Filed 11/10/15 Murphy v. Fadia CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MICHAEL E. MURPHY et al., Plaintiffs and Respondents, v. VIJAY FADIA, Defendant and Appellant.	B261301 (Los Angeles Country Super. Ct. No. PC055001)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen P. Pfahler, Judge. Affirmed.

Vijay Fadia, in pro. per., for Defendant and Appellant.

Poole & Shaffery, Hunt C. Braly, for Plaintiffs and Respondents.

Vijay Fadia appeals from a money judgment in favor of respondents Michael and Rosemary Murphy. Appellant argues that respondents did not submit substantial evidence to support the judgment. The trial was not reported, and the record before us consists almost entirely of the trial court's minute order, the judgment itself, and the briefing of the parties. On this limited record we find no error, and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On June 17, 2013 respondents filed a suit against appellant claiming that he allowed a eucalyptus tree on his property to grow roots that encroached onto their back yard. According to the complaint, these roots damaged a pool and deck on respondents' property. Appellant denied the claims and asserted, among other defenses, that the damage was actually caused by shifting soil on sloped ground.

A court reporter was not present for the bench trial, nor did the parties seek a settled statement of the case. As a result, the events that took place at trial are not in the record before us. The record includes a minute order, which reads in relevant part: "Plaintiff[']s evidence was primarily circumstantial. The only licensed contractor who testified during the trial was called by plaintiffs, and he testified that the subject trees caused the damage claimed by plaintiffs. Defendants presented no credible evidence to refute the plaintiffs' evidence. . . . [¶] The Court awards the plaintiffs damages in the amount of $12,000. The Court finds that such an amount is reasonable under the circumstances of this case, and that an award over that amount would be speculative and unsupported by the evidence."

The court also acknowledged that while respondents' evidence was legally sufficient, it was "not by much." There was neither photographic evidence nor evidence of destructive testing.

Appellant filed a motion for a new trial. The motion was denied, and this appeal followed.

DISCUSSION

Appellant's opening brief is difficult to follow, but appears to focus on three main arguments: that the testimony of the licensed contractor called by respondents was insufficient to support the judgment, that the damage award did not take into account depreciation and ignored certain appraisals, and that the trial judge improperly shifted the burden of proof to appellant. We need not discuss the merits of the first and second claims, as they are not supported by the record. On the third, we find no error.

I

On appeal "[a] judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error. [Citations]" (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409; *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.)

A reviewing court is bound to decide questions of substantial evidence by reviewing the entire record, not simply that evidence which is favorable to respondent. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.) It does not follow, however, that the court should look *outside* the record where a transcript or settled statement of proceedings is not provided. To the contrary, "[f]ailure to provide an adequate record on the issue requires the issue be resolved against the [appellant]. [Citation.]" (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) The rules apply to all appellants and no exception is made for those who represent themselves. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522–523.) Appellant makes several assertions regarding what was said (or not said) and shown (or not shown) at trial, without citations to (or indeed, support in) the record. Factual assertions on appeal must be tethered to a supporting record, and these assertions are not.

Applying this principle to appellant's first argument, we are left with a record that reflects that "[t]he only licensed contractor who testified during the trial was called by the plaintiffs, and he testified that the subject trees caused the damage claimed by the

plaintiffs." Except where additional evidence is required by statute, a single witness is sufficient to support the trial court. (Evid. Code, § 411.) This finding by the trial court is the only record we have of what was said at trial. The contents of appellant's moving papers, while on the record, show only what appellant *claims* happened at trial, and are no substitute for a transcript or settled statement. Since appellant did not submit a record of what the witness said, he waives any claim that the testimony was insufficient. (*Osgood*, *supra*, 127 Cal.App.4th at p. 435.)

Appellant also argues that the damage award in the case was improper. He bases his argument on a depreciation theory and a set of appraisals that were purportedly received in evidence at the bench trial. Neither the appraisals nor evidence of depreciation is contained in the record. The record shows only that the judge found the $12,000 figure to be "reasonable under the circumstances of this case, and that an award over that amount would be speculative and unsupported by the evidence." Here, appellant failed to provide a record that contains any of the evidence used to come to this conclusion.

II

Appellant contends the trial court improperly required him to prove the roots of his trees were not responsible for the damage, thus shifting the burden onto him as defendant. Appellant calls our attention to a single line in the minute order, which reads "Defendants presented no credible evidence to refute the plaintiffs' evidence." We do not interpret this to mean the court was shifting the burden to appellant. All it says is that when appellant's evidence was presented, it fell short of proving the factual claim he asserted.

A judgment on appeal is presumed correct. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) Thus, even were there two reasonable interpretations of the record, we are bound to favor the one that supports the judgment.

III

Respondents argue in their reply brief that this appeal is frivolous and appellant should be sanctioned for bringing it. A request for sanctions requires a separate motion including a declaration justifying the amount of the sanctions sought. (Cal. Rules of Court, rule 8.276(b)(1).) Respondents filed no such motion. Consequently, we need not address the issue of sanctions, and decline to do so. (*Saltonstall v. City of Sacramento*, (2014) 231 Cal.App.4th 837, 858–59; *Kajima Engineering and Construction Inc. v. Pacific Bell*, (2002) 103 Cal.App.4th 1397, 1402.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.