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REPORTS**

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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

IMPACT REALTY, INC.,

Plaintiff and Appellant,

v.

LETICIA SOTO FERNANDEZ,

Defendant and Appellant.

B270142

(Los Angeles County
Super. Ct. No. BC562514)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Offices of John Amoroso and John Amoroso for Plaintiff and Appellant.

Michael B. Montgomery for Defendant and Appellant.

Leticia Soto Fernandez (Fernandez) appeals from a judgment finding her liable for breach of contract and awarding attorney fees to Impact Realty (Impact). Impact cross-appeals, arguing the trial court erred in finding Fernandez did not conspire to commit fraud, and abused its discretion in awarding a reduced amount of attorney fees. We affirm.

Tawfiq Bishara, dba Century 21 Bright Horizons,¹ filed a complaint on January 17, 2014, alleging breach of contract and conspiracy to defraud against Fernandez and others (the initial complaint is not in the record), and Fernandez filed a cross-complaint for breach of contract on February 25, 2014, which later settled. In a FAC filed January 9, 2015, Impact alleged that Fernandez, Carol Ortega, and Lotus Escrow each was the agent of the other and acting within the scope of that agency. The first cause of action, breach of contract against Fernandez, alleged that on April 4, 2013, Fernandez signed a one-year listing agreement with Impact agent

¹ The trial court corrected a clerical error in the initial judgment, which named Bishara as the plaintiff (as in the original complaint), rather than Impact, which was named as the plaintiff in the first amended complaint (FAC). Impact appealed the judgment in Ortega's favor and the award of attorney fees, and we affirmed. (*Impact Realty, Inc. v. Ortega* (June 14, 2017, B272040) [nonpub. opn.].) We draw on our earlier opinion for a portion of the background facts in this opinion.

JoAnn Verduzco to sell a house owned by Fernandez. The agreement provided that Fernandez would pay Impact four percent of the purchase price. The FAC also alleged that under the agreement, “[i]n case of dispute regarding the obligation to pay compensation the prevailing party shall be entitled to reasonable attorney fees and costs.” Impact advertised the property for sale. Fernandez sold the property during the listing period, and refused to pay any broker’s compensation to Impact. Fernandez’s breach of contract caused Impact \$17,800 in damages “and attorneys fees and costs.”

The second cause of action, conspiracy to defraud, alleged that all three defendants conspired to deny Impact its broker’s compensation. When Fernandez learned of an interested buyer, she telephoned another Impact agent, Sandra Morrison, to execute a one-month listing agreement from September 5, 2013 to October 5, 2013, with a reduced selling price. On October 18, 2013, Ortega, a broker with another agency representing the prospective buyers, executed a purchase offer which stated that the property was for sale by owner (Fernandez). Impact alleged that this statement was false, because up to the time of sale Ortega dealt with Morrison, who Ortega knew was representing Fernandez as her broker. On October 28, 2013, during negotiations over price reductions, Fernandez issued an addendum to the purchase agreement stating that she was representing herself with no listing agent or office, which was also false. Before escrow closed, Impact learned of the

sale and provided the escrow company with a copy of the initial listing agreement covering April 4, 2013 to April 4, 2014. The escrow company conspired with Fernandez and Ortega to commit fraud and deny Impact its commission. Impact asked for \$17,800 in damages with interest, punitive damages of \$100,000, “reasonable attorneys fees pursuant to Paragraph 16 of the Residential Listing Agreement,” and costs.

On October 28, 2015, the trial court dismissed the FAC as against Ortega, granting judgment on the pleadings and nonsuit under Code of Civil Procedure, section 581. A corrected judgment on April 12, 2016 awarded Ortega \$25,073 in attorney fees. Impact settled with the escrow company.

The trial court denied Fernandez’s motion for judgment on the pleadings and held a court trial on October 28 and 29 and November 6, 2015. On December 1, 2015, the court found that the one-month listing agreement executed by Fernandez and Morrison (September 5, 2013 to October 5, 2013) was invalid, and did not terminate the existing one-year agreement (April 4, 2013 to April 4, 2014). The court entered judgment for Impact on its breach of contract claim against Fernandez, ordering Fernandez to pay Impact \$17,800 (the listing broker’s share of the commission) plus interest and attorney fees “if appropriately allowed in the listing agreement.” The court also found Impact did not present sufficient evidence to prove that Fernandez conspired to defraud Impact, and so Impact was not entitled

to punitive damages. The trial court entered judgment on December 18, 2015, ordering that Fernandez pay reasonable attorney fees to Impact pursuant to section 16 of the one-year listing agreement and Civil Code section 1717.

Impact filed a motion for \$44,200 in attorney fees under the listing agreement and Civil Code section 1717. Fernandez filed an opposition arguing that Impact had failed to mediate and so was not entitled to any fees, had not prevailed on its fraud cause of action, and had failed to allocate fees between the causes of action. After a hearing on January 21, 2016, the court granted the motion and awarded Impact \$34,000 in fees. The court entered judgment on January 25, 2016.

Fernandez filed a timely notice of appeal, and Impact filed a timely cross-appeal.

DISCUSSION

On appeal, Fernandez argues that the trial court erred in finding the thirty-day listing invalid, and in awarding attorney fees to Impact. On cross-appeal, Impact argues that the trial court erred in finding that Impact did not present substantial evidence that Fernandez conspired to defraud, and in awarding Impact less than the total requested amount of attorney fees.

We begin with the presumption that the judgment is correct, and “the appellant must prepare a record that adequately establishes the trial court committed prejudicial error.” (*Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 122.) The record here consists of only a

partial clerk's transcript. Fernandez states that the trial exhibits "disappeared" and in any event "are not necessary to this appeal." The trial court clerk was unable to find numerous exhibits in Fernandez's designation of the record on appeal, and certified that the parties were unable to supply the exhibits or provide the clerk with copies. There are no reporter's transcripts of the court trial or the attorney fees hearing and there is no settled statement. Further, Fernandez and Impact's briefs fail to make reasoned arguments supported by authority for many of their contentions on appeal. Following a review hampered by the inadequate record and the near-incoherence of the parties' briefs, and presuming the judgment correct, we affirm.

I. The trial court properly found the one-year listing agreement remained valid.

Fernandez argues that the thirty-day listing agreement was valid and terminated the existing one-year listing agreement, so that when Fernandez sold the property after the 30 days expired, no listing agreement was in place, and Fernandez therefore was not obligated to pay any brokers' compensation to Impact.

At the instruction of the trial court after the first day of trial, the parties filed supplemental briefing regarding whether the one-month listing was valid. Fernandez argued that the one-month listing was valid because it was signed by an Impact agent (Morrison), and Impact and Bishara never expressly repudiated it. In an earlier motion Fernandez cited Morrison's deposition testimony as evidence

that Bishara was aware of the one-month agreement. Impact argued that Bishara had disapproved the one-month listing agreement and had instructed Morrison to inform Fernandez. In a declaration in evidence at trial, Morrison stated that she met with Fernandez, who told her she was not happy with Verduzco. Morrison told Fernandez that the one-year listing agreement could not be revoked or amended without Verduzco's consent. Morrison also explained, and Fernandez understood, that the one-month agreement (executed in the face of a pending foreclosure, and intended to allow Fernandez not to have to communicate with Verduzco) was "in addition to [Fernandez's] existing contract with Joann Verduzco."

The limited record before us contains conflicting evidence regarding whether Impact ratified or disapproved the one-month agreement, and whether Fernandez understood and agreed that the one-month agreement was in addition to the one-year agreement. Bishara, Morrison, Verduzco, and Fernandez all testified at the trial. In the absence of a reporter's transcript of that and other testimony, we must reject Fernandez's argument that no substantial evidence supports the trial court's conclusion that the one-month listing agreement did not terminate the one-year listing agreement. "Where no reporter's transcript has been provided and no error is apparent on the fact of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial

testimony would demonstrate the absence of error.
[Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

We also must reject Fernandez's contention that Morrison's declaration was "not sustained by any credible evidence," and we presume the evidence at trial (including Bishara's and Morrison's testimony) supported the trial court's conclusion that the one-month listing agreement was invalid and did not terminate the one-year listing agreement. " '[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented.' " (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.)

As we affirm the trial court's conclusion that the one-month listing agreement was invalid, we need not consider Fernandez's argument that paragraph 20 of that agreement automatically invalidated the existing one-year agreement.

Fernandez cites *Horiike v. Coldwell Banker Residential Brokerage Co.* (2016) 1 Cal.5th 1024. That case held that when a real estate broker acts as a dual agent representing both the buyer and the seller, the broker's associate licensee (a salesperson or agent) owes the buyer the same fiduciary duty as does the broker, to learn and disclose all material

information affecting the value of the property. (*Id.* at pp. 1028–1029.) That holding is not relevant here.

II. The trial court properly awarded attorney fees to Impact.

Paragraph 16 of the one-year listing agreement states: “In any action . . . between Seller and Broker regarding the obligation to pay compensation under this Agreement, the prevailing Seller or Broker shall be entitled to reasonable attorney fees and costs from the non-prevailing Seller or Broker, except as provided in paragraph 20A.” Paragraph 20(A) provides that “Seller and Broker agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action,” and if any party “commences an action without first attempting to resolve the matter through mediation, or . . . before commencement of an action, refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action.” Fernandez argues that Impact failed or refused to mediate and so waived its right to attorney fees.

The record contains a January 8, 2014 letter from counsel for Impact rejecting Fernandez’s counsel’s suggestion that the parties resort to arbitration; a January 15, 2014 letter from counsel for Fernandez, demanding mediation and offering to commence the process through the county bar association; and an email dated February 2, 2014 from Impact’s counsel stating that the

initial complaint had been filed on January 17, 2014, Fernandez would be served soon, and as counsel had just returned from vacation, “I just saw your letter and email today.”

The mediation issue was squarely before the trial court in the briefing regarding attorney fees. Lacking the trial exhibits and a reporter’s transcript of the trial or the hearing on attorney fees, we must presume that the trial court was presented with evidence sufficient to support a conclusion that Impact did not violate the mediation provision in the agreement, and therefore was entitled to attorney fees.

(*Bennett v. McCall*, *supra*, 19 Cal.App.4th at p. 127.)

Fernandez admits the correspondence is “ambiguous,” and in the absence of a complete record and a reporter’s transcript we presume that substantial evidence supported the trial court’s decision to award attorney fees.

III. The trial court properly determined that Impact had not shown fraud.

Impact argues that the trial court erred in concluding that the evidence did not show that Fernandez, Morrison, and Ortega conspired to defraud Impact. As above, lacking trial exhibits and a reporter’s transcript, we must presume that the evidence at trial supported the trial court’s finding that the evidence did not show a conspiracy to defraud. (See (*Impact Realty, Inc. v. Ortega*, *supra*, B272040.)

IV. The trial court did not abuse its discretion in awarding reduced attorney fees to Impact.

Finally, Impact argues that it was “unfair” for the trial court to award Impact \$34,000 in attorney fees rather than the \$44,000 Impact requested. The court granted nonsuit on Ortega’s cause of action for conspiracy to defraud, and after trial, found against Impact on the allegations of conspiracy to defraud against Fernandez. Fernandez argued in her opposition to the fee motion that Impact could not recover attorney fees related to settlement, voluntary dismissal, and the unsuccessful tort claims. The apportioning of fees between successful and unsuccessful causes of action is well within the trial court’s discretion. (*El Escorial Owners’ Assn. v. DCL Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1365.) Impact’s brief makes no reasoned argument or citation to the record on the issue, and thus Impact has identified no basis for us to conclude that the trial court abused its discretion.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.