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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

AZITA ZENDEL, Plaintiff and Appellant, v. THE HERTZ CORPORATION, Defendant and Respondent.	B275721 (Los Angeles County Super. Ct. No. BC585449)

APPEAL from judgment of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Affirmed as modified.

Azita Zendel, in pro. per., for Plaintiff and Appellant.

Ford, Walker, Haggerty & Behar, Robert L. Reisinger and Adam C. Hackett, for Defendant and Respondent.

The trial court dismissed without prejudice the action brought by plaintiff and appellant Azita Zendel against the Hertz Corporation. Zendel, who represents herself, repeatedly failed to follow rules of procedure, culminating with her failure to file and serve a second amended complaint (SAC) as directed within 20 days after an order sustaining Hertz's demurrer with leave to amend. Zendel's adherence to the rules on appeal fares no better, as she has filed an appellant's appendix and brief that do not comply with the rules of court, and Zendel has not included in the record on appeal reporter's transcripts or suitable substitutes of hearings at which arguments were considered, conflicting evidence was weighed, and discretionary rulings were made. We modify the judgment to reflect that the dismissal is with prejudice, but otherwise affirm.

Relevant Procedural History[1]

On October 14, 2015, Zendel, appearing in propria persona, filed a first amended complaint (FAC) alleging nine causes of action against Hertz. On November 17, 2015, Hertz filed (1) a demurrer to the FAC; (2) a motion to strike portions of the FAC; and (3) a motion for various discovery enforcement orders and sanctions. A hearing was calendared for December 14, 2015, but was ultimately continued to February 8, 2016.

[1] We limit our discussion of the procedural history to matters pertinent to resolution of the appeal.

The trial court ruled on the demurrer and motion to strike on February 8, 2016, "[a]fter consideration of the briefing filed and oral argument." The record on appeal does not include a reporter's transcript of the proceedings on February 8, or suitable substitute for the transcript, such as a settled or agreed statement. The court issued a detailed written ruling and a minute order relating to the demurrer and motion to strike. Hertz's demurrer was overruled as to four causes of action, but sustained as to five causes of action with leave to amend within 20 days. Hertz's motion to strike was granted, but again, Zendel was granted leave to amend within 20 days. Hearing on the discovery issues raised by Hertz was continued to February 17, 2016. Notice of the rulings was served by Hertz on Zendel by email on February 8, 2016.

The trial court held a hearing on February 17, 2016. The court issued a minute order indicating it had considered the briefing and oral argument at the hearing. The court granted most of Hertz's discovery requests,[2] and denied without prejudice a motion by Zendel for a protective order relating to documents she wanted to either redact or file under seal. The ruling set forth in detail Zendel's repeated

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[2] The court granted Hertz's motion to (1) compel answers to interrogatories; (2) compel responses for requests for production of documents; (3) deem admitted all matters contained in Hertz's request for admissions; and (4) impose sanctions in the amount of $802.50 for failure to timely serve the requested responses.

failure to heed previous court orders to meet and confer, as well as admonitions to file complete documents in proper form. The court noted that Zendel failed to conduct herself with proper courtroom decorum, professionalism, and respect at the February 17, 2016 hearing, despite having been warned to do so at earlier hearings. Zendel's conduct required the trial judge to leave the bench, and the assistance of the Sheriff's Department to remove Zendel from the courtroom. The record on appeal does not include a reporter's transcript or suitable substitute of the proceedings on February 17.

On March 23, 2016, Hertz filed an ex parte application to dismiss Zendel's action, or alternatively, to strike a second amended complaint (SAC) that Zendel had filed but not served. Hertz argued that Zendel had failed to comply with the trial court's February 8, 2016 order requiring a SAC to be served within 20 days. The motion, supported by the declaration of counsel for Hertz and documentation, established that on February 29, 2016, Zendel filed a three-page SAC which included no factual allegations, supporting exhibits, or proof of service[3] on Hertz. Hertz cited Code of

[3] Appellant's Appendix contains a second version of the SAC that includes exhibits purportedly "conditionally filed under seal," but that version *does not* contain a file stamp from the clerk of the court. Respondent's Appendix includes a file-stamped SAC. The file-stamped version of the SAC lacks any factual allegations, exhibits, and proof of service.

Civil Procedure section 591, subdivision (f),[4] and Rule 3.1320 of the California Rules of Court[5] as authority for dismissal.[6]

On March 23, 2016, the trial court granted Hertz's ex parte application to dismiss the action on the basis that Zendel failed to file a second amended complaint SAC within

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[4] The citation to section 591, subdivision (f), repeated in the court's ruling, was an apparent citation error, as the correct section supporting the ruling is section 581, subdivision (f)(2). It is clear from the context of the motion and the ruling of the court that dismissal was based on section 581, subdivision (f)(2), which permits a court to dismiss a complaint "after a demurrer to the complaint is sustained with leave to amend [and] the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." The mistake is of no consequence, as a judgment may not be reversed for a technical error not resulting in prejudice. (Cal. Const., Art. VI, § 13; see also Code of Civil Procedure § 475 ["The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties"].)

[5] Rule 3.1320(h) provides as follows: "A motion to dismiss the entire action and for entry of judgment after expiration of the time to amend following the sustaining of a demurrer may be made by ex parte application to the court under Code of Civil Procedure section 581(f)(2)."

[6] Statutory references are to the Code of Civil Procedure unless otherwise indicated. Citations to rules are to the California Rules of Court.

20 days of the February 8, 2016 order granting leave to amend. Instead of filing a proper SAC, on February 29, 2016, Zendel lodged a form complaint which consisted of three pages and remaining portions "under seal" without obtaining approval from the trial court. She filed a noticed motion seeking permission to file portions of the SAC under seal, and calendared the hearing on the motion for May 9, 2016, without obtaining ex parte approval for the unauthorized procedure. No proof of service was attached to the purported SAC, nor could Zendel produce a proof of service at the hearing. Hertz's counsel represented that Hertz had not been served. Zendel's repeated failures to heed the court's admonitions to follow proper procedures resulted in prejudice to Hertz. Zendel's filings violated the court's February 8, 2016 order granting leave to amend within 20 days to correct the deficiencies in the FAC. The cause was dismissed without prejudice pursuant to section 591, subdivision (f)(2) [*sic*] and Rule 3.1320(h).

Also on March 23, 2016, the trial court denied Zendel's motion for reconsideration of the discovery orders issued by the trial court on February 17, 2016. In a detailed minute order, the court concluded that Zendel failed to satisfy the requirements for reconsideration under section 1008. The court set forth the history of Zendel's failure to file complete motions and her pattern of later adding missing pages. The court had warned Zendel on numerous occasions about her failure to comply with procedural rules, and found that Zendel's conduct was prejudicial to Hertz.

On May 9, 2016, the trial court signed a judgment dismissing Zendel's action without prejudice. The record on appeal contains two notices of appeal filed by Zendel. The first notice of appeal, filed on June 20, 2016, is from (1) an order dated April 16, 2016,[7] and (2) the order dated March 23, 2016, denying Zendel's motion to set aside and vacate orders issued in response to defendant Hertz's discovery motion. The first notice of appeal states, "This is not an appeal of 3/23/16 dismissal of case." The second notice of appeal, filed on July 15, 2016, is from the "5/9/16 Judgment & 3/23/16 order (Notice of Entry of Judgment filed 5/23/16.)"

DISCUSSION

Because there is no shortage of extraneous materials in the Appellant's Appendix,[8] and Zendel's briefing lacks clarity, we identify the issues on appeal from the content of

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[7] The record on appeal does not include an order dated April 16, 2016.

[8] The contents of Zendel's Appellant's Appendix are not arranged chronologically, as required by the Rules. Under Rule 8.124(d), "(1) An appendix must comply with the requirements of rule 8.144 for a clerk's transcript." Rule 8.144(b)(2)(C), in turn, requires that the contents of a clerk's transcript "must be arranged chronologically." Zendel's disregard of the rules on appeal is consistent with the trial court's findings that Zendel demonstrated little interest in complying with the procedural rules.

the two notices of appeal. First, we reject Zendel's claim that the trial court erred in its March 23, 2016 order denying reconsideration of the February 17, 2016 discovery orders issued on Hertz's motion. Second, we hold that Zendel has not shown an abuse of discretion in the trial court's March 23, 2016 dismissal of the action, which was the basis for the judgment of dismissal dated May 9, 2016.

Standards of Review

Discovery Rulings

"We review the trial court's grant or denial of a motion to compel discovery for an abuse of discretion. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186.) The statutory scheme vests trial courts with "'wide discretion'" to allow or prohibit discovery. (*Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107, quoting *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 378.) A circumspect approach to appellate review of discovery orders ensures an appropriate degree of trial court latitude in the exercise of that discretion." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540.)

Motion for Reconsideration

"We review a trial court's ruling on a motion for reconsideration under the abuse of discretion standard."

(*Yolo County Dept. of Child Support Services v. Myers* (2016) 248 Cal.App.4th 42, 50; *Rhue v. Superior Court* (2017) 17 Cal.App.5th 892, 897 (*Rhue*).) "In such a case, a settled statement may be indispensable. (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483) [In contrast to cases involving de novo review, '[i]n many cases involving the substantial evidence or abuse of discretion standard of review . . . a reporter's transcript or an agreed or settled statement of the proceedings will be indispensable.].)" (*Rhue, supra*, at p. 897.)

Motion to Dismiss for Failure to File Amended Complaint

"The decision to dismiss an action under section 581, subdivision (f)(2) rests in the sound discretion of the trial court and a reviewing court will not disturb the ruling unless the trial court has abused its discretion. (*Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1054.) It is appellant's burden to establish an abuse of discretion. (*Tandy Corp. v. Superior Court* (1982) 129 Cal.App.3d 734, 741.)" (*Gitmed v. General Motors Corp.* (1994) 26 Cal.App.4th 824, 827; *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

The Burden of an Appellant

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are

indulged in favor of its correctness. (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 507; *Munoz v. Olin* (1979) 24 Cal.3d 629, 635–636; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "It is axiomatic it is the appellant's responsibility to provide an adequate record on appeal. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 [to overcome presumption on appeal that an appealed judgment or order is presumed correct, appellant must provide adequate record demonstrating error]; *Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1 [burden on appellant to provide accurate record on appeal to demonstrate error; failure to do so 'precludes adequate review and results in affirmance of the trial court's determination']; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 4:43, p. 4–10.1 [appellate record inadequate when it 'appears to show *any* need for *speculation or inference* in determining whether error occurred'].)" (*Lincoln Fountain Villas Homeowners Assn. v. State Farm Fire & Casualty Ins. Co.* (2006) 136 Cal.App.4th 999, 1004, fn. 1.)

"'[I]t is appellant's burden to provide a reporter's transcript if "an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court . . ." (Cal. Rules of Court, rule 8.120(b)), and it is the appellant who in the first instance may elect to proceed without a reporter's transcript (Cal. Rules of Court, rule 8.130(a)(4)) . . . .' (*Sanowicz v. Bacal* (2015) 234 Cal.App.4th

1027, 1034, fn. 5.) A reporter's transcript may not be necessary if the appeal involves legal issues requiring de novo review. (See, e.g., *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 698–700 [transcript not necessary for de novo review of order granting an anti-SLAPP motions].) In many cases involving the substantial evidence or abuse of discretion standard of review, however, a reporter's transcript or an agreed or settled statement of the proceedings will be indispensible. (See, e.g., *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [declining to review the adequacy of an award of damages absent a transcript or settled statement of the damages portion of a jury trial]; *Vo. v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448 (*Vo*) ['The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court abused its discretion'].)" (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483.)

These general principles of appellate review apply to self-represented parties. "[W]e make clear that mere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (See *Lawrence v. Superior Court* (1988) 206 Cal.App.3d 611, 619, fn. 4.) . . . . A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial

courts, and would be unfair to the other parties to litigation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984–985.)

Denial of Reconsideration of the Ruling on Hertz's Discovery Motion Was Not an Abuse of Discretion

Zendel fails to demonstrate that the trial court's March 23, 2016 order denying reconsideration of the discovery orders issued on February 17, 2016 was an abuse of discretion. The decisions to grant Hertz's discovery motion and deny Zendel's motion for reconsideration are both reviewed on appeal under the deferential abuse of discretion standard of review. The minute orders from the two hearings indicate the trial court considered argument from the parties. The record on appeal is incomplete, because we have no reporter's transcript or settled or agreed statement of the oral proceedings on these discretionary rulings. Under these circumstances, we must presume the judgment is correct and the trial court did not abuse its discretion.[9]

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[9] Zendel argues that her motion for reconsideration describes what occurred at the February 17, 2016 hearing, and as a consequence, no reporter's transcript or suitable substitute is required. We reject the contention. Zendel's version of what purportedly happened at a hearing is not a substitute for the form of record of oral proceedings required by Rule 8.120(b): "If an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court, the record on appeal must include a record of these oral proceedings in the form of one of the following: (1)

But even without this fatal deficiency in the record, Zendel does not demonstrate an abuse of discretion. The record amply demonstrates Zendel's failures to comply with procedural rules, and as a result, we have no reason to believe the court arbitrarily ordered her to comply with discovery. Zendel makes no attempt in her briefing to demonstrate that her motion for reconsideration was properly brought under section 1008. Zendel has not established error or prejudice.

Dismissal for Failure to Timely File a Second Amended Complaint Was Not an Abuse of Discretion

We also conclude Zendel has failed to show an abuse of discretion in the dismissal of her action for failure to file and serve a SAC. As noted above, the trial court at the March 23, 2016 hearing considered argument, but Zendel has presented no record of the oral proceedings for appellate review. Because a motion to dismiss under section 581, subdivision (f)(2) is directed to the sound discretion of the trial court, and the burden is on Zendel to demonstrate an abuse of discretion, the absence of a reporter's transcript or suitable substitute defeats any claim of error not appearing on the face of the judgment roll, and no such error appears on the face of the record. To the contrary, the minute order

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A reporter's transcript under rule 8.130; (2) An agreed statement under rule 8.134; or (3) A settled statement under rule 8.137."

from the March 23 hearing states the court's finding that Zendel did not file a proper SAC, a finding supported the three page SAC which contains no factual allegations and is not supported by any exhibits. The court also ruled the SAC was not served by Zendel, a finding supported by the declaration of counsel for Hertz, as well as Zendel's inability to produce a proof of service at the hearing. The court further ruled that Zendel failed to file a SAC in a form authorized by law, and that her conduct was consistent with a pattern of disregard for the orderly procedure of the court. This finding, too, is amply supported on the face of the record.

Other Claims Need Not Be Addressed on Appeal

Zendel's brief goes to great lengths to discuss whether a portion of her complaint either was, or should have been, filed under seal. We have no occasion to discuss whether a plaintiff is entitled to file a lawsuit and then have the very basis for that lawsuit sealed, because the issue of sealing has no bearing on the resolution of this appeal. The discovery order was granted on Hertz's motion due to Zendel's lack of compliance, not based upon whether documents should have been sealed. Reconsideration of the discovery order was denied because Zendel did not satisfy the requirements of section 1008; whether documents should have been sealed was of no moment in the court's analysis, and properly so. The dismissal was entered because Zendel failed to properly

file and serve a SAC within 20 days as ordered by the court, an issue not dependent on Zendel's unilateral decision to attempt to file documents under seal without court permission.

The Judgment Must Be Amended to Reflect that Dismissal Under Section 581, Subdivision (f)(2) Is with Prejudice

The judgment reflects that the action is dismissed without prejudice. This is incorrect. A dismissal under section 581, subdivision (f)(2) must be with prejudice, and we order the judgment amended accordingly.

"Section 581, subdivision (f) provides: 'The court *may dismiss* the complaint as to that defendant, when: [¶] . . . [¶] (2) . . . after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend within the time allowed by the court and either party moves for dismissal.' (Italics added.) [¶] The phrase 'may dismiss' means discretionary dismissal. (Weil & Brown, Cal. Practice Guide (Rutter 2005) Civil Procedure Before Trial, ¶ 11:277.2, p. 11–84.) But, no cases have held that a dismissal pursuant to section 581, subdivision (f)(2) may be without prejudice. The right to dismiss *without* prejudice is expressly permitted by other subdivisions of section 581 but section 581, subdivision (f)(2) does not so provide. (See e.g., *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788–790; *Harris v. Billings* (1993) 16 Cal.App.4th 1396, 1402–1403.) . . . The dismissal without prejudice is also at variance with the

California Rules of Court. [Former] Rule 325(f)[10] provides for dismissal, by ex parte application or noticed motion, of '*the entire action and for entry of judgment* after the expiration of the time to amend following the sustaining a demurrer. . . .' (Italics added; see *Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, 977, fn. 11 [ex parte application must satisfy notice requirements of [former] Cal. Rules of Court, rule 379].) . . . [¶] Section 581, subdivision (f)(2) '. . . gives the defendant the right to obtain a court order dismissing the action with prejudice once the court sustains a demurrer with leave to amend and the plaintiff has not amended within the time given.' (*Parsons v. Umansky* (1994) 28 Cal.App.4th 867, 870, citing *Wells v. Marina City Properties, Inc., supra,* 29 Cal.3d at p. 789.)" (*Cano v. Glover* (2006) 143 Cal.App.4th 326, 329–330.)

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[10] Former rule 325(f) has been superseded by Rule 3.1320(h).

DISPOSITION

The judgment is ordered modified to reflect that dismissal is with prejudice. In all other respects, the orders and judgment are affirmed. Defendant and respondent the Hertz Corporation is awarded its costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER J.

KIM, J.*

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