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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JESSICA MONOARFA et al., Plaintiffs and Appellants, v. TONY DJIE et al., Defendants and Respondents.	B279593 (Los Angeles County Super. Ct. No. BC620681)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Gene H. Shioda and James A. Kim for Plaintiffs and Appellants.

Woo Law and John H. Woo for Defendants and Respondents.

INTRODUCTION

Appellants Jessica and Ray Monoarfa and respondent Tony Djie were engaged in litigation involving real property and related loans. Appellants extended an offer to compromise under Code of Civil Procedure section 998,[1] which respondent accepted. Appellants belatedly realized that a material term was omitted from the offer. They moved for relief based on their mistake; the court denied the motion and subsequently entered judgment based on the offer. Appellants argue that the trial court erred in refusing to set aside the offer and grant relief from judgment based on their attorney's excusable error in omitting a material term. We find no error and affirm.

FACTUAL AND PROCEDURAL HISTORY

I. *Pleadings*

Appellants filed a complaint on May 16, 2016 against respondent and several other defendants. They filed a first amended complaint (FAC) on July 26, 2016. As alleged in the FAC, Jessica[2] acquired title to the real property in question, a condominium unit (the property), in 2014 by "intra-family Grant Deed" from Ray, her father. In 2014 and 2015, Jessica executed two deeds of trust on the property, for a total of $375,000. Then, in October 2015, plaintiffs met with defendant Amelia Peng, a real estate agent, "to inquire about market price or to obtain a bridge loan for six to twelve months." Peng referred plaintiffs to respondent, "who agreed to provide [appellants] with a short term loan" of $129,566.11, paid in three installments on October

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

[2] We refer to appellants individually by first name for clarity because they share a surname.

7 and 9, 2015. The FAC alleged that the terms of this oral agreement included: (1) Jessica or Ray would pay to respondent $6,004 per month in "rental income" and an additional $150,000 by the end of November 2015; and (2) Jessica would execute a grant deed on the property to respondent, "which would revert back to [Jessica] upon repayment of the loan." Appellants alleged that respondent and Peng assured them "that the Grant Deed was meant as a type of assurance for the repayment of the loan and not meant to effectuate a transfer" of the property to respondent. Jessica executed the grant deed in favor of respondent; the deed was recorded on October 5, 2015.

Appellants further alleged that in January 2016, they orally agreed with respondent to modify the loan agreement, so that appellants would pay $580,000 to respondent by the end of February 2016.[3] This amount was meant to pay off the two deeds of trust, with the balance of $205,000 to be paid to respondent as repayment of the loan plus interest. As part of this agreement, respondent "promised to convey title back to" Jessica. However, in February 2016, before appellants repaid the loan, respondent sought to modify the agreement a second time to require payment of $268,421.81 to respondent instead of $205,000. Appellants did not agree, and respondent refused to accept their tender of the $580,000. Respondent refused to convey title to the property back to Jessica.

The FAC alleged ten causes of action arising out of this purported agreement, including breach of contract, quiet title, and specific performance. Appellants alleged damages of $580,000, representing the fair market value of the property, and

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[3] It is unclear whether this purported modification made any changes to the monthly payments of rental income.

sought an order returning ownership of the property to Jessica, among other things.

Appellants also filed a related complaint for interpleader against respondent on June 14, 2016. Therein, appellants claimed they were ready to repay respondent the amount of the loan, $129,566.11, but respondent refused to accept the funds. Accordingly, appellants sought to deposit the loan proceeds with the court and thereby "be discharged from all liability" arising out of those funds.

Respondent filed a cross-complaint against appellants and the two other deed of trust holders on June 29, 2016. He filed a first amended cross-complaint (FACC) on July 1, 2016. In the FACC, respondent alleged that between August and October 2015, Peng (acting on respondent's behalf) and Ray (acting on Jessica's behalf) met several times "to negotiate the purchase" of the property by respondent. They agreed on terms; respondent and Jessica then entered into a purchase agreement on October 2, 2015.

Respondent attached a copy of the written purchase agreement to the FACC. Under the agreement, respondent agreed to pay a purchase price of $500,000, with a cash deposit of $100,000. The agreement also gave respondent the "right to sell this condo as soon as possible to open market," with a right of first refusal to Jessica to repurchase the property for $580,000. The undated, one-page agreement bears the signatures of respondent as "Buyer" and Jessica as "Seller." Respondent further alleged that Jessica was supposed to pay any rental income received from the property to him, but only did so from October to December 2015.

Respondent further alleged that appellants "would repeatedly enter into agreements" with respondent to repurchase the property, but repeatedly failed to "honor those agreements." In addition, appellants "sabotaged" respondent's attempts to sell the property to third parties. Based on these alleged facts, the FACC alleged eight causes of action including quiet title, interference with contractual relations, and breach of contract.

Respondent demurred to the FAC. Appellants also demurred to the FACC. Both demurrers were pending at the time of appellants' offer to compromise pursuant to section 998 (section 998 offer).

II. *Section 998 offer*

Counsel for appellants sent respondent a section 998 offer dated August 31, 2016. The section 998 offer contained the following relevant terms: (1) appellants would pay $205,000 to respondent, including $129,000 from the interpleader action; (2) the parties would dismiss the entire action with prejudice; and (3) the parties would execute a mutual release of claims and waive attorneys fees and costs. The offer was purportedly signed by Michael Chang, one of the attorneys for appellants.

Respondent accepted the section 998 offer through the signature of his counsel on September 6, 2016. Respondent served notice of acceptance by mail on the same day. As detailed in section III, *post*, appellants' counsel belatedly discovered the offer was missing a material term and attempted to rescind it. Respondent's counsel refused and moved to enter judgment based on the offer.

III. *Section 473 motion for relief*

On September 27, 2016, appellants filed the motion at issue in this appeal, seeking relief due to mistake, inadvertence, and

excusable neglect under section 473, subdivision (b) (section 473(b)). They claimed that their counsel had mistakenly omitted a key provision from the section 998 offer—the transfer of title on the property back to Jessica in exchange for repayment of the loan—and that proceeding on the offer as made would "be an enormous windfall" to respondent.

Accompanying their motion, appellants filed declarations from their attorneys, Gene Shioda and Michael Chang. Shioda stated that Jessica authorized him to make a section 998 offer that included her payment of $205,000 in exchange for dismissal of the parties' complaints and "the execution of documents (i.e., Quitclaim Deed) necessary to reestablish Jessica['s] clear title to the subject property." Shioda was out of town at the time, so he instructed his assistant, Vanessa Raygoza, to finalize the offer with those terms. He did not review the offer and instructed Raygoza to sign it on behalf of appellants' counsel. Shioda realized the error when he received the accepted offer on September 6, 2016.

Chang stated that he "was provided with" the section 998 offer on August 31, 2016, but did not review it before it was sent out to respondent. Raygoza signed it on his behalf "per the firm's policy." He sent the accepted offer to Shioda on September 6, 2016; Shioda then informed him that the offer "was missing the provision requiring a Quitclaim Deed." Chang called respondent's counsel the following morning and "informed him that a mistake had occurred and that acceptance of the 998 Offer was conditioned on [respondent] quitclaiming his purported interest" in the property to Jessica. Respondent's counsel "insisted" that the section 998 offer was enforceable.

As soon as they realized the error, appellants' counsel served on respondent's counsel a document captioned "998 Offer to Compromise (Errata)," containing a provision regarding the quitclaim deed, as well as another document declaring the "rescission and non-acceptance" of the original offer. The latter document provided that the section 998 offer was "not accepted and is hereby rescinded" based on "the inability of the parties to come to terms to execute release documents to satisfy" sections (b) and (e) of the offer.[4]

Chang also stated that on September 8, 2016 at a previously-scheduled hearing, respondent's counsel informed the court that respondent had accepted the 998 offer and would seek entry of judgment. According to Chang, he "immediately notified the Court that the 998 Offer had been rescinded."

Raygoza also submitted a declaration in support of the motion. She stated that she was instructed to include the provision regarding a quitclaim deed in the section 998 offer, but "inadvertently omitted" it. Similarly, Jessica stated in a declaration that she would not have authorized an offer to compromise without "language to reestablish my good title to the Property."

Respondent opposed the motion for relief. He claimed that because he had been unable to resell the property, he continued to have to pay monthly interest on the two deeds of trust, as well as homeowners' association fees and property taxes. He also

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[4] Section (b) required the parties to dismiss the action "within one week of receipt of funds and release documents executed by all parties." Section (e) provided that all litigation matters were stipulated to be suspended to allow the parties time to "execute necessary documents."

stated that, in the event of a sale, he would have to pay off the deeds of trust on the property for $225,000 and $150,000, resulting in a net return for him of only about $16,000. Thus, he argued that the section 998 offer was reasonable, given appellants' purported liability. Moreover, he disputed appellants' claim that they mistakenly omitted the property transfer provision, claiming instead that appellants "got cold feet" and were attempting to negotiate a better deal. He also contended that the offer was enforceable and that relief was not available under section 473(b), as appellants had not demonstrated any excusable error. Respondent also filed a motion for determination of good faith settlement.

At the hearing on October 20, 2016, the court granted respondent's motion for determination of good faith settlement. The court denied appellants' motion for relief and found the pending demurrers were moot. Neither the court's minute order nor the notice of ruling included any bases for the court's rulings; no court reporter was present at the hearing. The court entered judgment pursuant to the section 998 offer to compromise on October 20, 2016.

IV. *Subsequent motions*

Appellants subsequently filed a motion for reconsideration, motion for new trial, and motion to set aside and vacate judgment. At the hearing on all three motions, appellants' counsel stated that they were challenging the entry of a money judgment against them, as they contended that such a judgment was not authorized by the section 998 offer. The court noted that the judgment reflected the precise terms of the section 998 offer and that it was required to enter judgment after a section 998 offer was accepted. The court then denied all three of appellants'

motions. Appellants filed their appeal the next day, December 16, 2016.

DISCUSSION

I. *Jurisdiction*

At the threshold of our inquiry, we address respondent's contention that this court lacks jurisdiction to hear the appeal, as a judgment entered pursuant to a section 998 offer is not directly appealable. In their notice of appeal, appellants identified their appeal as one from "a judgment entered based on a disputed 998 offer."

As explained in *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 667 (*Pazderka*), "[a]n appeal from a section 998 judgment order would be meaningless, because there would be no record for this court to review." Instead, "the appropriate procedure to challenge a section 998 judgment is to request the trial court to vacate the judgment pursuant to section 473." (*Id.* at pp. 667-668.) Parties may thereafter appeal the trial court's ruling regarding setting aside the agreement pursuant to section 473. (*Id.* at p. 668.)

We are bound to construe appellants' notice of appeal broadly, in favor of its sufficiency. (See Cal. Rules of Court, rule 8.100(a)(2); *Knodel v. Knodel* (1975) 14 Cal.3d 752, 762 ["We adhere to the rule that doubtful cases should be resolved in favor of the right to appeal where a substantial interest is affected"].) As such, "notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*International Assn. of Firefighters, Local 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1194, fn. 4; but see *Filbin v. Fitzgerald* (2012) 211

Cal.App.4th 154, 173 ["[t]he policy of liberally construing a notice of appeal in favor of its sufficiency . . . does not apply if the notice is so specific it cannot be read as reaching a judgment or order not mentioned at all"].)

Here, we can reasonably construe appellant's notice of appeal to encompass a challenge to the trial court's denial of their motion for relief under section 473. Where appellants appropriately challenged the court's entry of a section 998 judgment first through motions for relief and subsequently with a timely appeal, we find it reasonably clear from the record that appellants intended to challenge the denial of the motion for relief. Accordingly, we may construe the appeal to include that order. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 669 [discussing the "general and well-established rule that a notice of appeal which specifies a nonappealable order but is timely with respect to an existing appealable order or judgment will be construed to apply to the latter judgment or order"].)

II. *Section 473(b) motion for relief*

Appellants argue that their counsel's mistake in omitting the property transfer provision from the section 998 offer was excusable and therefore warranted relief pursuant to section 473(b). The trial court disagreed, and appellants have failed to demonstrate any abuse of discretion.

As relevant here, the discretionary relief provision of section 473(b) provides that: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." A party who seeks relief under this provision "'on the basis of mistake or inadvertence of counsel

must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.'" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 (*Zamora*).) "'In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether a reasonably prudent person under the same or similar circumstances" might have made the same error.'" [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.'" (*Ibid.*) On the other hand, conduct "'falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.'" (*Ibid.*)

We review the trial court's ruling on a motion under the discretionary relief provision of section 473(b) for an abuse of discretion. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 ["A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse."].) We reject appellants' assertion that we should exercise de novo review over the trial court's purported legal conclusion that "473 relief is unavailable to challenge a 998 offer" and the court's "interpretation of the written 998 offer." Appellants fail to cite any evidence in the record showing that the court made either of these rulings or any legal authority supporting de novo review of a section 473(b) order. (See, e.g., *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655 [appellant must

meet burden by "presenting legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record"].)

Turning to the substance of the appeal, appellants argue that the trial court "ruled that it could not consider the purported mistake urged by Appellants due to the ministerial obligation of entering judgment" following the acceptance of a section 998 offer. There is no evidence in the record that the court made such a ruling, nor does appellant cite to any. Indeed, the record shows only that the trial court denied appellants' motion. The order denying the motion does not state its reasons and there is no transcript from the hearing.[5]

The judgment and orders of the trial court are presumed on appeal to be correct, "'and all intendments and presumptions are indulged'" in their favor. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718, quoting *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Appellant bears the burden of overcoming this presumption by showing error on an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140–1141; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) "Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant]." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003, fn. 2 [reviewing court is limited to matters contained in the record and without the proper record, the evidence is conclusively presumed to support the judgment].) In the absence of a reporter's transcript, "it is presumed that the

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[5] Similarly, there is no support in the record for appellants' claim that the trial court "refused to interpret" the section 998 offer.

unreported trial testimony would demonstrate the absence of error." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992; see also *Smith v. Laguna Sur Villas Condominium Assn.* (2000) 79 Cal.App.4th 639, 646-647; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1320-1321.)

Absent any support in the record, we conclude that appellants fail to meet their burden to establish error by the trial court. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 [the party appealing must provide adequate record demonstrating error]; *Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1 [burden on the party appealing to provide adequate record on appeal to demonstrate error; failure to do so "precludes an adequate review and results in affirmance of the trial court's determination"].)

Appellants also contend that the trial court "refused to apply the holding" of *Zamora, supra*, 28 Cal.4th 249 and instead "informed [the] parties at the hearing" that *Pazderka*, *supra,* 62 Cal.App.4th 658 "was controlling."[6] Again, there is no support for this contention in the record before us. Moreover, even assuming the court did distinguish the error at issue in *Zamora* from the instant case, appellants have not demonstrated that would have constituted an abuse of discretion.

In *Zamora, supra,* 28 Cal.4th at p. 252, an assistant for plaintiff's counsel prepared a section 998 offer using the word "against" instead of the phrase "in favor of," resulting in an offer

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[6]We note that the argument that the court considered the applicability of *Zamora* and *Pazderka*—both cases considering relief under section 473(b) from section 998 judgments—is contrary to appellants' other argument that the court refused to consider section 473(b) relief at all.

to settle for a judgment *against* plaintiff. The trial court found plaintiff's counsel made a ministerial or clerical error and therefore granted the motion to set aside the judgment pursuant to section 473(b). (*Id*. at p. 253.) Our Supreme Court affirmed, finding that a party who made an erroneous section 998 offer may obtain relief pursuant to section 473(b), and further that the trial court did not abuse its discretion in concluding the mistake made by plaintiff's counsel was excusable: "The erroneous substitution of the word 'against' for the phrase 'in favor of' is a clerical or ministerial mistake that could have been made by anybody. While counsel's failure to review the document before sending it out was imprudent, we cannot say that his imprudence rendered the mistake inexcusable under the circumstances." (*Id*. at pp. 257-259.) In addition, the Supreme Court found no abuse of discretion in the trial court's finding that the terms of the agreement were "clearly not authorized by" the plaintiff. (*Id*. at p. 260.)

Here, based on the minimal record before us, we conclude it would have been within the trial court's discretion to find the reasoning of *Zamora* inapplicable under the circumstances. Although appellants contend that they did not authorize the section 998 offer without an agreement to transfer the property back to Jessica, there was a dispute as to whether the offer as written represented a "windfall" to respondent (and therefore was obviously made in error). Appellants have not demonstrated that the trial court abused its discretion in resolving that dispute in favor of respondent. Further, appellants' counsel here omitted an entire provision related to the key issue in dispute—ownership of the property. Assuming the court found as appellants suggest, it would not have been an abuse of discretion to conclude that such

an error regarding a material term central to the litigation was inexcusable, below the professional standard of care, and thus distinct from the type of errors discussed in *Zamora*. (See *Zamora*, *supra,* 28 Cal.4th at pp. 257-259; *Pazderka, supra,* 62 Cal.App.4th at p. 671 [no relief for counsel who "mistakenly failed to include attorneys' fees and costs in the offer to compromise, which is not the type of mistake 'ordinarily made by a person with no special training or skill'"]; *Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1237 [granting relief where attorney mistakenly checked the "with prejudice" box instead of the "without prejudice" box].)

IV. *Motion for sanctions*

Respondent moved for sanctions against appellants and their counsel for filing a frivolous appeal. We deny that motion. Respondent focuses largely on the assertion that appellants improperly appealed from judgment entered pursuant to a section 998 offer, an argument we have rejected. Respondent also points to appellants' failure to provide evidentiary support for their claims of prejudicial error. While appellants failed to meet their burden on appeal, we do not find the appeal was frivolous or taken solely for delay, so as to warrant sanctions. (§ 907; Cal. Rules of Court, rule 8.155; see also *Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 557 ["sanctions should be used sparingly to deter only the most egregious conduct"]; *Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 817 [imposing sanctions where appeal "indisputably has no merit" and "any reasonable attorney would agree that the appeal is totally and completely without merit"].)

DISPOSITION

The judgment is affirmed. The motion for sanctions is denied. Respondent is awarded his costs on appeal.

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COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.