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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FENG LAI ZHANG,

Plaintiff and Respondent,

v.

GUO PING LUO et al.,

Defendants and Appellants.

B275157

(Los Angeles County
Super. Ct. No. BS159750)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Mark A. Borenstein, Judge. Affirmed.

Law Offices of Ray Hsu & Associates, Ray Hsu for Defendants and
Appellants.

Neighborhood Legal Services of Los Angeles County, Andres Rapoport
and David Pallack for Plaintiff and Respondent.

Guo Ping Luo and Guo Min Li (Appellants) appeal from the judgment of the Los Angeles County Superior Court dismissing their appeal to that court from an order of the State of California Department of Industrial Relations, Division of Labor Standards Enforcement (DLE), holding them liable for \$52,004.96 in wages, penalties and interest that DLE had determined to be due to their former employee, respondent Feng Lai Zhang (Zhang). In appealing the DLE order, Appellants did not apply for or post the bond or undertaking required by Labor Code section 98.2, subdivision (b) (Labor Code section 98.2(b)), or seek waiver of that requirement as authorized by Code of Civil Procedure section 995.240. The trial court ruled their failure to do so barred their appeal and entered judgment against them. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Zhang filed a claim with the DLE seeking to recover unpaid wages and related compensation from his former employer. Following an administrative hearing, the DLE hearing officer issued an Order, Decision or Award of the Labor Commissioner (Award) ordering Appellants and two related entities to pay Zhang a total of \$52,004.96. The order was served by mail on December 22, 2015.¹

¹ The Award was issued against Quick Shabu Shabu, Inc., Shabu Shabu Express, Inc., Guo Lin Li and Guo Ping Luo, the hearing officer having determined that all of these defendants were responsible for wages and related amounts due to Zhang. The judgment from which this appeal is taken is against all four parties. Only Shabu Shabu Express, Inc., joined the two individuals in their appeal to the superior court; however, it is not a party to this appeal.

The Award included the following statement near the bottom of its single page:

“PLEASE TAKE NOTICE: Labor Code Section 98.2(b) requires that as a condition to filing an appeal of an Order, Decision or Award of the Labor

On January 6, 2016, the final day to do so, Appellants and Shabu Shabu Express, Inc., through their counsel, filed a notice of appeal to the superior court, entitling them to trial de novo if they otherwise complied with the bond or undertaking requirements of that statute, or if they obtained a waiver of that requirement. (Lab. Code, § 98.2(b); Code Civ. Proc., § 995.240.) Neither Appellant filed either a bond or an undertaking; nor did either seek a waiver of that requirement.² Appellants did seek waivers of certain court fees. On January 8, 2016, the superior court issued orders setting hearings on Appellants' requests, ordering them to provide proof of their income and expenses for a hearing on January 21, 2016. These orders gave Appellants notice of which fees were under consideration for waiver; waiver of the bond or undertaking requirement was not among the items listed for consideration of waiver at that hearing.³

The record on appeal does not include Appellants' completed mandatory Judicial Council forms on which they made their initial "Request to Waive Court Fees," or any of the financial information which Appellants were required by statute and by the Rules of Court to submit, either with

Commissioner [ODA], the employer shall first post a bond or undertaking with the court in the amount of the ODA; and the employer shall provide written notice to the other parties and the Labor Commissioner of the posting of the undertaking." (Original bold.)

² The corporation was not eligible for a waiver of the bonding requirement. (*Williams v. Freedomcard, Inc.* (2004) 123 Cal.App.4th 609, 615 [a corporation cannot be indigent within the meaning of Code Civ. Proc., § 995.240].)

³ The fees that are subject to waiver were also determinable by reference to rule 3.55, California Rules of Court.

We do not suggest that the bond or undertaking costs should have been listed in this order for reasons we discuss, *post*.

their initial applications for waiver of fees or in connection with the January 21, 2016 hearing, to establish their entitlement to waiver of one or more court fees. Appellants apparently provided sufficient information to the court to obtain waivers of certain fees as, in connection with the hearing on January 21, 2016, the trial court granted each appellant a waiver of specified filing and other fees.⁴ Although the two Orders on Court Fee Waiver documents which the court signed after the hearing that day contain a section in which the bench officer could make an entry waiving additional “fees,” there is no entry in that section of either Order in this case. Also, there is nothing in the record on appeal indicating Appellants ever asked that the bond or undertaking requirement be waived.

On February 3, 2016, Zhang filed a motion to dismiss Appellants’ appeal of the Award, arguing that by failing to post a bond or undertaking, Appellants had failed to comply with the “mandatory, jurisdictional requirements” of Labor Code section 98.2(b). In opposing that motion, Appellants argued that the circumstance that they had filed a “fee waiver request,” which was granted necessarily meant they “are qualified for [a] fee [sic; bond/undertaking] waiver under Code of Civil Procedure section 995.240”⁵ They also argued that the bonding requirement of Labor Code section 98.2(b) was not “jurisdictional.”

⁴ Among the fees waived was the fee for a court reporter. Notwithstanding the waiver of this fee, no reporter’s transcript has been provided, nor is there any indication that Appellants sought to take advantage of the availability of a reporter—without charge to them—at any hearing, including the hearing on the Motion to Dismiss, which was held several weeks after the orders waiving fees were issued.

⁵ The orders setting the hearing on Appellants’ fee waiver requests list 12 items to be considered at the January 21 hearing; the orders granting Appellants’ requests waive nine of those items. There is no item in either

Having taken the matter under submission, the court ultimately granted the motion to dismiss on March 25, 2016, reasoning: (1) Appellants presented no evidence they had applied for a waiver of the bond or undertaking requirement; (2) they should have timely filed a motion to waive the bond or undertaking requirement; (3) the determination that a party is eligible for an order waiving filing fees is not sufficient to establish that it is entitled to waiver of the separate requirement to post a bond or undertaking; (4) the filing of a fee-waiver application was not a substitute for filing “a motion under [Code of Civil Procedure section] 995.240”; (5) Appellants presented no evidence they made any attempt to obtain sureties, “whether [from] personal or admitted surety insurers”; and (6) “no evidence was presented sufficient for the court to have a basis to exercise its discretion under [Code of Civil Procedure section 995.240].”

On April 20, 2016, judgment was entered against Appellants and the corporate parties to the Award. Appellants filed a timely notice of appeal.

CONTENTIONS

Appellants contend: (a) “indigent” defendants need not comply with the requirement to file a bond or undertaking prior to the deadline to file an appeal from a DLE award; (b) as neither Labor Code section 98.2 nor Code of Civil Procedure section 995.240 states that a motion must be filed to obtain a waiver of the bond or undertaking requirement, the judgment below (based on the granting of Zhang’s motion to dismiss) is a denial of due process, equal access to justice and a “manifest miscarriage of justice”; and (c) a court order granting a waiver of “fees” “should” conclusively establish that Appellants

list that could be construed as referencing waiver of the bond or undertaking required by Labor Code section 98.2(b) (unless waived by Code of Civil Procedure section 995.240).

were indigent and entitled to a waiver of the bond or undertaking requirement of Labor Code section 98.2.

DISCUSSION

I. The Trial Court Correctly Dismissed Appellants' Appeal Based on Their Failure to Timely Post a Bond or Undertaking

Appellants contend that, because they are “indigent” they need not comply with the requirement that a party appealing a DLE award must either post a bond or undertaking by the time the appeal is filed or, by that date, obtain a waiver of that requirement. We disagree.

A. Background

Labor Code section 98.2, subdivision (a) (Labor Code section 98.2(a)) provides for trial de novo in superior court upon the timely filing of an “appeal” from a decision of the DLE awarding an employee back wages and related damages. That statute also provides that a party filing such an appeal has two monetary obligations it must meet unless waived. First, Labor Code section 98.2(a) requires that the appellant pay the filing fee for the appeal, stating, “The court shall charge the first paper filing fee under Section 70611 of the Government Code to the party seeking review.” (Lab. Code, § 98.2(a).)

Second, if the appellant is the employer, it must timely post a bond or undertaking. Labor Code section 98.2(b) provides: “As a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision or award. The undertaking shall consist of an appeal bond . . . or a cash deposit . . . in the amount of order, decision or award. . . . The undertaking shall be on the condition that, if any judgment is entered in favor of the employee, the employer shall pay the amount owed pursuant to the judgment If the

employer fails to pay the amount owed within 10 days of entry of the judgment . . . a portion of the undertaking equal to the amount owed, or the entire undertaking if the amount owed exceeds the undertaking, is forfeited to the employee.”

Each of these monetary obligations is subject to waiver. Provision for waiver of the filing fees is set out in Government Code sections 68630 through 68641 and rules 3.50 through 3.58, California Rules of Court.⁶

Provision for waiver of the bond or undertaking requirement is set out in Code of Civil Procedure section 995.240, which provides:

“The court may, in its discretion, waive a provision for a bond in an action or proceeding and make such orders as may be appropriate as if the bond were given, if the court determines that the principal is unable to give the bond because the principal is indigent and is unable to obtain sufficient sureties, whether personal or admitted surety insurers. In exercising its discretion, the court shall take into consideration all factors it deems relevant, including but not limited to the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond is waived.”

Only individuals may obtain waivers of the requirement to timely post a bond or undertaking, as we explained in *Williams v. Freedomcard, Inc.*, *supra*, 123 Cal.App.4th at p. 615, relying in part on *Rowland v. California Men’s Colony, Unit II Men’s Advisory Council* (1993) 506 U.S. 194, 203-206 (only natural persons may proceed in forma pauperis).

⁶ We take judicial notice of these provisions pursuant to Evidence Code sections 452, subdivisions (a), (c) and (e) and 459, subdivision (a). The fee waiver process requires submission of certain financial information on mandatory forms, including Judicial Council Mandatory Form FW-100. (Cal. Rules of Court, rule 3.51(a). (See *C.S. v. W.O.* (2014) 230 Cal.App.4th 23, 30-34.)

Labor Code section 98.2(a) requires that the bond or undertaking be posted by the time of filing of the appeal. This is a condition precedent to the maintenance of an appeal. The court in which the appeal is filed has no authority to extend this deadline. (*Palagin v. Paniagua Construction, Inc.* (2013) 222 Cal.App.4th 124, 132, 137 (*Palagin*).) In explaining the reason for this limitation on the right to appeal, the *Palagin* court emphasized that Labor Code section 98.2(a) was amended in 2010 with the express purpose to “discourage employers from filing frivolous appeals and from hiding assets in order to avoid enforcement of the judgment [in favor of the employee following an award by the DLE].” (*Id.* at p. 130.) That court took specific note of the holding in *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal.App.4th 540 (*Parker*), in which an earlier version of Labor Code section 98.2(a) had been held to be directory rather than mandatory. (*Parker*, at p. 543.) The *Palagin* court made clear that the amendment to Labor Code section 98.2(a) was enacted specifically to preclude appeals under Labor Code section 98.2 if neither a bond nor an undertaking is timely posted.

“These purposes are accomplished by making the undertaking requirement—including the deadline for posting the undertaking—mandatory and jurisdictional: as long as a notice of appeal cannot be filed without an undertaking, the absence of an undertaking means the appeal does not come into existence, and thus there is no need for the employee to move to dismiss and no delay in obtaining a dismissal; further, by not allowing the posting deadline to be extended, the employer does not have time to hide or transfer assets. And sure enough, in effecting these purposes, the Legislature used essentially the language that *Progressive Concrete* had identified as rendering an undertaking requirement mandatory and jurisdictional. In sum, the clear legislative intent in the 2010 amendment of

section 98.2 was to require employers to post an undertaking by the time the notice of appeal is filed, and for this requirement to be jurisdictional and thus incapable of extension by the court.” (*Palagin, supra*, 222 Cal.App.4th at p. 136.)

B. *Analysis*

Labor Code section 98.2(a) requires that the appeal be filed within 10 days of service of the decision of the DLE, or within 15 days if that decision is served by mail. In this case, the Award was served by mail; thus, the final day to file the notice of appeal—and the bond or undertaking—was January 6, 2016. The Award contained prominent notice of Appellants’ obligation to obtain a bond or undertaking, etc., as set out in footnote 1, *ante*.

Appellants timely filed their notice of appeal, and apparently timely filed their requests to obtain waivers of court fees,⁷ but do not dispute that they did not file either a bond or an undertaking; nor do they dispute that they did not seek a waiver of the requirement that they do so.

Instead, Appellants seek to distinguish *Palagin* on the basis that the appellant there was in fact capable of posting the undertaking, but was late in doing so. That is a distinction without significance; the holding in *Palagin*, that the deadline must be met as a condition to the filing of a valid appeal, is not based on the financial condition of the party filing the appeal. It is based on the words of the statute and the policy reasons set out in the legislative history of the 2010 amendment to the statute. Appellants here did not comply with the statute; and the trial court correctly applied the statute in dismissing their appeal.

⁷ The requests for waiver of court fees are not in the record on appeal. We infer their filing from the fact that the court issued the orders, described *ante*, two days later and adjudicated the fee requests on January 21, 2016.

II. Appellants Err in Their Claim That the Absence of “Motion Language” From the Relevant Statutes Entitles Them to Relief

Appellants seek to distinguish their case from the rule of *Palagin* and overturn the trial court’s dismissal of their appeal based on the absence from Labor Code section 98.2 and Code of Civil Procedure section 995.240 of words instructing that a motion must be filed to obtain consideration of a request for an order waiving the bond or undertaking requirement. This claim lacks merit.

While it is correct that the cited sections do not explain the procedure to be used to bring an application for waiver of bond or undertaking to the attention of the court, this purported “defect” is not a defect; instead it is a ubiquitous feature of our statutes. Inspection of either the Labor Code or the Code of Civil Procedure (or of any California code) will reveal that procedural instructions on, e.g., how to enforce a particular provision, are commonly not set out in that statute. Instead, statutes concerning the procedure by which to bring matters to the attention of a court are set out elsewhere. Thus, while Code of Civil Procedure section 995.240 provides that waiver of bond or undertaking is *available*, and sets out considerations to be taken into account to determine whether waiver may be granted, other provisions of the same code (and of the California Rules of Court) set out the *procedure* by which that waiver is to be sought.⁸

⁸ Insofar as Appellants argue that the burden to present the case for a waiver of the bond or undertaking requirement lay elsewhere, e.g., that the court had a sua sponte obligation to determine their eligibility for waiver— notwithstanding their failure to seek it—they err: It is fundamental that courts do not initiate requests on behalf of litigants; rather, they adjudicate matters brought to their attention by those litigants. A party seeking to take advantage of a statute, including when the party seeks the benefit of a statute containing an exception to a requirement of another statute, has the

A party seeking relief does so by filing a motion (or an application for ex parte relief, discussed *post*) setting out the relief requested. That is the import of Code of Civil Procedure section 1003, which defines a motion as “[a]n application for an order.” Further, a motion is deemed to have been brought before the court when it is served and filed. (Code Civ. Proc., § 1005.5) These and other statutes resolve Appellants’ concern about where to locate the “motion language,” which Appellants do not find in Labor Code section 98.2 or in Code of Civil Procedure section 995.240.

III. Appellants’ Claim Relating to the Filing Deadline for an Appeal

Appellants’ contention that the statutes are so constructed that they cannot apply for and obtain a waiver of the bond or undertaking requirement and meet the 10/15 day deadline to file their appeal ignores the availability of ex parte relief pursuant to rules 3.1200 through 3.1207 of the California Rules of Court. Although Appellants contend the absence from Code of Civil Procedure section 995.240 of “motion language” is a defect, instead it is one of the criteria validating an application for ex parte relief for the reason that specification in a statute that a noticed motion is required bars an application for ex parte relief. (*O’Brien v. Cseh* (1983) 148 Cal.App.3d 957, 961; see also Edmon & Karnow, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 9.348, p. 158.) Absence of the “motion language” here enables the filing of an ex parte application for waiver of the bond or undertaking requirement contained in the Labor Code and prominently stated in the body of the Award.

Appellants’ related claim that these statutes deny them due process fails for multiple reasons. In addition to the fact that Appellants did have

obligation to bring that request to the attention of the court. The law does not place any burden on a court to determine sua sponte whether an exception to a statutory requirement applies.

procedural means by which they could have complied with the statute they challenge, as described *ante*, Appellants never raised this claim below and they do not cite any case to support their claim other than the concurring opinion in *Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427.

Nor do they present any argument why this court should consider an argument that was not made below. An appellant has the initial obligation to support each contention by appropriate authority and supporting citations. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [appellant must present a fair and sincere effort to show the trial court was wrong, rather than a mere challenge to the respondent to prove the court was right]; see also *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 [“We will not develop the appellants’ arguments for them”]; *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164 [“This court is not inclined to act as counsel for him or any appellant”]). Applying these principles, we deem this argument by Appellants forfeited.

IV. The Grant of a Fee Waiver Does Not Necessarily Encompass a Grant of a Waiver of Bond or Undertaking

Appellants seek to overcome their lack of compliance with the requirements of the two statutes principally at issue by arguing the trial court abused its discretion by not granting the waiver of bond or undertaking when it granted the fee waivers. They do this by arguing that the granting of the fee waivers “should conclusively establish that [they] were indigent for waiver of bond,” and from that they argue the waiver should have been granted. Differently stated, Appellants contend the trial court abused its discretion by not sua sponte considering and granting waiver of the bond or

undertaking requirements based on its grant of the waiver of specified fees.⁹ This contention also lacks merit.

Code of Civil Procedure section 995.240, set out *ante*, expressly makes the granting of a waiver discretionary.¹⁰ We review any order made under the authority of that statute for abuse of discretion. (Code Civ. Proc., § 995.240; see *Williams v. Freedomcard, Inc.*, *supra*, 123 Cal.App.4th at p. 615.)

Appellants argue the evidence they submitted to the trial court and which resulted in the order waiving specified fees “justified and obviated the need to file an addition motion . . . because [the judge] had already determined that Appellants were indigent and unable to afford basic litigation costs.” Because there are no facts concerning the Appellants’ financial condition in the record on appeal, they therefore are asking that we review the matter based solely on the grant of the orders waiving their filing fees.

⁹ In their Reply Brief, Appellants seek to avoid the fact that they never asked the trial court for a waiver by asserting that to do so would have been futile. They support this argument with a citation to *Fuller v. State of California* (1969) 1 Cal.App.3d 664, 668. Yet, *Fuller* holds that, because the standards for obtaining a bond or undertaking require analysis of factors in addition to lack of assets—such as the willingness of a third party to provide the bond or undertaking—the party seeking a waiver must establish both financial need *and* that it made the effort to obtain a bond or undertaking. (*Id.* at pp. 670-671.) Indigence is not the only factor which must be established. Indeed, as the *Fuller* court suggests, an indigent party may obtain a bond notwithstanding his or her lack of assets. (*Id.* at pp. 670-671.) Thus, Appellants’ reliance on *Fuller* does not assist their argument.

¹⁰ The introductory clause of this statute is “[t]he court may, in its discretion, waive” (See *ante*, at pp. 7-8 for the full text of this statute.)

Appellants make this request notwithstanding the holding of *Fuller v. State of California*, *supra*, 1 Cal.App.3d 664, that a finding of eligibility for waiver of court fees is not sufficient to establish entitlement to waiver of the bond or undertaking requirement. As the *Fuller* court reasoned, the grant or refusal of a bond or undertaking involves considerations within the power of a third party, who may agree to stand a surety based on factors not wholly dependent on the current financial condition of the person seeking the bond or undertaking. For this reason, it is not an abuse of discretion for the court considering the application for waiver of bond or undertaking to require that the plaintiff “show her inability to obtain sureties.” (*Id.* at pp. 670-671.)

We further note that Code of Civil Procedure section 995.240 sets out several factors for the trial court’s consideration in addition to the financial condition of the party applying for the waiver. These include “the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond is waived.” (Code Civ. Proc., § 995.240.) Appellants have not presented any argument with respect to how these factors should be applied in this case. We note that the legislative history of the adoption of the present, amended version of Labor Code section 98.2 indicates that, in analyzing whether the bond or undertaking requirement should be waived in any particular case, the trial court should take into account the factors that underlay adoption of the amendment to that section. (See discussion, *ante*, at pp. 8-9.) Given the care evident in the trial judge’s ruling in this case, we are confident these factors would have been analyzed had Appellants presented evidence that they had applied for and been refused a bond, as required by *Fuller*. As Appellants presented no such evidence, we need not address these additional factors.

Accordingly, the circumstance that the court approved Appellants' fee waiver does not conclusively establish they are entitled to a waiver of bond, and their argument that the trial court abused its discretion in not sua sponte waiving the bond fails.¹¹

DISPOSITION

The April 20, 2016 judgment is affirmed. The parties shall each bear their own costs on appeal pursuant to California Rules of Court, rule 8.278(a)(5).

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GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

¹¹ Based on this disposition, we need not consider Appellants' other claims.

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