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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CARYL SHERMAN,

Plaintiff and Respondent,

v.

VANCE LORENZINI,

Defendant and Appellant.

B280046

(Los Angeles County  
Super. Ct. No. BC600862)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Fredrick C. Shaller, Judge. Affirmed.

Law Offices of Corey Evan Parker, Corey Evan Parker, Thomas Voge & Associates, Timothy M. Kowal, for Defendant and Appellant.

Raskin Gorham Anderson Law, Gary J. Gorham and Dustin J. Sloan, for Plaintiff and Respondent.

## **INTRODUCTION**

Defendant Vance Lorenzini (defendant) appeals from a monetary judgment entered against him based on his breach of a settlement agreement with plaintiff Caryl Sherman (plaintiff). Defendant asserts that the trial court erred when it denied his request to continue the trial—then in progress—based on his hospitalization for heart issues. According to defendant, the trial court misinterpreted as mandatory the provisions of Code of Civil Procedure section 36<sup>1</sup> limiting trial continuances in preference cases and, in any event, abused its discretion in denying the continuance. Defendant also contends that the trial court erred by concluding that defendant's usury cross-claim and affirmative defense were without merit.

In addition to contesting defendant's contentions on appeal, plaintiff moves to dismiss the appeal pursuant to the disentitlement doctrine. Plaintiff maintains that defendant's conduct in response to her judgment enforcement efforts requires us to exercise our inherent power to dismiss appeals for flagrant violations of trial court orders issued in aid of enforcement of judgments.

As explained below, we deny plaintiff's motion to dismiss because she failed to carry her burden on that motion, but otherwise affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

On May, 18, 2006, defendant entered into a loan agreement with plaintiff pursuant to which she loaned him \$100,000 and he agreed to make monthly interest-only payments for one year,

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

followed by a lump sum principal repayment in full. Defendant defaulted on the loan, and plaintiff sued him for breach of the loan agreement. The parties eventually resolved that lawsuit by way of settlement, but when defendant thereafter defaulted on the settlement agreement, plaintiff filed the instant action for breach of that agreement.

The matter was set for bench trial to commence on October 11, 2016, pursuant to plaintiff's request for priority trial setting under section 36, subdivision (a). As explained in detail below, after plaintiff completed her case-in-chief on the first day of trial, the trial court granted two short continuances due to defendant's heart condition which prevented him from appearing and testifying at trial. But when defendant was unable to appear for trial after the expiration of the second continuance, the trial court refused to delay trial further and proceeded to decide the case based on the evidence then before it and, pursuant to defendant's stipulation, his deposition testimony in lieu of his in-court testimony.

The trial court thereafter issued a detailed, 28-page tentative statement of decision and, after considering certain objections by the parties, a final statement of decision in which it awarded plaintiff damages for breach of the settlement agreement in the total amount of \$129,229.23. The trial court entered a judgment in plaintiff's favor in that amount,<sup>2</sup> from which defendant timely appealed.

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<sup>2</sup> The trial court subsequently entered an amended judgment, which added attorney fees and costs in the amount of \$67,591.41.

## DISCUSSION

### A. Motion to Dismiss

On April 9, 2018, after this matter was fully briefed on the merits, plaintiff filed a motion to dismiss the appeal based on the disentitlement doctrine. According to plaintiff, defendant committed “misconduct concerning [plaintiff’s] judgment–creditor rights, including [defendant’s] brazen circumvention of . . . [a trial court order lifting the stay on the enforcement of the judgment], . . . fraud on creditors (including [plaintiff]) and failure to respond to . . . judgment-creditor discovery.” Plaintiff maintains that such misconduct by defendant in the trial court, while the judgment against him is under review, warrants dismissal of his appeal without consideration of the merits.

#### 1. *Background*<sup>3</sup>

On December 14, 2016, the trial court entered a judgment in favor of plaintiff in the amount of \$129,229.23. The judgment provided for an award of attorney fees and costs in an amount to be determined after consideration of a subsequently filed fee declaration and cost bill.

On January 12, 2017, defendant filed a notice of appeal from the judgment. That same day, the trial court issued an abstract of judgment which plaintiff recorded against defendant’s residence on January 18, 2017.

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<sup>3</sup> Plaintiff’s April 9, 2018, request for judicial notice in support of the motion to dismiss is granted. Plaintiff’s February 15, 2018, motion to disregard portions of opening brief and request for judicial notice in support thereof are denied.

On May 4, 2017, defendant posted an undertaking by a qualified surety pursuant to section 917.1 in the amount of \$193,843.85. That amount was one and a half times the amount of the original judgment, and there is no dispute that such amount was sufficient under section 917.1<sup>4</sup> to stay enforcement of the judgment pending the appeal.

On July 11, 2017, the trial court entered an order awarding plaintiff attorney fees in the amount of \$65,245 and costs in the amount of \$2,346.41, for a total postjudgment award of \$67,591.41. On November 6, 2017, the trial court entered an amended judgment that included the fee and cost award of \$67,591.41.<sup>5</sup>

On October 26, 2017, plaintiff filed a motion under section 996.010 to increase the amount of undertaking on the grounds that the initial undertaking securing the payment of the original judgment was insufficient to secure the total amount of the amended judgment. Plaintiff argued that the amount of the amended judgment—\$196,820.64—plus accrued interest, *including anticipated future interest*, in the amount of \$20,588.48, should be secured by a new undertaking that was either 200 percent or 150 percent of the amended judgment plus all such interest.

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<sup>4</sup> Section 917.1, subdivision (b) provides, in pertinent part: “The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order.”

<sup>5</sup> Although not reflected in the amended judgment, the total amount awarded against defendant was \$196,820.64.

In opposition to the motion, defendant advised the trial court that the parties had stipulated to the amount of an amended undertaking to be filed by January 19, 2018, thereby mooting the motion. Defendant also argued that, if the trial court ruled on the motion, accrued interest should not be included in the amount of the amended judgment for purposes of calculating the amount of the amended undertaking under section 917.1.

On January 11, 2018, the trial court entered an order based on the stipulation of the parties which provided: “1) On or before January 19, 2018 [defendant] will post an undertaking by an admitted surety of [\$310,000] and will serve on [plaintiff’s] counsel . . . proof of compliance with this obligation; [¶] 2) In the event [defendant] fails to fully comply with the foregoing obligations, any stay on enforcement of the Amended Judgment will be deemed vacated and or lifted, and [plaintiff] will be allowed to undertake enforcement proceedings, without further order of the Court; and [¶] 3) [T]he January 11, 2018 hearing on plaintiff[s] Motion to Increase Undertaking is . . . vacated upon entry of the Court’s order.”

According to defendant’s business and real estate attorney, Ronald Ballard, during the week of January 15, 2018, he was actively working to obtain a new bond in a sufficient amount, but ultimately learned that he would need to find a different surety company. On January 23, 2018, he began working with “non-traditional” lenders to obtain a loan to fund an increase in the current amount of the bond from an admitted surety. On January 25, 2018, Ballard had commitments from two lenders to loan defendant the funds necessary to obtain an increased surety bond. After defendant selected one of the lenders, Ballard

contacted two title companies to discuss structuring a loan secured by defendant's residence, but in light of the fact that title to the residence was encumbered by plaintiff's judgment lien. When both companies suggested similar methodologies for the transaction, Ballard selected one and moved forward.

According to Ballard, the bonding company required that the amount of the new bond be secured by cash collateral equal to 100 percent of the face amount of the bond, i.e., \$310,000. In addition, Ballard explained that the loan proceeds were to be used for loan fees and costs, prepaid interest, the "100 [percent] cash collateral for the increase in the bond<sup>6</sup>, the bond premium, and related attorney's fees and costs . . . ."

On January 29, 2018, while Ballard was arranging for the necessary loan, plaintiff's counsel sent defendant's counsel, Timothy Kowal, an e-mail inquiring about the status of the undertaking by an admitted surety and reminding defendant that if a sufficient bond was not posted, plaintiff could begin enforcement proceedings. In response, Kowal advised that there were "some issues" in obtaining the bond and that defendant was still "making efforts" to obtain the bond. The record on the dismissal motion does not contain any response by plaintiff's counsel to this e-mail, much less a specific objection on the grounds that the January 11 stipulation and order foreclosed the posting of any bond after January 19.

On or about February 4, 2018, Ballard received a preliminary title report that plainly showed plaintiff's judgment lien. Based on this report, Ballard maintained that the "title insurer, escrow officer and loan broker" each had "clear

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<sup>6</sup> The additional cash collateral needed to obtain the increased bond was \$116,156.15.

knowledge of [plaintiff's] judgment lien" and that the primary purpose of the loan was to fund the increased amount of the bond.

On February 7, 2018, WFG National Title Company sent plaintiff's counsel a request for a payoff demand asking for the current amount necessary to satisfy plaintiff's judgment lien. On February 8, 2018, plaintiff's counsel responded by letter asserting the payoff amount was \$214,605.28, which included the amount of the original judgment, the attorney fee and cost award, and accrued interest to date.

On or about February 9, 2018, plaintiff sent defendant's counsel notice of defendant's judgment debtor exam ordered for March 14, 2018, as well as a set of judgment-creditor document demands.

By February 15, 2018, the necessary loan documents had been prepared and Ballard was informed the next day that defendant had signed them, including the note and deed of trust. The loan documents provided for the funding of the bond from the loan proceeds and the filing of the bond with the trial court before recording of the deed of trust. According to Ballard, the loan was made with full disclosure to the escrow holder of plaintiff's abstract of judgment and her calculation of the judgment payoff amount.

On February 21, 2018, the escrow officer informed Ballard that escrow had wire transferred from the loan proceeds the amount of the increased cash collateral to the bank for the bonding company pursuant to the lender's escrow instructions. That same day, the bonding company advised Ballard that the wire transfer had been received and that the amended bond was being sent out via overnight service. On February 22, 2018, Ballard was informed that Kowal had filed the amended bond



with the trial court. That same day, the escrow officer informed Ballard that, after reviewing a copy of the certified bond filed with the court, the title underwriter had approved the recording of the deed of trust the following day. On February 23, 2018, the escrow officer advised Ballard that the deed of trust had been recorded.

On February 23, 2018, Kowal served plaintiff's counsel via e-mail a notice of posting of undertaking and a notice of stay of proceedings, and thereafter served those documents by overnight delivery on February 26, 2018. Those notices, however, were not provided to the lender, title company, escrow, or bank, nor were they required by any of those parties.

In a series of e-mail exchanges on February 23 and 24, 2018, plaintiff, for the first time, took the position that the January 11 order precluded any stay of enforcement from and after January 19, the late filing of the amended bond notwithstanding. Defendant's counsel took the position that the January 11 order did not preclude the late filing of the amended bond and that the filing of the bond was a matter of right that automatically stayed enforcement of the judgment.

After unsuccessfully attempting to confirm with the trial court that defendant's March 14 judgment debtor exam was off-calendar, defendant's counsel appeared in the trial court that day and requested that the exam be taken off calendar in light of the amended bond and because the notice of the exam had been improperly served. Plaintiff's counsel appeared and argued that the January 11 stipulation and order foreclosed any further stay of enforcement, notwithstanding the late-filed bond. In an unrecorded oral ruling, the trial court concluded that no stay was in effect, but that the notice of judgment debtor exam had been

improperly served. The minute order for that oral proceeding provided: “The Court finds that [plaintiff] may proceed with enforcement proceedings because of the 1/11/18 stipulation and order. [¶] The court take[s the] exam of [defendant] off calendar because of lack of sufficient proof of service.”

On March 19, 2018, defendant filed in this appeal a petition for writ of supersedeas seeking a stay of enforcement of the judgment based on the posting of the amended undertaking. He argued that the 35-day delay in posting the amended undertaking did not prejudice plaintiff and provided no benefit to defendant. Defendant also requested an immediate stay pending the resolution of the writ pursuant to California Rules of Court, rule 8.112. That same day, this court denied the request for a temporary stay for failure to comply with rule 8.486(b), which requires petitions in original writ proceedings to be supported by a copy of the reporter’s transcript of the hearing in issue or a declaration “fairly summarizing” the hearing.

That evening, defendant filed a declaration that, consistent with the contents of his verified petition, summarized the March 14 hearing, including the respective arguments of counsel and the trial court’s oral ruling. The next day, March 20, 2018, this court issued an order granting an immediate stay which provided: “The immediate stay request is granted. (*Bradley Co. v. Mulcrevy* (1913) 166 Cal. 325, 328 [“[t]he Code of Civil Procedure fixes no time within which an undertaking to stay execut[ion] must be filed. The undertaking may be given at any time before execution of the judgment”].)”

On April 6, 2018, however, this court denied the petition for writ of supersedeas, as follows: “The petition is denied. The trial court did not err in denying [defendant’s] oral motion because

[defendant] failed to comply with the January 11, 2018, order and his new undertaking was insufficient as required by statute. (Code of Civ. Proc., § 917.1, subd. (b).)”<sup>7</sup>

Three days later, on April 9, 2018, plaintiff filed the instant motion to dismiss based upon the disentitlement doctrine.

## 2. Legal Principles

In *Stoltenberg v. Ampton Investments, Inc.* (2013) 215 Cal.App.4th 1225 (*Stoltenberg*), we summarized the appellate doctrine of disentitlement and the case law upon which it is based. “An appellate court has the inherent power, under the ‘disentitlement doctrine,’ to dismiss an appeal by a party that refuses to comply with a lower court order. (See, e.g., *Moffat v. Moffat* (1980) 27 Cal.3d 645, 652 [165 Cal.Rptr. 877, 612 P.2d 967]; *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277 [89 P.2d 382]; *Knoob v. Knoob* (1923) 192 Cal. 95, 96-97 [218 P. 568]; *TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 378-379 [83 Cal.Rptr.2d 834]; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 5:37.2, p. 5-20 (rev. # 1, 2012).) As the Supreme Court observed in *MacPherson v. MacPherson*, *supra*, 13 Cal.2d at page 277, ‘A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of

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<sup>7</sup> That same day, defendant filed a letter request to reconsider the denial of his petition because the \$310,000 amended bond was in excess of 150 percent of the amended judgment and therefore in compliance with the requirements of section 917.1, subdivision (b). But this court rejected that request as the order denying the writ was final when filed. (See Cal. Rules of Court, rule 8.264(b)(2)(A).)

contempt to legal orders and processes of the courts of this state. [Citations.]’

“We recently explained the equitable rationale underlying the doctrine. “Dismissal is not “a penalty imposed as a punishment for criminal contempt. It is an exercise of a state court’s inherent power to use its processes to induce compliance” with a presumptively valid order. [Citation.]” [Citation.] . . . [¶] Appellate disentitlement “is not a jurisdictional doctrine, but a discretionary tool that may be applied when the balance of the equitable concerns make it a proper sanction . . . .” (*People v. Puluc-Sique* (2010) 182 Cal.App.4th 894, 897 [106 Cal.Rptr.3d 365].)’ (*In re E.M.* (2012) 204 Cal.App.4th 467, 474 [138 Cal.Rptr.3d 846].) No formal judgment of contempt is required; an appellate court ‘may dismiss an appeal where there has been *willful disobedience or obstructive tactics*. (*Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669, 1683 [34 Cal.Rptr.2d 244].)’ (*In re Claudia S.* (2005) 131 Cal.App.4th 236, 244 [31 Cal.Rptr.3d 697], italics added.) The doctrine ‘is based upon fundamental equity and is not to be frustrated by technicalities.’ (*Stone v. Bach* (1978) 80 Cal.App.3d 442, 444 [145 Cal.Rptr. 599].)” (*Stoltenberg, supra*, 215 Cal.App.4th at pp. 1229-1230.)

### 3. *Analysis*

Plaintiff asserts three separate grounds for her motion to dismiss: (i) by filing the February 23 notice of stay, defendant violated the trial court’s January 11 order based on the stipulation of the parties which, according to plaintiff, prevented defendant from seeking to stay enforcement of the judgment if he failed to post the agreed-upon amended bond by January 19; (ii) defendant used the notice of stay to procure a loan on his

residence, which loan somehow impaired plaintiff's judgment creditor rights under her previously recorded abstract of judgment and defrauded the lender and escrow company; and (iii) defendant failed to comply with plaintiff's judgment-creditor document demands. In light of the evidence in support of the opposition to the motion, however, none of these grounds has a sufficient factual basis to warrant dismissal of the appeal.

Contrary to plaintiff's assertion, defendant did not flagrantly violate the trial court's January 11 order by filing the amended bond after the January 19 deadline. Nothing in the January 11 stipulation and order expressly precluded defendant from filing the amended bond after the January 19 deadline. In particular, there was no express agreement between the parties concerning the effect of a late-filed bond. Instead, the only express consequence for missing the January 19 deadline was the lifting of the original stay of enforcement without the need for further court order. Thus, the filing of the amended bond and the notice of stay based thereon did not violate the express terms of the January 11 stipulation and order.

In addition, based on the Ballard declaration in support of defendant's opposition to the motion to dismiss, it does not appear, as plaintiff contends, that defendant used the filing of the notice of stay to impair plaintiff's judgment creditor rights or to defraud the lender and escrow. As the Ballard declaration makes clear, all of the parties to the loan transaction were aware from the title report and plaintiff's judgment-payoff demand to the escrow company that plaintiff had perfected a judgment lien against defendant's residence well in advance of the contemplated loan, which loan was to be secured by that residence. That lien was clearly of record at the time of the loan

transaction and, presumably, would be a senior encumbrance to any deed of trust subsequently given by defendant to secure the loan necessary to fund the amended bond. Therefore, by procuring the loan to fund the bond, defendant did not and could not have impaired plaintiff's rights under her previously recorded judgment lien. And, because the lender apparently agreed to accept a deed of trust that was junior to plaintiff's judgment lien, there was no need to respond to plaintiff's payoff demand, as the judgment lien would remain as a senior encumbrance with priority over the lender's junior lien.

Moreover, once the amended bond was filed, plaintiff had an additional and more expeditious security interest that guaranteed payment of the judgment if she prevailed on appeal. As a result, plaintiff was not prejudiced in any way by defendant's belated, but seemingly good faith, attempt to procure a sufficient bond.

Finally, the record does not support plaintiff's assertion that defendant has willfully disobeyed a court order by failing to comply with judgment-creditor document demands. It is undisputed that defendant objected to plaintiff's document demands based upon improper service. Although plaintiff contends that objection was waived, there is nothing in the record to show that she obtained a trial court order overruling the objection and compelling compliance with the subject document demands. Absent such evidence, plaintiff has failed to carry her burden of showing that defendant is in open and flagrant violation of a court order compelling compliance with judgment-creditor discovery.

Based on the record before us on the motion to dismiss, there is no factual basis for plaintiff's assertion that defendant

has violated trial court orders issued in aid of the enforcement of the judgment or otherwise wrongfully impaired plaintiff's judgment-creditor rights. We therefore decline to exercise our discretion to dismiss the appeal under the doctrine of disentitlement and deny plaintiff's motion.

## **B. Appeal from Judgment**

### *1. Denial of Motion to Continue*

#### *a. Background*<sup>8</sup>

At the time of trial in October 2016, plaintiff was 83 years old and suffered from "significant physical conditions." She was therefore granted priority in trial setting pursuant to section 36, subdivision (a).

On October 11, 2016, the first day scheduled for trial, defendant's counsel represented to the trial court that defendant had been hospitalized. Based on the stipulation of the parties, if defendant did not appear and testify on that day or by no later than October 14, 2018, the court could read and consider defendant's deposition testimony without cross-examination in lieu of his live testimony.

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<sup>8</sup> The record on appeal does not contain transcripts of the trial continuance hearings or any writings that were submitted to the trial court in connection with those proceedings, such as, for example, the e-mails from counsel to the trial court concerning defendant's medical condition and plaintiff's opposition to further continuances. Instead, the only information about the continuance proceedings in the record is contained in the trial court's orders issued on October 14 and 20, 2016, and in the trial court's tentative and final statements of decision issued October 27 and November 22, 2016. The procedural background for the continuance proceedings is taken solely from those sources.

Plaintiff went forward with and completed her case that day, and defendant's counsel stipulated that the only witness he needed to call was defendant. Later that day, however, defense counsel informed the trial court that he could not reach defendant. Accordingly, the trial court continued trial to October 14, 2016.

On October 13, 2016, defendant's counsel e-mailed the trial court and counsel to advise that defendant could not testify on October 14, 2016, because defendant had not yet been released from the hospital. Over plaintiff's objection, the trial court continued the trial to October 21, 2016. Counsel's e-mail further informed the trial court that he needed defendant's trial testimony on several matters that were not covered by defendant's deposition transcript.

On October 20, 2016, defendant's counsel again e-mailed the trial court and counsel advising that defendant's heart condition required open heart surgery and that, as a result, defendant could not testify on October 21, 2016, or on any date certain thereafter. The trial court construed the e-mail as a concession that defendant could not be available to testify by the 15th day following commencement of trial, which date the court calculated as October 26, 2016. Over plaintiff's objection, defendant's counsel asked the trial court to issue an order to show cause regarding defendant's medical condition, a request which the trial court denied. The trial court further ruled that because any continuance beyond October 26 would violate section 36, subdivision (f), any further continuance request must be denied.

In its final statement of decision, the trial court detailed the reasons for its ruling as follows: "After consideration of the



statutory trial setting priority granted to [plaintiff] due to her age and health and the fact that [defendant] could not be available to testify by 15 days after the commencement of trial, the court denied any further continuances and determined that the case would be decided on the merits based upon the testimony of [plaintiff, her expert], and the deposition testimony of [defendant] (which the parties originally stipulated to be used in lieu of live testimony) together with the admitted ‘Stipulated Facts,’ [e]xhibits and matters of which the court took judicial notice. [¶] . . . Under [section 36, subdivision (f)] the court is limited in allowing continuances of trial setting under [section 36, subdivision (a)] to 15 days “for any party.” [October 26] was the 15th day after the matter was initially set for trial under the [section 36, subdivision (a)] preference. The court considers the 15-day limit for further continuances of trial to be mandatory ([s]ee e.g. *Rice v. Superior Court* (1982) 136 Cal.App.3d 81 . . .; *Koch-Ash v. Superior Court* (1986) 180 Cal.App.3d 689 . . .) and the court does not have discretion to continue the matter beyond the 15-day period. The denial is also based on the court’s exercise of its discretion since before [plaintiff] put on her case counsel for [defendant] agreed that if [defendant] could not come to court . . . his deposition could be used in lieu of his live testimony—so further delay in consideration of [plaintiff’s] age and health balance in favor of deciding the matter without further delay.”

The trial court also addressed defendant’s objections thereto. In so objecting, defendant’s counsel had provided two letters from defendant’s physicians describing defendant’s treatment for heart disease, including his hospitalization and subsequent open-heart, coronary artery by-pass surgery.

According to defendant's cardiologist, Dr. Ram, he would not be available to testify in court until November 28, 2016.

Defendant's counsel argued that he could not meaningfully respond to the tentative statement of decision and requested a further continuance until November 28 so that defendant could testify about, inter alia, the modification to the loan agreement. In responding to defendant's objections, the trial court explained in its final statement of decision: "The court has already addressed [d]efendant's unfortunate health issues but in light of the content of the objections, the fact that [d]efendant is still unavailable to testify, the fact that [d]efendant's relevant evidence was fairly available to the court in evidence admitted at the trial, and that the court has already continued the trial to the maximum extent permitted by [section] 36, [d]efendant's '[o]pposition to [t]entative [r]uling is denied.'"

#### b. Legal Error

Defendant contends that the trial court committed legal error by concluding that the limitation on continuances in section 36, subdivision (f)<sup>9</sup> was mandatory. According to defendant, no

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<sup>9</sup> Section 36, subdivisions (a) and (f), provides: "(a) A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings: [¶] (1) The party has a substantial interest in the action as a whole. [¶] (2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation. [¶] . . . [¶] (f) Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for *physical*

case has expressly held that the one-time, 15-day continuance limitation for physical disabilities in subdivision (f) is mandatory and, therefore, that provision should be construed in light of a trial court's broad discretion to control the proceedings before it and grant continuances based on good cause shown.

Assuming, as appears to be the case, that defendant's heart condition, hospitalization, and surgery qualified as a "physical disability" under section 36, subdivision (f), the express language of that subdivision is mandatory, i.e., based on his physical disability, defendant was only entitled to a single continuance limited to a 15-day postponement measured from the first day scheduled for trial, which in this case was October 11. Subdivision (f), however, contains no express limitation for the number of 15-day continuances that may be granted for "good cause." Thus, if defendant's medical circumstances constituted "good cause," and not a "physical disability," under subdivision (f), defendant arguably may have been entitled to more than one 15-day continuance, which might have permitted the trial court to grant in effect a much lengthier continuance consisting of multiple 15-day continuances strung together.

As explained below, however, under the particular circumstances of this case, we do not need to resolve what, if any, limitations the statute places on the number of "good cause" continuances, because, even if we assume the trial court erred by interpreting subdivision (f)'s single continuance limitation as mandatory in all circumstances, defendant cannot demonstrate

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*disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party.*" (Italics added.)

the trial court abused its discretion in denying any further continuances on this record.

c. Abuse of Discretion

Defendant's claim of legal error in the denial of a continuance beyond 15-days from the original trial date, even if correct, would not resolve this issue in his favor because, as defendant concedes, the requested continuance would still have been a matter within the sound discretion of the trial court to deny.

“The decision to grant or deny a continuance is committed to the sound discretion of the trial court. [Citation.] The trial court's exercise of that discretion will be upheld if it is based on a reasoned judgment and complies with legal principles and policies appropriate to the case before the court. [Citation.] A reviewing court may not disturb the exercise of discretion by a trial court in the absence of a clear abuse thereof appearing in the record.’ [Citation.] California Rules of Court, rule 3.1332(d), provides that in ruling on a request for a continuance ‘the court must consider all the facts and circumstances that are relevant to the determination.’ Among other facts and circumstances, the trial court properly considers the proximity of the trial date, whether there were previous trial continuances, the length of the requested continuance, and the prejudice that parties or witnesses would suffer as a result of the continuance. (Rule 3.1332(d).)” (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1126.)

We find no abuse of discretion in the trial court's denial of a further continuance of the trial to allow defendant to recover from heart surgery and testify in court. Trial continuances are

disfavored and may be granted only on an affirmative showing of good cause. (Cal. Rules of Court, rule 3.1332(c); *County of San Bernardino v. Doria Mining & Engineering Corp.* (1977) 72 Cal.App.3d 776, 781).

At the time of the requested continuance, the trial was in progress and plaintiff already had presented her case. The trial court had also granted two prior, albeit short, continuances. Moreover, plaintiff was 83 years old at the time of trial and suffered from her own health issues that necessitated the priority trial setting in the first instance. And, as the trial court explained in its statement of decision, in addition to basing its denial of the continuance on the mandatory provisions of section 36, subdivision (f), the court independently exercised its discretion to deny the continuance because defendant's counsel had stipulated that, if defendant could not testify in court within a specified period, the matter could be decided based on his deposition testimony.

Given the totality of the facts and circumstance considered by the trial court on the request for a further continuance, its decision to deny that request was clearly the product of reasoned judgment in conformance with legal principles. As such, it was not an abuse of discretion.

## 2. *Usury Defense and Cross-Claim*

### a. Factual Background<sup>10</sup>

In its final statement of decision, the trial court described the background for its determination of the usury defense and cross-claim: "The settlement and release agreement reached in

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<sup>10</sup> The factual background is taken from the trial court's findings on the usury defense in its final statement of decision.

the underlying action . . . resolved the litigation between [plaintiff] and [defendant] over the promissory note of 5/18/2006. The underlying promissory note called for the repayment of \$100,000 principal plus either 11% or 12% depending on the time period. The recitations in the release detail the claim for interest at 12% per annum after the date of default in payment which was 9/19/2010. The issue of a usurious interest rate was clearly evident from the demand for damages based on the illegal interest rate in excess of 10%. [¶] The attempt to exact a usurious interest rate of interest renders the usurious interest provisions of a note void. [Citations.] The usurious provisions, however, do not affect the right of the payee to recover the principal amount of the note when due. [Citation.] The inclusion of a usurious interest provision, therefore, results, in effect, in a note payable at maturity without interest.”

The trial court then explained its decision on the usury issue as follows: “[In t]he release and settlement agreement reached in the underlying civil action . . . [defendant] agreed to pay the \$100,000 principal plus . . . accrued interest of . . . \$17,850. [¶] Considering the amount of accrued principal and interest as well as the attorney’s fees to be awarded in the case, the settlement amount was a reasonable and good faith resolution of the action on the note. The new settlement agreement purged the usurious interest rate on the original promissory note and the parties resolved their lawsuit with a dismissal of the civil action. [¶] The effect of the settlement agreement and release in consideration of a dismissal of the underlying litigation had the effect of extinguishing the obligation on the old promissory note. Civil Code [section] 1541 (release). It is clear from the signatures on the release and

settlement and the approval as to form by both counsel for the parties that the parties expressly and in detail intended to extinguish the old promissory note and replace it with a new agreement which called for only 10% interest. . . . [¶] As stated in [*Kogan v. Bergman*] (1966) 244 Cal.App.2d 613: ‘though a contract is tainted with usury, the abandonment of the usurious agreement and the execution of a new obligation for the amount of the actual debt free from the usury and bearing only legal interest, purges the original usury and makes the second obligation valid and enforceable. [Citations.] [¶] Regardless of the usurious interest on the initial loan obligation, the release and settlement agreement . . . in the court’s view, constitutes a new and different agreement. . . . [¶] The release and settlement agreement specifies interest at a legal rate of 10% which is free from usury and is legal interest. Under the authorities cited above, this agreement supersedes the original agreement and constitutes a valid and enforceable contract. The court finds based on [defendant’s] declaration that there was no modification to the original settlement and release agreement. [¶] Therefore the court finds no valid defense on the basis of . . . [a] usurious contract . . . .’

b. The Parties’ Contentions

Defendant contends that the trial court erred by finding that the settlement agreement purged any usury that may have existed based on the terms of the original promissory note. He claims the settlement agreement itself called for payment of \$17,850 in deferred accrued interest under the promissory note, which interest was illegal and could not have been collected under the promissory note. Therefore, he asserts that the

inclusion of that amount in the settlement constituted an agreement to pay illegal interest. He also claims that by requiring the repayment of the entire \$100,000 principal amount due under the original note, the settlement agreement failed to take into account that defendant had made usurious payments under the original note that should have been credited toward a reduction of the principal amount but were not. Thus, by requiring the repayment of the entire amount of the principal due, defendant concludes that the settlement included payments for illegal interest. Defendant further asserts that the parties modified the settlement agreement to increase the monthly payment thereunder to a usurious amount, further tainting the settlement with usury.

In response to defendant's contentions, plaintiff argues, *inter alia*, that the record on appeal is inadequate and prevents this court from reviewing the trial court's determination regarding the issue of usury. As plaintiff points out, the record does not contain the trial testimony of the plaintiff or her expert or the deposition and declaration testimony of defendant. In addition, the record does not contain any of the exhibits considered by the trial court, including the exhibits that summarized the interest payments made by defendant under the original note and subsequent settlement.

c. Analysis

"Usury is defined as 'the charging of interest for a loan or forbearance on money in excess of the legal maximum.' (8 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 21:1, p. 4, fn. omitted.) In California, the maximum amount that may be charged is set forth in the Constitution. (See Cal. Const., art XV, § 1.) The



precise amount is complex and it can vary with economic conditions. (*Ibid.*) [¶] The usury law is subject to many exceptions some of which are set forth in the Constitution (Cal. Const., art XV, § 1), some of which are set forth in various statutes (see, e.g., Civ. Code, §§ 1916.1, 1916.2, 1917.220), and some of which are set forth in the case law.” (*Junkin v. Golden West Foreclosure Services, Inc.* (2010) 180 Cal.App.4th 1150, 1155.)<sup>11</sup>

It is well established that the question of whether a given transaction is usurious is a mixed question of fact and law. “The . . . cases suggest that the question of whether a transaction is usurious is generally a mixed question of fact and law. As explained in a nonusury case, ‘There are three steps involved in deciding a mixed fact/law question. The first step is the establishment of basic, primary or historical facts. The second is the selection of the applicable law. The third is the application of law to the facts. All three trial court determinations are subject to appellate review. Questions of fact are reviewed by giving deference to the trial court’s decision. Questions of law are reviewed under a nondeferential standard, affording plenary review. [Citation.]’” (*Ghrirado v. Antonioli* (1994) 8 Cal.4th 791, 800.)

Here, because defendant did not object to the statement of decision on the basis that it failed to decide a controverted fact or otherwise was ambiguous, we must assume the trial court made all factual findings necessary to support the court’s ultimate

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<sup>11</sup> Here, the parties seem to agree that the original loan transaction was subject to a maximum interest rate of 10 percent and that any rate in excess of that amount violated California’s usury law.

conclusions. (§ 634.) “The doctrine of implied findings is based on our Supreme Court’s statutory construction of section 634 and provides that a ‘party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party . . . . [I]f a party does not bring such deficiencies to the trial court’s attention, that party waives the right to claim on appeal that the statement was deficient . . . and hence the appellate court will imply findings to support the judgment.’ (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134, fn. omitted [275 Cal.Rptr. 797, 800 P.2d 1227].) Stated otherwise, the doctrine (1) directs the appellate court to presume that the trial court made all factual findings necessary to support the judgment so long as substantial evidence supports those findings and (2) applies unless the omissions and ambiguities in the statement of decision are brought to the attention of the superior court in a timely manner. (*Ibid.*; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 8:23, p. 8-8; see generally, §§ 632, 634; rule 232.)” (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.)

Because defendant did not include in the record the reporter’s transcript of trial or a suitable substitute, the exhibits, or defendant’s deposition and declaration testimony, we cannot adequately assess his contention on appeal that the settlement agreement included usurious provisions that could not be enforced by the trial court. Specifically, we cannot begin to make the requisite analysis of the predicate “basic, primary or historical facts” that would allow us to then address the legal merits of his usury claim.

For example, defendant claims that because the settlement agreement included a component for \$17,850 in deferred accrued interest, it was tainted with the same usury that prevented the enforceability of the usurious interest provisions in the original promissory note. But, without the trial testimony and exhibits, including the testimony of plaintiff's expert about the interest payment summaries he prepared, there is no way for us to determine whether the deferred accrued interest component of the settlement was, in fact, usurious. Instead, we must assume that the trial court found that the deferred accrued interest component did not include any amounts for illegal interest that may have been due under the terms of the original promissory note.

Similarly, defendant asserts that he made usurious payments under the original promissory note that should have been applied to reduce the \$100,000 principal amount due under that note for purposes of structuring a settlement free from the taint of usury. Without the trial testimony and exhibits concerning interest payments under the promissory note, however, we cannot review the factual basis for that claim. Instead, we must accept the trial court's ultimate conclusion that the amounts due under the settlement agreement, including the \$100,000 component characterized as principal, were reasonable and free from any taint of usury, and assume the court made all factual findings necessary to support that conclusion, regardless of whether such findings are expressly set forth in the court's decision.

In addition, we cannot on this record review the factual basis for defendant's claim that the parties modified the settlement agreement to include an increase in the monthly

payment to a usurious rate. Under the authorities cited above, we must accept the trial court's conclusion that the agreement was not modified as claimed and assume that conclusion is based on all necessary factual findings.

In response to the claimed deficiencies in the record on appeal, defendant merely states that the trial court's lengthy and detailed final statement of decision "gives this Court an adequate record from which to make a decision." We agree, subject to the principles discussed above that we must assume to be true all express and implied findings necessary to support the trial court's judgment. Here, we accept as true the trial court's finding that the parties reached "a reasonable and good faith resolution" of defendant's claim that the original promissory note was usurious. The resulting settlement agreement therefore "purge[d] the original usury" as a matter of law. (*Kogan v. Bergman*, *supra*, 244 Cal.App.2d at p. 623.) We therefore find no error in the trial court's conclusion that defendant may not revive his claim of usury in connection with the enforcement of the settlement agreement in this matter. Furthermore, defendant has provided this court with no basis to evaluate the trial court's determination of the amounts defendant owes plaintiff as set forth in the statement of decision. (See *Estate of Bernard* (1962) 206 Cal.App.2d 375, 383 ["A reviewing court will not consider the sufficiency of the evidence unless all the evidence pertaining to the matter complained of is included in the record on appeal. It follows that the sufficiency of the evidence cannot be reviewed where the record omits the evidence altogether . . ."].) We therefore find no error in the amounts defendant has been ordered to pay pursuant judgment.

### **DISPOSITION**

The motion to dismiss is denied. The order denying the request for a continuance and the judgment are affirmed. Plaintiff is awarded costs on appeal.

KIN, J.\*

We concur:

BAKER, Acting P. J.

MOOR, J.

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\* 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.