulty asked to reopen his case-in-chief and bifurcate the issue of punitive damages. The court determined that Ottosi had made a defamatory statement that constituted slander per se and it was repeated to a committee to some extent, but there was no showing of any financial loss from the time of the incident to the present. The trial court took the matter of damages, including punitive damages, under submission, and allowed further briefing on the issue of punitive damages.

Further proceedings were held on January 30, 2015. The trial court found that McNulty's request to bifurcate the issue of punitive damages was timely. The court allowed extensive argument by the parties. The court read the portion of CACI No. 3940

on punitive damages containing the definitions of malice and oppression aloud.[2] The court applied the definitions from the jury instruction and found Ottosi's comment did not rise to the level of malice, oppression, or despicable conduct required to support punitive damages. It was spontaneous, juvenile name-calling. No economic damage occurred as a result of Ottosi's outburst. There was no malice, fraud, or oppression sufficient to justify an award of punitive damages. The trial court awarded $7,500 in damages for the slander per se.

On March 19, 2015, the trial court entered judgment in favor of Ottosi and against McNulty as to all of the causes of action except slander per se. The court also entered judgment in favor of Ramos and against McNulty. The court found in favor of McNulty on the cause of action for slander per se and awarded damages in the amount of $7,500 against Ottosi, plus costs. Judgment was entered on the cross-complaint in favor of McNulty and against Ottosi.

McNulty filed a memorandum of costs totaling $3,757.10 on March 31, 2015. Ottosi filed a motion to tax costs on April 20, 2015, which McNulty opposed.

On May 18, 2015, McNulty filed a notice of appeal from the March 19, 2015 judgment in this case.

On June 18, 2015, a hearing was held on the motion to tax costs. No reporter's transcript of the hearing is contained in the record on appeal. The trial court found McNulty's recovery in the case fell below the threshold for limited jurisdiction cases, and therefore, the court had discretion to decline to award costs to the prevailing party. The

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[2] CACI No. 3940 provides in pertinent part as follows: "'Malice' means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"'Oppression' means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"'Despicable conduct' is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people."

court concluded it was not appropriate for an award of costs to the prevailing party in this case and granted the motion to tax costs in its entirety.

DISCUSSION

Standard of Review

"""The purpose of Code of Civil Procedure section 631.8 is to enable a trial court which, after weighing the evidence at the close of the plaintiff's case, is persuaded that the plaintiff has failed to sustain his burden of proof, to dispense with the need for the defendant to produce evidence. [Citations.]" [Citation.] Thus, section 631.8 serves the same purpose as does section 581c, which permits the court to grant a nonsuit in a jury trial. [Citation.] However, unlike a motion for nonsuit which may be brought only by the defendant, a section 631.8 motion may be brought by either party. Generally, however, it is the defendant who brings the motion.' [Citation.]" (*Roth v. Parker* (1997) 57 Cal.App.4th 542, 549.)

"The substantial evidence standard of review applies to judgment given under Code of Civil Procedure section 631.8; the trial court's grant of the motion will not be reversed if its findings are supported by substantial evidence. [Citation.] Because section 631.8 authorizes the trial court to weigh evidence and make findings, the court may refuse to believe witnesses and draw conclusions at odds with expert opinion. [Citation.]" (*Roth v. Parker, supra,* 57 Cal.App.4th at pp. 549-550.)

"Interpretation of statutes and administrative regulations, such as the state's Rules of Professional Conduct for members of the State Bar, receives our independent review on appeal. [Citation.]" (*Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 895 (*Margolin*).)

Equitable Estoppel

McNulty contends the trial court should have found Ottosi caused the failure to obtain written consent to fee-splitting from clients and prevented compliance with rule 2-200. From this premise, McNulty argues Ottosi was estopped to rely on rule 2-200 to avoid paying fees under the fee-splitting agreement.

Rule 2-200, subdivision (A), provides in pertinent part: "A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless: [¶] (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and [¶] (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable . . . ."

"The purpose of rule 2-200 is to protect clients from their attorneys' potential conflicts of interest created by fee-sharing agreements. (*Mark v. Spencer* (2008) 166 Cal.App.4th 219, 227 (*Mark*).) Such agreements have the potential to motivate an attorney to charge excessive fees or to make tactical decisions unfavorable to the client's interests. (*Ibid*.) Rule 2-200 alleviates these risks by requiring the attorneys to disclose, and obtain the client's written consent to, the fee-sharing arrangement. 'Such information may affect the client's level of confidence in the attorneys and is indispensable to the client's ability to make an informed decision regarding whether to accept the fee division and whether to retain or discharge a particular attorney.' (*Chambers* [*v. Kay* (2002) 29 Cal.4th 142, 157 (*Chambers*)].) In this way, rule 2-200 protects the public and promotes confidence in the legal profession. (*Chambers*, at p. 158.)" (*Barnes, Crosby, Fitzgerald & Zeman, LLP v. Ringler* (2012) 212 Cal.App.4th 172, 180 (*Barnes*).)

"[An] attorney cannot enforce a fee-sharing agreement if that attorney could have obtained written client consent as required by rule 2-200, but failed to do so." (*Barnes, supra*, 212 Cal.App.4th at p. 181.)

In *Margolin, supra,* 85 Cal.App.4th at page 896, the plaintiff attorneys referred a case to the defendant attorney. The defendant promised to obtain written consent from the client to a fee-splitting agreement. (*Ibid*.) The client gave consent orally, but did not provide consent in writing. (*Ibid*.) The defendant failed to pay any share of the attorney fees to the plaintiffs. (*Id.* at p. 897) The *Margolin* court found the attorneys' fee-splitting agreement was unenforceable as a result of rule 2-200. (*Margolin, supra*, at p. 894.) Equitable estoppel could not be used as a defense. (*Id.* at p. 901.) The plaintiffs could not reasonably rely on the defendant's promise to obtain written consent. (*Ibid*.) "Plaintiffs, as attorneys, are presumed to have known that rule 2-200 requires actual written disclosure and written consent, not a promise by the receiving attorney to provide that disclosure and secure that consent. Plaintiffs assumed the risk that [defendant] would not keep his promise to comply with rule 2-200. Therefore, there is no unconscionable injury to plaintiffs. Moreover, [defendant's] failure to share his fees under the fee sharing agreement does not constitute his unjust enrichment sufficient to support application of the doctrine of equitable estoppel, since rule 2-200 exists for the benefit of clients. Plaintiffs could have protected themselves by providing [the client] with the required written fee sharing disclosure and obtaining her written consent." (*Margolin, supra*, at pp. 901-902, italics omitted.)

Our Supreme Court cited *Margolin* with approval in *Chambers, supra*, 29 Cal.4th at pages 156-157. In *Chambers*, the court found rule 2-200 precluded the plaintiff attorney from enforcing a fee-splitting agreement without the client's written consent. (*Chamber, supra*, at pp. 157-158.) "Were we to hold that the fee . . . may be divided as [the attorneys] agreed, with no indication that the required client consent was either sought or given, we would, in effect, be both countenancing and contributing to a violation of a rule we formally approved in order 'to protect the public and to promote respect and confidence in the legal profession.'" (*Id.* at p. 158.) The *Chambers* court concluded, "Although [the plaintiff] complains that [the defendant] should not be permitted to take advantage of his own disregard of the Rules of Professional Conduct, we are not persuaded that this circumstance justifies or otherwise excuses [the plaintiff's]

equally disturbing neglect of rule 2-200 and the policy considerations that motivated its adoption. [The plaintiff] could have protected his interests, and at the same time fulfilled the beneficial purposes of the rule and acted in [the client's] best interests, by requesting proof of her written consent to the fee division before committing himself to her case." (*Chamber, supra,* at pp. 162-163.)

The sole authority to apply an exception to California's strict application of rule 2-200 was *Barnes, supra,* 212 Cal.App.4th at page 186. The underlying lawsuit in *Barnes* was a class action. (*Id.* at p. 183.) The plaintiff attorney obtained written consent to a fee-splitting agreement from the class representative in the class action. (*Id.* at p. 186.) The defendant attorneys replaced the class representative with new class representatives and threatened to file a lawsuit if the plaintiff attorney contacted the new representatives. (*Ibid.*) The *Barnes* court found the public policy objectives of rule 2-200 were circumvented "when one attorney refuses to comply with the rules' disclosure and consent requirements and inequitably blocks the other attorney from doing so. In such a case, the offending attorney is equitably estopped from wielding rule 2-200 as a sword to obtain unjust enrichment. Defendants assert 'there is no "bad guy" exception to' rule 2-200. Under the unique circumstances presented by this case, defendants are wrong." (*Barnes, supra,* at p. 186.)

In this case, the trial court found Ottosi did not prevent McNulty from obtaining written consent to fee-splitting from the clients in dispute. This finding is supported by substantial evidence. McNulty had the initial contact with all of the clients at issue. He had an opportunity to obtain written consent to the fee-splitting agreement from each client. He was not prevented from obtaining written consent from Ramos or Lara. There was no evidence that he ever even asked Ramos or Lara for written consent to his fee-splitting agreement with Ottosi. Instead, the evidence showed that he did not believe he needed to obtain written consent from clients, such as Ramos, with whom he had written retainer agreements. McNulty had ample opportunity to fulfill his professional responsibility to his clients by obtaining written consent to fee-splitting with Ottosi. Ottosi had no obligation to notify McNulty that this duty existed. After Ramos's case

settled, Ramos told McNulty that Ottosi was her attorney. The trial court did not find McNulty's testimony about their conversation to be the equivalent of Ottosi having prevented McNulty from obtaining Ramos's consent to fee-splitting. The trial court's finding that Ottosi did not prevent McNulty from obtaining written consent to fee-splitting from clients was supported by substantial evidence.

McNulty argues that it was Ottosi's responsibility to obtain written consent from the clients because he was the "outside attorney" brought in to the case for his special expertise, but this is incorrect. Each of the attorneys had a professional responsibility to obtain the client's written consent to fee-splitting, and their fee-splitting agreement is not enforceable without the client's written consent. As stated above, even when one attorney promises to obtain written consent to a fee-splitting agreement from a client and fails to do so, the fee-splitting agreement is not enforceable by either attorney.

McNulty argues for the first time on appeal that he and Ottosi had a de facto partnership. "An appellate court ordinarily will not consider arguments made for the first time on appeal. [Citations.] 'The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that "contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial." [Citation.]' [Citation.] This rule does not apply, however, if the new argument raises a pure issue of law on undisputed facts. [Citations.] On appeal, a party may raise a new issue of law based on undisputed facts [citation] and may even 'change the legal theory he relied upon at trial, so long as the new theory presents a question of law to be applied to undisputed facts in the record' [citation]." (*C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1491-1492.) Whether McNulty and Ottosi's agreement constituted a de facto partnership is not merely a question of law, and therefore, cannot be raised for the first time on appeal.

McNulty also raises the issue of quantum meruit recovery for the first time on appeal. McNulty did not argue in the trial court that he was entitled to recover fees on a quantum meruit basis, even if the fee-splitting agreement and the retainer agreements

were not enforceable. McNulty's complaint did not contain a cause of action for quantum meruit, and there was no evidence presented at trial of the value of McNulty's services in connection with any of the lawsuits on which he did not recover fees. McNulty's entitlement to fees in quantum meruit cannot be raised for the first time on appeal.

There was no evidence of damages that McNulty suffered in connection with any cause of action other than the amounts required under the fee-splitting agreement. The trial court did not prevent McNulty from presenting his case. McNulty made no offer of proof as to any additional evidence that he wished to present or any argument that he was not allowed to make. In the absence of written consent to fee-splitting from his clients, McNulty could not recover the amount due from the fee-splitting agreement through any cause of action, and he did not present evidence of any other amount he was entitled to recover in connection with any cause of action. The trial court properly found in favor of Ottosi on the causes of action in the complaint other than slander.

Agreement between McNulty and Ramos

McNulty contends his retainer agreement with Ramos is enforceable. However, the trial court found the agreement was superseded by Ramos's agreement with Ottosi. McNulty introduced Ramos to Ottosi and told her that Ottosi would be handling her case. She believed Ottosi was her attorney from that point forward. She entered into a written retainer agreement with Ottosi. The date on the agreement with Ottosi was incorrect, as acknowledged by all parties involved, but they testified that it reflected their financial agreement. McNulty did not perform any work on the case after introducing Ramos to Ottosi. The trial court's findings were supported by substantial evidence.

Malice

McNulty contends the trial court applied the wrong standard to determine whether

Ottosi's statement constituted malice. We disagree.

Under Evidence Code section 664, we begin with the presumption that the court has properly performed its judicial duty. (Evid. Code, § 664; *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) We presume that the trial court "[knew] and [applied] the correct statutory and case law [citation] . . . ." (*People v. Coddington, supra,* at p. 644.) In addition, we presume that the trial court applied the proper burden of proof in resolving a case tried to the court. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914.)

In this case, the trial court actually read into the record the definitions of malice and oppression from CACI No. 3940. McNulty has not shown that the court interpreted "malice" as requiring an intent to harm. The court simply noted, in determining that malice had not been shown, that there was no intent to cause injury. The court applied the correct law in determining that Ottosi's statement did not rise to the level of malice, oppression or fraud required for punitive damages. We gave the trustee permission to file a supplemental letter brief contending that the plaintiff is barred from recovering punitive damages from a decedent's successor in interest. In light of our decision to affirm the trial court's ruling denying punitive damages, we need not address the trustee's contention.

Costs

McNulty contends the trial court abused its discretion by declining to award costs in this case. The order denying costs is not properly before us, and the record is inadequate for appellate review in any event.

When a plaintiff files an unlimited civil action but recovers a judgment within the jurisdictional limit for a limited civil or small claims action, the trial court has discretion to deny costs to the plaintiff. (§ 1033, subds. (a), (b); *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 983.) "We review the trial court's denial of costs under Code of

Civil Procedure section 1033, subdivision (a) for abuse of discretion." (*Steele v. Jensen Instrument Co.* (1997) 59 Cal.App.4th 326, 331.)

We have no jurisdiction to review the court's order granting the motion to tax costs in this case, however, because McNulty's May 18, 2015 notice of appeal does not expressly or by implication appeal from the order on costs rendered on June 18, 2015. A discretionary cost award is a separately appealable order; it is not reviewable on an appeal from the judgment. (*Fish v. Guevara* (1993) 12 Cal.App.4th 142, 147-148.)

Even if we found that the ruling on costs was properly appealed, the record is insufficient to demonstrate reversible error. The record on appeal does not include a reporter's transcript of the hearing on the motion to tax costs or a suitable substitute such as a settled statement under California Rules of Court, rules 8.137.

Appellate courts often refuse to reach the merits of a claim on appeal if there is no reporter's transcript or suitable substitute for the relevant proceeding, because the trial court's order is presumed to be correct and prejudicial error must be affirmatively shown by the appellant. (*Foust v. San Jose Const. Co., Inc.* (2011) 198 Cal.App.4th 181, 186.) We make all presumptions in favor of the trial court's action unless the appellant demonstrates a contrary showing in the record. (*Id*. at p. 187.) The record is inadequate to review the trial court's exercise of its discretion without a reporter's transcript of the hearing on the motion to tax costs. (See, e.g., *Great Western Bank v. Converse Consultants, Inc.* (1997) 58 Cal.App.4th 609, 615.) We presume any matters that could have been presented to the trial court to authorize the order were presented. (*Foust v. San Jose Const. Co., Inc., supra*, at p. 187.) McNulty has not demonstrated an abuse of discretion in the ruling on costs, because the appellate record does not include a reporter's transcript or suitable substitute for the hearing on Ottosi's motion to tax costs.

DISPOSITION

The judgment is affirmed. Respondent Linda Golla Ottosi is awarded her costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAPHAEL, J.*

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