

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CONTINENTAL HERITAGE
INSURANCE CO.,

Defendant and Appellant.

B275718

(Los Angeles County
Super. Ct. Nos. SA090466,
SJ1846)

APPEAL from an order and judgment of the Superior Court
of Los Angeles County, Kerry Bensinger, Judge. Affirmed.

Law Office of John Rorabaugh, John M. Rorabaugh and
Crystal L. Rorabaugh for Defendant and Appellant.

Mary C. Wickham, County Counsel, Ruben Baeza, Jr.,
Assistant County Counsel, Joanne Nielsen, Principal Deputy
County Counsel and Lillian Russell, Deputy County Counsel for
Plaintiff and Respondent.

Defendant and appellant Continental Heritage Insurance Co. (Continental), the surety on a bail bond, appeals an order denying its motion to vacate forfeiture and exonerate bail, as well as the judgment that was entered on the forfeited bond.¹

Continental contends the trial court lost jurisdiction over the bond by failing to declare a forfeiture immediately upon criminal defendant Ahmed Soliman's (Soliman) failure to appear in court on September 3, 2015 for the preliminary hearing. The essential issue presented is whether the trial court acted within its discretion in refraining from forfeiting bail promptly upon Soliman's failure to appear at that hearing.

The record reflects that Soliman was admitted to this country "on some sort of visa that allowed him to get his pharmacy license. During the pendency of this situation, the visa expired. He was unable to get an extension. So on the advice of an immigration attorney he went home to refresh the visa . . . and then the State Department denied him [a] re-entry visa."

Given these circumstances, the trial court acted within its discretion in finding that "sufficient excuse may exist for the

¹ " 'An order denying a motion to vacate or set aside a forfeiture and exonerate the bail is an appealable order. [Citation.]' " (*People v. Western Ins. Co.* (2013) 213 Cal.App.4th 316, 321.) Also, although a summary judgment entered on forfeiture of bail is a consent judgment and therefore ordinarily is not appealable, if the summary judgment is not entered in conformity with the statutory scheme, the judgment is appealable. (*People v. International Fidelity Ins. Co.* (2007) 151 Cal.App.4th 1056, 1059-1060.)

failure to appear.” (Pen. Code, § 1305.1.)² Therefore, the trial court properly refrained from forfeiting bail promptly upon Soliman’s nonappearance on September 3, 2015. Accordingly, the trial court did not lose jurisdiction over the bond on September 3, 2015, and thus retained jurisdiction to forfeit the bond at a later time.

FACTUAL AND PROCEDURAL BACKGROUND

On May 11, 2015, American Liberty Bail Bonds, Inc., as an agent of Continental, posted a \$30,000 bond for Soliman’s release from custody on a felony count.

On July 1, 2015, Soliman and his defense attorney were present in court for the preliminary hearing. The matter was continued to September 3, 2015, and the court ordered Soliman to appear on the next court date.³

On September 3, 2015, Soliman failed to appear but was represented by defense counsel, who advised the court as follows: “Apparently, [Soliman] was here on some sort of visa that allowed him to get his pharmacy license. During the pendency of this situation, the visa expired. He was unable to get an extension. So on the advice of an immigration attorney he went home to refresh the visa, however that works, and then the State Department denied him [a] re-entry visa, and here we are.”

Based on counsel’s showing, the trial court made “a finding of good cause not to forfeit the bond.” The trial court issued and held a bench warrant until October 26, 2015, and requested

² All unspecified statutory references are to the Penal Code.

³ Soliman’s personal presence was required at the preliminary hearing. (§ 1043.5.)

documentation “in terms of his being out of the country and unable to return.”

On October 26, 2015, Soliman again failed to appear in court. His attorney advised the court as follows: “Mr. Soliman is an Egypt[ian] national. . . . I’m told that on the advice of an immigration counsel he returned to deal with visa issues because his visa was about to expire and now [he] is having visa issues getting back into the country. [¶] My understanding is that he’s prepared to face the charges if he was free to travel. So my request to the court would be to just continue the warrant hold until December 9th when I can either have him here or know for sure that he’s not able to return.”

The trial court declined to do so, stating it lacked “sufficient justification to continue to hold [the warrant] as opposed [to] issuing a warrant.” It ordered the bond forfeited and issued the bench warrant. On October 28, 2015, the clerk served Continental with notice of forfeiture of the surety bond.

On April 27, 2016, Continental filed a motion to vacate the forfeiture and exonerate bail, contending the trial court lost jurisdiction over the bond by failing to declare a forfeiture upon Soliman’s initial failure to appear on September 3, 2015. Continental contended the court is required to declare an immediate forfeiture when a defendant fails to appear in court unless there is reason to believe that sufficient excuse may exist for a defendant’s failure to appear, and here, “[t]he docket fail[ed] to reflect an excuse, factual or otherwise, for the defendant’s failure to appear on September 3, 2015.”

In opposition, the People cited the representation by defense counsel to the court on September 3, 2015, as reflected in the docket entry for that date, that Soliman was out of the

country.⁴ The People also argued that because Continental had failed to provide a complete transcript of the September 3, 2015 hearing, Continental had failed to demonstrate the trial court lacked sufficient excuse not to declare an immediate forfeiture.

In its reply, Continental provided a transcript of the September 3, 2015 hearing, but argued that Soliman's voluntary departure to the Middle East did not constitute sufficient excuse for his nonappearance.

On June 3, 2016, the matter came on for hearing. The trial court denied Continental's motion, stating that because the court did not do anything to cause Soliman's departure, the contract "was not impacted by the court in any way." Further, with respect to whether there was sufficient excuse for the defendant's failure to appear, the court stated, "it's a very low threshold . . . there needs to be some rational[] basis for the court's belief. [¶] Here the rational[] basis was that the defendant went to refresh his visa and was to come back. That would be a sufficient basis or a least a rational[] basis for the court to believe that there was a sufficient excuse."

On June 3, 2016, summary judgment was entered on the forfeited bond in the sum of \$30,370. This appeal followed.⁵

⁴ Although the docket entry for September 3, 2015, simply contained defense counsel's representation that Soliman was "out of the country," the reporter's transcript of that hearing, quoted above, provides greater detail on the issue of good cause. That reporter's transcript is before this court by way of Continental's motion to augment the record, which this court granted.

⁵ We note the notice of appeal appears to contain an erroneous designation of parties. It identifies the appellant as Financial Casualty & Surety Inc., not Continental. However, the

CONTENTIONS

Continental contends the trial court lost jurisdiction over the bond when it failed to declare a forfeiture upon Soliman's failure to appear in court for the preliminary hearing on September 3, 2015.

DISCUSSION

1. *Standard of review.*

“The determination of a motion to set aside an order of forfeiture is entirely within the discretion of the trial court, not to be disturbed on appeal unless a patent abuse appears on the record. [Citations.]’ [Citation.] ‘“The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.” [Citations.]’ [Citation.]” (*County of Los Angeles v. Nobel Ins. Co.* (2000) 84 Cal.App.4th 939, 944-945.) Under the abuse of discretion standard, “[t]he trial court’s findings of fact are reviewed for substantial evidence . . . and its application of the law to the facts is reversible only if arbitrary and capricious.’” (*County of Los Angeles v. Fairmont Specialty Group* (2009) 173 Cal.App.4th 538, 543, quoting *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.)

erroneous designation is not fatal to the appeal, as no prejudice has resulted to respondent, and we liberally construe the notice of appeal to refer to Continental. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 562, pp. 641-642.)

2. *The pertinent statutes; sufficiency of excuse for nonappearance.*

Section 1305, subdivision (a)(1) provides that the court “shall in open court declare forfeited the undertaking of bail or the money or property deposited as bail if, without sufficient excuse, a defendant fails to appear” for arraignment, trial, judgment, or any other occasion prior to pronouncement of judgment if the defendant’s presence in court is lawfully required. Thus, to declare a forfeiture, “ ‘(1) the defendant must fail to appear for arraignment, trial, judgment, execution of judgment, or when his presence is otherwise lawfully required; and (2) the failure to appear must be without sufficient excuse. [Citation.]’ ” (*People v. National Automobile & Casualty Ins. Co.* (2004) 121 Cal.App.4th 1441, 1447 (*National Auto*).)

Section 1305.1 creates an exception to the general rule that a failure to appear requires the trial court to order forfeiture of the bail. (*National Auto, supra*, 121 Cal.App.4th at p. 1450.) “If the defendant fails to appear . . . when his or her appearance is lawfully required, *but the court has reason to believe that sufficient excuse may exist for the failure to appear*, the court may continue the case for a period it deems reasonable to enable the defendant to appear without ordering a forfeiture of bail or issuing a bench warrant. [¶] If, after the court has made the order, the defendant, without sufficient excuse, fails to appear on or before the continuance date set by the court, the bail shall be forfeited and a warrant for the defendant's arrest may be ordered issued.” (§ 1305.1, italics added.)

Thus, the trial court has the discretion to continue a hearing, and retain its jurisdiction to declare a forfeiture, as long as it has “ ‘ “some rational basis” ’ ” to believe there is a sufficient

excuse for the defendant's nonappearance. (*People v. Amwest Surety Ins. Co.* (1997) 56 Cal.App.4th 915, 923; accord *People v. Ranger Ins. Co.* (2005) 135 Cal.App.4th 820, 823.)

“The theory behind this exception [under section 1305.1] is that “[i]f bail forfeiture is required immediately upon the first nonappearance of a defendant, no matter how valid his reason for nonappearance [may] be, such defendant would be subjected not only to having his bail forfeited but the additional penalty of possibly being required to pay another premium for its reinstatement.” [Citation.]” (*National Auto, supra*, 121 Cal.App.4th at p. 1450.)

The determination of whether an excuse is sufficient to permit the court to continue the matter without ordering a forfeiture of bail is within the trial court's discretion and decided on a case-by-case basis. (*People v. Harco National Ins. Co.* (2005) 135 Cal.App.4th 931, 934 (*Harco*).) “[T]he test is not whether it has been conclusively demonstrated a defendant had an actual and valid excuse for his nonappearance to justify continuing a hearing without declaring a bail forfeiture”—rather, “the statute requires the court only have ‘reason to believe that sufficient excuse *may* exist for the failure to appear.’” (*People v. Ranger Ins. Co.* (2003) 108 Cal.App.4th 945, 953, italics in original.)

In most situations involving a determination of sufficient excuse for nonappearance, “ ‘the only reasons before the trial court are the evidence or representations furnished by defendant's counsel. The cases demonstrate that the courts have cooperated with defense counsels' requests and have liberally relied on their representations.” ’ ” (*People v. Ranger Ins. Co., supra*, 108 Cal.App.4th at p. 952, quoting *People v. National Automobile & Cas. Ins. Co.* (1977) 75 Cal.App.3d 302, 306.)

Reasons found “insufficient have included justifications for defense counsel’s, as distinguished from the defendant’s, absence. And of course, silent records provide no grounds to justify continuing a hearing without declaring a forfeiture of bail when the defendant fails to appear. [¶] Sufficient excuses have included representations the defendant wanted to be with his mother who had terminal cancer, representations the defendant had died, representations the defendant was then appearing in another criminal matter in another jurisdiction, representations the defendant had sought medical treatment for internal bleeding, representations the defendant had been in an automobile accident, and . . . defense counsel’s statement the defendant’s absence may be due to an emergency, but that he might be available the next morning.” (*People v. Ranger Ins. Co.*, *supra*, 108 Cal.App.4th at pp. 952-953, fns. omitted.)

For example, in *Harco*, neither the defendant nor his attorney appeared in court on September 26, a Friday, and defense counsel contacted the court stating he could not appear that day and requested that any bench warrant issued be held. (*Harco*, *supra*, 135 Cal.App.4th at p. 933.) The trial court granted counsel’s request. (*Ibid.*) On Monday, September 29, the trial court forfeited the bond, after being advised by defense counsel that he could not locate his client. (*Ibid.*) The reviewing court reversed, concluding that insufficient evidence supported the finding of sufficient excuse for the defendant’s failure to appear on Friday, and the trial court’s failure to forfeit bail on that date deprived it of jurisdiction to do so later. (*Id.* at pp. 934-935.)

Sufficient excuse for nonappearance was shown in *People v. Financial Casualty & Surety, Inc.* (2017) 14 Cal.App.5th 127, 135

(*Financial Casualty*). There, the defendant's attorney had a reasonable explanation for defendant's nonappearance at a February 18 hearing. The lower court concluded that due to a possibly confusing order to appear at two separate court dates (February 18 and February 26), and the uncommon setting of bail and a referral to supervised pretrial release, it would give the defendant "the benefit of the doubt and not forfeit the posted bail. As a result, the [lower] court found there was sufficient excuse [for defendant's] nonappearance, and refrained from forfeiting bail until [defendant] missed his second court date. Accordingly, the trial court retained its jurisdiction over the bond on February 18, 2015, and properly forfeited bail at the subsequent hearing on February 26, 2015." (*Ibid.*)

3. *Record supports trial court's exercise of its discretion in finding sufficient excuse for Soliman's nonappearance on September 3, 2015.*

Continental argues that although defense counsel provided the trial court with "an explanation of the defendant's failure to appear," he failed to provide "a sufficient excuse" for the nonappearance. The argument is unpersuasive because the determination of sufficient excuse was a matter for the trial court to determine, based on the showing made by defense counsel at the September 3, 2015 hearing. Our role, in turn, is to determine whether the trial court acted within the bounds of its discretion in finding that sufficient cause may exist for the failure to appear.

The record "clearly demonstrates that [defense counsel] had a *reasonable explanation* for [Soliman's] nonappearance that day." (*Financial Casualty, supra*, 14 Cal.App.5th at p. 135, *italics added.*) At the September 3, 2015 hearing, defense counsel

explained to the trial court that Soliman’s visa had expired, and that on the advice of an immigration attorney Soliman had returned to his home country to renew his visa, but then was denied a visa to re-enter the United States. In other words, the People argue that Soliman was faced with a legal dilemma—he was obligated to appear in court on September 3, 2015, but simultaneously was required to depart the United States due to his expired visa.

We conclude that under the circumstances known to the trial court at the time of the hearing on September 3, 2015, the trial court had a rational basis to believe that “sufficient excuse may exist for the failure to appear.” (§ 1305.1.) Consequently, the trial court properly refrained from forfeiting bail on September 3, 2015, and thus retained jurisdiction to forfeit bail at a later time.⁶

⁶ In its reply brief, Continental cites the recently decided case of *People v. The North River Ins. Co.* (2017) 18 Cal.App.5th 863 (*North River*) for the proposition that the defendant’s voluntary departure from the United States constituted a breach of his bail contract, so as to require the trial court to forfeit bail on September 3, 2015. *North River* is of no assistance to Continental. In this regard, *North River* states, “ ‘ when there is a breach of [the] contract, the bond should be enforced.’ [Citation.] Here, the surety allowed defendant to voluntarily flee and, as a consequence, breached its contract with the court.” (*Id.* at pp. 879-880.) Thus, *North River* addresses a breach by the surety, not a breach by the criminal defendant. Further, the issue in *North River* was whether the surety was entitled to a vacatur of the forfeiture of a bail bond on the basis of permanent or temporary “disability” under section 1305, subdivisions (d) and (e), when the defendant charged with trafficking narcotics had voluntarily fled the country and was barred from reentry under

In sum, on the record presented, we do not perceive an abuse of discretion in the trial court's ruling.

DISPOSITION

The order denying the motion to vacate forfeiture and exonerate bail, and the judgment that was entered on the forfeited bond, are affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.

federal immigration law due to the pending charges. (*Id.* at p. 867.) *North River* did not involve section 1305.1 and has no bearing on whether the trial court herein had “reason to believe that sufficient excuse may exist for the failure to appear.” (*Ibid.*)