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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TJOMME ARTHUR BOING,

Plaintiff and Appellant,

v.

WASHINGTON MUTUAL BANK,

Defendant and Respondent.

B283417

(Los Angeles County  
Super. Ct. No. GC045925)

APPEAL from a denial of a motion to vacate a voluntary dismissal of the Superior Court of Los Angeles County, Edward B. Moreton, Judge. Dismissed.

Tjomme Arthur Boing, in pro. per., for Plaintiff and Appellant.

Dunbar & Associates, Kevin T. Dunbar and Matt D. Derossi for Defendant and Respondent.

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## I. INTRODUCTION

Plaintiff Tjomme Arthur Boing sued defendant Washington Mutual Bank for injuries he claimed occurred on September 4, 2008 when he slipped and fell at defendant's bank. On June 25, 2013, during the second day of trial, plaintiff asked to dismiss his case because he was in pain, on medication, and not thinking properly. According to plaintiff, the trial judge insisted that the dismissal be with prejudice. When plaintiff who was self-represented asked what that meant, it was explained that he could never sue defendant again. The clerk then printed a dismissal form, the opposing counsel filled it in, and plaintiff signed it dismissing his case with prejudice. Apparently no judgment or order signed by the court was ever entered.

More than three years later, on June 27, 2016, plaintiff moved to vacate the dismissal. Plaintiff acknowledged the motion was untimely under Code of Civil Procedure<sup>1</sup> section 473, subdivision (b), but argued equitable grounds to vacate the dismissal due to extrinsic fraud or mistake. He contended the Department of Veterans Affairs (VA) fabricated evidence regarding plaintiff's medical records and prohibited VA doctors from testifying at trial; the Los Angeles County Superior Court improperly moved his case to various courthouses; the trial judge unfairly denied a continuance and ordered him to proceed without medical records or witnesses; and he was in pain and on medication. Plaintiff also argued the dismissal should be vacated pursuant to section 473, subdivision (d), because of clerical error.

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<sup>1</sup> Further statutory references are to the Code of Civil Procedure.

On April 24, 2017, following a hearing, the trial court denied plaintiff's motion, and plaintiff appealed.

Because plaintiff appeals from a nonappealable order and due to an inadequate record, the appeal is dismissed.

## II. DISCUSSION

The right to appeal is statutory and jurisdictional. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 (*Griset*) ["A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment"]; *City of Gardena v. Rikuo Corp.* (2011) 192 Cal.App.4th 595, 599; see § 904.1.) "A trial court's order is appealable when it is made so by statute." (*Griset, supra*, 25 Cal.4th at p. 696.) "The primary statutory basis for appealability in civil matters is limited to the judgments and orders described in section 904.1 of the Code of Civil Procedure, which essentially codifies the "one final judgment rule" and provides that only final judgments are appealable. . . . [Citation.]' [Citation.]" (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1365-1366 (*H.D. Arnaiz*).)

"A voluntary dismissal is a ministerial act, not a judicial act, and not appealable."<sup>2</sup> (*H.D. Arnaiz, supra*, 96 Cal.App.4th at p. 1365; *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 975 ["It is well established that a voluntary

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<sup>2</sup> A voluntary dismissal with prejudice may be an appealable order if it was entered after an adverse ruling by the trial court to expedite an appeal of the ruling. (See, e.g., *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1012.) That is not the situation here.

dismissal under Code of Civil Procedure section 581 is not appealable”] (fn. omitted).) And, when the order dismissing the case (whether voluntary or not) is not signed by the trial court, it is not appealable. (*Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1578 [dismissing appeal because unsigned minute order did not confer appellate jurisdiction]; § 581d.) Here the order was signed by the clerk, not the trial court. No statute makes an unsigned voluntary dismissal order, or an order denying a motion to vacate such an order, appealable.

A different situation is presented when a party appeals an order denying a motion to vacate a judgment under section 473. Generally that order is appealable because it is an order after final judgment and therefore falls into one of the types of orders itemized in section 904.1, in particular section 904.1, subdivision (a)(2). (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394 [order denying section 473 motion to vacate judgment appealable “as a special order made after final judgment” under section 904.1, subdivision (a)(2)].) Here, there was no judgment.<sup>3</sup>

Plaintiff also contends the trial court made clerical errors, and that he is appealing from an order denying a motion to vacate on the grounds of clerical error under section 473, subdivision (d). Again, because no judgment exists, the order is

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<sup>3</sup> Also, we note that plaintiff’s motion to vacate did not present evidence that his decision to dismiss was due to mistake or extrinsic fraud. His complaints about the VA fabricating evidence and prohibiting VA doctors from testifying, the court moving his case to various courthouses, the trial judge denying a continuance, and his pain and medication were known to him at the time he requested dismissal.

not appealable. (*Bowden v. Green* (1982) 128 Cal.App.3d 65, 68, fn. 1.)

If the appeal were properly before this court, the order denying plaintiff's motion would need to be affirmed because plaintiff did not provide an adequate record. Error is never presumed on appeal; instead, the judgment or order is presumed correct. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) An appellant has the burden of overcoming the presumption by providing an adequate appellate record demonstrating the error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362.) "A necessary corollary to this rule [is] that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed." [Citation.]" (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.)

The grant or denial of a motion to vacate a judgment or order is reviewed for an abuse of discretion. (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1041.) There is no record of what occurred at the hearing denying his motion because plaintiff chose to proceed on appeal without a reporter's transcript. Plaintiff cannot obtain reversal based on abuse of discretion when there is no record of the underlying hearing or the trial court's reasoning. (See *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259 ["The absence of a record concerning what actually occurred at the hearing precludes a determination that the court abused its discretion"].)

### III. DISPOSITION

The appeal is dismissed. Defendant is entitled to recover its costs on appeal.

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SEIGLE, J.\*

We concur:

BAKER, Acting P.J.

MOOR, J.

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