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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LORENA CABRERA,

Plaintiff and Appellant,

v.

POPOCHIPS, INC. et al,

Defendants and
Respondents.

B286222

(Los Angeles County
Super. Ct. No. BC597293)

APPEAL from an order of the Superior Court for the County of Los Angeles, Elizabeth R. Feffer, Judge. Affirmed.

Tafoya & Garcia, Robert N. Tafoya and Ashton R. Watkins for Plaintiff and Appellant.

Caldarelli Hejmanowski Page & Leer and Marisa Janine-Page for Defendants and Respondents.

Plaintiff and appellant Lorena Cabrera appeals from the trial court's post-trial order awarding sanctions against her, her

attorney Robert Tafoya and the law firm Tafoya & Garcia, LLP after the court found Cabrera brought a frivolous claim for disability discrimination against defendants Popchips, Inc. and Sonora Mills Foods, Inc. (collectively Popchips). Cabrera contends the court abused its discretion in awarding sanctions. We affirm.

PERTINENT PROCEDURAL HISTORY

1. *Cabrera's Complaint and Popchips' Motion for Summary Judgment*

Cabrera sued Popchips, alleging the following causes of action: (1) discrimination based on disability (Fair Employment and Housing Act (FEHA), Gov. Code, § 12940, subds. (a), (c)); (2) discrimination based on gender (Gov. Code, § 12940, subds. (a), (c)); (3) harassment based on gender (Gov. Code, § 12940, subd. (j)); (4) failure to prevent discrimination, harassment and retaliation (Gov. Code, § 12940, subd. (k)); (5) interference with rights under the California Family Rights Act (CFRA)/Family Medical Leave Act (FMLA) and retaliation for taking CFRA/FMLA leave (Gov. Code, § 12945); (6) failure to accommodate and engage in interactive process (Gov. Code, § 12940, subds. (m), (n)); (7) retaliation (Gov. Code, § 12940, subd. (h)); (8) wrongful termination in violation of public policy; and (9) intentional infliction of emotional distress. Cabrera alleged her supervisor caused her work stress, necessitating medical treatment and disability leave. She contended that when she returned from her leave, Popchips informed her she had been terminated. She further contended her supervisor had harassed and threatened her and made gender-based comments and negative comments about her disability and taking medical leave. Further, Cabrera alleged her supervisor gave preferential

treatment to male workers. Cabrera alleged that after she complained to the human resources department, her supervisor retaliated against her and ultimately she was wrongfully terminated.

Popchips filed a motion for summary judgment or, in the alternative, for summary adjudication as to the first through eighth causes of action. The minute order for the June 30, 2016 hearing on the motion reflects only that the court denied the motion because “there are triable issues of fact.”

2. Trial and Verdict

Before trial commenced, the parties indicated no court reporter would be provided for trial, and the parties did not wish to prepare a settled statement. The nine-day trial began on February 28, 2017. At the close of Cabrera’s case-in-chief on March 8, 2017, Popchips made an oral motion for nonsuit, which the court denied.¹ On March 10, 2017, the jury returned a special verdict in favor of Popchips as to each of Cabrera’s causes of action. The jury found that Cabrera was “eligible for medical leave” and that Popchips discharged her, but that Cabrera did not have a physical condition that limited her ability to engage in a major life activity; it further found neither her gender nor her protected activity (taking medical leave or complaining about unlawful harassment or discrimination) was a substantial motivating reason for her discharge. The court entered judgment in favor of Popchips, reserving the issue of costs to be recovered by Popchips from Cabrera.

¹ A court reporter was present only for the ruling on the motion for nonsuit. As the court noted before issuing its ruling, no court reporter was there when the parties argued the motion.

Although on appeal Cabrera refers to certain trial exhibits, it appears only a handful of the exhibits admitted at trial are in the appellate record. Cabrera's trial attorney, Ashton Watkins, attached five trial exhibits to his July 5, 2017 declaration in opposition to Popchips' motion for sanctions, including documents that Watkins alleges demonstrate Cabrera's disability. As discussed, there is no transcript or settled statement, and we are unable to determine which exhibits were admitted at trial. In the same declaration, Watkins purports to summarize portions of the trial testimony by several witnesses, but his declaration is not a substitute for a reporter's transcript or settled statement. (See *Ward v. Litowsky* (1970) 5 Cal.App.3d 437, 439-440 [plaintiff's declaration in support of motion for new trial "is not a substitute for the reporter's transcript, or in this instance, for the settled statement on appeal, nor can it be relied upon to establish what was said by anyone in the course of the trial"].)

3. *Popchips' Motion for Sanctions*

Popchips moved for sanctions against Cabrera and her attorney, Robert Tafoya, pursuant to Code of Civil Procedure section 128.5, based on their alleged bad-faith actions and tactics in the litigation. Popchips argued that all Cabrera's claims against Popchips were frivolous, and that Tafoya knew as much at the outset of the litigation and yet prosecuted Cabrera's case without regard to the facts. Among other contentions, Popchips argued Cabrera brought "frivolous claims driven by an attorney who did not conduct his mandatory due diligence before signing and filing the Complaint, who had no objectively reasonable basis to believe the merits of the case, who ignored the repeated evidence of the frivolity of the case and Ms. Cabrera's deceit, and who push[ed] on with scorched-Earth litigation tactics to

dramatically and unnecessarily increase the costs of litigation in hopes of extorting a settlement from Defendants.” Then, once trial commenced, Tafoya left at the lunchbreak on the second day of trial and (without any explanation) never returned, leaving Watkins, who lacked sufficient familiarity with the case, to complete the trial. Popchips complained that Cabrera’s counsel called Dr. Artis Woodward to testify at trial regarding Cabrera’s alleged medical problems, when they should have known he was a “convicted felon” who “never personally reviewed and signed off on [Cabrera’s] medical file nor treated [her].” Popchips requested the court sanction Cabrera and Tafoya in the amount of \$298,644 in attorney fees and \$54,986.19 in costs.

Cabrera opposed the motion, arguing Popchips could not meet its burden to show her claims were frivolous, given that the court denied Popchips’ motions for summary judgment and nonsuit, and that the jury concluded in the special verdict that Cabrera engaged in protected activity, was eligible for medical leave, and was discharged. Cabrera also argued that “ineptitude is not synonymous with bad faith.” Tafoya submitted a declaration stating he represented Cabrera with the good faith belief that she could prevail at trial. He stated he became sick during the trial and was unable to complete it.

On June 16, 2017, the court heard Popchips’ sanctions motion. No reporter was present for the hearing, and the parties did not request a settled statement. The minute order for that hearing and a notice of hearing prepared by Cabrera’s counsel reflect that the court granted the motion as to the first cause of action for discrimination based on disability, finding the claim was frivolous, and denied the motion as to all the other causes of action. The court deferred the issue of the amount of sanctions

until July 18, 2017, and ordered Popchips to file a supplemental declaration estimating the appropriate amount given the court granted sanctions only with respect to the first cause of action.

After that June 16, 2017 hearing, Cabrera filed a supplemental opposition to Popchips' motion for sanctions. Cabrera also filed a motion for reconsideration of the court's ruling on sanctions in part based on alleged "new evidence" showing that, contrary to Popchips' insinuation at trial, Dr. Woodward's medical license was not suspended during the period of time that he allegedly treated Cabrera and thus he could legitimately attest that she had a disability at that time.

Marisa Janine-Page, counsel for Popchips, submitted a supplemental declaration for the July 18, 2017 hearing, requesting that, at a minimum, Cabrera and her counsel be ordered to pay 75 percent of Popchips' attorney fees (and all of its costs) as a sanction, given the overlap in the work necessary for the various causes of action. The day before the July 18, 2017 hearing, Cabrera filed and served objections to Janine-Page's supplemental declaration.

On July 18, 2017, the court conducted a further hearing. The court deemed Cabrera's evidentiary objections to the supplemental declaration of Janine-Page untimely, indicating it had not seen them, and they had not appeared on the docket. Popchips' counsel indicated she had not seen the objections either.

The court reiterated that the hearing solely concerned the amount of sanctions that should be imposed based on the court's earlier finding that the first cause of action was frivolous. The court repeated its determination apparently made at the previous hearing that Cabrera had "no disability" and that her alleged

disability “was completely concocted.” The court noted that Dr. Woodward, the “defrocked” doctor who testified at trial as to Cabrera’s purported disability, never examined Cabrera. Rather, Dr. Woodward relied on written notes in the file prepared by a chiropractor and a physician’s assistant, who did not testify at trial and who did not have the requisite ability to diagnose her with a disability. Counsel for Cabrera noted his disagreement with the court, arguing that the testimony and medical records introduced at trial sufficiently established that Cabrera had a medical disability. The court stated, “[W]e already had the argument on that issue,” and “the court already made the findings in June.” The court imposed an attorney fee award of \$36,037.54 jointly and severally against Cabrera, Tafoya and Tafoya & Garcia, LLP, calculated as 12 percent of Popchips’ total attorney fee claim, excluding work on the motion for summary judgment and a motion to compel. The court also ordered Cabrera to pay Popchips \$18,524.13 for its expert fees and costs.

Cabrera timely appealed from the October 2, 2017 final order on the sanctions award.²

DISCUSSION

I. *Governing Law and Standard of Review*

Code of Civil Procedure former section 128.5,³ subdivision (a), provided, “A trial court may order a party, the

² Popchips moved to dismiss the appeal, arguing that Cabrera should have appealed from either the June 16, 2017 or the July 18, 2017 minute orders. We denied the motion.

³ References to Code of Civil Procedure former section 128.5 are to the text of that statute as amended effective January 1, 2015. (Stats. 2014, ch. 425, § 1, pp. 552-553.)

party's attorney, or both to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." "Frivolous" is defined to mean "totally and completely without merit or for the sole purpose of harassing an opposing party." (Code Civ. Proc., § 128.5, subd. (b)(2).) "An evil motive is not required; subjective bad faith may be inferred from the prosecution of a frivolous action." (*Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563, 574.) "To be entitled to sanctions the moving party must show the action or tactic was in bad faith *and* frivolous or brought solely to cause unnecessary delay." (*Harris v. Rudin, Richman & Appel* (2002) 95 Cal.App.4th 1332, 1343.)

We review a sanctions award for abuse of discretion. (*Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 997 "[t]o justify a reviewing court's interference with a sanction award, the trial court must abuse the broad discretion accorded it by the Legislature".) "Appealed judgments and orders are presumed correct, and error must be affirmatively shown. [Citation.] Consequently, appellant has the burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. [Citation.] Without a record, either by transcript or settled statement, a reviewing court must make all presumptions in favor of the validity of the judgment." (*Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935.) Particularly when our review is for abuse of discretion, "a reporter's transcript or an agreed or settled statement of the proceedings will be indispensable." (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483.)

II. *The Trial Court Did Not Abuse Its Discretion by Granting Popchips' Motion for Sanctions*

A. *The Finding that Cabrera's First Cause of Action Was Frivolous Did Not Contradict the Court's Prior Rulings Denying Popchips' Motions for Summary Judgment and Nonsuit*

Cabrera contends that at two junctures in the case, the trial court made findings that Cabrera's claims had merit. Specifically, she relies on the trial court's denial of Popchips' motion for summary judgment because "there are triable issues of fact," and its denial of the motion for nonsuit because "there's some evidence of disability that at least go[es] to weight."⁴

⁴ Cabrera also contends that at the same time Popchips made a nonsuit motion on March 8, 2017, Popchips also made a motion for directed verdict. In the court's oral ruling that was transcribed on March 8, 2017, the court does not reference a motion for directed verdict and only discusses the motion for nonsuit. The only reference in the record before us to a motion for directed verdict is the minute order from March 8, 2017 stating the court heard argument on the "oral motion for directed verdict pursuant to Code of Civil Procedure Sections 621 and 581(c)" and denied the motion in its entirety. (It appears the intended citations were to Code of Civil Procedure sections 630 and 581c.) While a defendant brings a motion for nonsuit after "the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence" (Code Civ. Proc., § 581c, subd. (a)), a defendant generally makes a motion for a directed verdict "after all parties have completed the presentation of all of their evidence." (Code Civ. Proc., § 630, subd. (a).) At the time Popchips' motion for directed verdict was purportedly heard and decided, Cabrera had completed the presentation of her evidence, but Popchips had not yet put on its own evidence. Thus, any motion for directed verdict was entirely duplicative of the motion

Cabrera contends that her first cause of action “cannot be frivolous” given these earlier findings by the court.

In *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, which also concerned a FEHA discrimination claim, this court “decline[d] to establish a bright-line rule whereby a plaintiff who survives a motion for summary judgment or nonsuit can *never* be liable for attorney fees” for bringing a frivolous claim. (*Id.* at p. 866.) We held that “[s]uch a rule would unjustifiably shield those plaintiffs who are able to raise a triable issue of fact, even though it be by means of fabricated evidence and false testimony. If the false and unfounded nature of such a plaintiff’s claims is revealed at trial, the prevailing defendant should be able to recoup its attorney fees to the extent the plaintiff is able to pay.” (*Ibid.*)

In *Bond v. Pulsar Video Productions* (1996) 50 Cal.App.4th 918, the court reached a similar conclusion in response to the plaintiff’s “novel” argument that “since his causes of action survived [defendant’s] motion for summary judgment, his discrimination claim could not be frivolous, unreasonable or without foundation.” (*Id.* at p. 923.) The court found that “[d]eclarations sufficient to create a triable issue in a summary judgment proceeding may, in the crucible of a trial, be revealed to be spurious and the litigant’s claim frivolous, unreasonable and without foundation.” (*Ibid.*; see *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1282-1283 [denial of a summary judgment motion does not preclude the trial court from finding, after it has heard all the evidence, that the action was brought or

for nonsuit, and the court’s ruling did not incorporate consideration of the evidence subsequently proffered by the defense.

maintained in bad faith such that sanctions should be imposed under the California Uniform Trade Secret Act]; *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1264, fn. 6 [finding plaintiff “unpersuasively contends its lack of bad faith is demonstrated by the court’s denial of [defendant’s] motion for nonsuit . . . and motion for a directed verdict,” and opining that the motions should have been granted because the case was devoid of merit].)

As discussed, we have no record of either the trial proceedings or the June 16, 2017 hearing on Popchips’ motion for sanctions. “As the party challenging a fee award, [Cabrera] has an affirmative obligation to provide an adequate record so that we may assess whether the trial court abused its discretion. . . . The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court abused its discretion.” (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447-448; see *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141 [“Because [the appellant] failed to furnish an adequate record of the attorney fee proceedings, [the appellant’s] claim must be resolved against [him]”]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [same].) Without a record of the trial proceedings, we have no ability to gauge the strength or weakness of the evidence introduced at trial with respect to the first cause of action for disability discrimination. Critically, we do not know whether the full trial revealed that Cabrera had presented false or fabricated evidence in support of that claim. And without a record of the June 16 hearing at which the court determined sanctions should be imposed, we do not know

whether the court found that Cabrera's evidence was spurious.⁵ (*Rhule v. WaveFront Technology, Inc.* (2017) 8 Cal.App.5th 1223, 1228-1229 ["Without a reporter's transcript or an agreed or settled statement of the proceedings at the two pertinent trial court hearings, we do not know the basis of the trial court's reasoning in awarding fees"].) Given this dearth of information, it would be impossible for us to conclude, based on the court's terse rulings denying Popchips' motions for summary judgment and nonsuit, that the trial court abused its discretion in finding that cause of action was frivolous. In the absence of evidence to the contrary, we must presume that the totality of the evidence at trial supported the trial court's assessment that sanctions were warranted.⁶ (*Taylor v. Nu Digital Marketing, Inc.* (2016) 245 Cal.App.4th 283, 291 ["[w]ithout a record of the trial

⁵ During the July 18, 2017 hearing on the appropriate amount of sanctions, the trial court referenced some of its reasoning underlying its decision to impose sanctions on June 16, 2017. These brief, incomplete references to the bases for the earlier ruling are not a sufficient substitute for a record of the hearing, but it is notable that the court called Cabrera's disability "completely concocted."

⁶ Cabrera also argues the trial court's determination not to award sanctions in connection with the second through ninth causes of action undermines the court's finding that the first cause of action was frivolous. Again, "[t]he absence of an adequate record of what transpired at both of the key hearings in the trial court hobbles plaintiff's appeal." (*Rhule v. WaveFront Technology, Inc.*, *supra*, 8 Cal.App.5th at p. 1227.) We lack any information as to why the court determined not to impose sanctions on the claims other than the disability discrimination claim.

testimony, we must conclusively presume it would also support the trial court's conclusion"].)

B. *The Jury's Special Verdict Does Not Preclude a Determination that Cabrera's First Cause of Action Was Frivolous*

Cabrera also contends the determination that her first cause of action was frivolous is precluded by the jury's finding as to her fifth cause of action under the CFRA and the FMLA that Cabrera was "eligible for medical leave." Because the jury instructions are not in the appellate record, and there is no record of the oral proceedings, we do not know what instructions the jury was given as to how to determine whether Cabrera was "eligible for medical leave." It is unclear if the finding was tied only to the definitions of an "eligible employee" under the FMLA and CFRA, which require the employee to have been employed for at least 12 months and worked at least 1,250 hours during that period. (Gov. Code, § 12945.2, subd. (a); 29 U.S.C. § 2611(2).) Alternatively, the finding might have been intended as the equivalent of a finding that Cabrera was "entitled" to medical leave: "Under both the CFRA and . . . the FMLA, an employee is entitled to medical leave when, because of a serious health condition, the employee cannot perform the assigned job's duties." (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 213.) However, "disability" and "serious health condition" are "different concepts, and must be analyzed separately." (*Id.* at p. 216.) Thus, even if the jury's finding that Cabrera was "eligible for medical leave" equated to a finding she had a serious health condition, that would not have precluded the court from determining Cabrera's first cause of action for disability discrimination was frivolous because she did not have a

disability. Moreover, the jury expressly found that Cabrera did *not* have a “physical condition that limited her ability to engage in a major life activity (i.e. work)” for purposes of her cause of action for disability discrimination. Cabrera’s position therefore lacks merit.

C. *Cabrera Forfeited Her Procedural Objections*

Cabrera raises several procedural objections on appeal. First, she contends Popchips failed to give proper notice of the motion for sanctions, such that it was unclear whether Popchips was seeking sanctions against Cabrera, Tafoya, Tafoya’s firm, or all three. However, Cabrera asserted this objection on July 5, 2017, *after* the court had already held the hearing on the sanctions motion. Cabrera’s counsel plainly had notice of the June 16, 2017 proceedings, as they filed an opposition on June 5, 2017 and appeared at the hearing. Any objections that notice was not proper should have been raised at that time. (See *In re Marriage of Taeb* (Aug. 26, 2019, A152178) __ Cal.App.5th __ [by failing to object prior to hearing at which sanctions were imposed, attorney and her client waived any objections that “no reasonable notice and opportunity to be heard” was provided].)

Second, Cabrera contends the trial court erroneously refused to consider her objections to the June 23, 2017 supplemental declaration of Popchips’ counsel on the basis that the objections were untimely filed and served. Cabrera contends that “existing law allows for parties to file and raise objections to evidence at the time of the hearing.” However, Cabrera cites only to Code of Civil Procedure section 437c, the provision applicable to summary judgment motions, which does not support her contention. Because Cabrera has failed to support her argument with reasoned argument and relevant legal authorities, we deem

it forfeited. (*DP Pham LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 674 [party forfeits argument by failing to adequately support it with reasoned argument and relevant legal authority].)

DISPOSITION

The order awarding sanctions is affirmed. Respondents are to recover their costs on appeal.

STONE, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.