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

SHERRIE KRAMER, Plaintiff and Respondent, v. TWAROWSKI PACIFIC, LLC et al., Defendants and Appellants.	B267701 (Los Angeles County Super. Ct. No. BC475354)
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APPEAL from a judgment of the Superior Court of Los Angeles County. Deirdre Hill, Judge. As to Twarowski Pacific, LLC, the appeal is dismissed. As to Eugene H. Twarowski, III, the judgment is affirmed.

E. Thomas Moroney for Defendants and Appellants.

Matison & Margolese, Vana Margolese and Wayne Hunkins for Plaintiff and Respondent.

* * * * *

Defendants and appellants Eugene H. Twarowski, III, and Twarowski Pacific, LLC (TP LLC) appeal from the entry of judgment in favor of plaintiff and respondent Sherrie Kramer and her husband, Philip Kramer.¹ Defendants contend the court abused its discretion in entering the judgment, which defendants describe as a default judgment against both of them. We conclude the appeal by TP LLC must be dismissed, and we affirm the judgment against Mr. Twarowski.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2009, a water pipe burst and caused significant damage to plaintiffs' home. Plaintiffs' homeowners' insurance carrier was Allstate Insurance Company (Allstate). In August 2009, frustrated by Allstate's delays in processing their claim, plaintiffs contacted Mr. Twarowski, a licensed public adjustor, to assist them in handling and negotiating their property damage claim with Allstate. Plaintiffs signed a contract with Mr. Twarowski's company, TP LLC, on August 7, 2009 (hereafter "the public adjustor contract").

In December 2011, plaintiffs filed this action against defendants seeking damages for breach of contract and fraud, and also stating claims for declaratory relief and rescission. Plaintiffs' claims arose from alleged breaches of the public adjustor contract, and alleged misrepresentations made by Mr. Twarowski about his experience, the scope of his work and how his fees would be paid.

¹ Plaintiff's husband was a plaintiff in the underlying action, but passed away during the pendency of this action, and is not a party to this appeal. Where appropriate, we use the term "plaintiffs" to refer to the Kramers.

Plaintiffs alleged Mr. Twarowski was belligerent and failed to negotiate with Allstate in a manner designed to facilitate a settlement, prematurely invoked the appraisal process and then essentially abandoned them, and extorted an additional fee agreement from them in violation of his fiduciary duties (hereafter the “client fee agreement”).

Defendants answered the complaint, and filed a cross-complaint against plaintiffs for breach of contract, unjust enrichment and related claims. Defendants alleged, among other things, they were wrongfully denied fees due under the client fee agreement with plaintiffs. Plaintiffs answered the cross-complaint.

In January 2014, the parties stipulated to bifurcate trial, with the first phase being a court trial on issues related primarily to contract interpretation of both the public adjustor contract and the client fee agreement. Phase two was to be a jury trial as to the remaining issues, mainly damages. Defendants posted jury fees.

Phase one of the trial took place over several days at the end of January and beginning of February 2014. Both sides presented testimony and documentary evidence. At the conclusion of the phase one court trial, plaintiffs moved for a directed verdict. The court reserved argument on the motion, set a hearing for February 26, 2014, directed the parties to file briefs on the legal issues, and indicated its intent to file written findings of fact and conclusions of law.

When the parties appeared on February 26, 2014, plaintiffs’ counsel advised the court he had learned TP LLC had been suspended by the Secretary of State. The court continued the hearing to allow for the submission of certified documentation

regarding TP LLC's current status and its legal capacity to proceed in the litigation. The court also set an Order to Show Cause (OSC) regarding the striking of TP LLC's pleadings.

At the continued hearing and OSC on May 13, 2014, the court acknowledged it had received from plaintiffs a certified copy of a Notice of State Tax Lien and a certificate of status from the Secretary of State demonstrating that TP LLC's "powers, rights, and privileges" were suspended as of December 2, 2013. Defendants did not provide proof of revivor. The court therefore struck TP LLC's cross-complaint, as well as its answer to plaintiffs' complaint, and entered TP LLC's default.

On May 15, 2014, the court trial resumed. The court issued its proposed findings of fact and conclusions of law, ordered the parties to meet and confer about a mandatory settlement conference date, and continued trial to July 10, 2014 for the jury trial portion.

In June 2014, defendants filed a complaint for malpractice against their attorney, Bradford Child. Mr. Child filed a motion to be relieved as defense counsel in light of the conflict of interest created by defendants' malpractice suit. After a hearing on the motion, the court granted defense counsel's motion to withdraw and continued trial to July 14, 2014. In the order granting withdrawal, the court ordered that "[TP LLC] must appear through counsel of record and be an entity in good standing as a prerequisite to participating in defense. Eugene Twarowski is to be personally present at trial 7-14-14 or appear through counsel of record."

The jury trial was called on July 14, 2014, but defendants failed to appear, and no counsel appeared on their behalf. The court struck Mr. Twarowski's answer for failure to appear and

defend and entered his default. With both defendants in default, the court set a default prove-up hearing on calendar. The court also overruled defendants' objections to the court's findings of fact and conclusions of law and adopted the findings as the court's decision on the issues presented in the phase one trial. Plaintiffs waived jury for phase two.

Shortly thereafter, plaintiffs requested that the defaults of both defendants be vacated as they intended to file and serve a first amended complaint and a statement of damages clarifying their damage claims. The court vacated the defaults on August 14, 2014.

Plaintiffs filed and served their first amended complaint against defendants on August 25, 2014. The separate statement of damages does not appear in the record. On October 6, 2014, Mr. Twarowski filed his answer, in propria persona, to the first amended complaint. He also purported to file an answer on behalf of TP LLC in propria persona.

On November 18, 2014, the court struck the answer of TP LLC on the grounds it was not filed by counsel and TP LLC had not demonstrated it had obtained a certificate of revivor from the Secretary of State and therefore lacked capacity to proceed as a litigant in the action. The court again entered the default of TP LLC and set a default prove-up hearing for January 22, 2015. The court also set phase two of the trial to begin on January 22, 2015, as between plaintiffs and Mr. Twarowski. Mr. Twarowski was admonished there would be no further continuances of the trial date to accommodate any additional requests to obtain legal counsel. Finally, the court issued and held a bench warrant on Mr. Twarowski until January 22, 2015, for reasons that are not reflected in the record.

On January 22, 2015, plaintiff's counsel appeared and requested a continuance due to plaintiff having suffered an injury. The court granted the continuance to March 25, 2015. Mr. Twarowski failed to appear. The minute order states the court struck his answer and "enter[ed] default against said defendant." As explained in the discussion below, the trial court later ordered the minutes of this hearing to be modified nunc pro tunc, because the court did not order entry of default against Mr. Twarowski. Rather, the court ordered the trial was continued to March 25, and the bench warrant was to be held until that date. The minute order also notes that: "MUCH LATER, the defendant appears in Court and is informally advised by Court Staff of the next hearing date, of the Bench Warrant Hold and to appear promptly on March 25, 2015."

On March 25, 2015, Mr. Twarowski appeared with new counsel, Mr. Aaron Aftergood. There is no reporter's transcript of the second phase of the trial, which proceeded as a court trial. The minute order does not indicate that Mr. Twarowski requested a jury trial or that there was any discussion about a jury. Testimony was received from plaintiff, as well as from witness Alan White, who provided expert testimony as a public adjustor. Mr. Twarowski left the courtroom prior to being called as a witness. Defense counsel was present and given an opportunity to cross-examine and participate, but he "elected not to participate." The court granted judgment in favor of plaintiffs as against both defendants in the amount of \$1,276,452.95, reserving the issue of fees and costs for a later date.

On April 14, 2015, the court entered a judgment in favor of plaintiffs. The form of judgment submitted by plaintiffs' counsel

to the court states that “default judgment” was entered against both defendant Twarowski and defendant TP LLC.

On May 4, 2015, due to apparent congestion on the court’s motion calendar, the court heard Mr. Twarowski’s ex parte application and specially reserved a date for “defendant’s 473 Motion.”

On June 12, 2015 (59 days after entry of the April 14 judgment), defendants, through new counsel (Attorney Moroney), filed a motion to vacate the defaults and default judgments entered against them on the grounds the defaults were void because they were entered without notice or statutory authority, and/or were taken against defendants based on their excusable neglect or mistake.

In opposition, plaintiffs argued defendants had not demonstrated excusable neglect or any other basis to be relieved from default. The opposition papers refer to the judgment against both defendants as a default judgment.

The motion to vacate was heard on July 21, 2015 and taken under submission. The court issued its ruling on October 2, 2015. The court denied the motion and the clerk mail-served notice of the order that day. The record does not contain any transcript of the July 21, 2015 hearing.

The court’s October 2, 2015 written order summarizes the ruling as follows: “The motion to vacate defaults and default judgment is DENIED as to [TP LLC]. As to E. Twarowski, however, the court specifically recalls and finds that E. Twarowski’s answer was not ordered stricken and default was not ordered to be entered on 1-22-15. Rather at all times on 3-25-15, this court was proceeding with trial as against E. Twarowski when taking evidence in conjunction with a prove

up hearing as to TP [LLC]. The request to set aside the default as to E. Twarowski is MOOT as it was entered into the minutes in error and the request to set aside judgment as against E. Twarowski is DENIED. THE CLERK IS TO CORRECT THE MINUTES OF JAN 22, 2015, NUNC PRO TUNC AS STATED HEREIN.”

On October 9, 2015, defendants filed their notice of appeal as to the judgment entered on April 14, 2015, the amended judgment entered on October 2, 2015, and the orders on the motion to vacate and motion for fees issued on October 2, 2015.

DISCUSSION

1. TP LLC

We first address whether TP LLC has the legal capacity to pursue this appeal.

Pursuant to Revenue and Taxation Code section 23301, “the corporate powers, rights and privileges of a domestic taxpayer may be suspended” for nonpayment of taxes. “[A] suspended corporation cannot sue or defend a lawsuit while its taxes remain unpaid.” (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 217-218 (*Kaufman & Broad*)). “A corporation whose powers have been suspended may apply with the Franchise Tax Board for reinstatement after satisfying its obligations. (§ 23305.) *If the statutory requirements are met*, the Franchise Tax Board issues a ‘certificate of revivor.’ (§ 23305.) ‘Upon the issuance of the certificate [of revivor] by the Franchise Tax Board the taxpayer therein named shall become reinstated but the reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or

forfeiture’ (§ 23305a.)” (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 324, italics added.)

There is no dispute that TP LLC was suspended by the Secretary of State for nonpayment of taxes in December 2013. The court continued proceedings to allow time for defendants to present proof of revivor and set a hearing on an OSC regarding the striking of TP LLC’s pleadings.

On May 13, 2014, the court received certified copies of documents from the Secretary of State’s office demonstrating that TP LLC’s corporate powers had been suspended due to nonpayment of taxes in December 2013, and that defendants had not provided proof of revivor. The court therefore struck TP LLC’s pleadings and entered its default on plaintiffs’ complaint.

The default was later set aside because of the filing of a first amended complaint. TP LLC was served and purported to file an answer to the first amended complaint “in propria persona.” The answer was signed by Mr. Twarowski. TP LLC did not file a certificate of revivor. On November 18, 2014, the court struck TP LLC’s answer and re-entered its default on the grounds that TP LLC could not appear in propria persona and had still failed to provide proof of revivor.

It is well settled that once a suspended corporation satisfies its obligations and obtains a certificate of revivor, it “may be allowed to carry on the litigation. [Citation.] Its revivor will validate most otherwise invalid prior proceedings in the case. [Citation.] The underlying purpose of this statute is to induce the corporation to pay its taxes.” (*Kaufman & Broad, supra*, 136 Cal.App.4th at p. 218.)

The record in this case is devoid of proof that TP LLC obtained a certificate of revivor. Defendants did provide, in

June 2015, proof that an *application* for revivor had been submitted to the Secretary of State. Mr. Twarowski submitted a declaration that stated he had submitted the application and it was his “understanding” that the TP LLC was thereafter revived. His lawyer attested to being given a “status report” from the Secretary of State but not a certificate of revivor. There is nothing in the purported status report that demonstrates TP LLC’s corporate status was revived. If its obligations had been satisfied, the Secretary of State would have issued a certificate of revivor pursuant to Revenue and Taxation Code section 23305. Defendants’ failure to provide any proof of revivor justified the trial court continuing to treat TP LLC as a suspended corporation.

Defendants have not sought to provide this court, whether by augmentation of the record or otherwise, with proof of TP LLC’s revivor. We therefore conclude TP LLC lacks the capacity to prosecute this appeal and dismiss the appeal as to TP LLC.

2. Mr. Twarowski

Because of the unusual procedural history of this case and the somewhat disjointed discussion in the briefs about the timeliness of this appeal, we briefly explain why we conclude the appeal by Mr. Twarowski is timely.

Apparently due to the confusion created by the error in the minutes of January 22, 2015, regarding entry of default (which we discuss below), Mr. Twarowski filed a motion for relief from default. An order denying relief from a motion to vacate a default judgment is an appealable order. (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394 [order denying relief from default judgment is appealable]; accord, *Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 857, fn. 3

[“An order denying a motion to set aside the judgment is appealable, regardless of whether the time to appeal from the underlying judgment has expired.”].) Where, as here, a motion to vacate the judgment is filed within the time prescribed by California Rules of Court, rule 8.104 to appeal from the judgment, then the time to appeal is extended. (Cal. Rules of Court, rule 8.108(c).) As relevant here, the time to appeal is extended to 30 days after service of the order denying the motion to vacate. (*Ibid.*) Here, the notice of appeal was timely filed within one week of the court’s service of the October 2, 2015 order denying defendant’s motion.

We now turn to the merits. Mr. Twarowski argues the judgment entered against him was a default judgment that is void, and the court’s October 2, 2015 order denying his motion to vacate was an improper use of the court’s authority to correct orders *nunc pro tunc*. He also contends the court erred by trying phase two of the trial without a jury. We reject these contentions.

A trial court has authority to correct clerical errors in its orders and judgments to make them conform to the order actually issued. “[T]he court may enter a *nunc pro tunc* order to correct clerical errors in the original order, or to enter the proper date of entry of order when the order was not filed timely due to inadvertence, [but] it may not correct judicial error. [Citation.] Judicial error is an erroneous decision, as opposed to an inadvertent clerical error.” (*W. Shield Investigations & Sec. Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 950-951; see also 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, §§ 60-61, pp. 595-597 [“The court can only make the record show that something was actually done at a previous time. A *nunc pro*

tunc order cannot declare that something was done that was not done.”].)

In “ ‘determining whether an error is clerical or judicial, great weight should be placed on the declaration of the judge as to his intention in signing the [judgment].’ ” (*Bowden v. Green* (1982) 128 Cal.App.3d 65, 71 [discussing motion to correct a judgment under Code Civ. Proc., § 473, subd. (a)]; accord, *Gill v. Epstein* (1965) 62 Cal.2d 611, 615, overruled in part on other grounds in *Manta Management Corp. v. City of San Bernardino* (2008) 43 Cal.4th 400, 412, fn. 8.)

In its seven-page, single spaced October 2, 2015 order, the court clearly and unequivocally stated, in six separate paragraphs, that it did not enter Mr. Twarowski’s default on January 22, 2015, and that the reference to a default in the minute order of that date was recorded by the clerk in error. The court explained, “rather than entering E. Twarowski’s default as first considered, the court instead stated its intention to continue the trial to a later date, and proceed with the trial even in the absence of E. Twarowski if he failed to appear. The minute order of 1/22/15 fails to properly reflect the court’s stated intentions[.]” The court directed the clerk, in all capital letters, to correct the order nunc pro tunc accordingly. The court went on to explain that on March 25, 2015, it proceeded with the phase two trial as to damages as to Mr. Twarowski in conjunction with the default prove-up hearing as to TP LLC.

The minute order for March 25, 2015, reflects the proceedings on calendar for that date were “trial,” “civil prove-up hearing” and “final status conference,” consistent with what the court explained in its October 2 order. The March 25 minute order, and the court’s October 2 ruling, also reflect that

Mr. Twarowski was present in court but left prior to plaintiffs' counsel calling him as a witness, and that defense counsel was also present and given an opportunity to cross-examine or present witnesses, but "elected not to participate" in the proceedings. There would have been no reason to permit Mr. Twarowski to cross-examine plaintiffs' witnesses and present testimony for the defense if the proceedings had been a default prove-up as to Mr. Twarowski, because he would not have had the right to participate in a defense, through counsel or otherwise, had he been in default.

Further, nothing in the record suggests that Mr. Twarowski ever asserted his right to a jury for the second phase of the trial. He did not appear in court on the date first set for the second phase jury trial in July 2014, after which plaintiffs waived jury for the second phase, and there is no subsequent reference to a jury in the record before us. Rather, the record reflects Mr. Twarowski again chose to absent himself from the second phase of the trial before he could be called as a witness by plaintiffs. His failure to assert a right to a jury in the trial court amounts to a waiver, and he cannot now complain of it on appeal. (See, e.g., *Escamilla v. Cal. Ins. Guar. Assn.* (1983) 150 Cal.App.3d 53, 61-64, and *Tyler v. Norton* (1973) 34 Cal.App.3d 717, 722.)

Moreover, a judgment of the trial court is presumed correct. We have no reporter's transcript of the March 25, 2015 proceedings. It was Mr. Twarowski's burden as the appellant to provide an adequate record demonstrating error in the trial court's judgment and the order denying his motion to vacate the judgment. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 ["a party challenging a judgment has the burden of showing reversible

error by an adequate record”]; accord, *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003, fn. 2.) The failure to present a record upon which this court can assess error or determine whether substantial evidence supports the judgment forfeits those arguments.

Finally, to the extent Mr. Twarowski argues that the court exceeded the scope of its authority under the parties’ stipulation during phase one of the trial, Mr. Twarowski has failed to affirmatively show any error on this basis.

DISPOSITION

The appeal of defendant Twarowski Pacific, LLC, is dismissed.

The judgment entered against defendant and appellant Eugene H. Twarowski, III, is affirmed.

Plaintiff and respondent Sherrie Kramer shall recover costs of appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.