Filed 3/12/14 McKenzie v. El Rey De Oros Nightclub CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KENNETH MCKENZIE, dba FLORENTINE GARDENS et al., Defendant and Appellant, v. EL REY DE OROS NIGHTCLUB, LLC, Plaintiff and Respondent.	B240239 (Los Angeles County Super. Ct. No. BC442717)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Joanne O'Donnell, Judge. Affirmed.

Law Offices of Ann A. Hull, Ann A. Hull for Defendant and Appellant.

Kourosh Pourmorady at Law, Kourosh Pourmorady for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Kenneth McKenzie dba Florentine Gardens (owner) appeals from a judgment entered against him on a breach of contract claim brought by plaintiff and respondent El Rey De Oros Nightclub LLC (Nightclub). Owner contends that the trial court abused its discretion when it denied his pretrial motion to continue the trial and his motion in limine to exclude witnesses and evidence not disclosed in discovery. Owner also challenges the trial court's denial of his motion for nonsuit on the contract cause of action and the sufficiency of the evidence in support of the jury's damage award. In addition, owner raises several instances of alleged attorney misconduct and other claimed irregularities in the trial court's conduct of the trial.

We hold that the trial court did not abuse its discretion when it denied owner's motion to continue trial and motion in limine to exclude witnesses and evidence not disclosed in discovery. We further hold that because the record does not reflect that owner made a motion for nonsuit on the contract cause of action, the trial court could not have erred as claimed and that substantial evidence supported the jury's finding on the amount of damages. Finally, we conclude that owner's claims of attorney misconduct and irregularities in the conduct of trial have either been forfeited or have no merit. We therefore affirm the judgment.

BACKGROUND OF DISPUTE[1]

In 2007, owner entered into an arrangement under which the three members of the plaintiff limited liability company, Nightclub,[2] used owner's facility in El Monte—the Florentine Gardens—to present Mexican music concerts on Saturday nights. Although

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[1] The detailed factual background for each of the issues raised on appeal is set forth in the section that discusses each issue.

[2] The three members of the plaintiff limited liability company were Jose Gomez, Jesus Gamboa, and Juan Carlos Galvan, each of whom testified at trial.

the parties disputed at trial whether their use arrangement was ever reduced to a formal written lease agreement, it was undisputed that the arrangement continued for over three years. In July 2010, a dispute arose between the parties to the use arrangement that resulted in owner terminating it. This litigation followed.

PROCEDURAL BACKGROUND

On July 30, 2010, Nightclub filed an action against, inter alia, owner.[3] In the operative second amended complaint, Nightclub asserted, inter alia, causes of action for breach of license agreement and tortious interference with prospective economic advantage, the only two causes of action in the operative complaint that were tried to the jury. Owner filed a cross-complaint against Nightclub asserting a cause of action for tortious interference with prospective economic advantage that was also tried to the jury.

In January 2012, the matter came on for trial. Following trial, the jury returned a special verdict that included the following findings: on Nightclub's breach of contract claim, the jury found that Nightclub and owner agreed to the terms of a contract; Nightclub performed under the contract; owner failed to perform as required under the contract causing harm to Nightclub; and Nightclub's damages amounted to $250,000 for past economic loss. The jury did not award any damages for future economic loss on the contract cause of action. The jury further found that owner did not interfere with Nightclub's prospective economic advantage and, on owner's cross-complaint, found that Nightclub did not interfere with owner's prospective economic advantage. The trial court awarded Nightclub $6,471 in costs, and entered a judgment on the special verdict in the total amount of $256,471.

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[3] The complaint also named as a defendant Jose Alfredo Nunez, erroneously sued as Freddy Munoz, dba Promociones Freddy.

DISCUSSION

A. Trial Continuance

1. Background

On October 21, 2011, owner filed an ex parte application to continue the trial date, which date was then set for December 14, 2011.[4] The application was made on the ground that owner's trial counsel was "scheduled for a medical procedure on December 12, 2011, two days before trial." The application was also based on the ground that because owner's trial counsel had believed the action was settled, she had not completed discovery and trial preparations. Because Nightclub apparently stipulated to the continuance, the application was not opposed. Nevertheless, in a minute order, the trial court denied the motion on the grounds that no good cause had been shown. According to the trial court, owner's counsel's "medical excuse [was] premature and unsubstantiated by any doctor's declaration/note stating that she [would] be medically unable to participate in the trial on December 14, 2011. [Owner's c]ounsel's declaration fail[ed] to demonstrate that [owner's] failure to complete necessary discovery [was] excused, as required by [California Rules of Court, rule] 3.1332(c)(6). The pendency of settlement discussions does not constitute good cause for failing to prepare for trial. . . ."

2. Standard of Review

We review the trial court's denial of owner's motion to continue the trial for an abuse of discretion. (*Lazarus v. Titmus* (1998) 64 Cal.App.4th 1242, 1249, citing *Foster v. Civil Service Com*. (1983) 142 Cal.App.3d 444, 448 [190 Cal.Rptr. 893] ["'The granting or denying of a continuance is a matter within the court's discretion, which cannot be disturbed "on appeal except upon a clear showing of an abuse of discretion."'

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[4] As noted above, trial commenced on January 11, 2012.

[Citation.]"] A trial court abuses its discretion when it exceeds the bounds of reason by making a determination that is arbitrary, capricious, or patently absurd. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

3. Analysis

The declaration in support of owner's ex parte application for a continuance contained few, if any, facts to justify the requested continuance. As for counsel's medical excuse, the declaration mentioned a prior gallbladder surgery and an unspecified "medical procedure" scheduled for two days prior to trial. But, based on those facts, it could not be determined whether the medical procedure in question was related to the prior gallbladder surgery and, if so, whether the timing of the procedure—just before the scheduled trial date—was medically necessary. Similarly, there was no explanation why the procedure had not been scheduled earlier or why it could not be postponed until after trial. And, as the trial court observed, there was no declaration or writing from counsel's treating physician confirming that the procedure in question could not be performed earlier, i.e., in November, or that it could not be performed after trial. Given the vague and nonspecific nature of the declaration in support of the application, it was not arbitrary, capricious, or patently absurd to deny the application based on counsel's medical excuse.

As for the failed settlement, the declaration in support of the application was again devoid of essential facts. Although the declaration contained facts showing that the ongoing settlement negotiations had progressed to the point that a settlement appeared imminent to owner's counsel, those facts were insufficient to excuse counsel from preparing owner's case for trial. The trial court had not been asked to stay discovery pending finalization of the settlement, and, absent such a stay, it was not unreasonable for the trial court to conclude that owner's counsel should have continued trial preparation during the negotiations until such time as the case had formally settled.

In addition, the declaration, with one exception, failed to identify the witnesses, documents, and other information that had not yet been obtained through discovery nor

did the declaration provide an estimate as to how long such unspecified discovery would take to complete. Finally, it appears that the one witness identified in the declaration as unavailable for trial, police officer Santos Hernandez, had been deposed prior to trial and testified at trial. Thus, in light of the facts provided, it was not an abuse of discretion for the trial court to conclude that the failed settlement negotiations and counsel's claimed unpreparedness for trial did not constitute good cause to continue the trial.

B. Denial of Motion in Limine

1. Background

Prior to trial, owner filed, inter alia, a motion in limine to exclude evidence and witnesses not produced or identified in discovery. The motion was supported by a one-page memorandum of points and authorities and a three-paragraph declaration of counsel. Nightclub opposed the motion, and in a minute order the trial court denied it. According to the trial court, "the motion [was] denied [as] no such evidence [withheld in discovery] [was] referenced or identified."

2. Standard of Review

We review the denial of a motion in limine for an abuse of discretion. (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 456, disapproved on another ground in *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 4.) As noted, a "trial court exceeds the limits of legal discretion by making an arbitrary, capricious or patently absurd determination." (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.)

3. Analysis

Neither the memorandum nor the declaration in support of the motion in limine identified any witness, documents, or other information that had been withheld during discovery. Similarly, the motion did not show that Nightclub had willfully failed to respond to discovery, that Nightclub had refused to respond to discovery to which the

trial court had ordered it to respond, or that any third-party witnesses had willfully failed to appear for a subpoenaed deposition or produce subpoenaed documents. Absent an adequate showing that witness identities, documents, and other information had been willfully withheld during discovery, there was no factual basis upon which the trial court could have excluded witnesses or other evidence. Because the trial court could not issue an evidentiary exclusion order in a vacuum, it did not abuse is discretion in denying the motion in limine.

C. Substantial Evidence

Owner contends that the trial court erred when it denied his motion for nonsuit because there was insufficient evidence to support the jury's finding that the parties mutually consented to the terms of a lease agreement. Owner also contends that there was insufficient evidence to support the amount of damages awarded by the jury.

1. Standard of Review

Owner's challenge to the trial court's denial of his motion for nonsuit is governed by a substantial evidence standard of review. "A defendant is entitled to nonsuit if the trial court determines as a matter of law that the plaintiff's evidence, when viewed most favorably to the plaintiff under the substantial evidence test, is insufficient to permit a jury to find in his favor. (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 262-263 [80 Cal.Rptr.2d 196].) We review an order denying a motion for nonsuit by using the same test as the trial court, and will affirm that order so long as there was substantial evidence to support the jury's verdict. (*Ibid.*; *Huber Tool Works, Inc. v. Marchant Calculators, Inc*. (1962) 204 Cal.App.2d 822, 824 [23 Cal.Rptr. 10].) The same is true in the federal courts. (*Starceski v. Westinghouse Electric Corp.* (3d Cir. 1995) 54 F.3d 1089, 1093, fn. 1 [motions for nonsuit and JNOV are both motions for judgment as a matter of law under Fed. Rules Civ.Proc., rule 50(a), 28 U.S.C.]; *Guilloty Perez v. Pierluisi* (1st Cir. 2003) 339 F.3d 43, 50 [substantial evidence standard applies to review

of motion for judgment as a matter of law]; *Ortega v. Schramm* (11th Cir. 1991) 922 F.2d 684, 694 [standard of review from district court's order denying defendant's JNOV motion on ground of qualified immunity is same as that of the district court in the first instance; all of the evidence from the trial must be considered in the light most favorable to the party opposed to the motion, and where there was substantial conflicting evidence to support the jury's verdict, the motion should be denied].)" (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 713.)

Owner's challenge to the sufficiency of the evidence in support of the damage award is also governed by the substantial evidence standard of review. "Whether a plaintiff 'is entitled to a particular measure of damages is a question of law subject to de novo review. [Citations.] The amount of damages, on the other hand, is a fact question . . . [and] an award of damages will not be disturbed if it is supported by substantial evidence.' (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 691 [21 Cal.Rptr.3d 732].) We make '"[a]ll presumptions in favor the trial court's ruling, which is entitled to great deference because the trial judge, having been present at trial, necessarily is more familiar with the evidence and is bound by the more demanding test of weighing conflicting evidence rather than our standard of review under the substantial evidence rule. . . . [W]e do not reassess the credibility of witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor."' (*Kelly v. CB&I Constructors, Inc*. (2009) 179 Cal.App.4th 442, 452 [102 Cal.Rptr.3d 32], citations omitted.) 'The evidence is insufficient to support a damage award only when no reasonable interpretation of the record supports the figure.' (*Toscano v. Greene Music, supra*, 124 Cal.App.4th at p. 691.)" (*Rony v. Costa* (2012) 210 Cal.App.4th 746, 753-754.)

2. Background and Analysis

Upon conclusion of Nightclub's case-in-chief, the trial court and owner's counsel had the following exchange concerning counsel's intention to move for a nonsuit. "The

Court: Any more witnesses? [¶] [Nightclub's Counsel]: Your Honor, I rest at this point. [¶] The Court: Okay. We'll go to the defense case-in-chief. Call your first witness. [¶] [Defense Counsel]: I'd like to also move for nonsuit. [¶] The Court: Maybe you'd like to do that later. I suggest that you call your next witness. [¶] [Defense Counsel]: All right. Thank you."

At the beginning of the next day of trial, the trial court heard a motion for nonsuit, but it related primarily to codefendant Nunez (see fn. 3 ante), not owner. "The Court: Okay, so the motion for nonsuit, [defense counsel]. [¶] [Defense Counsel]: Yes, with regards to the establishment of any kind of liability on the part of Mr. Nunez they just simply didn't do it. *I don't think that there was any testimony at all to show that they were harmed by Mr. Nunez doing his job.* [¶] *The Court: That's on the cause of action against Mr. Nunez for intentional interference with a prospective business advantage?* [¶] [*Defense Counsel*]*: Correct.* [¶] The Court: Is that it? [¶] [Defense Counsel]: Likewise, I also believe there was also no testimony on the other causes of action concerning [owner] doing interference with their business relations or contract, but my main focus really is with regards to Mr. Nunez. [¶] The Court: [Nightclub's counsel]. [¶] [Nightclub's Counsel]: Your Honor, I disagree. I think Mr. Freddy Nunez clearly established that we—that El Rey De Oros had about a 5,000 customer list at the time when both [owner] and Freddy took over the—terminated the agreement with [Nightclub] and; therefore, each of those customers are prospective economic, basically, relationship that they had with my client and; therefore, you know, there were conflicting stories about who's getting paid and who's not getting paid between Freddy and [owner]. [¶] The damages are basically going to be the loss of profits that we have presented. You know, as far as the intent, I mean, that's something that I think the jury is going to have to decide. So I think we've established a prima facie case in this, as far as I'm concerned. [¶] The Court: Anything further? [¶] [Defense Counsel]: Yes. Mr. Gamboa and Mr. Galvan both testified that that mailing list that they had was theirs, it was valuable and at no point in time did [owner] or anybody else steal that mailing list. Furthermore, they also testified that they went right away to another location that was just

about five minutes away, five blocks away, and it was right away. So if that mailing list is so valuable, especially with them having posters and banners and things out in front of the Florentine Gardens there's no way that they were harmed. [¶] The Court: Okay, there's not much evidence, but there's enough to go to the jury so I'll deny the motion. [¶] [Defense Counsel]: Thank you." (Italics added)

As the transcript from the hearing on the only motion for nonsuit made by owner demonstrates, the motion was made basically on behalf of owner's codefendant only, and, to the extent it included a claim against owner, if at all, that nonsuit motion was limited to the tortious interference with prospective economic advantage claim. It did not make any reference to the contract cause of action against owner, much less the sufficiency of the evidence in support of that cause of action. Based on the record, owner's claim of error concerning the nonsuit motion lacks merit.

As to the issue of excessive damages, Nightclub's accountant testified that the Nightclub's net profit for 2007 was $198,000; the net profit for 2008 was $545,000; the net profit for 2009 was $456,083; and the net profit for 2010 was $231,081. According to the accountant, after July 2010, Nightclub's income "dropped by two-thirds" and "ceased entirely after the end of October." According to Mr. Gomez, the member of Nightclub who kept its books, if owner had not terminated the arrangement under which Nightclub presented Mexican music concerts at the Florentine Gardens in or about July 2010, the Nightclub's net profit for 2010 would have been as much, if not more, than the net profits for 2008 and 2009.

The foregoing testimony supported a reasonable inference that but for owner's breach of the agreement found by the jury, Nightclub would have had a net profit for 2010 of between $545,000—2008—and $456,083—2009—instead of the $231,081 net profit that it actually made in 2010. Therefore, the $250,000 awarded by the jury represented a reasonable estimate of the amount of net profit Nightclub lost in 2010 following owner's breach in July of that year. Accordingly, the evidence was sufficient to support the damage award.

D. Attorney Misconduct

Owner contends that certain conduct by Nightclub's counsel during voir dire and argument biased the jury against him and deprived him of a fair trial. Owner claims that by mentioning a specific damage amount during voir dire—after being instructed by the trial court not to mention such amounts—Nightclub's counsel committed prejudicial misconduct.[5] Owner further contends that Nightclub's counsel committed prejudicial misconduct when, during argument, he repeatedly referred to owner as greedy and dishonest.

1. Standard of Review

"Attorney misconduct is an irregularity in the proceedings and a ground for a new trial. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 870 (*Decker*).) . . . However, to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial and the party must also have moved for a mistrial or sought a curative admonition unless the misconduct was so persistent that an admonition would have been inadequate to cure the resulting prejudice. (*Cassim* [*v. Allstate Ins. Co.* (2004)] 33 Cal.4th [780,] 794-795 [(*Cassim*)].) This is so because '[o]ne of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.' (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 320 [74 Cal.Rptr. 534, 449 P.2d 750] (*Sabella*).)" (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148 (*Garcia*).)

"But it is not enough for a party to show attorney misconduct. In order to justify a new trial, the party must demonstrate that the misconduct was prejudicial. (*Cassim, supra,* 33 Cal.4th at p. 800.) As to this issue, a reviewing court makes 'an independent determination as to whether the error was prejudicial.' (*Decker, supra,* 18 Cal.3d at p.

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[5] According to owner's counsel, she "promptly objected," but she says, "the objection oddly does not appear in the reporter's transcript . . . ."

872.) It 'must determine whether it is reasonably probable [that the appellant] would have achieved a more favorable result in the absence of that portion of [attorney conduct] now challenged.' (*Cassim, supra,* at p. 802.) It must examine 'the entire case, including the evidence adduced, the instructions delivered to the jury, and the entirety of [counsel's] argument,' in determining whether misconduct occurred and whether it was sufficiently egregious to cause prejudice. (*Ibid.*) 'Each case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.' (*Sabella, supra,* 70 Cal.2d at pp. 320-321, fn. omitted.) '[I]t is only the record as a whole, and not specific phrases out of context, that can reveal the nature and effect of such tactics.' (*Id.* at p. 318.)" (*Garcia, supra,* 204 Cal.App.4th at p. 149.)

2. Conduct During Voir Dire

During voir dire, Nightclub's counsel asked the prospective jurors the following question: "Now if—if [Nightclub] is able to prove [its] case, do you have any problem with awarding a figure of more than $500,000?" Because the trial court had apparently instructed the parties not to mention a dollar amount of damages during voir dire, the trial court and Nightclub's counsel had the following exchange in the presence of the jury: "The Court: [Nightclub's Counsel]? [¶] [Nightclub's Counsel]: Okay. [¶] The Court: Do you recall the Court's instruction? [¶] [Nightclub's Counsel]: I remember that, Your Honor, but - - [¶] The Court: Do not mention a number of any kind. [¶] [Nightclub's Counsel]: Do not mention a number. Okay. Thank you." Thereafter, during proceedings that took place outside the presence of the jury, the trial court and Nightclub's counsel engaged in the following colloquy concerning counsel's mention of an amount of damages in contravention of the trial court's previous instruction. "The Court: All right. We are out of the presence of the jury. [¶] I've already made the record, I think, out of your presence, perhaps, [owner's counsel]. So I raised that

[Nightclub's Counsel]'s conduct in mentioning a damages number was scandalous in its disregard of the court's direct order. [¶] It's a major concern in these cases that we have, and that is why I give that instruction. It is completely unfair, and it puts the defense at a tremendous disadvantage, so - - [¶] [Nightclub's Counsel]: Can I—may I inquire, your Honor, just for my own education, your Honor? [¶] I apologize. I didn't mean to be scandalous about it. [¶] But you said, 'don't bring in the facts of the number of the case,' and that's what I understood, as far as the facts of the case - - [¶] The Court: I could not have been clearer. 'No numbers,' I said. [¶] [Nightclub's Counsel]: I apologize. I didn't hear that. I mean, you know—I wasn't trying to - - [¶] The Court: We'll be in recess. We'll start at 9:45."

Contrary to owner's assertion, the record does not reflect that his counsel objected to the comment by Nightclub's counsel concerning an amount of damages. Rather, the record demonstrates that the trial court instructed the parties not to mention a damage amount during voir dire prior to counsel's comment and then, after the comment that violated the court's instruction, admonished counsel in the presence of the jury and again outside the presence of the jury. Because the record does not show that owner's counsel objected to the trial court's admonitions or requested further or different curative action by the trial court on the issue, owner has failed to preserve this claimed instance of attorney misconduct for appeal.

3. Unplugging Projector

According to owner, his right to a fair trial was violated when two of the members of Nightclub, Mr. Gamboa and Mr. Galvan, allegedly unplugged his counsel's projector during cross-examination. But even if the record supported the conclusion that Messrs. Gamboa and Galvan intentionally attempted to obstruct, disrupt, or interfere with counsel's witness examinations—which it does not—owner's counsel failed to object to the misconduct and request a curative admonition or a mistrial. Owner has therefore failed to preserve this contention for appeal.

4. Statements During Argument

As noted, owner asserts that during argument, Nightclub's counsel referred to him as greedy and dishonest. In support of this assertion, owner cites to the following seven statements by Nightclub's counsel: "But [owner] was greedy. He wanted to have it all for himself." "[Owner is] making it all up." "We know that [owner's] testimony is totally unreliable, because he lied to us." "That's when . . . [owner] became greedy." "It's all about greed." "[Owner], he lied to us. His testimony was totally unreliable." [Owner's] testimony was totally unreliable."

Owner did not object to any of the foregoing statements or request a curative or clarifying instruction. He therefore failed to preserve for appeal any claimed instance of misconduct based on those statements.

Owner did object to one statement by Nightclub's counsel during argument: [Nightclub's Counsel]: "There was no testimony that [the facilities manager at Florentine Gardens] ever received any check from [owner]. There was no testimony that anybody else except Joe [Gomez] received any checks from owner." According to owner, that argument by Nightclub's counsel prejudicially portrayed owner as a man who did not satisfy his financial obligations.

Contrary to owner's characterization of the foregoing comment, it did not suggest or imply that owner did not pay his bills. When read in the context of the entire argument made on this issue, it is clear that Nightclub's counsel was arguing that Mr. Gomez was the manager at Florentine Gardens, and this involved a crucial factual issue in dispute between the parties. Therefore, counsel's comment was legitimate argument and did not constitute misconduct.

E. Other Claimed Irregularities in Conduct of Trial

1. Evidentiary Rulings

a. "Expert" Testimony

Owner claims that the trial court committed prejudicial error when it allowed two witnesses—Gerald McNally, Nightclub's accountant—and Esther Navarro—its business consultant—to testify as experts notwithstanding the trial court's order excluding expert testimony. But owner forfeited these claims by failing to object to the testimony of these witnesses on the grounds that they were experts who had been excluded from testifying or percipient witnesses who gave expert opinions. "The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 37, pp. 497-500.) The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon* (2001) 25 Cal.4th 1082 [108 Cal.Rptr.2d 385, 25 P.3d 598] (*Simon*): '"'"The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ."' [Citation.] '"No procedural principle is more familiar to this Court than that a *constitutional* right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." . . .' [Citation.] [¶] 'The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . . : "'In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'"' [Citation.]" (Fn. omitted; [citations].)' (*Simon, supra*, 25 Cal.4th at p. 1103, italics added.)" (*Keener v. Jeld-Wen, Inc*. (2009) 46 Cal.4th 247, 264-265.)

As for the accountant, owner objected to taking his testimony out of order, but did not object on the basis that his testimony would violate the trial court's in limine order excluding testimony from experts. As for the business consultant, owner made no objection to her testimony, much less on the ground that she was an expert whose testimony had been excluded, and owner did not cross-examine her.

Moreover, it is clear from the transcript of the testimony of both witnesses that they testified as percipient witnesses, not experts. Thus, owner's claim of error based on the testimony of these two witnesses is meritless.

b. Irrelevant, "Overly Emotional" Testimony

Owner claims that the trial court committed prejudicial error when it allowed Ms. Navarro to testify as follows: "Q. Okay, now, during your - - after [Nightclub] stopped-- Carlos [Galvan], your husband, stopped promoting, did that affect your financials at home? A. Yes, very much so. Q. Can you describe to the jury what is going on with that? A. I - - since I had a high-risk pregnancy, I couldn't work, so Carlos was the breadwinner for the family. I had postpartum depression right after my baby so I had to continue staying home. We've lost everything. I had to file bankruptcy. My home - - our home is in foreclosure. There's been days we don't even have anything to eat. We have to go to my parents' to eat, that's how bad. [¶] . . . [¶] Q. Do you need a napkin? A. No. It's fine."

There was no objection to Ms. Navarro's testimony in the trial court, much less an objection on the grounds that her testimony was irrelevant or constituted "emotional theatrics." Owner has therefore forfeited this claimed evidentiary error on appeal.

c. Exclusion of Impeachment Evidence

Owner contends that he was denied a fair trial because the trial court refused to allow his counsel to cross-examine Mr. Gomez based on his deposition testimony. Although the trial court did not allow owner's counsel to impeach Mr. Gomez with his deposition testimony, the deposition testimony in question, which would be essential to

our disposition of this claim of error, is not in the record.[6] Judgments and orders of the trial court are presumed correct, and error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) As a result, an appellant has the burden of providing an adequate record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Id*. at pp. 1295-1296.) Thus, as to this claim of error, the record is inadequate and does not enable us to access whether the error occurred.

2. Statements to Jury Outside Defense Counsel's Presence

Owner maintains that the following statement by the trial court constituted per se reversible error. "The Court: All right. We are out of the presence of the jury. I've already made the record, I think, out of your presence, perhaps, [owner's counsel]." This comment by the trial court is, at best, ambiguous as to the subject matter of "the record" that was purportedly made, as to whether the record was made in the presence of the jury, and as to whether owner's counsel was present. As such, the record on appeal is not adequate to allow us to evaluate this claim on appeal.

3. Bias

Owner maintains that the manner in which the trial court responded to the comment by Nightclub's counsel during voir dire about damages, including the court's statement about having made a record outside owner's counsel's presence, showed that the trial court was biased against owner. As we have explained, in response to the comment by Nightclub's counsel during voir dire about damages, the trial court admonished Nightclub's counsel in the presence of the jury and again outside the presence of the jury. The record does not reflect that owner's counsel had any objection to or issue with the manner in which the trial judge handled the misconduct by Nightclub's counsel. Thus, contrary to showing bias, the trial court's response to the

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[6] The docket for this case reflects that owner lodged a transcript of a deposition of Mr. Gomez, but did not receive permission to file that transcript, nor request judicial notice of it. It is therefore not properly before us on appeal.

inappropriate comment of Nightclub's counsel demonstrated that the trial court acted promptly and properly in protecting owner from any possible prejudice that the comment may have caused.

4. Failure to Correct Defense Counsel's Misstatement During Argument

Owner's counsel contends that the trial court erred when it failed to correct a misstatement made during argument by owner's counsel. During her argument, owner's counsel made the following misstatements by referring to owner, when she apparently intended to refer to Mr. Gomez. "[Owner's Counsel]: And another thing is, you know, when you've got employees, everybody might run their business a little different, but [owner], you heard testimony, he runs things really straight. He doesn't allow his employees to drink on the job. But yet you've got [owner] not only drinking but getting drunk and also getting violent and [fighting] with [owner]'s employees and actually knocking down Walter Crosco."

Owner's contention assumes that the trial court was under an affirmative duty to correct his counsel's misstatements, but he cites no authority for such a duty. It was owner's obligation to recognize and correct the mistake, and the failure to do so forfeited the issue. Moreover, given the testimony about Mr. Gomez drinking and fighting at the Florentine Gardens and the context of the misstatements, it was evident to the jury that owner's counsel misspoke and that she was referring to Mr. Gomez, not owner. Because there was no evidence that owner drank or fought at the Florentine Gardens, the misstatements could not have been taken seriously by the jury and thus were not prejudicial.

DISPOSITION

The judgment from which owner appeals is affirmed. Nightclub is awarded its costs on appeal.[7]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.

[7] Nightclub's motion for sanctions for filing a frivolous appeal is denied.