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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL POOLE, Plaintiff and Respondent, v. GAIL MARGARETTE REZNIK, Defendant and Appellant.	B285750 (Los Angeles County Super. Ct. No. LC102696)

APPEAL from a judgment of the Superior Court of Los Angeles County, Huey P. Cotton, Judge. Affirmed.

Gail Margarette Reznik, in pro. per., for Defendant and Appellant.

Law Offices of Natalya Vartapetova and Michael L. Poole, for Plaintiff and Respondent.

INTRODUCTION

Attorney Michael Poole filed this action against his former client, Gail Margarette Reznik, for unpaid legal fees. Following a court trial, the trial court awarded Poole $12,281.10. Reznik argues the trial court misinterpreted the attorney-client fee agreement and did not rule on her cross-complaint for professional negligence. We affirm.

FACTUAL BACKGROUND

A. *Reznik Retains Poole*

On November 19, 2012 Reznik signed an attorney-client fee agreement retaining Poole to represent her in a fraud and negligence action against her lender and brokers.[1] Paragraph 2 of the agreement, titled "Scope of Services," described the legal services Poole agreed to provide Reznik under the agreement. Paragraph 2(i) stated that Poole agreed to "prepare the Complaint, application to either stop or set aside the trustee's sale and prevent defendant bank from selling the subject property to a third party and from proceeding with eviction, appear/argue at preliminary injunction hearing, prepare reply to defendant's opposition, and represent Client at any unlawful

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[1] We augment the record to include the following from the superior court file: minute orders dated February 21, 2017, February 22, 2017, March 14, 2017, April 14, 2017 and July 21, 2017 and trial exhibits 1 (the fee agreement between Poole and Reznik), 10 (Poole's final invoice), and 16 (the settlement agreement between Reznik and her lender). (See *In re Jonathan V.* (2018) 19 Cal.App.5th 236, 240, fn. 5; Cal. Rules of Court, rule 8.155(a)(1)(A).)

detainer action related to the subject property." Poole also agreed in paragraph 2(ii) to "[n]egotiate and prepare settlement agreement, if applicable," which would include making a "demand to lower [the] principal to fair market value," although Reznik acknowledged "this is unlikely to be agreed to" by the lender. Paragraph 2(iii) stated that Poole did not have to provide "any additional services unless a separate fee is paid and agreement is entered into by the parties" and that such excluded services included "filing a Complaint in federal court to wrest jurisdiction away from the unlawful detainer court in the event a TRO and/or preliminary injunction is mailed [*sic*]."

Paragraph 3 stated Poole would "represent [Reznik] through trial and post-trial motions," but not on appeal or in any proceedings relating to enforcement of the judgment. Paragraph 3 also stated: "Separate arrangements must be agreed to for those services. Services in any matter not described above will require a separate Agreement."

Paragraph 5 of the agreement provided that Reznik would pay Poole "an initial flat fee of Four Thousand Five Hundred Dollars ($4,800.00) [*sic*] for the services above" and then "$1,500 each month beginning 30 days after the Complaint is served if further litigation is required." The agreement did not describe the $1,500 payments as flat-fee payments, but as deposits against charges Poole could bill at an hourly rate of $350 "[i]f additional work not covered hereunder is required . . . ." Paragraph 6, although not referring to the hourly rate of $350, provided that, "[f]or items not covered by the flat fee above," Reznik would pay Poole "by the hour at [his] prevailing rates for all time spent on [Reznik's] matter" and $100 per hour for law clerks and paralegals. Reznik acknowledged in the agreement "that any

deposits" under paragraph 5 were "not an estimate of total fees and costs, but merely an advance for security."[2] Reznik made 13 payments of $1,500 during the course of Poole's representation.

In September 2014 Reznik settled her dispute with the lender. Under the settlement agreement, Reznik agreed to pay $645,000 to satisfy the promissory note, and the lender agreed to direct the trustee to reconvey the deed of trust to Reznik within 45 days.

B. *Poole and Reznik Sue Each Other*

Poole sent Reznik his final invoice on January 9, 2015. The invoice detailed the services Poole performed for Reznik, which included reviewing Reznik's bankruptcy petition; negotiating and drafting the settlement agreement with the lender; participating in strategy sessions; reviewing pleadings, emails, correspondence, and wire transfer documents; researching and drafting oppositions to demurrers; preparing a case management statement; and attending court hearings. Claiming 35.4 hours of work in late 2014 at $350 per hour, $121.80 in costs, what appears to be a prior balance of $15,932.45 in hourly charges, and a $4,500 credit for three $1,500 payments, Poole demanded $23,944.25.

On March 6, 2015 Poole sued Reznik for breach of contract and breach of the implied covenant of good faith and fair dealing. Poole alleged that he represented Reznik in her fraud and

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[2] Reznik also agreed to pay certain costs: the "filing fee for Complaint ($435), service cost ($70 for each defendant), ex parte application fee ($40), preliminary injunction hearing ($40) and copies of public records ($30)," as well as "all costs in the event further litigation is required."

wrongful foreclosure action from November 2012 to January 2015, that he "zealously pursued the . . . litigation for more than a year, including all pre-trial motions and putting together a prima facie case of fraud and wrongful foreclosure," that trial preparation was "extensive," and that the scope of issues "substantially increased" when the lender challenged Reznik's standing. Poole also alleged that in June 2014 Reznik began falling behind on her monthly payments.

Reznik filed a cross-complaint alleging Poole failed "to insure [*sic*] that the written settlement agreement . . . was free of liens and encumbrances." Reznik asserted causes of action for professional negligence, breach of contract, and breach of fiduciary duty.

C. *The Trial Court Rules in Favor of Poole, but Awards Him Less Than He Sought*

The trial court conducted a court trial without a reporter. At the conclusion of trial, the court asked the parties to submit damages analyses. In her analysis, Reznik calculated she either overpaid Poole by $8,915.75 or, at worst, underpaid him by $9,691.10. Poole's analysis calculated Reznik owed him $18,759 ($38,259 in fees and costs, less $19,500 because of 13 payments of $1,500).

The trial court issued a statement of decision agreeing with Reznik's calculation that she owed $9,691.10, but added $2,590 for Poole's "charges incurred between September 16 and September 19" for negotiations with the lender and legal research during this time. The court, however, excluded "the bankruptcy related charge" and time Poole had spent drafting his own version of the settlement agreement, finding that this work was

"not included in the scope of the settlement related work provided for in the fee agreement."

Reznik objected to the trial court's statement of decision, arguing that it was unclear whether the court's ruling was based solely on its interpretation of the agreement or also on extrinsic evidence and that the court's statement of decision did not address Reznik's cross-complaint. The court held a hearing on the statement of decision and overruled Reznik's objections, stating the court's prior statement of decision "will stand as the Court's final Statement of Decision." On May 11, 2017 the court entered judgment in favor of Poole in the amount of $13,541.76, which included $1,260.66 in costs.

D. *The Trial Court Denies Reznik's Motion for a New Trial*

Reznik filed a motion for a new trial arguing that the trial court failed to address her cross-complaint and that the court erred in awarding Poole costs because he had not filed a memorandum of costs. Reznik also argued the trial court's decision was legally and factually incorrect because the fee agreement was ambiguous and the court failed to construe the agreement against its drafter, Poole. In opposition to the motion, Poole argued that the court correctly found Reznik breached the fee agreement and that, even if the agreement was ambiguous, he was entitled to payment for the reasonable value of his services. Finally, Poole argued the court properly rejected Reznik's professional negligence cause of action because she had not introduced any expert testimony.

On July 21, 2017 the trial court denied Reznik's motion for a new trial. The court stated: "[R]egarding the interpretation of

the contract, the court carefully considered all credible competent evidence and argument presented by the parties. In fact, the court primarily accepted [Reznik's] analysis of the damages . . . . " The court stated that, by ruling in favor of Poole on his complaint, the court had essentially ruled against Reznik on her cross-complaint. Finally, the court agreed with Reznik that Poole was not entitled to recover his costs because he had not filed a memorandum of costs. The court struck $1,260.66 from the judgment and on August 23, 2017 entered a new judgment in the amount of $12,281.10. Reznik appealed.[3]

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[3] In her notice of appeal, Reznik checked the box stating she was appealing from an "order after judgment under Code of Civil Procedure, § 904.1(a)(2)." She attached to her notice of appeal, however, the August 23, 2017 judgment. Reznik obviously meant to appeal from the August 23, 2017 judgment, and we liberally construe the notice of appeal to be from that judgment. (See *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 22 ["'appellate courts have discretion to "save" an appeal erroneously taken from an order denying a new trial (rather than from the underlying judgment) by construing it as an appeal from the judgment'"]; *Good v. Miller* (2013) 214 Cal.App.4th 472, 475 ["In a case involving a notice of appeal mistakenly specifying a nonappealable order denying a new trial, instead of the then-extant underlying judgment, our Supreme Court has held that reviewing courts generally should exercise discretion in favor of preserving the right to appeal."].)

DISCUSSION

A. *Applicable Law and Standard of Review*

"'California recognizes the objective theory of contracts [citation], under which "[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation."'" (*Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 8.) In interpreting a contract, a court "always looks first to the words of the contract . . . ." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 986.) The traditional rules of contract interpretation apply to an attorney fee agreement. (See *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 752 [whether "parties entered an agreement for the payment of attorney fees and, if so, the scope of the attorney fee agreement" involves "traditional rules of contract interpretation"]; *M'Guinness v. Johnson* (2015) 243 Cal.App.4th 602, 617 ["[c]lient agreements are construed by the court under traditional principles of contract interpretation"].)

"'In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] But, 'to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, [we] will review such factual findings under a substantial evidence standard.'" (*Deere & Co. v. Allstate Ins. Co.* (2019) 32 Cal.App.5th 499, 513; see *Veiseh v. Stapp* (2019) 35 Cal.App.5th 1099, 1104; *Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) "'[A]ny conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision.'" (*In re Marriage of Ciprari* (2019) 32 Cal.App.5th 83, 94.)

B. *The Agreement Provides Reznik Will Pay Poole Hourly for Services Not Within the Scope of Services Covered by the Agreement*

Reznik's primary argument is that her agreement with Poole was a flat-rate agreement and that she "never agreed to an hourly fee agreement." According to Reznik, the fee agreement "clearly states that it is a flat fee agreement, *unless a separate fee is paid and agreement is entered into by the parties*," and that "if any work not contemplated by the Agreement was required to be performed, *a separate fee agreement would be required – and a separate fee paid*."

But that's not what the agreement said. Paragraph 2 defined the scope of services covered by the agreement and identified the tasks Poole was obligated to perform under the agreement: draft a complaint, apply to the court to stop or set aside a trustee sale and prevent the lender from selling the property and evicting Reznik, appear at the hearing on any application for preliminary relief, represent Reznik in any unlawful detainer action relating to the property, and negotiate and prepare a settlement agreement. This is the work the agreement refers to in paragraph 5 as "covered hereunder." Paragraph 2 also identified the tasks Poole was *not* obligated to perform under the agreement: anything else, including filing a federal action.

Paragraph 5 required Reznik to pay the flat fee of $4,500 or $4,800, depending on which number is the typographical error, for the services specified in paragraph 2, i.e., "for the services above." But for "additional work not covered" under paragraph 2, Reznik agreed to pay Poole $350 an hour. In addition, if "further

litigation" were required beyond 30 days after service of the complaint, Poole made sure Reznik would pay for that work by requiring her to make monthly payments of $1,500 as "security" for, and deposits toward, the money she would owe for Poole's hourly work. The agreement specified that Poole would keep Reznik's $1,500 payments in a trust account and make payments from the fund toward "the fees and other charges as they are incurred."

Therefore, contrary to Reznik's assertion, the agreement was not a pure flat-fee agreement. It was a flat-fee agreement for certain work, which the agreement described in paragraphs 2(i) and 2(ii). But it was an hourly fee agreement after that, requiring Reznik to make monthly payments toward the hourly charges Poole would bill for work "not covered hereunder."

Reznik argues that, before Poole could charge for "work not contemplated by the Agreement," she and Poole had to enter into a separate agreement. Again, that is not what the agreement said. Paragraph 2(iii) stated that Poole "shall not be obligated to perform any additional services unless a separate fee is paid and agreement is entered into by the parties." This provision thus allowed Poole to perform "additional services" without a separate agreement, but did not "obligate" him to do so. It essentially gave Poole the choice, if he performed work not covered by paragraph 2, to bill for those services under the existing agreement (at the hourly rate and pursuant to the monthly deposit procedure in paragraph 5), but gave him the option to require a new agreement if he performed that work.[4] Paragraph 2 did not, as

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[4] Reznik does not argue this provision was unethical or unconscionable.

Reznik suggests, state that Poole could only provide additional services not covered by the flat-rate provision if he and Reznik entered into a separate agreement. Indeed, the parties specifically indicated in the agreement when a separate agreement would be required: "[i]n the event of binding arbitration or trial" (paragraph 2(v)) and in connection with post-judgment proceedings or an appeal (paragraph 3). Poole, however, did not seek compensation for those services, and they are not at issue in this case.

Reznik argues that the agreement is ambiguous because it did not clearly and explicitly delineate which services were covered by the flat fee and which were covered by an hourly fee and that the court should resolve that ambiguity against Poole because he drafted the agreement. She asserts: "What further litigation there may be that does not require an entirely new retainer agreement under the terms of the Agreement is left to the imagination." And she points to the various mistakes in Poole's fee agreement, including the amounts of the flat fee and certain costs.

The agreement Poole drafted was not a model attorney-engagement letter. It contained mistakes, typographical errors, and some confusing language, including, as Reznik points out, using "initial deposit" in paragraph 1 when Poole meant the "flat fee" of $4,500/$4,800 and failing to make clear in paragraph 5 that "further litigation" referred to litigation occurring more than 30 days after service of the complaint, not litigation beyond the tasks listed in paragraphs 2(i) and 2(ii). And, although Reznik does not emphasize this language, it would have been better if the last sentence of paragraph 3 had stated that services other than "trial and post-trial motions," such as appeal and "execution

proceedings" (the subject matter of paragraph 3), rather than "services in any matter not described above," would "require a separate Agreement." At oral argument, even Poole was unable to explain some of the provisions in his fee agreement.

But to resolve this appeal we must interpret the agreement, and we must do so without knowing, and having the assistance of, the trial testimony of the contracting parties. Considering the agreement as a whole, the most reasonable interpretation is the one the trial court implicitly followed: Reznik agreed to pay Poole a fixed fee for the services described in paragraphs 2(i) and 2(ii) and hourly for services beyond those described in paragraphs 2(i) and 2(ii) (and incurred more than 30 days after service of the complaint), and she agreed to make monthly $1,500 payments toward, and as security for, Poole's hourly charges. (See *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 195 [""[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.""]; *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 69 ["'We consider the contract as a whole and interpret its language in context so as to give effect to each provision, rather than interpret contractual language in isolation.'"].)

To the extent the lack of clarity in Poole's fee agreement created ambiguities, Reznik is correct that courts often resolve such ambiguities against the drafter of the agreement. Civil Code section 1654 provides: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." But as the introductory clause's reference

to "preceding rules" indicates, the "rule of [Civil Code] section 1654 'is to be used only when there is no extrinsic evidence available to aid in the interpretation of the contract or where the uncertainty cannot be remedied by other rules of interpretation. [Citations.] The rule does not stand for the proposition that, in every case where one of the parties to a contract points out a possible ambiguity, the interpretation favored by the nondrafting party will prevail. The rule remains that the trier of fact will consider any available extrinsic evidence to determine what the parties actually intended the words of their contract to mean. [Citation.] Only in those instances where the extrinsic evidence is either lacking or is insufficient to resolve what the parties intended the terms of the contract to mean will the rule that ambiguities are resolved against the drafter of the contract be applied.'" (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 183-184; see *Houge v. Ford* (1955) 44 Cal.2d 706, 711 [Civil Code section 1654 "applies by its terms only 'In cases of uncertainty not removed by the preceding rules'"].)

One of the "preceding rules" of contract interpretation is codified in Civil Code section 1647. That statute provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (See *Wind Dancer Production Group v. Walt Disney Pictures*, *supra*, 10 Cal.App.5th at p. 69 ["'Extrinsic evidence is admissible . . . to interpret an agreement when a material term is ambiguous.'"]; *Anderson v. Yousem* (1960) 177 Cal.App.2d 135, 140 [where a contract is ambiguous, "extrinsic evidence is admissible to construe it," and "resort may be had to the surrounding circumstances to resolve that doubt"].) The rule in

Civil Code section 1647 applies to contracts between attorneys and clients. (*Houge v. Ford*, *supra*, 44 Cal.2d at p. 711.)

Here, according to Reznik, there was testimony at trial concerning the circumstances in which the fee agreement was made and matters to which the agreement related. But unfortunately there is no record of that testimony, and therefore we must presume it sufficiently explained the fee agreement and supported the trial court's findings. (See *Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609 ["the absence of a court reporter at trial court proceedings and the resulting lack of a verbatim record of such proceedings will frequently be fatal to a litigant's ability to have his or her claims of trial court error resolved on the merits by an appellate court" because "a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment"]; *Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935 ["[f]ailure to provide an adequate record on an issue requires that the issue be resolved against appellant," and "[w]ithout a record, either by transcript or settled statement, a reviewing court must make all presumptions in favor of the validity of the judgment"]; *National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 522 [where "[t]he record on appeal does not contain any testimony regarding the formation, existence, interpretation, or performance of the contract between the parties, nor is there a settled statement which might support the allegations of claimed error," we "presume the receipt of sufficient evidence in favor of the judgment"].) Reznik cannot rely on the absence of extrinsic evidence in the record to invoke Civil Code section 1654 when she, by failing to provide an

adequate record of the trial, is responsible for that absence. (See *Jameson*, at p. 609 [the appellant "'has the burden of providing an adequate record,'" and "'[f]ailure to provide an adequate record on an issue requires that the issue be resolved against [the appellant]'"].)

C. *In the Absence of a Complete Record, Reznik Cannot Challenge the Trial Court's Findings on Which Services Were Covered by the Agreement*

Reznik argues that Poole "performed no services above and beyond those which were detailed in Paragraphs 2 and 3 of the Agreement." The trial court, however, found Poole did perform such services, although not as many as he claimed. Indeed, the court agreed with Reznik's analysis of the services Poole performed that were not covered by paragraphs 2(i) and 2(ii), and the court specifically excluded work Poole did on Reznik's bankruptcy case and some of the work Poole did on the settlement agreement.

We review for substantial evidence the trial court's factual findings on whether Poole, as the plaintiff, met his burden of showing which tasks were not covered by the flat-fee portion in paragraphs 2(i) and 2(ii). (See *Veiseh v. Stapp*, *supra*, 35 Cal.App.5th at p. 1104 ["'[i]n reviewing a judgment based upon a statement of decision following a bench trial, we . . . apply a substantial evidence standard of review to the trial court's findings of fact'"].) In the absence of a reporter's transcript of the trial, however, Reznik cannot meet her burden of showing substantial evidence does not support those findings. (See *People ex rel. Harris v. Shine* (2017) 16 Cal.App.5th 524, 533 [absence of a reporter's transcript generally prevents review of a substantial

evidence argument]; *Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 941 [appellant could not challenge a finding by the trial court for lack of substantial evidence because there was "no reporter's transcript of the trial"]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 ["Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct as to all evidentiary matters*"]; see also *Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1412 ["[w]e cannot presume error from an incomplete record"].)

D. *The Trial Court's Error in Failing To Address Reznik's Cross-complaint Was Harmless*

Reznik argues the trial court's statement of decision "is silent as to the cross-complaint for professional negligence." Reznik is correct. In its statements of decision, the court stated that "Defendant failed to pay Plaintiff the full amount due" and that "the court finds in favor of Plaintiff and against Defendant in the total amount of $12,281.10." There is no mention of the cross-complaint or Reznik's claims against Poole for malpractice.

The trial court's error, however, was harmless. (See *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108 ["a trial court's error in failing to issue a requested statement of decision is not reversible per se, but is subject to harmless error review"].) In denying Reznik's motion for a new trial, the court stated: "Regarding the arguments that the court did not address the cross complaint, the statement of decision indicates that the court found in favor of plaintiff and against defendant. This ruling was as to all claims between the parties. The court found no malpractice that caused the defendant injury committed by plaintiff." Given the court's

ruling on Reznik's motion for a new trial, there is no reasonable probability the court would have ruled for Reznik on her cross-complaint. (See *Estate of Herzog* (2019) 33 Cal.App.5th 894, 903 [""To establish prejudice, a party must show "a reasonable probability that in the absence of the error, a result more favorable to [it] would have been reached.""].) And even if we were to remand the case to the trial court to make findings adverse to Reznik in a statement of decision rather than in an order denying her motion for a new trial, Reznik would not be able to challenge those findings because there is no record of the trial.

DISPOSITION

The judgment is affirmed. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J. FEUER, J.