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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BHIKHUBHAI C. PATEL,

Plaintiff and Appellant,

v.

CLOCKTOWER INN, INC.,

Defendant and Respondent.

B266410

(Los Angeles County
Super. Ct. No. YC067782)

Appeal from an order of the Superior Court of the County of Los Angeles, Stuart Rice, Judge. Affirmed.

AlveradoSmith, Kevin A. Day and Jacob M. Clark for
Plaintiff and Appellant Bhikhubhai C. Patel.

Jeffery B. Singer for Defendant and Respondent Clocktower
Inn, Inc.

Plaintiff and appellant Bhikhubhai Patel (plaintiff) appeals from the trial court's order denying his motion for an award of attorney fees. According to plaintiff, the trial court erred when it concluded plaintiff's successful lawsuit against defendant and respondent Clocktower Inn, Inc. (Clocktower) did not confer a substantial benefit on that corporation.

We hold that the record provided by plaintiff is inadequate to warrant appellate relief. We therefore affirm the order denying the motion for an award of attorney fees.

PROCEDURAL BACKGROUND

Following an evidentiary hearing before a court-appointed referee, the trial court entered a judgment in favor of plaintiff on his declaratory relief claim, which judgment established that plaintiff was a 50 percent shareholder in Clocktower. Plaintiff thereafter filed a motion for an award of attorney fees (attorney fees motion), arguing that his declaratory relief claim was brought as a shareholder derivative lawsuit that conferred a substantial benefit on Clocktower, thereby entitling him to recover his attorney fees from Clocktower. Following briefing and oral argument, the trial court denied the motion, finding that plaintiff's action did not confer a substantial benefit on Clocktower.

Plaintiff filed a timely notice of appeal from the order denying his attorney fees motion. Plaintiff's record on appeal, however, did not include a reporter's transcript of the hearing on the attorney fees motion. As a result, we requested the parties brief the issue of whether plaintiff's failure to provide a reporter's transcript of the hearing on the attorney fees motion or a suitable substitute warranted affirmance based on the inadequacy of the

record. Plaintiff addressed the issue in his reply brief and Clocktower addressed it in a letter brief.

DISCUSSION

A. Contentions

Notwithstanding the lack of a reporter's transcript of the hearing on the attorney fees motion,¹ plaintiff contends the record is adequate because prior to the hearing, the trial court provided a tentative ruling stating its reasons for denying the attorney fees motion, and that ruling, without any modifications, became the final ruling of the trial court. According to plaintiff, the tentative ruling provides a sufficient basis upon which to determine whether the trial court erred by finding that his lawsuit did not confer a substantial benefit on Clocktower.

Clocktower contends the absence of a reporter's transcript or a suitable substitute precludes us from considering the merits of plaintiff's appeal. According to Clocktower, plaintiff, as the moving party on the attorney fees motion, had the burden of arranging for a court reporter to transcribe the hearing to preserve his right to appeal from the trial court's ruling.

B. Adequacy of Record

1. Legal Principles

An appealed judgment or order is presumed to be correct. “[I]t is settled that: ‘A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are

¹ The parties agree there was no court reporter at the hearing.

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.’ (3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238-2239; *Minardi v. Collopy* [(1957)] 49 Cal.2d 348, 353 [316 P.2d 952]; *Coleman v. Farwell* [(1929)] 206 Cal. 740, 742 [276 P. 335].)” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The appellant has the burden of overcoming the presumption of correctness. (*Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429, 436.) In determining whether the presumption has been rebutted, our Supreme Court has addressed the failure of a party challenging an attorney fees order to provide an adequate record in the following way: “[T]he party challenging the [attorney] fee award on appeal [has the duty] to provide an adequate record to assess error. [Citations.] Here, [the] defendants should have augmented the record with a settled statement of the proceeding. [Citations.] Because they failed to furnish an adequate record of the attorney fee proceedings, [the] defendants’ claim must be resolved against them.” (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

2. Analysis

It is undisputed that plaintiff had an affirmative duty on appeal to provide an adequate record, including the duty to provide a reporter’s transcript of the hearing on the attorney fees motion. It is also undisputed that, in the absence of a reporter’s transcript, plaintiff had the duty to provide an agreed or settled statement pursuant to California Rules of Court, rules 8.130(h),

8.134, and 8.137. Plaintiff, however, failed to include either document in the record.

Without a transcript or a suitable substitute, we do not know what arguments or concessions were made at the hearing or whether matters that do not appear in the tentative ruling, such as evidentiary objections and stipulations, were made and determined. For example, a week before the hearing, plaintiff submitted six exhibits with his reply brief. Some of those exhibits, such as Clocktower's motion for a bond, included numerous other exhibits, such as minutes from various shareholders' meetings of Clocktower. In response to the submission of those exhibits, Clocktower filed a written objection four days before the hearing, maintaining that the exhibits were untimely and should not be considered.

Based on the record before us, we do not know whether the parties addressed the exhibits and Clocktower's objection at the hearing or whether the trial court considered them in making its ruling. Given that the exhibits were submitted just a week before the hearing and Clocktower's objection was filed just days before the hearing, there is a serious question whether the trial court relied, in whole or in part, on those exhibits and whether we therefore should consider them on appeal. But, without a transcript or a substitute, that question cannot be answered and the merits of the appeal cannot be resolved on the record provided.

Accordingly, we affirm the trial court's order denying plaintiff's attorney fees motion based on the inadequacy of the record.

DISPOSITION

The order denying plaintiff's attorney fees motion is affirmed. Defendant Clocktower is awarded costs on appeal.

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KUMAR, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

* Judge of the Superior Court of the County of Los Angeles, appointed by the Chief Justice pursuant to article VI, section 6 of the California Constitution.