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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KINKLE RODIGER & SPRIGGS, P.C.,

Plaintiff and Respondent,

v.

SAM SABER,

Defendant and Appellant.

B259758

(Los Angeles County
Super. Ct. No. BC485948)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Sam Saber, in pro. per., for Defendant and Appellant.

Pyka Lenhardt Schnaider Zell, Guillermo W. Schnaider and Francois Auroux for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Sam Saber, appeals from a judgment following an uncontested bench trial. Plaintiff, Kinkle Rodiger & Spriggs, P.C., a law firm, sued defendant for unpaid attorney's fees. Defendant represented himself in propria persona for a majority of the litigation. Defendant subsequently retained an attorney, Sandra L. Bauer, to represent him about two and one-half months prior to the scheduled trial date. Three days prior to trial, Ms. Bauer filed an ex parte application to be relieved as his counsel. Ms. Bauer related that she could not continue to ethically represent him under the Rules of Professional Conduct. On the day of trial, defendant did not appear but sent a "limited appearance attorney," Johanna Hansen, to appear on his behalf. Ms. Hansen was not authorized to represent him during trial. Following an in camera discussion with Ms. Bauer, the trial court granted her ex parte application to be relieved as counsel. The trial court denied Ms. Hansen's oral motion to continue trial. After the bench trial at which plaintiff presented evidence, the trial court found in its favor. Defendant's subsequent new trial motion was denied. Defendant contends: plaintiff lacked standing to bring its lawsuit against him; he should receive a new trial because the trial court erred by permitting Ms. Bauer to withdraw the day of trial; and the trial court erred by not continuing the trial. We affirm the judgment.

II. BACKGROUND

A. Plaintiff's Complaint

On June 6, 2012, plaintiff filed a complaint against defendant for contract breach and quantum meruit. Plaintiff alleges the following. On June 28, 2004, defendant retained plaintiff to perform legal services regarding an action entitled *Saber v. Delta Home Loans*. While the first lawsuit was being litigated, defendant retained plaintiff to

perform legal services in an action entitled *Saber v. Saber*. Plaintiff represented defendant in the underlying two lawsuits until November 19, 2010.

Defendant made monthly payments of portions of his outstanding bills through August 2010. Defendant agreed to an hourly \$150 rate as well as reimbursement of costs advanced by plaintiff. They orally modified the contract terms to reduce the hourly rate for associate attorney work and increase the: overall scope of the legal representation; amount of work to be performed; and authorized attorney's fees. On November 19, 2010, plaintiff sent defendant a final bill of \$46,811.09 owed for the *Saber v. Delta Home Loans* lawsuit and \$17,597.51 owed the for *Saber v. Saber* litigation. Defendant made no further payments. Plaintiff fully performed its contractual obligations. Defendant contractually breached by failing to pay for the legal services performed.

On December 20, 2011, plaintiff sent defendant a notice demanding payment and informed him of his Business and Professions Code section 6200 rights to arbitrate their fee dispute. Defendant did not file an application for arbitration or otherwise respond to plaintiff's December 20, 2011 notice. On January 20, 2012, plaintiff sent defendant another letter indicating its willingness to submit to voluntary arbitration if he agreed to do so within 10 days. Defendant again failed to respond. Plaintiff's complaint seeks contractual breach and quantum meruit damages in the amount of \$64,408.60, pre- and post-judgment interest and costs of suit.

B. Discovery and Admissions Requests

On April 24, 2013, plaintiff served defendant 23 admissions requests. The admission requests include the following: "18. Admit that you owe a total of \$64,408.60 for legal services and legal costs in the matters of *Saber v. Saber* and *Saber v. Delta Home Loans*. [¶] 19. Admit that \$64,408.60 for legal services and legal costs in the matters of *Saber v. Saber* and *Saber v. Delta Home Loans* is fair and reasonable. . . . [¶] . . . [¶] 23. Admit that you owe [plaintiff] 10% per annum of \$64,408.60 for non-payment of legal fees and legal costs [plaintiff] performed in *Saber v. Saber* and *Saber v.*

Delta Home Loans, beginning on December 20, 2011, the date that [plaintiff] sent its second letter demanding payment on its final balance.” During a July 8, 2013 case management conference, jury trial in this matter was set for July 14, 2014. Defendant telephonically appeared in propria persona at the case management conference where the trial date was selected.

On September 12, 2013, plaintiff moved for an order establishing the admissions requests deemed admitted. Plaintiff’s counsel submitted a declaration stating he had served defendant with the admissions requests and defendant did not serve a timely response. On January 30, 2014, following a hearing, the trial court ordered the 23 admissions requests propounded on April 24, 2013, deemed admitted by defendant.

C. Ms. Baurer’s Ex Parte Application to Be Relieved As Counsel

On July 11, 2014, Ms. Bauer filed an ex parte application for an order shortening time for hearing on her motion to be relieved as counsel. Ms. Bauer asserted she and defendant had a “complete and utter breakdown in attorney-client communication” and relationship. Ms. Bauer contended there was good cause to grant her relief under Rules of Professional Conduct, rules 3-700(B) and 3-700(C). Ms. Bauer declared the circumstances were so serious it was ethically impossible for her to continue representing defendant. Ms. Bauer requested as relief an order shortening the time for hearing and alternatively granting the underlying application immediately or anytime thereafter. Ms. Bauer declared she notified defendant on July 10, 2014, at 2:30 p.m. via telephone of her intent to file this ex parte application. Defendant was also notified via e-mail. To protect the attorney-client privilege, Ms. Bauer did not disclose the exact nature of the circumstances requiring her to be relieved as counsel in her declaration. However, she declared she would provide additional information to the court in an in camera setting. Plaintiff’s counsel was aware of and did not oppose Ms. Bauer’s ex parte application. However, plaintiff’s counsel wanted to maintain the July 14, 2014 trial date.

D. Ex Parte Application Hearing and Trial

On July 14, 2014, the trial court heard Ms. Bauer's ex parte application for an order shortening time for hearing on her motion to be relieved as counsel. Ms. Bauer had first appeared in this case on April 28, 2014, when she filed a substitution of attorney. The trial court stated to Ms. Bauer that it was very difficult to relieve her as counsel on the day of trial. Ms. Bauer stated if she was relieved as counsel, defendant had indicated he would represent himself in what is a simple matter. Ms. Bauer reiterated she could not ethically represent defendant.

Ms. Bauer disclosed to the trial court in camera her reasons for seeking to be relieved as counsel. No court reporter was present at the in camera hearing. Defendant has made no effort to secure a settled statement of what occurred during the in camera hearing. Following the in camera session, the trial court in open court found grounds to grant Ms. Bauer's request. Ms. Bauer stated she had notified defendant of this issue via e-mail as well as telephone. Ms. Bauer had given the portions of the case file in her possession to defendant on July 11, 2014. Ms. Bauer stated she found out defendant had never given her the complete case file. She never saw a complete set of the relevant documents. Ms. Bauer only became aware of the problem arising from defendant's failure to provide her with the entirety of the relevant documents after speaking with opposing counsel.

Ms. Hansen purported to appear specially for defendant during the hearing to oppose Ms. Bauer's ex parte application and alternatively to move for continuance of trial. Defendant was not present. Ms. Hansen acknowledged receipt of a service copy of Ms. Bauer's ex parte application to be relieved as counsel. Ms. Hansen was not prepared for or authorized to proceed to trial. The trial court stated no trial continuance would be granted unless Ms. Hansen agreed to substitute as counsel of record. Ms. Hansen stated she would attempt to contact defendant by telephone to see what he wanted her to do. A recess was taken for 10 minutes in order for Ms. Hansen to contact defendant. Ms. Hansen was unsuccessful in contacting defendant. The trial court stated its belief that

this was a delaying tactic by defendant to avoid commencing the trial. The trial court noted defendant knew of the trial date. The trial court filed the order granting Ms. Bauer's ex parte application on July 14, 2014.

At the July 14, 2014 trial, plaintiff submitted as evidence the deemed admitted admissions requests. Guillermo Schnaider also testified as a witness. He was formerly plaintiff's managing partner. Mr. Schnaider testified Dan Alderman was the principal attorney representing defendant in both cases. Mr. Schnaider testified defendant paid plaintiff some but not all of the fees owed. Mr. Schnaider authenticated several bookkeeping documents kept by plaintiff regarding defendant's unpaid bills. At the conclusion of testimony, the trial court found in plaintiff's favor in the amount of \$64,408.60, plus 10 percent prejudgment interest from December 20, 2011. Prejudgment interest was calculated at \$16,533.69. Judgment was entered on July 29, 2014.

E. Defendant's Disqualification and New Trial Motions

On August 5, 2014, defendant moved to disqualify the trial court. On August 7, 2014, the trial court issued an order striking the statement of disqualification as being untimely and disclosing no legal grounds for disqualification. (Code Civ. Proc., § 170.4, subd. (b).) On August 29, 2014, defendant moved for a new trial. Defendant asserted: the trial court abused its discretion by permitting Ms. Bauer's withdrawal as counsel on the day of trial; the trial court abused its discretion by conducting trial immediately after granting Ms. Bauer's ex parte application and not granting a continuance; he was unable to appear in court because of a second degree burn he suffered to his foot on July 9, 2014; he was having trouble sleeping on July 13, 2014, and took a double dose of sleeping medication; consequently, he was not in a condition to travel or be in court on July 14, 2014. Defendant also declared, "I was able to see a doctor about my condition on July 19."

On September 29, 2014, defendant's new trial motion was denied. The trial court found: defendant had been well aware of Ms. Bauer's ex parte application to be relieved

as counsel prior to trial; and defendant could have guarded against this state of affairs by the exercise of ordinary prudence. Finally, the trial court ruled that defendant had failed to demonstrate prejudice and identify what evidence, if presented at trial, would have led to a more favorable result.

III. DISCUSSION

A. Plaintiff's Standing

Defendant contends plaintiff lacked standing to bring its complaint. Defendant relies on several documents he asked us to judicially notice, such as articles of incorporation and Secretary of State filings. None of these documents were presented in the trial court. Therefore, we denied defendant's judicial notice motion. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2; *Department of Industrial Relations v. Davis Moreno Construction, Inc.* (2011) 193 Cal.App.4th. 560, 573-574, fn. 2.) Defendant's standing argument relies primarily on documents which are not properly before us. Accordingly, defendant's standing argument is without merit because it has no evidentiary support.

B. The Trial Court Did Not Abuse Its Discretion by Granting Ms. Bauer's Ex Parte Application

Defendant argues the trial court erred by granting Ms. Bauer's ex parte application to be relieved as counsel on the day of trial. Defendant contends: he received no notice of the withdrawal request as required by Code of Civil Procedure section 284; he received no service of the ex parte application; the declaration accompanying Ms. Bauer's ex parte application was defective under Code of Civil Procedure section 2015.5 as it was not dated; the declaration did not comply with California Rules of Court, rule 3.1204(b)(1); Ms. Bauer's ex parte application did not make the requisite showing of

irreparable harm for granting relief ex parte as required by California Rules of Court, rule 3.1302(c); and the trial court did not make a record of the in camera hearing and thus denied defendant an opportunity to provide an adequate record on appeal. We review the ruling on a motion to be relieved as counsel for an abuse of discretion. (*Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1133; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340.) We review the trial court’s factual findings for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

We first address defendant’s notice arguments. California Rules of Court, rule 3.1362(d) governs motions to be relieved as counsel: “The notice of motion and motion, the declaration, and the proposed order must be served on the client and on all other parties who have appeared in the case. The notice may be by personal service or mail.” The trial court’s order made a specific finding as to service of the ex parte application on defendant. Substantial evidence supports the trial court’s finding of proper service. Here, Ms. Bauer declared on July 11, 2014, she would hand deliver a copy of the ex parte application to defendant. She also declared she had notified him by e-mail and telephone on July 10, 2014. These events occurred prior to the July 14, 2014 hearing on the ex parte motion. On July 14, 2014, Ms. Hansen had possession of Ms. Bauer’s ex parte motion.

We next address defendant’s arguments that Ms. Bauer’s declaration in support of her ex parte application was deficient because it was undated. Code of Civil Procedure section 2015.5 requires declarations under penalty of perjury to include the date of execution. California Rules of Court, rule 3.1204(b)(1), which concerns ex parte applications, provides in pertinent part: “An ex parte application must be accompanied by a declaration regarding notice stating: [¶] (1) The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected” California Rules of Court, rule 3.1202(c) provides, “An applicant must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate

danger, or any other statutory basis for granting relief ex parte.” Defendant’s arguments have no merit. Ms. Bauer’s declaration incorporated the motion and memorandum of points and authorities in support of her ex parte application, which was dated July 11, 2014. The ex parte motion is dated July 11, 2014. The points and authorities are dated July 11, 2014. The motion and points and authorities are immediately followed by Ms. Bauer’s declaration. Ms. Bauer’s declaration indicates that the “foregoing is true and correct” which includes the date on the motion and the points and authorities. This satisfies the Code of Civil Procedure section 2105.5 execution date requirement.

Additionally, defendant contends he did not receive proper notice. But Ms. Bauer declared she notified defendant by phone of her intent to move for an order shortening the time to be relieved as his counsel on the day of trial. This satisfies the notice requirement under California Rules of Court, rule 3.1204(b)(1). Further, defendant contends no irreparable harm was present. But Ms. Bauer declared she could not continue to ethically represent defendant and was required to withdraw as counsel under the Rules of Professional Conduct. This satisfies the California Rules of Court, rule 3.1202(c) irreparable harm requirement.

Defendant asserts he was denied the opportunity to produce an adequate record for review as to what occurred during the in camera hearing. Defendant reasons the trial court did not have the court reporter present during the in camera hearing. California Rules of Court, rule 2.585(a) provides, “If a confidential in-camera proceeding is held in which a party is excluded from being represented, the clerk must include in the minutes the nature of the hearing and only such references to writings or witnesses as will not disclose privileged information.” The clerk’s minutes state the trial court conducted a chambers conference with Ms. Bauer regarding her ex parte application to be relieved as counsel. The minutes further state the trial court found grounds for immediate relief. There is no constitutional, statutory or rule promulgated requirement that a court reporter in a civil case be present during in camera proceedings. Finally, defendant made no effort to secure a settled statement as to what occurred during the in camera hearing.

None of defendant's contentions based upon the trial court's failure to provide an adequate record of what occurred during the in camera hearing have merit.

Even if the trial court erred by not having a court reporter present, defendant has failed to demonstrate there is a reasonable probability of a different result had one been present. (*Cassim v. Allstate Insurance Co.* (2004) 33 Cal.4th 780, 800; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) Substantial evidence supported the trial court's finding that grounds existed for Ms. Bauer to withdraw as counsel. As noted, Ms. Bauer declared under penalty of perjury she could not ethically represent defendant pursuant to the Rules of Professional Conduct. Defendant has not demonstrated the trial court would have reached a more favorable result even if a court reporter was present in camera. No abuse of discretion occurred when the trial court granted Ms. Bauer's ex parte application to be relieved as counsel.

C. The Trial Court Did Not Abuse Its Discretion By Denying Ms. Hansen's Continuance Request

Defendant argues the trial court erroneously denied the continuance request after having relieved Ms. Bauer as his counsel on the day of trial. The grant or denial of a motion to continue is reviewed for an abuse of discretion. (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395; *Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1603.) Our Supreme Court held: "A trial court's exercise of discretion will be upheld if it is based on a 'reasoned judgment' and complies with the '... legal principles and policies appropriate to the particular matter at issue.'" [Citation.] (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 815; *Color-Vue, Inc. v. Abrams*, *supra*, 44 Cal.App.4th at p. 1603.) Defendant asserts the trial court: denied him his constitutional right to counsel at trial; denied him a fair hearing; refused to hear argument on the continuance issue; should have granted a continuance because of his medical condition; and denied his right to testify or present evidence.

California Rules of Court, rule 3.1332(b) governs motions to continue a trial: “A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the request for a continuance by a noticed motion or an ex parte application under the rules in chapter 4 of this division, with supporting declarations. The party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered.” (See *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1126.) No noticed or ex parte motion complying with California Rules of Court, rule 3.1332 was ever filed by Ms. Bauer, Ms. Hansen or defendant. Thus, on this ground alone, the trial court’s refusal to continue trial must be affirmed.

Defendant asserts Ms. Hansen was forbidden from filing a continuance motion. The following exchange occurred regarding a continuance between Ms. Hansen and the trial court: “THE COURT: So, Ms. Hansen, are you substituting in? [¶] MS. HANSEN: No, Your Honor, not at this time. I was not retained to make a general appearance. I was simply retained to protect Mr. Saber’s interest here today, and request a continuance if Ms. Bauer was indeed relieved. [¶] THE COURT: Yeah, well, I’m not giving a continuance. Unless if you’re substituting in, I would give you 24 hours. But if you’re not, I’m not; we’re going to go forward. [¶] I have to say that based on my experiences with Mr. Saber in the past, I have an abiding concern this is a litigation tactic to try to avoid the trial.” The trial court later stated: “I’m not continuing it. I believe this is all a litigation tactic by Mr. Saber to delay this matter for trial. I know that he had notice of the trial dates. And he obviously knew his counsel was going to be removed; that’s why he sent you [Ms. Hansen]. But if you can’t substitute in, we have to go forward.” California Rules of Court, rule 3.1332(c) identifies legitimate grounds for a continuance of a trial: “The court may grant a continuance only on an affirmative showing of good cause requiring the continuance. Circumstances that may indicate good cause include: [¶] . . . [¶] (2) The unavailability of a party because of death, illness, or other excusable circumstances.” (*Thurman v. Bayshore Transit Management, Inc.*, *supra*, 203 Cal.App.4th at p. 1127.) Defendant was purportedly injured on July 9, 2014, when

he burned his foot. However, on July 14, 2014, Ms. Hansen's only argument for a continuance was premised on Ms. Bauer's withdrawal as counsel on the day of trial. Defendant made no mention of his injury until August 5, 2014, in his motion to disqualify the trial court. Also, it was defendant's own reported conduct of taking a "double" dose of sleeping pills that affected his ability to appear at trial. The trial court did not abuse its discretion here by finding defendant did not present good cause for a continuance.

Defendant argues he was denied the right to be represented by counsel at trial. The right to be represented by counsel at a trial is a due process right. (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 925-926; *Mendoza v. Small Claims Court* (1958) 49 Cal.2d 668, 673.) However, defendant fails to demonstrate how he was denied this right. The trial court told Ms. Hansen she could represent defendant during the trial. But Ms. Hansen explained defendant did not authorize her to represent him in that capacity. No right to counsel was denied.

Defendant also asserts it was a structural error for the trial court to deny the trial continuance. Specifically, defendant contends it was structural error for him to be denied the right to present testimony and evidence. However, defendant was not denied those rights. Rather, defendant failed to appear or to send counsel to assert his right to present testimony and evidence at trial. The trial court did not abuse its discretion when it denied the continuance request.

IV. DISPOSITION

The judgment is affirmed. Plaintiff, Kinkle Rodiger & Spriggs, P.C., shall recover its appeal costs from defendant, Sam Saber.

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TURNER, P. J.

We concur:

MOSK, J.

BAKER, J.