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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COUNTY OF LOS ANGELES, Plaintiff and Respondent, v. INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, Defendant and Appellant.	B231395 (Los Angeles County Super. Ct. No. S00J1268)

APPEAL from an order of the Superior Court of Los Angeles County, Karla D. Kerlin, Judge. Affirmed.

E. Alan Nunez, for Defendant and Appellant.

Office of the County Counsel, Ruben Baeza, Jr., Assistant County Counsel and Takin Khorram, Deputy County Counsel for Plaintiff and Respondent.

I. INTRODUCTION

Indiana Lumbermens Mutual Insurance Company ("the surety") appeals from an order denying a motion to vacate a summary judgment entered following a bond forfeiture when defendant, Jose C. Quinones, failed to appear in a criminal matter. The surety asserts the bail bond was void. The surety reasons the bond amount as calculated by the arresting agency was less than that set at the arraignment. Thus, when defendant failed to appear, the surety asserts the bond was void in light of the more serious charges appearing in the complaint. We disagree and affirm.

II. PROCEDURAL HISTORY

On June 23, 2009, Montana Bail Bonds, Inc. posted a $35,000 bond (U550-780573) for defendant's release. The bond provides in part: "Now, the INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY . . . hereby undertakes that the above named defendant will appear in the above-named court on the date above set forth to answer any charge in any accusatory pleading based upon the acts supporting the complaint filed against him/her and duly authorized amendments thereof, in whatever court it may be prosecuted, and will at all times hold himself/herself amendable to the orders and process of the court, and if convicted, will appear for pronouncement of judgment or grant of probation, or if he/she fails to perform either of these conditions, that the INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY . . . will pay to the people of the State of California, the sum of Thirty-Five Thousand dollars ($35,000)."

When arrested, defendant was charged with carrying a concealed weapon with a prior conviction of crimes against a person, property or involving drugs. (Former Pen. Code,[1] § 12025, subd. (b)(5), currently § 25400, subd. (c)(5).) The presumptive bail

[1] All further statutory references are to the Penal Code unless otherwise indicated.

amount for the charge in the Los Angeles County Superior Court felony bail schedule is $35,000. Defendant posted a $35,000 bond. Defendant was ordered to appear in court on July 16, 2009.

On July 15, 2009, the district attorney filed a felony complaint. The complaint charged defendant with the following crimes: methamphetamine possession while carrying a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)); possession of methamphetamine for sale (Health & Saf. Code, § 11378); possession and purchase for sale of cocaine (Health & Saf. Code, § 11351); and two counts of possession of concealed firearms by a convicted felon. (§ 12021, subd. (a)(1).) The complaint recommended bail be set at $80,000.

On July 16, 2009, defendant failed to appear for his arraignment. No attorney appeared on his behalf according to the clerk's minutes. The clerk's minutes state Commissioner Joel Wallenstein declared the bail forfeited and issued a bench warrant in the amount of $80,000. On July 17, 2009, notice of bail forfeiture was mailed to the surety. Judge Terry A. Bork entered summary judgment against the surety on the forfeited bond on September 8, 2010, plus $330 in costs for a total of $35,330.

On December 1, 2010, the surety moved to: set aside the summary judgment; discharge the forfeiture; exonerate the bond; and return any money and interest paid. The surety argued the bond was exonerated when the forfeiture risk was materially increased by the prosecutor's decision to add charges beyond those contemplated by the arresting agency. The surety further asserted the arresting agency had the duty to set the bail consistent with defendant's four prior "enhancements." (It is unclear what "enhancements" were being referred to by the surety. According to the complaint, defendant had one prior felony conviction for violating Health and Safety Code section 11378 in 2007.) According to the surety, this was because the four "enhancements" substantially increased the bail set by the trial court and ultimately the flight risk. The surety also argued defendant's "four prior enhancements" were not based on the acts specified in the complaint.

The County of Los Angeles (the county) opposed the surety's motion on the grounds neither the law nor the bail bond permitted relief from forfeiture. According to the county: bail was set in accordance with section 1269b, subdivision (c); the bond states the surety agreed to produce defendant to answer for any charges based on the acts supporting the complaint; the surety had a month between the time the bail was posted and the day the criminal complaint was filed to investigate defendant for risk potential including prior convictions; and during that time, the surety could have surrendered defendant pursuant to section 1300.

A minute order dated January 21, 2011 states the "summary judgment of $35,790.27" was paid in full on October 26, 2010. Judge Karla D. Kerlin ordered the motion to set aside the summary judgment off calendar. The surety filed a notice of appeal on March 4, 2011, from Judge Kerlin's refusal to set aside the summary judgment.

III. DISCUSSION

A. The Absence Of A Reporter' Transcript

On June 6, 2011, we directed the parties to address the surety's failure to designate a reporter's transcript or provide a suitable alternative. We raised the issue as to whether the failure to provide a transcript or suitable substitute warrants affirmance based on the inadequacy of the record. The surety chose to proceed without designating a reporter's transcript. Rather, the surety argues the hearing was not reported and the only issues raised in the case were legal and not evidentiary.

A judgment is presumed to be correct and an appellant has a duty to provide the reviewing court with an adequate record to demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494; *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58.) In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute

was provided. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 [transfer order]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [attorney fee motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived and the minor consented to informal adjudication]; *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1672 [transcript of judge's ruling on an instruction request]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [trial transcript when attorney fees sought]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [surcharge hearing]; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [nonsuit motion where trial transcript not provided]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [monetary sanctions hearing]; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532 [reporter's transcript fails to reflect content of special instructions]; *Buckhart v. San Francisco Residential Rent etc. Bd.* (1988) 197 Cal.App.3d 1032, 1036 [hearing on Code Civ. Proc., § 1094.5 petition]; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385-386 [motion to dissolve preliminary injunction hearing]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 713-714 [demurrer hearing]; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71-73 [transcript of argument to the jury]; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 462 [failure to secure reporter's transcript or settled statement as to offers of proof]; *Wetsel v. Garibaldi* (1958) 159 Cal.App.2d 4, 10 [order confirming arbitration award].)

We agree with the county the surety's failure to secure a reporter's transcript or a settled statement requires the order be affirmed. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [lead opn. of George, C.J.]; *Ballard v. Uribe, supra,* 41 Cal.3d at pp. 574-575.) The clerk's minutes state a noticed hearing on the motion to set aside the summary judgment was scheduled for January 21, 2011. According to the minutes, both the surety and the county were represented by counsel. The minutes state the surety paid the total amount on October 26, 2010, and the motion to set aside the summary judgment was ordered off calendar. We have no idea why the motion was

ordered off calendar. And, contrary to the surety's claim, the minutes state a reporter, Grace E. Donester, was present. We presume no error was committed.

B. Whether The Bond Was Void

Based on the present limited record, we cannot find the bond was void. The surety contends the bail contract was rendered "absolutely void" because defendant was released on bail in an amount less than later set by Commissioner Wallenstein. This is because: the surety only undertook to answer for defendant's failure to appear for a complaint charging specific offenses; the arresting agency originally set the bail at $35,000 consistent with the superior court bail schedule (§ 1269b, subds. (c) & (d)); and when the complaint was filed on July 15, 2009, Commissioner Wallenstein set bail at $80,000 as recommended in the complaint.

The surety relies on *County of San Luis Obispo v. Ryal* (1917) 175 Cal. 34, 35-36 and *County of Merced v. Shaffer* (1919) 40 Cal.App. 163, 168, to support contentions the bond was absolutely void. In those cases, the courts held that the contractual language in those particular bonds was defective. That is, the defective language did not obligate those sureties to pay for those defendant's failure to appear. (*County of San Luis Obispo v. Ryal*, *supra*, 175 Cal. at pp 35-36; *County of Merced v. Shaffer*, *supra*, 40 Cal.App. at p. 168.) In addition, *County of Merced v. Shaffer*, *supra*, 40 Cal.App. at page 168 concluded that the bond in that case was "absolutely void" because the amount of the bond exceeded the court order. However, neither *County of San Luis Obispo* nor *County of Merced* requires reversal of the summary judgment in this case.

First, we are unpersuaded the differing bail amounts rendered the bond "absolutely void" based on the discussion in *County of Merced*, *supra*, 40 Cal.App. at page 168. This is because the discussion as to whether that particular bond was "absolutely void" was *dictum*. Further, the appellate court reached its conclusion by relying on out-of-state authorities. (*Ibid*.) In this state, an order requiring increased bail does not automatically discharge a surety from liability. (*People v. Indiana Lumbermens Mut. Ins. Co.* (2012)

202 Cal.App.4th 1541, 1546; *People v. International Fidelity Ins. Co.* (2010) 185 Cal.App.4th 1391, 1398; *People v. Bankers Ins. Co.* (2010) 181 Cal.App.4th 1, 5-6; *National Automobile Ins. Co. v. Superior Court* (1929) 96 Cal.App. 412, 414-415.) Rather, the bond remains in full force and effect until a new bond is supplied. (*National Automobile Ins. Co. v. Superior Court, supra,* 96 Cal.App. at pp. 414-415.) As our Supreme Court explained: "[T]he 'bail bond is a contract between the surety and the government whereby the surety acts as a guarantor of the defendant's appearance in court under the risk of forfeiture of the bond.' [Citation.] Thus, when there is a breach of this contract, the bond should be enforced." (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657-658; accord *People v. Indiana Lumbermens Mutual Ins. Co.* (2010) 49 Cal.4th 301, 313.) The bond remained enforceable.

Second, here (unlike in *County of San Luis Obispo* and *County of Merced*), the bond language expressly obligated the surety to answer for defendant's nonappearance. Here, the bond obligated the surety to answer for defendant for "any charge in any accusatory pleading based upon the acts supporting the complaint filed against him/her . . ." and duly authorized amendments. Section 1459 requires the use of this language.[2] Thus, the surety did not contractually limit its liability to specific charges

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[2] Section 1459 states: "Undertakings of bail filed by admitted surety insurers shall meet all other requirements of law and the obligation of the insurer shall be in the following form except to the extent a different form is otherwise provided by statute: [¶] _____ (stating the title and the location of the court). [¶] Defendant _____ (stating the name of the defendant) having been admitted to bail in the sum of _____ dollars ($ _____) (stating the amount of bail fixed) and ordered to appear in the above-entitled court on _____, 19___ (stating the date for appearance in court), on _____ (stating only the word 'misdemeanor' or the word 'felony') charge/s; [¶] Now, the _____ (stating the name of admitted surety insurer and state of incorporation) hereby undertakes that the above-named defendant will appear in the above-named court on the date above set forth to answer any charge in any accusatory pleading based upon the acts supporting the complaint filed against him/her and all duly authorized amendments thereof, in whatever court it may be prosecuted, and will at all times hold him/herself amenable to the orders and process of the court and, if convicted, will appear for pronouncement of judgment or grant of probation or if he/she fails to perform either of these conditions, that the _____ (stating the name of admitted

identified at the time of defendant's arrest. Instead, the surety agreed to answer for defendant's failure to appear based on the acts supporting the complaint as well as for all "duly authorized "amendments." (See *People v. Bankers Ins. Co. supra*, 181 Cal.App.4th at pp. 6-8 [bond's open-ended language guaranteeing defendant's appearance on any charges in the accusatory pleading and authorized amendments established surety's liability]; see *People v. International Fidelity Ins. Co., supra*, 185 Cal.App.4th at p. 1395.) The surety does not assert that the bond did not allow the filing of any additional charges. Irrespective of the inadequate record, the surety has failed to demonstrate the bail forfeiture was not entered as required by law.

III. DISPOSITION

The order denying the motion to vacate the forfeiture and exonerate the bond is affirmed. The County of Los Angeles is awarded its costs on appeal from the surety, Indiana Lumbermen's Mutual Insurance Company.

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TURNER, P. J.

We concur:

MOSK, J. KRIEGLER, J.

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surety insurer and state of incorporation) will pay to the people of the State of California the sum of _____ dollars ($ _____) (stating the amount of the undertaking of the admitted surety insurer). [¶] If the forfeiture of this bond be ordered by the court, judgment may be summarily made and entered forthwith against the said _____ (stating the name of admitted surety insurer and state of incorporation) for the amount of its undertaking herein, as provided by Sections 1305 and 1306 of the California Penal Code."