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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

BORIS GRAYFER, Plaintiff and Appellant, v. WAWANESA GENERAL INSURANCE COMPANY, Defendant and Respondent.	B285554 (Los Angeles County Super. Ct. No. BC533792)

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

Shaghzo & Shaghzo and Armen Shaghzo for Plaintiff and Appellant.

The Greenfield Law Firm, Kenneth N. Greenfield and Kate A. Greenfield for Defendant and Respondent; Nivinskus Law Group and Mark Nivinskus for Defendant and Respondent.

Boris Grayfer sued his insurance company, Wawanesa General Insurance Company, after his car was stolen. Wawanesa made a statutory settlement offer, which Grayfer rejected, and the parties tried the matter to a jury. The jury returned a defense verdict, and the trial court awarded costs, including expert witness fees Wawanesa incurred after Grayfer rejected the settlement offer. The trial court also denied in part Grayfer's motion for a claim of exemption after Wawanesa levied his bank accounts. Grayfer does not appeal the verdict, but does appeal each of the postjudgment orders adjudicating the award of expert fees and the partial denial of his claim of exemption. Grayfer has failed to establish an abuse of discretion or error by the trial court, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

According to appellant Boris Grayfer's (Grayfer) opening brief on appeal, he filed this action against Wawanesa General Insurance Company (Wawanesa) asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair business practices.[1] In January 2015, Wawanesa served a section 998 offer in the amount of $15,001; Grayfer rejected the offer and served an offer in the amount of $299,995. After a jury trial, the trial court entered judgment for Wawanesa in May 2017.

Wawanesa filed its memorandum of costs, claiming, among other costs, expert witness fees. Grayfer filed a motion to tax

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[1] The record on appeal does not include the initial pleadings in the matter, nor does it include the trial transcript. Because Grayfer does not challenge the jury's verdict, we accept this statement but will not discuss the factual issues relating to the complaint or the trial.

costs; as relevant to this appeal, he challenged the claim for close to $70,000 in expert fees. He argued that Wawanesa was not entitled to recover those fees because its statutory settlement offer (Code of Civ. Proc., § 998)[2] was unreasonable and had been made in bad faith, because the experts were not court ordered, and because the amounts expended were neither reasonable nor necessary (§ 1033.5).

The trial court heard the motion to tax costs in August 2017; Grayfer presented no oral argument. The court found that, because Grayfer had recovered nothing at trial, the judgment was lower than the rejected section 998 offer. With respect to the question of whether the offer had been made in good faith, the court "easily concludes that Defendant's offer of $15,001.00 was made in good faith and was 'realistically reasonable' under the circumstances of this case. Plaintiff's complaint makes clear that the alleged value of the vehicle that was stolen was $31,263.43. Thus, Defendant's offer equated to nearly half of the value of the property in question. This was a more than sufficient offer given Defendant's persistent declarations of having no liability and the ultimate jury verdict reaffirming Defendant's position. The court also finds that the $15,001.00 was reasonable in light of Plaintiff's claimed emotional distress."

With respect to Grayfer's assertions that the fees were not reasonable in amount and not supported by a factual showing, the court found that the evidence of the amounts was sufficient, and that the use of the experts was justified. The court denied the motion to tax with respect to the expert fees.

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[2] All further statutory references are to the Code of Civil Procedure.

After the order was entered, Wawanesa sought to execute on Grayfer's bank accounts. Grayfer filed a claim of exemption, asserting primarily that the accounts contained social security and disability payments. Grayfer's spouse also filed a claim of exemption, asserting the same grounds. Both claims identified a single account as the account into which the social security benefits were deposited.

The trial court heard the claim in February 2018 and granted it in part, finding that the single account identified as receiving social security benefits was exempt, but that the Grayfers had established no exemptions for the other accounts. The trial court rejected an evidentiary submission tendered by Grayfer shortly before the hearing, finding it both untimely, and submitted without necessary evidentiary support.

Grayfer then submitted an ex parte motion for reconsideration, seeking again to provide the evidentiary record that he failed to include with his initial motion. The court denied the application, finding Grayfer had failed to demonstrate he was entitled to relief.

Grayfer appealed the partial denials of both his motion to tax costs and his motion for claim of exemption; this Court consolidated the two matters on appeal. We affirm.

DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion In Denying the Motion To Tax Costs On Expert Fees

1. Awards of expert fees as costs.

Section 998, subdivision (c)(1) provides:

"If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

This statute is read to include a requirement that the settlement offer be made in good faith; that is that it is "realistically reasonable under the circumstances of the particular case. (*Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821.) It must also have a "reasonable prospect of acceptance." (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698). It is the trial court that evaluates these requirements in determining whether an award of expert fees is appropriate in the case before it.

2. We review the trial court's decision for abuse of discretion.

The question of whether an offer was reasonable and made in good faith, permitting the trial court to award expert fees as costs against a party whose recovery does not exceed the offer, is reviewed for abuse of discretion. The party challenging the determination bears the burden of demonstrating abuse; a reviewing court will not substitute its own judgment for that of the trial court unless there has been a miscarriage of justice.

(*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1484 [$10,000 offer in case where defense verdict entered was reasonable]; *Melendrez v. Ameron Internat. Corp.* (2015) 240 Cal.App.4th 632, 647, 651 [plaintiffs' comparison to potential recovery, belief in viability of claim, and lack of ability to value offer insufficient to establish abuse of discretion].)

Where, as here, the defendant obtains a judgment more favorable than the offer, "the judgment constitutes prima facie evidence showing the offer was reasonable," leaving the plaintiff with the burden of establishing unreasonableness or the absence of good faith. (*Sanantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 117). This is true even where, following an offer premised on an evaluation of no liability, defendant expends significant funds on experts to prepare its defense at trial. (*Bates v. Presbyterian Intercommunity Hospital, Inc.* (2012) 204 Cal.App.4th 210, 221 [where defendant believes it will prevail, it may make modest offer, and if rejected, employ experts to establish no liability].)

3. Grayfer has failed to present a record demonstrating abuse of discretion

As in *Bates, supra*, 204 Cal.App.4th at p. 221, Wawanesa obtained a judgment of no liability, establishing the prima facie reasonableness of its offer. Grayfer asserts that, in light of his substantial claims for emotional distress, and the amount of his own counteroffer, Wawanesa could not reasonably expect him to accept the offer at the time it was made. He concludes that the offer was made for the purpose of imposing expert fees after trial. To meet his burden of overcoming the prima facie case, however,

he must establish that the trial court's decision was arbitrary or capricious. (*Adams, supra*, 199 Cal.App.4th at 1482.)

On review, we acknowledge that the trial court, having heard the evidence, was in the best position to determine both whether the offer was reasonable and whether the fees were reasonably necessary. (*Huber, Hunt & Nichols v. Moore, Inc.* (1977) 67 Cal.App.3d 278, 315.) Grayfer's failure to include in the record before this court the pleadings, or the transcript of the testimony at trial, leaves us completely unable to review the trial court's view of the evidence at trial.[3]

"Appealed judgments and orders are presumed correct, and error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193.) Consequently, appellant has the burden of providing an adequate record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295, 240 Cal.Rptr. 872, 743 P.2d 932; *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 644, 177 Cal.Rptr.3d 184.) Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. *(Maria P., supra* at pp. 1295–1296, 240 Cal.Rptr. 872, 743 P.2d 932.) Without a record, either by transcript or settled statement, a reviewing court must make all presumptions in favor of the validity of the judgment. (*Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, 202 Cal.Rptr.3d 318.)" (*Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935.)

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[3] When the appeal was filed, we asked the parties to brief the effect of the failure to include the record of trial. Grayfer argued that the record was unnecessary for our review; as discussed, we disagree.

In light of the established prima facie case, and the absence of any record on which a showing of abuse of discretion could be made, we affirm the trial court's order denying the motion to tax the expert witness fees.

B. The Trial Court Did Not Err In Denying, In Part, The Claim of Exemption

1. The standard of review

Section 704.080, the basis for Grayfer's claim of exemption, provides an exemption from levy for deposit accounts into which payments of public benefits or social security payments are made, up to the maximum amounts set by the statute. After property has been levied, the owner may file a claim for exemption under the statute. The procedure to determine the claim places the burden of proof on the claimant. (§ 703.580 (b).)

An order on a claim of exemption is appealable, but is presumed correct. Accordingly, it will be affirmed if it is supported by substantial evidence; if the facts are not in dispute, however, the reviewing court may conduct a de novo review. (*Schwartzman v. Wilshinsky* (1996) 50 Cal.App.4th 619, 626.)

2. Grayfer has failed to demonstrate any error

In his opening brief on appeal, Grayfer asserts that the court erred, relying almost entirely on the supplemental evidence that he first attempted to submit prior to the hearing, and attempted to resubmit in his subsequent ex parte motion. The court denied his request to consider that evidence and, on appeal. His assertion that the trial court erred is without citation to legal authority. We do not consider arguments not supported by such citation. (See *Akins v. State of California* (1998) 61 Cal.App.4th

1, 50 [contention waived by failure to cite legal authority]; *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [a point asserted by appellant without argument or authority need not be discussed by reviewing court].)

The evidence that was submitted with the claim of exemption identified four accounts, only one of which, account 7557, was identified as containing social security and disability income necessary for support. The trial court granted the exemption as to that account.

With respect to the other accounts, neither in the claim, the supporting declaration, nor the attached financial statement did Grayfer set forth any facts supporting his claim of exemption. His financial statement listed a total monthly income of $11,100, consisting of social security, disability, and rental income, without further explanation of source. While he argued, both at the trial court and at this court, that the remaining accounts contained savings from prior social security and disability payments, he provided no evidentiary support for this argument. Accordingly, the trial court properly determined that he failed to meet his burden of proof with respect to his claim of exemption for these accounts.

DISPOSITION

The orders of the trial court are affirmed. Respondent is to recover its costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J. FEUER, J.