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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VIN A. FICHTER et al.,

Plaintiffs and Respondents,

v.

TYRONE G. BYRD,

Defendant and Appellant.

B270418
(Los Angeles County
Super. Ct. No. LC101802)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth A. Lippitt, Judge. Affirmed as modified.

Law Office of Vin A. Fichter and Vin A. Fichter for Plaintiffs and Respondents.

Tyrone G. Byrd, in pro. per., for Defendant and Appellant.

Respondents Vin A. Fichter and his firm, The Law Office of Vin A. Fichter, obtained a judgment against appellant Tyrone Byrd for attorney fees owed by appellant to respondents. Appellant, acting in pro. per., seeks reversal of the judgment on multiple grounds, including lack of substantial evidence to support it. However, appellant did not supply a reporter's transcript or any equivalent. Accordingly, we cannot review the sufficiency of the evidence. We do address other grounds for reversal raised by appellant and conclude his due process rights were not violated, Fichter did not violate procedure or defraud the court by including the law office as a separate party, and the trial court did not err in refusing to impose terminating sanctions on respondents for failing to comply with the final status conference order. We agree with appellant, however, that costs were added to the judgment prematurely and without authority. Accordingly, we strike the costs, but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2014, respondents brought suit against appellant and two other parties seeking payment for legal services rendered by respondents under theories of breach of written contract, breach of oral contract, quantum meruit, and several common counts, including account stated and

open book account.[1] Respondents alleged they were retained in 2010 to perform legal services in connection with an Orange County lawsuit. Defendants allegedly agreed to compensate respondents at the rate of $325 per hour, and to reimburse respondents for all costs and expenses. The complaint alleged that respondents had billed $166,325.74, defendants had paid $45,300.70, and that the amount of $121,025.04 remained due and owing.

In October 2015, several months prior to trial, appellant moved in limine to dismiss respondents' complaint or exclude invoices submitted by respondents on the ground they failed to comply with any of the requirements of the court's final status conference order, including exchanging exhibits. Appellant also claimed that some of the invoices respondents wished to introduce into evidence were inaccurate copies of invoices he received.[2] At a non-jury trial on December 17, 2015, the court did not expressly deny the motion, but did so implicitly, permitting the case to go forward and admitting the invoices after providing appellant

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[1] Defendants Don L. Byrd and Diamond Blue Enterprises, LLC defaulted. They are not parties to this appeal.

[2] Attached as exhibits to the motion were copies of eight invoices dated between August 2011 and May 2012, for services rendered from July 2011 to January 2012. One of the invoices -- dated August 2011 -- was marked "paid."

ten minutes to review them.[3] A number of other exhibits were admitted, and Fichter and appellant testified.[4]

Following trial, the court took the matter under submission. On December 21, 2015, the court issued its ruling, finding in favor of respondents. The court specifically found that respondents met their burden of proof on the causes of action for account stated, open book account and breach of contract. It found that appellant was entitled to a discount if he paid timely, but that respondents "did not bill [appellant] on a timely basis." Accordingly, the court discounted the claim, awarding $90,768 for attorney fees and adding $48,044.41 for "service charges."[5]

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[3] There were seven invoices dated between August 2011 and May 2012 for services rendered from July 2011 to January 2012. They appear identical to the six invoices not marked "paid" attached to appellant's October motion.

[4] No reporter's transcript of the trial was provided in the record on appeal. Nor did appellant submit an agreed statement or a settled statement. (See Cal. Rules of Court, rule 8.134(a) [an agreed statement "must explain the nature of the action the basis of the review court's jurisdiction, and how the superior court decided the points to be raised on appeal"]; Cal. Rules of Court, rule 8.137(a) [a settled statement is "a summary of the superior court proceedings approved by the superior court"].)

[5] At the time of trial, respondents sought $121,025.04 for unpaid fees and $64,059.22 for "[s]ervice [c]harges." The fee agreement stated that any balance due and unpaid by more than 14 days over and above the amount of funds in the attorney trust account "shall be subjected to a 'Service Charge' (not 'interest')
(*Fn. is continued on the next page.*)

On January 29, 2016, respondents filed a memorandum of costs, requesting $729.11. The memorandum of costs was served by mail on appellant on January 26, at his address in Hawaii.

The clerk of the court entered judgment against appellant on February 8, 2016 in the amount of $139,541.52, consisting of the $90,768 in fees and $48,044.41 in service charges awarded by the court, and $729.11 for costs. This appeal followed.

DISCUSSION

Appellant contends that respondents did not meet their burden of proof on the causes of action for open book account, account stated or breach of contract. Appellant further contends his due process rights were violated and respondents committed fraud on the court because: (1) The Law Office of Vin A. Fichter was not a legal entity, and Fichter had no standing to pursue the matter in his own name; (2) the court did not enforce the final status conference order or the local rules governing final status conferences, rendering that procedure meaningless, as appellant was not provided respondents' exhibits or trial brief prior to trial; (3) the court admitted exhibits not exchanged at the final status conference; (4) costs were entered prior to the running of the time in which a motion to

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payable to Attorney at the rate of Twelve Percent (12%) per annum, calculated on a daily pro rata basis."

tax costs could be filed; (5) trial was delayed several times without sufficient notice to appellant and assigned to a judge unfamiliar with the facts; (6) respondents disregarded the court's order requiring the judgment to be prepared and submitted by January 4, 2016; and (7) the claim for breach of oral contract was time barred.[6]

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[6] Appellant also contends the judgment was incorrect because the court, in its ruling, awarded "attorney fees" and "services charges," but the judgment refers to "damages," and that the court granted relief not sought in the complaint. The judgment was not incorrect with respect to its award of damages. The attorney fees and service charges awarded by the court are considered damages. The court did not grant relief not sought in the complaint. In the complaint's prayer, respondents sought money damages in the sum of $121,025.04, plus service charges. In contending otherwise, appellant appears to be confused by a paragraph in the complaint seeking attorney fees for litigating the open book account cause of action in "an amount equivalent to the lesser of either (i) $660.00 or (ii) twenty-five percent (25%) of the . . . total Account balance due . . . ."

We need not address the contention that the cause of action for breach of oral contract was time barred, as the remaining claims on which the court awarded judgment would stand even were that cause of action dismissed. With regard to appellant's contentions that the trial date was continued on short notice, the judge assigned to try the case was not familiar with the facts, and the entry of judgment was delayed, these are ordinary occurrences in civil court. Appellant has identified no prejudice suffered as a result of the continued trial date, the judge's unfamiliarity with the case, or the delayed entry of judgment. We observe that the facts of the case were not so complex that a judge could not become familiar with them within a short period of time.

We are unable to address appellant's contentions that substantial evidence did not support the trial court's findings on respondents' claims for account stated, open book account and breach of contract, because appellant failed to supply a reporter's transcript or its equivalent (agreed statement or settled statement). Without a proper record we can neither review the sufficiency of the evidence nor make a finding that the court erred. (See *Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362 [it is appellant's burden to present an adequate record for review];[7] *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [absent a reporter's transcript or equivalent, "it is presumed that the unreported trial testimony would demonstrate the absence of error"]; *Mitchell v. City of Indio* (1987) 196 Cal.App.3d 881, 890 ["'In reaching a decision on appeal an appellate court is governed by the record; [it] will not consider facts having no support in the record; and will disregard statements of such facts set forth in a brief'"]; see also *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 ["'A judgment or order of the lower court is presumed correct'" (italics omitted)].) Put another way, unless error is apparent on the face of the existing appellate record, "the judgment must be conclusively presumed correct as to all evidentiary matters," and we must assume that "the

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[7] Although appellant is self-represented, that status does not exempt him from the rules of appellate procedure or relieve him of his burden on appeal. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

unreported trial testimony would demonstrate the absence of error. [Citation.]" (*Estate of Fain*, *supra*, at p. 992, italics omitted.) "The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript [or agreed or settled statement] will be precluded from raising an argument as to the sufficiency of the evidence. [Citations.]" (*Ibid.*)

The absence of a reporter's transcript or its equivalent does not preclude us from addressing other contentions. Appellant contends that The Law Office of Vin A. Fichter is not a legal entity of any kind, and that Fichter defrauded the court by naming his law firm as a plaintiff. Conversely, he contends that Fichter lacked standing to pursue the action, presumably because the fee agreement was with the law office. Fichter did not defraud the court. Paragraph 4 of the complaint stated that "The Law Office of Vin A. Fichter" was a name used by Fichter, a practicing lawyer. Moreover, naming himself, the law office, or both in the complaint was not improper. ""'Doing business under another name does not create an entity distinct from the person operating the business.'"" (*Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348, italics omitted.) "'The business name is a fiction, and so too any implication that the business is a legal entity separate from its owner.'" (*Ibid.*) Consequently, a party who enters into a contract under the fictitious name "[is] the contracting party, and [is] entitled to pursue an action to collect for the work done pursuant to the contract." (*Ball v. Steadfast-BLK* (2011) 196 Cal.App.4th

694, 701; see also *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 943 [individual who owns assets of sole proprietorship is "personally liable for all debts and responsibilities incurred by the business," and "the assets of a sole proprietorship business [are his]"].) Naming the sole proprietorship in the complaint is "an entirely acceptable procedure." (*Pinkerton's, Inc. v. Superior Court*, *supra*, at pp. 1348, 1349 [lawsuit properly brought against party "by suing and serving it under its fictitious business name"].)

Appellant contends that the court should have dismissed the complaint or precluded respondents from admitting the documentary evidence needed to prove their claims because respondents did not comply with the final status conference order or the local rules. We are not persuaded. Trial courts have the power to impose sanctions, including dismissing actions or striking pleadings, if a party fails to comply with its orders or local rules. (*Tliche v. Van Quathem* (1998) 66 Cal.App.4th 1054, 1060-1061; see Gov. Code, § 68608, subd. (b); Code Civ. Proc., § 575.2; *Stephen Slesinger, Inc. v. Walt Disney Co*. (2007) 155 Cal.App.4th 736, 758 [California courts have inherent power to dismiss actions "when faced with pervasive litigation abuse"].) However, exercise of the power to dismiss an action or impose other sanctions that would result in termination of the litigation due to a procedural error is "disfavored" (*Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 97), and should be limited to "'extreme circumstances'" of deliberate misconduct "when no lesser sanction would be

effective to cure the harm." (*Stephen Slesinger, Inc. v. Walt Disney Co.*, *supra*, at p. 760; accord, *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1399 ["'Preventing parties from presenting their cases on the merits is a drastic measure; terminating sanctions should only be ordered when there has been previous noncompliance with a rule or order and it appears a less severe sanction would not be effective'"]; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1364 ["[C]ourts ordinarily should avoid treating a curable violation of local procedural rules as the basis for crippling a litigant's ability to present his or her case"].) Before imposing terminating sanctions, the court should consider the history of the party's conduct in the case and consider whether less severe sanctions would be effective to assure compliance. (*Tliche v. Van Quathem*, *supra*, at pp. 1060-1061; see Gov. Code, § 68608, subd. (b).) Because appellant has failed to provide a full record of the proceedings, we have no basis to conclude the court abused its discretion in rejecting the extreme sanctions appellant sought.[8]

Finally, appellant contends that costs were added to the judgment before the time within which to file a motion to

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[8] Based on the limited record provided, we find the court's decision to grant appellant additional time during trial to review respondents' invoice exhibits rather than excluding them was not an abuse of discretion. The number of documents was small, and as was demonstrated by appellant's motion in limine, appellant had available his own copies of the pertinent invoices prior to trial.

tax costs had expired.[9] This appears to be so. Rule 3.1700(b)(4) of the California Rules of Court provides: "After the time has passed for a motion to strike or tax costs or for determination of that motion, the clerk must immediately enter the costs on the judgment." Rule 3.1700(b)(1) states: "Any notice of motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum. If the cost memorandum was served by mail, the period is extended as provided in Code of Civil Procedure section 1013." Section 1013 provides that any right to do any act or to make any response within any period or on a date certain after service of the document "shall be extended . . . 10 calendar days if . . . the place of address is outside the State of California but within the United States . . . ."

The memorandum of costs is in the clerk's transcript. It was filed-stamped January 29, 2016. According to the attached proof of service, it was served on appellant in Hawaii on January 26, 2016. Twenty-five days after service was February 20, a Saturday. If the last day to perform an act falls on a "holiday," defined to include Saturdays and Sundays, the time is extended to an including the next day that is not a holiday. (Code Civ. Proc., §§ 10, 12a; Cal. Rules of Court, rule 1.10(a) & (b); *Purifoy v. Howell* (2010) 183 Cal.App.4th 166, 175.) Thus, appellant had until Monday,

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[9] Respondents' only response is to cite rule 8.278 of the Rules of Court, which states that a prevailing party is entitled to costs on appeal.

February 22 to file a motion to tax costs. The judgment, which included $729.11 in costs, was entered by the clerk prematurely on February 9.[10] Because the clerk lacked authority under Rule 3.1700(b)(4) to enter an order for costs on February 9, the costs awarded must be stricken from the judgment. (See *Baird v. Smith* (1932) 216 Cal. 408, 410-411 [clerk ""derives all his powers from the statute, and. . . in each case it must appear that what he did was within the authority conferred on him by the statute""; where clerk "exceeds the limited power conferred upon him by the statute, there is an entire absence of jurisdiction and his action . . . is a nullity and open to attack at any time"]; accord, *Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 99, fn. 7 [when clerk manifestly acts beyond his or her statutorily-conferred powers, action is void]; see also *Bristol Convalescent Hospital v. Stone* (1968) 258

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[10] As explained in *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 996, generally a judgment, when entered, includes an award of costs and fees with the amounts left blank for future determination. "After the parties file their memoranda of costs and any motions to tax, a postjudgment hearing is held and the trial court makes its determination of the merits of the competing contentions. When the order setting the final amount is filed, the clerk enters the amounts on the judgment nunc pro tunc." (*Id*. at pp. 996-997.) In other words, a prevailing party generally waits until judgment is entered before filing a memorandum of costs. (*Ibid*.; *Boonyarit v. Payless Shoesource, Inc*. (2006) 145 Cal.App.4th 1188, 1192.) Here, respondents set the error in motion by filing their memorandum of costs prematurely.

Cal.App.2d 848, 862 [if clerk's mechanical computation of time elapsed since service was completed is in error and he enters default prematurely, judgment is void and may be set aside at any time, regardless how it comes to the court's attention].)

DISPOSITION

The award of costs in the amount of $729.11 is stricken from the judgment. The judgment is otherwise affirmed. Respondents are awarded their costs on appeal.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.