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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HENRY WILLIAMS,

Plaintiff and Respondent,

v.

NICK ALDEN,

Defendant and Appellant.

B226611

(Los Angeles County
Super. Ct. No. SC102466)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Richard A. Stone, Judge. Reversed.

Nick Alden, in pro. per., for Defendant and Appellant.

Law Offices of Michael A. Lotta and Michael A. Lotta for Plaintiff and
Respondent.

* * * * *

This appeal follows a legal malpractice action tried to the trial court. The court found that the lawyer's conduct had caused his former client to suffer damages totaling approximately \$79,000, and entered judgment accordingly. The lawyer Nick Alden appeals, among other things, contending that the trial court abused its discretion by denying his request for a jury trial; we agree and reverse the judgment.

FACTS

1. Background

In mid-2004, Henry Williams entered into a contract to purchase real property improved with five residential units from James, Brenda and Aaron Smith (collectively Smith). In the course of the transaction, Williams placed approximately \$15,000 into an escrow account at Tiempo Escrow II (Tiempo). While Williams was working with a lender to get financing to close the purchase, the lender discovered that only three of the units on the property were built with permits and refused to fund the transaction. After the deal, Williams initiated efforts to get back the \$15,000 he deposited into escrow.

Although the trial evidence is hazy in some details, it is undisputed that Williams retained attorney Alden, and that Alden agreed to undertake efforts of an unclear scope to help Williams recover his \$15,000. The next series of events took place while Williams was represented by Alden.

In April 2006, Williams filed a complaint against Smith and Smith's real estate broker, alleging various wrongs related to the failed sale of the apartment complex. (*Williams v. Smith* (Super. Ct. L.A. County, 2008, No. BC351258).) The complaint named Tiempo as a nominal defendant on express allegations that it had been named solely to "have all parties before the court," and that it would be dismissed upon proof that the funds held in escrow were delivered to the court.

Meanwhile, Tiempo decided that it had heard enough from Williams and Smith regarding the \$15,000 still held in escrow. In November 2006, Tiempo filed a cross-complaint for interpleader naming both Williams and Smith.

In July 2007, at approximately the same time Tiempo filed a motion in Williams' action against Smith for an order authorizing it to interplead the \$15,000 held in escrow, Alden on behalf of Williams filed a first amended complaint (FAC) in that action. The record shows that Williams' FAC, for the first time, named Tiempo in causes of action seeking damages.

In August 2007, the trial court entered an interpleader order on Tiempo's cross-complaint, allowing Tiempo to deliver the funds held in escrow into the court's account.

In July 2008, the trial court granted Tiempo's motion for judgment on the pleadings on Williams' FAC and awarded Tiempo attorney fees and costs against Williams. The following month, the court entered judgment in favor of Tiempo and against Williams in the amount of approximately \$56,000 for its attorney fees.

2. The Legal Malpractice Action

In April 2009, represented by new counsel, Williams sued Alden for legal malpractice. In summary, the complaint alleged that Alden wrongly filed and litigated the FAC against Tiempo in the underlying proceedings, and that Williams suffered the \$56,000 judgment as a direct result. The complaint also alleged that Alden pursued other litigation tactics that were below the standard of care.

The legal malpractice claim was tried to the trial court in May 2010. On June 11, 2010, the trial court entered judgment in favor of Williams and against Alden in the amount of \$79,076.50.

Alden filed a timely notice of appeal.

DISCUSSION

1. The Trial Court Abused Its Discretion in Denying Alden a Jury Trial

"The right to trial by jury is a basic and fundamental part of our system of jurisprudence." (*Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654; see also *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 411.) The right to a jury trial in a civil case is expressly guaranteed under our Constitution. (Cal. Const., art. I, § 16.) However, in a civil case the right "may be waived by the consent of the parties

expressed as prescribed by statute.” (*Ibid.*) One of the ways in which a party in a civil case may waive a trial by jury is by failing to deposit jury fees at least 25 calendar days before the date initially set for trial. (Code Civ. Proc., § 631, subds. (b) & (d).)

Even in the case of waiver, the trial court retains discretion to permit a trial by jury. (Code Civ. Proc., § 631, subd. (e); *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638 (*Tesoro*); *Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 810 (*Johnson-Stovall*); *Massie v. AAR Western Skyways, Inc.* (1992) 4 Cal.App.4th 405, 411 (*Massie*).) And, the trial court should grant a motion to be relieved of a jury waiver “unless, and except, where granting such a motion would work serious hardship to the objecting party.” (*Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806, 809; see also *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1703.) Thus, when there is doubt concerning the propriety of granting relief from waiver, such doubt should be resolved in favor of the party seeking a trial by jury. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956.)

In resolving a motion for relief from waiver of a jury trial, the crucial question is whether any prejudice will be suffered by a party or the court if relief from waiver is granted. (*Tesoro, supra*, 200 Cal.App.4th at p. 638; *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104.) The prejudice that must be shown from granting relief from a waiver is prejudice from the grant of relief, not prejudice from a jury trial. (*Winston v. Superior Court* (1987) 196 Cal.App.3d 600, 603.) The trial court may consider the delay in rescheduling a jury trial, lack of funds, timeliness of the request and prejudice to the litigants in determining whether to grant relief from a waiver. (*McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 363.) The court abuses its discretion in denying relief when there has been no prejudice to the other party or the court from an inadvertent waiver. (*Johnson-Stovall, supra*, 17 Cal.App.4th at pp. 811-812; *Massie, supra*, 4 Cal.App.4th at p. 412; see *Tesoro, supra*, 200 Cal.App.4th at p. 639.)

Here, on the date set for trial, the parties initially argued motions in limine. The court then noted it had no jury instructions from either side and stated, “I’ve got a jury who’s due here at ten o’clock.” Alden apologized, telling the court he thought he had printed the instructions but could not then locate them. Counsel for Williams stated he had e-mailed a copy of the instructions to opposing counsel but had not heard back; nevertheless, he was “ready to go” and was “ready to hand them in.” Later, the court inquired whether the jury was available and was advised by the clerk they were “taking a break right now.” When the court called the matter after the break, counsel for Williams announced that plaintiffs would waive a jury. At that point, Alden informed the court he would like to post fees for the jury and “pick up” the jury “because we asked for a jury trial at the beginning.” When the court inquired whether Alden had paid the fees, he stated he had not because Williams had already done so and “I didn’t think it was necessary to pay it twice.” Alden told the court he would “go down and pay it.” The court told Alden it had no jury instructions from him. Alden responded that he had prepared instructions and had filed them, handing the court a conformed copy of a list of his requested jury instructions. Referring to the document as merely “a piece of paper with some numbers on it,” the court announced that “[t]he jury has been waived.”

The court expressed displeasure with both counsel’s failure to follow its directions. The court stated: “I expected you . . . to come in here this morning . . . ready, that you would have everything prepared for me. You would have a joint witness list. You’d have a joint exhibit list. You’d have a joint statement of the case. You would have your jury instructions prepared and they would be ready. They were going to be joint instructions that you both discussed and agreed to. None of those things occurred this morning.” The court indicated that both counsel had an obligation to bring the case in as a jury trial and “neither of you have met that obligation.” The court had a brief discussion with the jury panel and then proceeded with a court trial. In so proceeding, the court erred.

Even if the court did not have a joint witness list, joint exhibit list or a joint statement of the case as was its preference, a failure to file a joint witness list, joint exhibit list or a joint statement of the case is not one of the statutorily enumerated occurrences by which a jury trial is waived. (See Code Civ. Proc., § 631, subd. (d).)¹ Alden waived a jury trial by his failure to deposit fees 25 days before the initial trial date notwithstanding his mistaken belief he was not required to post such fees. Under section 631, subdivision (b), *each* party demanding a jury trial is required to deposit advance jury fees.

However, there was no showing that granting Alden relief from his waiver would have resulted in prejudice to Williams or the court. Williams had previously posted jury fees, and Alden offered to immediately deposit the first day's jury fees with the court. Thus, lack of funding was not a concern. Granting Alden relief from his waiver would have caused no undue delay in the trial proceedings because the parties and the court expected there to be a jury trial. The panel already had been assembled and was present outside the courtroom. It was not until counsel for

¹ The trial court did not purport to base its denial of a jury trial on Alden's failure to comply with the court's pretrial management orders. Superior Court of Los Angeles County Local Rules, former rule 7.9(h) in effect at the time of trial required compliance with pretrial orders respecting exchange of jury instructions, exhibits and witness lists. Sanctions for noncompliance were authorized by former rule 7.13. The trial court did not mention the local rules. To the contrary, the trial court was prepared to go forward with the jury trial requested by Williams even though Williams's counsel had not filed the documents required by local rules.

We observe that the current case management rule, not in effect at the time of trial, provides: "Failure to exchange and file these items [jury instructions, exhibit and witness lists, and joint statement] may result in not being able to call witnesses, present exhibits at trial, or have a jury trial." (Super. Ct. L.A. County, Local Rules, rule 3.25 (h)(1).) We express no opinion on the power of trial courts to impose a jury waiver on a party who does not comply with local rules. We observe, however, that in a line of cases over 150 years old, our Supreme Court has said that the power to deprive a party of a jury trial rests exclusively with the Legislature. (See *Grafton Partners v. Superior Court*, *supra*, 36 Cal.4th at pp. 953-955; *People v. Metropolitan Surety Co.* (1912) 164 Cal. 174, 177-178; *Exline v. Smith* (1855) 5 Cal. 112, 112-113.)

Williams abruptly retracted his jury trial request, just before the panel was to be called into the courtroom, that there was any indication Williams would forego a jury trial. Alden voiced his desire for a jury as soon as Williams declared he no longer wished a jury trial. As noted, counsel for Williams had previously assured the court his jury instructions were ready to go. The record thus established no prejudice would have resulted in granting relief from the jury waiver.²

Respondent asserts there is not a single record reference dedicated to Alden's claim of jury trial error. We note, however, that Alden's opening brief did cite to a portion of the reporter's transcript following the colloquy between court and counsel regarding Alden's request for a jury trial that we have quoted, *ante*. Such fleeting reference, though minimal, was sufficient to call this court's attention to the relevant portion of the record especially as relevant portions of the record were all in one place. A citation to the entire passage in the reporter's transcript leading up to the jury trial denial would have been more appropriate, but under the circumstances we cannot say the failure to call attention to the complete discussion constituted a forfeiture.

The trial court was understandably not pleased with the parties' failure to fully comply with its pretrial procedures. A list of instructions is no substitute for the actual instructions. (See Cal. Rules of Court, rule 2.1055.) Local rules require the timely submission of premarked exhibits, jury instruction requests, trial witness lists and a proposed short statement of the case. (See Super. Ct. L.A. County, Local Rules, former rule 7.9, current rules 3.170, 3.171, 3.25(h), (i).) We share the trial court's strong concerns that, in this era of dwindling resources in which courtrooms are being closed and court personnel are being laid off, it is unacceptable to keep the court and jury waiting while the parties belatedly get their pretrial documents in order. It is equally unacceptable to essentially coerce the trial court to begin trial in an inefficient setting. We also recognize the trial court spent considerable time writing a thoughtful

² In light of our disposition of the case, we need not reach Alden's remaining contentions.

and complete statement of decision, judicial time that may go wasted. As a matter of equity, depriving Alden of his jury trial has a ring of rough justice. The Code of Civil Procedure, however, does not permit waiver of the right to jury trial except under certain situations and, under the circumstances of this case, the stated reason that Alden had not paid his jury fees created no prejudice to the court or the parties, as required by law. On remand, we do not foreclose the imposition of sanctions against any party in the court's discretion.

DISPOSITION

The judgment is reversed and the cause remanded for a new trial.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.