

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

KHMER BUDDHIST ASSOCIATION,

Plaintiff and Respondent,

v.

SOK HOEUT PHAN,

Defendant and Appellant.

B272212

(Los Angeles County
Super. Ct. No. NC059776)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ross M. Klein, Judge. Affirmed.

Sok Hoeut Phan, in. pro. per., for Defendant and Appellant.

Anthony Kornarens for Plaintiff and Respondent.

Sok Hoeut Phan (appellant) appeals from a judgment following a court trial. The trial court invalidated certain real property transfers and awarded Khmer Buddhist Association, Inc. (KBA) \$1,052,337, including treble damages for appellant's repeated and open violations of Penal Code section 496.¹ We find no error and therefore affirm the judgment.

FACTUAL BACKGROUND

KBA was formed in 1985 under the Nonprofit Religious Corporation Law. It was formed by a group of Cambodian refugees who fled the persecution of the Khmer Rouge. KBA was organized exclusively for religious purposes within the meaning of section 501(c)(3) of the Internal Revenue Code.

In 2014, Pang Khoeun, an elderly monk at KBA who was the subject of eviction proceedings brought by KBA, purported to transfer on behalf of KBA for no consideration, six parcels of real property owned by KBA to the "Buddha For World Peace Organization" (BWPO).² Pang Khoeun was acting unilaterally. He was not on KBA's Board at the time, and had no power to gift KBA's property. The deeds, as well as letters purporting to grant all of KBA's assets to BWPO, were written only in English. Pang

¹ Penal Code section 496 prohibits the buying or receiving of property that has been stolen or obtained in a manner constituting theft or extortion. Any person who has been injured by a violation of section 496 may bring an action for three times the amount of actual damages, costs of suit, and reasonable attorney's fees. (Pen. Code, § 496, subd. (c).)

² The specific properties at issue are: (1) 1305 E. 20th Street, Long Beach, CA 90806; (2) 1239 E. 20th Street, Long Beach, CA 90806; (3) 1235 E. 20th Street, Long Beach, CA 90806; (4) 1223-1225 E. 20th Street, Long Beach, CA 90806; (5) 2485 Atlantic Ave., Long Beach, CA 90806; and (6) 1242 E. Wesley Drive, Long Beach, CA 90806.

Khoeun only speaks Khmer, and is largely illiterate, even in the Khmer language. KBA, purportedly acting through Pang Khoeun, did not give the required written notice to the California Attorney General before it conveyed all or substantially all of its assets. Nor did the Attorney General give KBA a written waiver of Corporations Code section 9633 as to the purported transactions. The purported transfers did not comply with the portions of the Nonprofit Religious Corporations Act requiring Board or membership approval for transfers not in the usual course of business of the corporation. (Corp. Code, § 9631, subd. (a).)

The purported transferee of the properties, BWPO, is controlled by appellant.³ Appellant claimed to be an officer of KBA at the time of the transfers, but he was not. Appellant was expelled from KBA in 2013. Appellant and BWPO immediately tried to sell three of the gifted parcels of KBA's property. KBA demanded that BWPO and appellant return the property, but they refused to do so. The KBA Board authorized a lawsuit to set aside these "gifts" of KBA's property.

PROCEDURAL HISTORY

The complaint was filed on November 7, 2014. It named two defendants: appellant and BWPO. It asserted claims for (1) quiet title; (2) cancellation of deeds; (3) declaratory relief; (4) imposition of constructive trust; (5) temporary restraining order and permanent injunction; (6) accounting; (7) conversion; (8)

³ This was the second time that Pang Khoun attempted to unilaterally transfer the properties. In August 2013, Pang Khoun purported to transfer KBA's real property to three individuals, one of whom was appellant. On August 21, 2013, the KBA Board unanimously disapproved the transfers. At KBA's demand, the property was returned to KBA.

violations of Penal Code section 496, subd. (c); (9) unfair competition; and (10) damages for aiding and abetting fraud.

KBA filed a motion seeking summary adjudication of its first, second and ninth causes of action. Specifically, KBA sought an order cancelling the deeds in question and enjoining further transfers. Neither BWPO nor appellant opposed the motion.

On August 27, 2015, the trial court granted the motion for summary adjudication, noting that each transfer was without consideration and without notice to the governing body of KBA. Further, the transfers did not comply with Corporations Code section 9633, which requires notice to the state Attorney General before a religious corporation can dispose of all or substantially all of its assets. The undisputed evidence showed that the transfers were unauthorized and not in conformity with law. The court further found that the remedy of injunction was appropriate. The court enjoined appellant and BWPO from further transfers of the properties without authorization from the governing body of KBA and in compliance with California law.

A bench trial commenced on January 15, 2016. The trial court issued its ruling on February 8, 2016. The court noted that BWPO and appellant “misappropriated all of the KBA’s properties” and “promptly tried to sell them.” BWPO and appellant failed to comply with the interlocutory judgment setting aside the transfers. Even after the trial court granted summary adjudication declaring the transfers invalid, BWPO and appellant declined to return the real property and removed more property from the KBO premises.

The court found that KBO sustained damages due to BWPO’s and appellant’s actions in allowing the property to slide into decline, failing to pay back property taxes, and attempting to collect rent in KBA’s name. Further, BWPO and appellant took and refused to return \$23,000 worth of personal property from

KBA. For unpaid property taxes, lost rent, loss of use of premises, stolen and lost items of personal property, damages to property, legal fees, and lost donations, the trial court found that KBA suffered a total of \$350,779 in damages. Pursuant to Penal Code section 496, subdivision (c), the court trebled the damages, for a total award of \$1,052,337. The judgment was entered against appellant and BWPO jointly and severally. The court found KBA entitled to both costs and legal fees in an amount to be determined.

Final judgment was entered on March 2, 2016. On May 10, 2106, appellant appealed from the March 2, 2016 judgment.⁴

DISCUSSION

I. Standards of review

Many of appellant's arguments on appeal are forfeited due to appellant's failure to raise them below. (*Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 222 (*Green*) ["arguments and objections not raised and preserved in the trial court are waived on appeal"].) However, to the extent appellant's arguments are not forfeited, the following standards of review apply.

Appellant contests the factual findings underlying the trial court's decision to grant summary adjudication invalidating the property transfers. A party may challenge an order granting summary adjudication after trial. (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 949-950 ["Appealing from a judgment after trial ordinarily provides an adequate remedy at law for a party aggrieved by an order granting summary adjudication"].) In reviewing an order granting summary

⁴ BWPO also filed a notice of appeal on May 10, 2016. However, on July 11, 2016, this court dismissed BWPO's appeal for failure to serve and file notice of representation of counsel. Therefore, BWPO is not a party to this appeal.

adjudication, ““we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.]”” (*Ibid.*) We review the trial court’s decision de novo, ““considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.” [Citation.]” (*Id.* at pp. 950-951.)

The trial court’s factual findings made after trial are reviewed for substantial evidence. Under this standard, we should not substitute our judgment for the trial court’s express or implied findings supported by substantial evidence. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143.) Our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, that will support the court’s factual determinations. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501.)

II. Authority of the KBA Board to file this lawsuit

Appellant’s first argument is that the individuals who approved the filing of this lawsuit against him are not members of the Board of Directors of KBA, nor are they executive officers of KBA. Thus, appellant argues, they lack standing to represent KBA against him. Appellant fails to provide a citation to the record indicating that he raised this argument below. Therefore, it is waived. (*Green, supra*, 194 Cal.App.3d at p. 222.)

Further, the trial court had before it evidence that a fair election of Board members was held on January 26, 2014. This information was provided in the declaration of Anthony Ly, a member of KBA’s Board of Directors, in support of KBA’s unopposed motion for summary adjudication. The results of the January 26, 2014 election were presented to the court. The Board, duly elected in accordance with KBA’s bylaws, authorized this proceeding. Ly’s uncontested declaration supported the trial

court's implicit finding that the lawsuit against BWPO and appellant was authorized by the sitting Board of KBA.

III. The evidence supports the judgment

Appellant contests the trial court's findings that the property transfers were done without authorization of the governing body of KBA. He asserts that Pang Khoeun was the CEO of KBA, and provided the properties to BWPO as donations of religious assets. Appellant fails to provide citations to the record supporting his assertions.⁵

The record supports the trial court's determination that appellant and BWPO misappropriated the property. The relevant evidence was presented to the court in support of KBA's uncontested motion for summary adjudication. Specifically, the declaration of Anthony Ly provided that Pang Khoeun was voted out of office in the election of 2014. In addition, KBA initiated unlawful detainer proceedings against him on September 5, 2014. Pang Khoeun's position that, as an elder, he was not accountable to the Board, was inconsistent with KBA's bylaws.

Appellant failed to provide evidence contradicting the evidence provided by KBA in support of KBA's motion for summary adjudication. Thus, the trial court found it was "undisputed" that "the transfers were without notice to the governing body of the KBA." Ly's declaration supports this determination. By failing to support his factual assertions with citations to evidence, appellant has forfeited any argument that

⁵ We decline to consider appellant's numerous unsupported factual assertions. (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 590 (*Alki Partners*) ["By failing to support the factual assertions in their legal arguments with citations to the evidence, plaintiffs have forfeited their argument"].)

the trial court erred in granting the summary adjudication. (*Alki Partners, supra*, 4 Cal.App.5th at p. 590.)

Appellant's repeated arguments that the evidence provided in this proceeding was fraudulent, and provided by persons who never had control of KBA, are similarly not well taken. Appellant's arguments attacking the credibility of KBA's declarations in support of its motion for summary adjudication should have been presented in opposition to that motion. (*Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 616 (*Uhrich*) [summary judgment will not be defeated by mere averment that evidence exists, "such evidence must be presented in opposition to summary judgment"].) Appellant made no showing in the trial court that he could successfully attack the credibility of KBA's evidence in support of summary adjudication.

The trial court was in the best position to evaluate the evidence presented at trial regarding damages. The credibility of witnesses is within the province of the trial court, and we do not reevaluate the court's credibility determinations on appeal.⁶ (*People v. Maury* (2003) 30 Cal.4th 342, 403 ["it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends"].)

IV. Lost reporter's transcript

Appellant asserts that the judgment should be vacated because the transcript of proceedings was lost and a reporter's transcript was not available.

⁶ Appellant's argument that the Board members of KBA did not provide information filed with the Secretary of State is forfeited due to appellant's failure to provide a citation to the record indicating that he raised this issue before the trial court. (*Green, supra*, 194 Cal.App.3d at p. 222.) Therefore, we decline to consider it.

A. Applicable law

Code of Civil Procedure section 914 addresses this situation. The statute provides:

“When the right to a phonographic report has not been waived and when it shall be impossible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule, because of the death or disability of a reporter who participated as a stenographic reporter at the trial or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the trial court or a judge thereof, or the reviewing court shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding.”

Code of Civil Procedure section 914 thus permits, but does not require, courts to vacate a judgment on the ground that the reporter’s transcript of proceedings is unavailable.

California Rules of Court, rule 8.130(h) provides an alternate remedy for the loss of a reporter’s transcript. It states:

“(1) If any portion of the designated proceedings cannot be transcribed, the superior court clerk must so notify the designating party in writing; the notice must show the date it was sent. The party may then substitute an agreed or settled statement for that portion of the designated proceedings by complying with either (A) or (B):

“(A) Within 10 days after the notice is sent, the party may file in superior court, under rule 8.134, an agreed statement or a stipulation that the parties are attempting to agree on a statement. If the party files a stipulation, within 30 days thereafter the party must file the agreed statement, move to use a settled

statement under rule 8.137, or proceed without such a statement; or

“(B) Within 10 days after notice is sent, the party may move in court to use a settled statement. If the court grants the motion, the statement must be served, filed, and settled as rule 8.137 provides, but the order granting the motion must fix the times for doing so.

“(2) If the agreed or settled statement contains all the oral proceedings, it will substitute for the reporter’s transcript; if it contains a portion of the proceedings, it will be incorporated into that transcript.

“(3) This remedy supplements any other available remedies.”

“Although the choice is largely the appellant’s, the trial court must take into account the rights of both parties. [Citation.]” (*Weinstein v. E. F. Hutton & Co.* (1990) 220 Cal.App.3d 364, 369 (*Weinstein*)). Thus, an appellant’s request for new trial may be denied where “the record strongly suggests an adequate settled statement could be reached. [Citations.]” (*Ibid.*)

Further, the party requesting a new trial must demonstrate that the questions which the party desired to raise on appeal could not be properly considered without the missing reporter’s notes. (*Lilienthal v. Hastings Clothing Co.* (1954) 123 Cal.App.2d 91, 93 (*Lilienthal*).)⁷ In *Lilienthal*, defendant’s

⁷ The *Lilienthal* court analyzed former Code of Civil Procedure section 953e. However, “Code of Civil Procedure section 914 is derived from former Code of Civil Procedure section

counsel informed the plaintiff that he had taken extensive notes of the missing testimony and offered to collaborate in an effort to work out a settled statement. The offer was refused, and plaintiff's attorney stated that he intended to move for a new trial. The *Lilienthal* court disapproved of the plaintiff's position that "she is not required in any way to attempt to provide or join in providing any substitute" for the lost notes. (*Id.* at p. 94.) The court noted that the case law suggests that "the failure of the appellant to make an effort to find a substitute for the lost notes," where such a substitute was likely to be effective, is good reason to deny a new trial. (*Id.* at p. 95.)

B. A new trial is not warranted in this case

While appellant states generally that he is unable to demonstrate error without the reporter's transcript, appellant fails to provide specific arguments as to why there is no adequate alternative to a whole new trial. In the absence of a showing of specific prejudice from the loss of the transcript, we have no reason to find that a substitute, such as a settled statement, would not have been equally as effective. The *Lilienthal* court's reasoning is convincing: "Courts are too busy these days to repeat a . . . trial unless it is necessary to do so in the interests of justice." (*Lilienthal, supra*, 123 Cal.App.2d at p. 96.) Appellant has failed to demonstrate any sincere efforts to collaborate on a settled statement or that the interests of justice require a new trial in this case.

Further, the majority of appellant's arguments on appeal involve his position that the present Board members were not authorized to initiate this lawsuit to undermine the property transfers at issue. The evidence on this issue was presented in connection with KBA's motion for summary adjudication. Thus,

953e. [Citation.]" (*Weinstein, supra*, 220 Cal.App.3d at p. 369, fn. 3.) Thus, we find the *Lilienthal* court's analysis persuasive.

the evidence was in writing and is included in the clerk's transcript. The trial court found that KBA met its initial burden to show that the transfers of property were "unauthorized and not in conformity with law." (Code Civ. Proc., § 437c; *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630 (*Lawlor*).)

The burden thus shifted to appellant to show a triable issue of one or more material facts as to the propriety of the transfers. (Code Civ. Proc., § 437c, subd. (p)(1); *Lawlor, supra*, 222 Cal.App.4th at p. 631.) Appellant provided no opposition to the motion for summary adjudication. Thus, the trial court found the facts supporting KBA's motion to be "undisputed." Because he declined to oppose the motion for summary adjudication, appellant's factual assertions as to the status of KBA's leadership were forfeited. (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 10-11 ["The party opposing the summary judgment must make an independent showing by a proper declaration or by reference to a deposition or another discovery product that there is sufficient proof of the matters alleged to raise a triable question of fact if the moving party's evidence, standing alone, is sufficient to entitle the party to judgment"].) Assertions that the evidence exists are insufficient -- "such evidence must be presented in opposition to summary judgment." (*Uhrich, supra*, 109 Cal.App.4th at p. 616.) Appellant failed to establish the facts necessary to his position on appeal during the summary adjudication proceeding. Thus, it is difficult to envision how a reporter's transcript would assist his appeal.⁸

⁸ Appellant did not request a reporter's transcript of the hearing on the summary adjudication motion.

In sum, in the present matter, it is not in the interests of justice to order a new trial on the ground that the reporter's transcript is unavailable. We decline to exercise our power to do so.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT