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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AMAN CHAUDHARY,

Plaintiff and Respondent,

v.

HOWARD BARTNOF,

Defendant and Appellant.

B265371

(Los Angeles County
Super. Ct. No. BC427084)

Appeal from a judgment of the Superior Court of Los Angeles County,
Suzanne G. Bruguera, Judge. Affirmed.

Kosnett Law Firm and Louis V. Kosnett, for Defendant and Appellant.
Kull and Hall and Kevin P. Hall for Plaintiff and Respondent.

Aman Chaudhary filed a legal malpractice action against Howard Bartnof. On the morning of trial, Bartnof, who was representing himself, requested a continuance. Chaudhary opposed the request, which the court denied. Bartnof declined to participate in the ensuing bench trial. After hearing Chaudhary's evidence, the court entered a judgment in his favor. Bartnof now appeals the judgment, arguing that the trial court abused its discretion when it denied his request for a continuance. We affirm.

FACTUAL BACKGROUND

A. Background Facts

On December 1, 2009, plaintiff Aman Chaudhary filed a legal malpractice action alleging that Howard Bartnof provided negligent advice to Chaudhary's father regarding the amendment of a family trust. The complaint alleged, in relevant part, that: (1) Chaudhary was the sole beneficiary of the family trust; (2) "As the lawyer[] . . . to [Chaudhary's father], [Bartnof] owed [a] dut[y] of care to [Chaudhary]"; (3) Bartnof had negligently advised Chaudhary's father with respect to various aspects of the trust; and (4) as the result of this negligent advice, Chaudhary had been forced to surrender real property to a third-party.

In May of 2011, the trial court granted Bartnof's motion for summary judgment, concluding that the defendant did not owe a duty of care to Chaudhary. We reversed the judgment, and remanded for further proceedings. (See *Chaudhary v. Bartnof* (May 22, 2013, B236833) [nonpub. opn.]¹) Several months later, the trial court issued a minute order scheduling the final status conference and the trial for December 1, 2014. The court later continued those dates until February 2, 2015.

During the February status conference, at which Bartnof represented himself, the parties informed the court they were interested in pursuing a

¹ Our prior decision contains a more detailed factual summary regarding the terms of the family trust, and the conduct underlying Chaudhary's malpractice claim. Those additional facts are not relevant to any of the issues raised in this appeal, which relate solely to whether the trial court abused its discretion in denying Bartnof's oral motion to continue the trial.

mediation. The court ordered the parties to schedule a mediation, and continued the final status conference until May 5, 2015, and the trial until May 11, 2015. Following the status conference, plaintiff's counsel served Bartnof a notice advising him of the new dates.

Bartnof failed to appear at the May 5th final status conference. Plaintiff's counsel informed the court that despite its prior order, Bartnof had refused to schedule a mediation. The trial court issued a minute order confirming that Bartnof had failed to appear at the final status conference, and setting a hearing on an order to show cause (OSC) "as to why [defendant's] answer should not be stricken and why [he] should not pay \$500 as attorneys fees to plaintiff and \$500 to the court." The court scheduled the OSC for May 11, 2015, the same date the trial was scheduled to begin. Plaintiff's counsel served Bartnof with a notice advising him of the date and time of the OSC.

On May 11, Bartnof appeared in court, again acting as his own counsel. When the trial court asked Bartnof why he had failed to attend the May 5th final status conference, he asserted that he was "never given any notice," continuing: "And we were supposed to go to mediation and [plaintiff's counsel] called me a few weeks ago to tell me that the clerk had sent him some kind of notice that the judge who was supposedly going to hear the matter, was retired . . ." The trial court then asked Bartnof whether he had spoken to plaintiff's counsel about scheduling a mediation. Bartnof responded: "He called, and I don't know the form, and he hung up, and I tried calling the clerk and I finally got a hold of the clerk three days later and she explained to me what happened, and I happened to be here in the building the next day and I picked up the form, so I haven't heard anything from [plaintiff's counsel]. And to be quite honest with you your honor, I do tax returns, I have tax season, my mother has senile dementia, and my brother passed away from brain cancer." The court asked Bartnof again whether he had ever tried to schedule a mediation with plaintiff's counsel. Bartnof maintained that he "never heard from [counsel]."

The court then asked plaintiff's counsel whether he could "recall contacting [Bartnof] regarding the settlement process that [the court had] ordered." Counsel asserted that when he initially contacted Bartnof to

discuss mediation dates, Bartnof told him: “It is taxes, I’m too busy, I’m not giving you anything until after April 15th.” Counsel explained that he contacted Bartnof again after April 15, 2015, and that Bartnof again refused to discuss mediation dates.

The court informed the parties it would “come back” to the OSC, explaining that it needed “to begin the process of picking our jury.” Plaintiff’s counsel informed the court that Chaudhary was “prepared to waive the jury,” and proceed by way of a bench trial. When asked whether he preferred a jury or bench trial, Bartnof stated: “Your honor, with all due respect, I’m not only shocked, I’m worn out.” The court told Bartnof it did not understand his comments. In response, Bartnof said he believed the trial court had correctly decided his motion for summary judgment, and that the case should be over. The trial court explained that its “decision was reversed” on appeal, and again asked Bartnof whether he wanted a jury trial. Bartnof eventually waived his right to a jury. The trial court then directed the parties to exchange exhibit lists, and notified them the trial would begin that morning.

At that point, Bartnof requested a “continuance,” stating: “This was originally supposed to go for mediation [¶] . . . [¶] I thought we were supposed to go through that first.” In response, the court explained: “Yes, and . . . my understanding is that [plaintiff’s counsel] attempted to do that and it was not successful, partly because there were no dates that were provided from your office[.] [S]o are you [now] . . . interested. . . in trying to settle this matter today?” Bartnof said he was not prepared to settle the matter.

The court told the parties it would begin hearing the case that afternoon, and asked Bartnof whether he intended to call any witnesses. Bartnof responded: “Your honor, I cannot have a trial now. I cannot go through a trial. I cannot do a trial. I have nothing here. I have to get an attorney. I was going to go down to set up a mediation date. . . . [¶] . . . [¶] I can’t, your honor. I can’t. I absolutely can’t. [¶] . . . [¶] Your honor, I have nobody here, I have nobody to call. [¶] . . . [¶] I am asking for a continuance so we can take care of this is in proper order.” The court told Bartnof it intended to deny the request unless the plaintiff was willing to stipulate to a continuance. Plaintiff’s counsel declined, noting that his client was “definitely opposed” to a continuance. The court confirmed it would begin

hearing the case after lunch. Bartnof, however, informed the court he might not return to the courtroom after the lunch recess. In response, the court told him the trial would begin regardless of whether he was present.

After the lunch recess, Bartnof returned to the courtroom, and immediately renewed his request for a continuance. The court noted that it had already denied his request, and asked plaintiff's counsel to begin his opening statement. At that point, Bartnof walked to the back of the courtroom, sat down and refused to participate in the trial. The court announced that it intended to proceed with the trial in Bartnof's absence. After hearing Chaudhary's evidence, the court entered a judgment in plaintiff's favor, awarding him approximately \$350,000.00 in damages.

DISCUSSION

Bartnof raises a single issue in this appeal, arguing that the trial court abused its discretion "by not granting [his] oral motion for a continuance necessitated by the untimely death of [his] brother."

A. Summary of Applicable Law and Standard of Review

"The decision to grant or deny a continuance is committed to the sound discretion of the trial court. [Citation.] . . . Trial continuances are disfavored and may be granted only on an affirmative showing of good cause." (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1126 (*Thurman*); California Rules of Court, rule 3.1332(c).) The procedures for seeking a trial continuance are set forth in California Rules of Court, rule 3.1332, which provides in relevant part: (a) . . . [¶] To ensure the prompt disposition of civil cases, the dates assigned for a trial are firm. All parties and their counsel must regard the date set for trial as certain. [¶] (b) . . . [¶] A party seeking a continuance of the date set for trial, whether contested or uncontested . . ., must make the request for a continuance by a noticed motion or an ex parte application . . ., with supporting declarations. The party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered." California Rules of Court, rule 3.1332(c) lists seven different "[c]ircumstances that may

indicate good cause,”² and (d) lists numerous additional factors the court may consider in assessing whether to grant a continuance.³

A trial court’s decision to grant or deny a continuance will not be disturbed on appeal except upon a clear showing of an abuse of discretion. (See *Thurman*, *supra*, 203 Cal.App.4th at p. 1126; *Lazarus v. Titmus* (1998) 64 Cal.App.4th 1242, 1249; *Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 448 [“The granting or denying of a continuance is a matter within the court’s discretion, which cannot be disturbed ‘on appeal except upon a clear showing of an abuse of discretion’”].) An abuse of discretion occurs “where, considering all the relevant circumstances, the court has exceeded the bounds of reason or it can fairly be said that no judge would

² The factors listed in California Rules of Court, rule 3.1332(c) include: “(1) The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances; [¶] (2) The unavailability of a party because of death, illness, or other excusable circumstances; [¶] (3) The unavailability of trial counsel because of death, illness, or other excusable circumstances; [¶] (4) The substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice; [¶] (5) The addition of a new party . . . ; [¶] (6) A party’s excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts; or [¶] (7) A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial.”

³ The factors listed in California Rules of Court, rule 3.133(d) include: “(1) The proximity of the trial date; [¶] (2) Whether there was any previous continuance, extension of time, or delay of trial due to any party; [¶] (3) The length of the continuance requested; [¶] (4) The availability of alternative means to address the problem that gave rise to the motion or application for a continuance; [¶] (5) The prejudice that parties or witnesses will suffer as a result of the continuance; [¶] (6) If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay; [¶] (7) The court’s calendar and the impact of granting a continuance on other pending trials; [¶] (8) Whether trial counsel is engaged in another trial; [¶] (9) Whether all parties have stipulated to a continuance; [¶] (10) Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and [¶] (11) Any other fact or circumstance relevant to the fair determination of the motion or application.”

reasonably make the same order under the same circumstances.” (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 7.)

As with an appeal from any judgment, three “fundamental principles” guide our 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.” (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.)

B. Bartnof Has Failed to Establish the Trial Court Abused its Discretion When it Denied his Request for a Continuance

Bartnof argues that the trial court was required to continue the trial based on the fact that Bartnof’s brother had recently died. Specifically, Bartnof argues: “In a proper case a continuance should be granted because of the illness of a party [citations], or of a member of his family. [Citations.] Tragically, on April 12, 2015, Appellant’s brother passed away, leaving Appellant primarily responsible for all funeral arrangements. The grief and anguish that Appellant was feeling was indescribable, and overwhelming. Appellant could barely compose himself sufficiently to perform routine day-to-day activities, let alone prepare for trial in which he was acting as his own counsel. [¶] Appellant made every effort to inform the Trial Court that he was unable to proceed [T]he death of Appellant’s brother, which demonstrably disturbed and dejected Appellant to the point where he was unable to proceed with trial, should at least have been sufficient cause to grant Appellant a short continuance. The trial court’s failure to do so was therefore an abuse of its discretion, and resulted in extreme and unfair prejudice to Appellant, namely, the rendering of a judgment in the amount of \$351,332.60.”

It is true that “[t]he illness of a party or of a member of his family” may provide a proper basis for granting a continuance of a trial. (*Kalmus v. Kalmus* (1951) 103 Cal.App.2d 405, 413, disapproved on other grounds by *Hudson v. Hudson* (1959) 52 Cal.2d 735; see also Cal. Rules of Court, rule 3.1332(c)(1)-(3).) In this case, however, it is clear that the trial court did not abuse its discretion in declining to grant a continuance based on the death of Bartnof’s brother because, contrary to the assertions in his brief, Bartnof

never requested a continuance on that basis. The hearing transcript shows that Bartnof only referred to his brother's death once, which occurred while responding to questions about whether he had provided opposing counsel any dates for a mediation: "I haven't heard anything from [plaintiff's counsel.] And to be quite honest with you, your honor, I do tax returns, I have tax season, my mother has senile dementia, and my brother passed away from brain cancer." At the time Bartnof made these statements, he had not yet raised the issue of a continuance.

Bartnof's initial request for a continuance occurs five pages later in the transcript, immediately after the court had informed the parties it intended to begin the trial that day. Upon receiving this information, Bartnof made an oral motion for a continuance to allow the parties to pursue a mediation. He did not mention his brother's death. Later in the hearing, Bartnof renewed his request for a continuance, explaining that none of his witnesses were present, that he needed to "get an attorney" and that he thought the parties should participate in a mediation before the trial began. Again, Bartnof made no reference to his brother's death. The foregoing portions of the transcript conclusively demonstrate that Bartnof never requested a continuance based on his brother's death.⁴ The trial court did not abuse its discretion by declining to grant a continuance for a reason that was never presented to it.⁵

⁴ Nor does the record support Bartnof's suggestion that he requested only "a short continuance." The hearing transcript shows that Bartnof never specified the length of the continuance he was seeking. However, based on the reasons he gave for the continuance, which included scheduling a mediation and obtaining a lawyer, it can be reasonably inferred he was seeking more than a brief continuance.

⁵ Even if Bartnof had raised his brother's death as a basis for a continuance, the trial court would have been justified in denying the request. Under the California Rules of Court, a party seeking a continuance of the trial must: (1) make the request by a noticed motion or an ex parte application; (2) provide "supporting declarations"; and (3) make the motion or application "as soon as reasonably practical once the necessity for the continuance is discovered." (See Cal. Rules of Court, rule 3.1332(b).) Bartnof failed to comply with any of those requirements. First, he did not file a

Moreover, Bartnof has not argued that the court abused its discretion in denying a continuance for any of the three reasons the defendant did identify at the hearing, namely: (1) to allow him additional time to pursue a mediation; (2) to obtain a lawyer; and (3) to secure the attendance of witnesses. “It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness.’ [Citation.]” (*Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 204.) In the absence of any argument to the contrary, we must presume the trial court was justified in denying a continuance for any of these three reasons.

DISPOSITION

The judgment is affirmed. The respondent shall cover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.

noticed motion or an ex parte application. Instead, he made an oral request for a continuance on the morning of trial. Second, he did not provide a declaration or any other evidence in support of his request. Third, it does not appear he made his motion for a continuance as soon as “reasonably practical.” His opening brief states that his brother died on April 15, 2015, almost a month before Bartnof made his oral motion for a continuance. Given the amount of time he waited to request the continuance, and his failure to provide any evidence in support thereof, the trial court would have been justified in denying the request. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823 [trial court did not abuse discretion where evidence showed that party “had known for over a month that she might not have an attorney at the hearing but had waited until the day of the hearing to request the continuance”].)