Filed 2/28/18 Optikal Noize, Inc. v. Global Gift Foundation CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

OPTIKAL NOIZE, INC., Plaintiff and Appellant, v. GLOBAL GIFT FOUNDATION et al., Defendants and Respondents.	B281682 (Los Angeles County Super. Ct. No. BC579909)

APPEAL from an order of the Superior Court of Los Angeles County. Holly E. Kendig, Judge. Affirmed.

Obagi Law Group, Zein E. Obagi and Ben Jakovljevic for Plaintiff and Appellant.

Liner, Stanton L. Stein and Diana A. Sanders for Defendants and Respondents.

Plaintiff and appellant Optikal Noize, Inc. (Optikal) appeals from an order dismissing its action against defendants and respondents Global Gift Foundation (GGF), Maria Bravo, and Alina Peralta (collectively, Respondents). The trial court dismissed the action 14 months after it had granted Respondents' motion to stay the case under Code of Civil Procedure section 410.30 based upon a contractual forum selection clause.[1] On November 24, 2015, the trial court initially stayed the case to permit an action to be commenced in Spain, the designated forum. Then, at a status hearing on January 18, 2017, the trial court dismissed the action after learning that Optikal had filed a complaint in Spain.

Optikal argues that: (1) there was no valid forum selection clause because Respondents fraudulently included the clause in the parties' contract; (2) the clause should not be enforced even if deemed part of the contract because Optikal would not "receive fair and reasonable treatment" in a Spanish forum; and (3) the trial court improperly dismissed the case rather than continuing the stay pending a determination of whether Spain would adjudicate Optikal's claims. We conclude that we lack jurisdiction to consider Optikal's first two arguments, as Optikal chose not to appeal the trial court's November 2015 ruling enforcing the forum selection clause and granting a stay. With respect to the third issue, we hold that Optikal failed to meet its burden on appeal to provide a record showing that the trial court erred in ordering the dismissal. We therefore affirm.

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[1] Subsequent undesignated statutory references are to the Code of Civil Procedure.

BACKGROUND

1. *Optikal's Complaint*

Optikal filed its original complaint on April 27, 2015, and filed a first amended complaint (FAC) on October 9, 2015. According to the FAC, Optikal is a "creative consulting agency specializing in connecting famous and luxury brands through sponsorships or in kind support with internationally relevant charity and entertainment events across the globe." Optikal alleges that, since 2009, it worked with Bravo and Peralta in arranging sponsorships for charitable events. Until 2013, Optikal had a contractual relationship with an entity called "MandA," which was owned by Bravo and Peralta. The charitable events benefited charitable organizations founded or sponsored by actress Eva Longoria, whom Optikal claims is a close friend of Bravo and Peralta.

On October 14, 2013, Optikal entered into an "Independent Agent Collaboration Agreement" (Agreement) with Bravo and Peralta as the "founders of Global Gift Foundation . . . in representation of the GLOBAL GIFT GALA S.L." (GGG). The Agreement stated that GGG is a "charity platform dedicated to raising awareness and funds for selected associations and foundations." The Agreement established the terms for Optikal to obtain sponsorships for charitable events for GGG in return for a commission.

Optikal alleges that Respondents breached their contractual promises to Optikal and committed various related torts by wrongly representing that GGF was qualified as a "501(c)(3) tax-exempt entity" under the Internal Revenue Code. Optikal also alleges that Respondents wrongfully failed to disclose that Bravo and her deceased husband "were previously

involved in an international boiler room scam." Optikal claims that these misrepresentations damaged its relationship with a client, Harry Winston, Inc., whom Optikal had enlisted as a sponsor for GGF events under the condition that GGF was a qualified charitable organization.

2. *Respondent's Motion to Dismiss or Stay on the Ground of Forum Non Conveniens*

Respondents moved to dismiss or stay the case under section 410.30 on the ground that the parties agreed to adjudicate disputes in Spain. In a section labeled "Jurisdiction," the Agreement provided: "If any questions or disputes arise in relation to this contract, both Parties are obliged to submit to the Courts of Málaga, Spain expressly waiving their own jurisdiction. This contract is of an exclusive commercial nature, governed by its own terms, and the provisions of the Code of Business Conduct, under specific commercial laws and usages. As proof and acceptance of the aforementioned, both Parties sign the pages of this contract, issued in duplicate, with a single purpose, in the city and on the date mentioned in this contract." Optikal's president, Nancy Cihlar, signed each page of the Agreement, including just below this provision.

Optikal opposed the motion on the ground that it never agreed to Spain as the designated forum. Optikal argued that Respondents changed the designated forum from California to Spain during an exchange of drafts without disclosing the change. Optikal claimed that the parties actually agreed upon California as the designated forum to resolve disputes, and that the Agreement should be revised to reflect that fact.

The trial court granted Respondent's motion to stay on November 24, 2015. The court rejected Optikal's claim that the

Agreement should be reformed to reflect a California forum, finding "insufficient evidence that the parties ever agreed to California jurisdiction." The court concluded that Optikal could not challenge the validity of the forum selection clause without "attacking the validity of the contract as a whole," which Optikal did not do. The court also found that Optikal "fail[ed] to meet its burden of establishing that enforcement of the clause is unreasonable," noting that the Agreement: (1) was with a Spanish business entity whose founders "are of Spanish nationality"; (2) referenced Spanish laws; (3) provided for payment to a Spanish bank account; (4) required that Optikal invoice Respondents at an office in Spain; and (5) called for certain payments in euros. The court therefore found a "rational basis for selecting a Spanish forum."

The trial court ordered the action stayed and set a status conference for December 16, 2016, concerning the stay. Optikal did not appeal the ruling.

3. *The Trial Court's 2017 Decision Dismissing the Action*

The status conference occurred on January 18, 2017. The only information in the appellate record concerning what occurred at the status conference is a copy of the trial court's minute order. The order states, in its entirety: "Matter is called for hearing. [¶] The parties inform the court that a complaint was filed in Malaga, Spain. Counsel are waiting to see if the District Attorney will take jurisdiction over this matter. [¶] Based on the information from counsel that there is now a case filed in Spain, the court orders this matter DISMISSED, ENTIRE ACTION. [¶] It is so ordered. [¶] Notice is waived."

Optikal filed its notice of appeal on March 21, 2017. On April 19, 2017, Optikal filed a proposed written order reflecting the trial court's dismissal of the action, which the court signed and filed on May 2, 2017.[2]

DISCUSSION

1. *By Failing to Appeal the Trial Court's November 24, 2015 Ruling Enforcing the Forum Selection Clause Optikal Forfeited its Right to Challenge that Ruling on Appeal.*

The rule in California is that a party has "one shot" to appeal an appealable order. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8.) This means that, "if an order is appealable, appeal must be taken or the right to appellate review is forfeited." (*Ibid.*)

This rule is reflected in section 906. That section provides that, on appeal from a verdict or decision, a reviewing court may review "any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or

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[2] Optikal's notice of appeal was timely. The time period for filing the notice of appeal did not begin to run until the written dismissal order was filed on May 2, 2017. (§ 581d ["All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes"]; *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1578.) Although premature, by rule Optikal's notice of appeal was deemed filed immediately after the trial court's written order was entered. (Cal. Rules of Court, rule 8.104(d)(1) ["A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment"].)

order appealed from or which substantially affects the rights of a party." (*Ibid.*) However, the Legislature established an important exception: "The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken." (*Ibid.*)

For example, pursuant to this rule a plaintiff forfeits the right to appeal an order dismissing an action against one defendant after a successful demurrer without leave to amend, even though the plaintiff later appeals the subsequent dismissal of similar claims against other defendants. (See *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1369–1371.) And a plaintiff who loses just a portion of his or her claims following a defendant's successful "anti-SLAPP" motion[3] must "choose between interrupting the prosecution of his or her case and forfeiting appellate review of the SLAPP ruling." (*Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1185, fn. 7; see *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1247 [order granting an anti-SLAPP motion is not appealable from the final judgment].) The rule that a party must timely appeal is jurisdictional, and " 'where no appeal is taken from an

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[3] "SLAPP" is an acronym for "[s]trategic lawsuit against public participation." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.) Under section 425.16, subdivision (b)(1), a defendant may file a special motion to strike claims that arise from certain protected conduct. Under section 425.16, subdivision (i), a losing party has a right to appeal a ruling granting or denying such a motion.

appealable order, a reviewing court has no discretion to review its merits.' " (*Maughan*, at p. 1247)

An order granting a motion to stay an action on the ground of inconvenient forum is appealable. (§ 904.1, subd. (a)(3).) Thus, to obtain appellate review of the trial court's November 24, 2015 order granting Respondents' motion to stay the action on the basis of the forum selection clause, Optikal was required to timely appeal that order. Optikal's notice of appeal filed on April 21, 2017, more than 17 months later, was not timely with respect to that order.

Optikal argues that the "merits of the forum selection clause" are properly at issue on this appeal because the "central question" of the case is whether to continue the stay or to "enforce the effect of the clause to end the case." The problem with this argument is that the issue of *how* the clause should be enforced is different from the question whether the clause should be enforced at all. The trial court resolved the latter question in ordering the stay in 2015. The record does not provide any indication that the trial court revisited the validity or enforceability of the forum selection clause in deciding to dismiss the case in January 2017. Rather, the court simply noted that "there is now a case filed in Spain." To obtain appellate review of the validity and enforceability of the forum selection clause, Optikal was required to appeal the 2015 trial court ruling that decided that issue.

Optikal also argues that it "had no reason" to appeal the 2015 order because, at that point, it had "suffered no prejudice." Assuming for the sake of argument that an order enforcing the forum selection clause and requiring Optikal to pursue its claims in a different country caused it no prejudice, the point is irrelevant. The time for appealing the trial court's order ran from

the date of entry of the order (and/or service of a notice of entry), not the date when Optikal actually suffered some prejudice. (Cal. Rules of Court, rule 8.104(a).)[4] Optikal may have had strategic or practical reasons not to appeal the order granting the stay, but Optikal's strategic decision not to appeal nevertheless resulted in a forfeiture of the right to seek appellate review of the validity and enforceability of the forum selection clause.

2. *The Record Does Not Show that the Trial Court Erred in Deciding to Dismiss the Action.*

The parties appear to agree that the abuse of discretion standard applies to our review of the trial court's decision to dismiss the case in 2017. That standard is appropriate for appellate review of a trial court's decision to dismiss a previously stayed action based upon a party's failure to prosecute its claims diligently in a foreign forum. (See *Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 Cal.App.4th 122, 131; *Auffret v. Capitales Tours, S.A.* (2015) 239 Cal.App.4th 935, 940–942 (*Auffret*).) On the other hand, in *Diaz-Barba v. Superior Court* (2015) 236 Cal.App.4th 1470, the court applied the substantial evidence standard to review the trial court's implicit findings that the plaintiff had attempted to pursue litigation in Mexico in good faith. (*Id.* at pp. 1484-1490.)

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[4] Indeed, other appealable interlocutory orders may not cause the losing party any actual prejudice unless and until an adverse final judgment is entered. For example, an order granting an anti-SLAPP motion to strike particular claims in a plaintiff's complaint arguably does not cause any prejudice unless the plaintiff is ultimately precluded from obtaining the relief he or she seeks through other claims.

The appellate record here is insufficient even to decide the appropriate standard of review, much less to review the trial court's decision in light of that standard. The basis of the trial court's ruling is almost entirely opaque.

The only information in the record concerning the information presented to the trial court and the reason for its ruling is the court's brief minute order. Optikal elected to proceed with its appeal without a reporter's transcript of proceedings at the January 18, 2017 hearing. Nor did Optikal provide a settled statement concerning events at the hearing. (See Cal. Rules of Court, rule 8.137.) If any pleadings or factual materials were filed in connection with the hearing, the appellate record does not include them.

Thus, we cannot tell from the record whether the trial court's dismissal was based on findings that Spain had accepted jurisdiction over Optikal's claims, or that Optikal had failed to act in good faith to prosecute those claims diligently, or for some other reason. Indeed, the record does not even show that Optikal objected to the dismissal, or if it did so, on what ground. (*In re Carrie W.* (2003) 110 Cal.App.4th 746, 755 [" ' " 'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the trial court by some appropriate method' " ' "].) The record also lacks any information about the judicial process in Spain and the significance of the fact that, as the trial court noted, "[c]ounsel are waiting to see if the District Attorney will take jurisdiction over this matter." (See *Auffret, supra,* 239 Cal.App.4th at p. 941 [appellate court took judicial notice of an English translation of a decision by a French court on a jurisdictional question issued

after the trial court had dismissed the case in favor of a French forum].)

In light of this record, we must affirm under the appellate doctrine that a trial court ruling is presumed correct in the absence of a record showing the contrary. " 'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, quoting 3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238–2239.)

It was Optikal's burden to provide an adequate record to support its claim of error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140–1141; *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039 ["It is Stasz's obligation as appellant to present a complete record for appellate review, and in the absence of a required reporter's transcript and other documents, we presume the judgment is correct"].) In particular, where an appellant claims that a trial court abused its discretion in making a ruling, the appellant's failure to provide any record explaining the basis for the trial court's reasoning precludes review of that ruling. (*Rhule v. Wavefront Technology, Inc.* (2017) 8 Cal.App.5th 1223, 1228–1229.) We therefore presume the trial court's decision was correct, and we affirm the dismissal.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.