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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ALLEN SHAY,

Plaintiff and Appellant,

v.

JANET HURREN,

Defendant and Respondent.

B287552

(Los Angeles County  
Super. Ct. No. EC061455)

APPEAL from a judgment of the Superior Court of  
Los Angeles County. Laura A. Matz, Judge. Affirmed.

Allen Shay, in pro. per., for Plaintiff and Appellant.

Law Offices of David Kestner & Associates and David  
Kestner for Defendant and Respondent.

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Plaintiff Allen Shay appeals from a judgment entered in favor of defendant Janet Hurren following a jury trial. Shay contends the trial court made numerous errors in responding to questions the jury submitted during deliberations. We find no error and affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

As best we can tell, the facts of the case are as follows:<sup>1</sup>

In November 2013, Shay filed a complaint against Hurren asserting claims for intentional interference with contractual relations and intentional interference with prospective economic relations. The case was tried to a jury over the course of five days in 2017, during which Shay represented himself.

At trial, Shay testified that he owned a home he rented to Hurren. In 2012, he defaulted on his home loan and the lender initiated foreclosure proceedings. In order to avoid foreclosure, Shay negotiated a “cash for keys” agreement with the loan servicer, BSI/NuView Financial Services (BSI), whereby he would receive \$30,000 if he could deliver the keys to the lender within a specified period of time.

According to Shay, he received the cash for keys contract from BSI on January 31, 2013, which he promptly signed and returned. Shay did not retain a copy of the contract and did not introduce the contract into evidence at trial.

Shay further testified that the cash for keys contract required he pay a fee and file an unlawful detainer action against Hurren, which he did on April 10, 2013. Although far from clear,

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<sup>1</sup> Many of these facts are taken from a settled statement drafted by Shay, a self-represented litigant. Despite being adopted in substantial part by the trial court, much of the settled statement is disjointed, argumentative, and confusing.

it appears a separate condition of the agreement was that Hurren would provide BSI a purchase contract for a short sale of the property. Hurren, however, failed to do so, and the property was eventually sold at a trustee's sale.

At the close of evidence, Hurren moved for a directed verdict. The court granted the motion as to the interference with prospective economic relations claim, but denied it as to the interference with contractual relations claim.

During deliberations, the jury submitted to the court the following questions: "What the definition of a valid contract is [sic]? Was there any contract between Allen Shay [and] BSI or specifically a contract in regards to cash for keys?" According to Shay, he was not in the courtroom at the time, but received a phone call from the clerk of the court informing him the jury submitted a question. His cell phone reception was poor, and the call was dropped. Shay did not immediately return to the courtroom.

About a half hour after receiving the jury's questions, the court responded with California Civil Jury Instructions (CACI) No. 302:

"A contract is an agreement to do or not to do a certain thing.

"To prove that a contract was created, Allen Shay must prove all of the following:

"1. That the contract terms were clear enough that the parties could understand what each was required to do;

"2. That the parties agreed to give each other something of value. A promise to do something or not to do something may have value, and

"3. That the parties agreed to the terms of the contract.

“If Allen Shay did not prove all of the above, then a contract was not created.”

The court further directed, “It is for you to decide whether Allen Shay proved there was a contract between him and BSI and that it was a contract to provide cash for keys.”

Shortly after receiving the court’s response, the jury returned a special verdict, in which it answered “no” to the question, “Was there a contract between Allen Shay and BSI Financial?” Based on the special verdict, the court entered judgment in Hurren’s favor.

Shay timely appealed.

## **DISCUSSION**

### **I. We Decline to Strike the Settled Statement and Shay’s Opening Brief**

Before turning to the merits of Shay’s arguments, we must consider Hurren’s requests that we strike the settled statement and Shay’s opening brief on appeal.

The trial in this case was not reported by a court reporter. As a result, in his notice designating record on appeal, Shay elected to use a settled statement as the record of the oral proceedings in the trial court, pursuant to California Rules of Court, rule 8.137. Subsequently, he filed in the trial court a proposed settled statement, which the court adopted and certified with modifications.

In her respondent’s brief, Hurren urges us to strike the settled statement as untimely under California Rules of Court, rule 8.137(b)(2), which requires appellants file a motion to use a settled statement in lieu of a reporter’s transcript at the same time they file their notice designating the record on appeal. That rule does not apply, however, if the designated oral proceedings

in the superior court were not reported by a court reporter, as was the case here. (See Cal. Rules of Court, rule 8.137(b)(1)(A), (b)(2).) Hurren's argument, therefore, lacks merit.

Hurren also urges us to strike Shay's opening brief on appeal for failure to cite to the record. California Rules of Court, rule 8.204(a)(1)(C), requires parties to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Shay's brief does not cite volume and page numbers in the record, but it does cite specific exhibits that are clearly labeled and easily located in the record. Although this does not comply with rule 8.204, we do not think the violation is so severe that it warrants striking Shay's brief. (See *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 990 [declining to strike appellant's opening brief despite violations of rule 8.204(a)(1)(C)].)

## **II. Shay Has Not Shown Error**

Shay purports to raise nine issues on appeal, many of which are borderline incomprehensible. As best we can tell, his arguments fall into three general categories: (1) the trial court should have responded to the jury's questions by stating there existed a valid contract between Shay and BSI; (2) the trial court failed to provide Shay proper notice of the jury's questions and an opportunity to give input on the response; and (3) the trial court erroneously failed to give additional jury instructions in response to the jury's questions. None of Shay's arguments has merit.

Shay first contends that, in response to the jury's questions, the court should have instructed that there was a valid contract between Shay and BSI. His argument appears to be premised on a mistaken belief that, in denying in part Hurren's motion for a directed verdict, the court found, as a matter of law,

there was a valid contract between him and BSI. The court did no such thing. Instead, it simply found Shay had submitted sufficient evidence from which the jury could find in his favor on that issue. (See *Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1154 [directed verdict may be granted only if there is no evidence of sufficient substantiality to support a verdict in favor of the party opposing the motion].) The court did not determine the jury must do so.

Shay alternatively contends the court should have instructed the jury there was a valid contract given Hurren did not introduce any evidence showing there was not a valid contract. In making this argument, Shay overlooks that he had the burden of proof to show the existence of a valid contract. (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148.) He also overlooks that the jury was free to disregard his evidence, even if uncontradicted. (*Graf v. Marvin Engh Truck Co.* (1962) 207 Cal.App.2d 550, 555 [“the trier of fact may reject the uncontradicted testimony of a witness provided he has not acted arbitrarily”]; *Wells Fargo Bank, N.A. v. 6354 Figarden General Partnership* (2015) 238 Cal.App.4th 370, 392 [same].) Accordingly, the court was not required to instruct the jury there was a valid contract between Shay and BSI.

Shay next contends the trial court violated his due process rights and rule 3.190 of the Superior Court of Los Angeles County Local Rules (Local Rules), by failing to give him proper notice of the jury’s questions and an opportunity to provide input on the response. Local Rules, rule 3.190, provides that, upon receipt of a question from the jury, “the trial judge should review it with counsel outside the presence of the jury, and discuss with them an appropriate answer to be given the jury.” (See *Carlson*,

*Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 230 [noting the trial court must not answer jury requests for information outside the presence of counsel]; Code Civ. Proc., § 614 [if the jurors “desire to be informed of any point of law arising in the cause . . . the information required must be given in the presence of, or after notice to, the parties or counsel”].)

By Shay’s own admission, the trial court provided him notice of the jury’s questions before issuing its response. After receiving that notice, Shay did not immediately return to the courtroom or even attempt to contact the court. The trial court was not required to wait indefinitely for his return. Under these circumstances, we cannot say the trial court violated the Local Rules or Shay’s due process rights.

Finally, throughout his brief, Shay suggests the trial court should have responded to the jury’s questions with numerous additional instructions. In particular, he argues the court should have instructed the jurors with CACI No. 2201 (concerning elements of an intentional interference with contractual relations claim), CACI No. 304 (concerning oral contracts), an optional section of CACI No. 302 (concerning the elements of contract formation), and Civil Code section 1624 (concerning exceptions to the statute of frauds). He also asserts the court should have instructed the jurors to “review the testimony and documents admitted into evidence by the court . . . and determine if the elements along with the legal purpose [of the contract] was found to exist . . . .” As best we can tell, Shay’s argument is that the court’s response to the jury’s questions was incomplete, and therefore misleading, absent these additional instructions.

“It is settled that a party may not complain on appeal that an instruction correct in law is too general or incomplete unless

he had requested an additional or qualifying instruction.” (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948, disapproved of on other grounds by *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563.) Under such circumstances, a “[p]laintiff’s failure to request any different instructions means he may not argue on appeal the trial court should have instructed differently.” (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131.) Here, the record does not disclose that Shay requested the court give any of the above instructions in response to the jury’s questions. As a result, he is barred from arguing on appeal that the trial court’s response was incomplete. (*Ibid.*)

Even if we were to overlook the forfeiture, we would reject Shay’s arguments for another reason: he failed to provide an adequate record from which we could find reversible error. “‘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.]” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) It is the appellant’s burden on appeal to produce a record overcoming the presumption of validity of the judgment or order. (*Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 595.) “‘Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant].’” (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–188 (*Foust*); *In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498.)



To determine whether a trial court's response to a jury's question was proper, the reviewing court must consider the full context in which it was made, including any other instructions given to the jury. (See *People v. Cain* (1995) 10 Cal.4th 1, 36 [a claim of instructional error requires review of the specific language challenged, the instructions as a whole, and the jury's findings]; *People v. Partner* (1986) 180 Cal.App.3d 178, 186, fn. 5 [finding court's response to jury's question not prejudicial in light of its prior instructions].) Here, it appears the trial court provided the jurors with 35 pages of instructions at the close of evidence. The record on appeal, however, contains only one of those pages. Without the full set of jury instructions, we cannot perform our appellate function. Shay's failure to provide an adequate record requires that we resolve the issue against him.<sup>2</sup> (*Foust, supra*, 198 Cal.App.4th at pp. 186–188.)

#### DISPOSITION

The judgment is affirmed. Hurren is awarded costs on appeal.

BIGELOW, P. J.

We Concur:

STRATTON, J.

WILEY, J.

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<sup>2</sup> To the extent Shay purports to raise other issues on appeal, we consider them waived by his failure to provide cogent legal argument or citation to authority. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)