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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

SCOTT KOHN, Plaintiff and Appellant, v. MEDICAL CLINIC & SURGICAL SPECIALTIES OF GLENDALE, INC. et al., Defendants and Appellants.	B260261 (Los Angeles County Super Ct. No. BC441260

APPEAL from a judgment of the Superior Court of Los Angeles County, Kevin C. Brazile, Judge. Affirmed as modified.

The Yarnall Firm and Delores A. Yarnall; The Law Office of Paul P. Young, Paul P. Young and Joseph Chora, for Plaintiff and Appellant.

Law Offices of Richard M. Foster, Richard M. Foster and Marine Khachoyan, for Defendants and Appellants.

Paykar Construction prevailed in a lawsuit against Medical Clinic and Surgical Specialties of Glendale, Mardiros Mihranian and Susan Chobanian (Medical Clinic) and assigned its rights against Medical Clinic to Scott Kohn, who successfully moved for summary judgment in an action to renew the judgment. Upon learning that formal judgment may not have been entered on the order granting summary judgment, Kohn moved to have judgment entered nunc pro tunc. Medical Clinic moved to have the action dismissed for failure to prosecute. The trial court denied both motions and entered a new judgment in the action. The parties appealed. We vacate the new judgment, direct the order granting summary judgment entered nunc pro tunc as the judgment and affirm the denial of the motion to dismiss for failure to prosecute.

FACTUAL AND PROCEDURAL BACKGROUND

In 2000, judgment was entered on a special verdict in favor of Paykar Construction and against Medical Clinic in a suit for damages alleging fraud and breach of contract. In 2010, Paykar Construction assigned its rights and interest in the judgment to Kohn.

In December 2010, Kohn filed a separate action to renew the original judgment and moved for summary judgment without any opposition. Medical Clinic did not appear at the hearing. On March 2, 2011, Judge Kevin C. Brazile granted the summary judgment motion and ordered Kohn's counsel "to prepare a judgment and give notice." Counsel agreed, but said, "It looks like there was a proposed one filed in December [2010], [a] proposed summary judgment. Did you receive that?" Judge Brazile acknowledged the document had been received, and

instructed counsel to prepare an "order granting the motion and judgment." Counsel agreed.

The two-page order granting summary judgment in the action was signed by Judge Brazile and filed on March 21, 2011, awarding Kohn in excess of $2 million. Notice of entry of judgment was filed on March 25, 2011. It consists of a face page, entitled "Notice of Entry of Judgment," which reads: "PLEASE TAKE NOTICE that judgment was entered on March 21, 2011. An authentic copy of the judgment is attached as Exhibit '1.'" Exhibit 1 is a copy of the signed order granting summary judgment, filed on March 21, 2011, which reads, "[I]t appearing to the satisfaction of the Court that there exists no triable issue of fact, and that Plaintiff [Kohn] is entitled to a judgment against Defendants [Medical Clinic] as a matter of law, and good cause appearing. THE MOTION IS GRANTED. [¶] IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff . . . shall have and recover against Defendants as follows . . . . " What follows is a recitation of the amount of damages owed by each Medical Clinic defendant to Kohn and costs "according to cost memorandum."

Later in 2011, Kohn commenced enforcement efforts, which were vigorously opposed by Medical Clinic. In 2013, Kohn appeared before Judge Luis A. Lavin and moved for the appointment of a limited receiver. Judge Lavin noted because the record contained an order granting summary judgment in the action, but no judgment, he believed the applicable statutes precluded the appointment of a limited receiver. He then denied Kohn's motion on other grounds.

Kohn thereafter moved to have Judge Brazile enter judgment in the action nunc pro tunc to March 21, 2011. Medical

Clinic filed opposition. In denying the motion, Judge Brazile repeatedly advised counsel during the hearing that he lacked the authority to enter judgment nunc pro tunc. Judge Brazile explained he was bound by Judge Lavin's conclusion that no judgment had been entered. Later, Judge Brazile denied the motion by Medical Clinic to dismiss the action for delay in prosecution. Judge Brazile ordered the parties to meet and confer and to submit a proposed judgment.

In May 2014, Kohn submitted a proposed judgment over objections by Medical Clinic Judge. Brazile overruled the objections and entered judgment on October 27, 2014. Medical Clinic timely appealed, challenging the denial of their motion to dismiss for delay in prosecution. Kohn also appealed, challenging the denial of his motion to enter judgment nunc pro tunc.

DISCUSSION

1. Medical Clinic's Appeal

The sole claim on appeal by Medical Clinic is that Judge Brazile should have granted their motion to dismiss the action for failure to prosecute.

The trial court has discretionary authority to dismiss an action for unreasonable delay in prosecution. (Code Civ. Proc., § 583.410; Cal. Rules of Court, rule 3.1342.) When the trial court has ruled on a motion to dismiss for dilatory prosecution, """"unless a clear case of abuse is shown and unless there has been a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" [Citations.] ""The burden is on the party complaining to establish an abuse of discretion . . . ."""" (*Kidd v. Kopald* (1994) 31 Cal.App.4th 132, 139.)

Medical Clinic acknowledge in their opening brief that it is their burden to establish an abuse of discretion. However, they never discuss Judge Brazile's ruling or attempt to show that "it exceeded the bounds of reason." (See *Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249.) Instead, they assert that Kohn had a statutory obligation to diligently prosecute the action, and without having obtained a judgment, he failed to do so; they also argue that Kohn engaged in misconduct in his enforcement efforts. To the extent these assertions are relevant to the resolution of the appeal, they are not supported by citations to the record or reasoned legal analysis.

In his respondent's brief, Kohn advances several arguments why Judge Brazile's denial of the motion to dismiss was not an abuse of discretion. None of these arguments is addressed by Medical Clinic; they did not file a reply brief.

"An appellant must affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685; see *Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 80.) We are not tasked with searching the record to ascertain whether it contains support for their contentions. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539,545.)

In the absence of argument based on appropriate citations establishing Judge Brazile abused his discretion in denying their motion, Medical Clinic have forfeited the claim on appeal. (*Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at p. 545; *People v. Stanley* (1995) 10 Cal.4th 764,793; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["When an issue is unsupported by pertinent or cognizable legal

argument it may be deemed abandoned and discussion by the reviewing court is unnecessary"]; *In re Marriage of Falcone & Fyke*, (2008) 164 Cal.App.4th 814, 830 ["The absence of cogent legal argument . . . allows this court to treat the contentions as waived"].

2. Kohn's Appeal

Kohn argues Judge Brazile abused his discretion by refusing to enter judgment on the summary judgment order nunc pro tunc – that is, by refusing to backdate entry of the judgment to March 21, 2011. We agree.

We review a trial court's order granting or denying a motion to enter judgment nunc pro tunc for abuse of discretion. (See, *United States Golf Assn. v. Arroyo Software Corp*. (1999) 69 Cal.App.4th 607, 624.) Here, Judge Brazile failed to appreciate the scope of his discretion and thus failed to exercise it in denying the motion. "The failure to exercise discretion is an abuse of discretion." (*Pratt v. Ferguson* (2016) 3 Cal.App.5th 102, 114.) Judge Brazile mistakenly believed he lacked the authority to enter judgment nunc pro tunc based on Judge Lavin's understanding that no judgment had been entered in the action.

"'All courts have the inherent power to enter orders nunc pro tunc . . . .'" (*Martin v. Martin* (1970) 2 Cal.3d 752, 760-761; *Norton v. Pomona* (1935) 5 Cal.2d 54, 62.) "'The function of a nunc pro tunc order is merely to correct the record of the judgment and not to alter the judgment actually rendered – not to make an order now for then, but to enter now for then an order previously made.'" (*APRI Ins. Co. SA. v. Superior Court* (1999) 76 Cal.App.4th 176, 185; *Mather v. Mather* (1943) 22 Cal.2d 713, 719 [purpose of nunc pro tunc order is to correct and to

express the true intention of the court as of the earlier date "and thus conform to verity"].)

It is true that Judge Brazile could not override or disregard a pertinent order of another superior court judge. "'A superior court is but one tribunal, even if it be composed of numerous departments. . . . An order made in one department during the progress of a cause can neither be ignored nor overlooked in another department . . . .'" (*Sandco American Inc. v. Notrica* (1990) 216 Cal.App.3d 1495, 1508; *Lee v. Offenberg* (1969) 275 Cal.App.2d 575, 583.) However, Judge Lavin's conclusion the record did not contain a judgment did not foreclose Judge Brazile from considering whether that was due to a clerical error, which could be corrected nunc pro tunc.

Kohn maintains the clerical error in this case concerns the order granting summary judgment, attached to the notice of entry of judgment as "Exhibit 1." Kohn essentially argues the order was mislabeled the "order granting summary judgment," rather than the formal "judgment," but it otherwise reflects Judge Brazile's expressed intention at the hearing to enter judgment in Kohn's favor.

Notwithstanding its typed designation as an "order granting summary judgment," the order satisfies the function of a judgment, which is to effect "the final determination of the rights of the parties in an action or proceeding." (Code. Civ. Proc., § 577.) In stating, "Plaintiff [Kohn] is entitled to a judgment against Defendants [Medical Clinic] as a matter of law;" and "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff [ ] shall . . . recover against Defendants" certain damages, the order, which was signed by the court, definitively resolves the merits of the action, awards Kohn the

monetary relief to which he was found entitled and leaves nothing further to litigate other than Medical Clinic's compliance with Kohn's enforcement efforts. (See *Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 ["judgment is the final determination of the rights of the parties [citation] ""when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined."""" """[i]t is not the form of the decree but the substance and effect of the adjudication which is determinative"""]; compare, *Davis v. Superior Court* (2011) 196 Cal.App.4th 669, 674 [an order that omits an "'express declaration of the ultimate rights of the parties'" cannot constitute a judgment].)

Additionally, the court and the parties consistently viewed the order as the judgment in the enforcement action. Kohn and Medical Clinic litigated Kohn's enforcement efforts for nearly two and one-half years, and Medical Clinic never disputed the existence of a judgment in the action. In sum, the mislabeling of the order was an error made in recording the judgment, not in rendering it. (See, *In re Daoud* (1976) 16 Cal.3d 879, 882.) As such, it was a clerical error that could be reached by a corrective nunc pro tunc order.

Because the parties have not been prejudiced by the clerical error, rather than remand for a hearing on the nunc pro tunc motion, the order granting summary judgment is to be entered nunc pro tunc, as the judgment in the action. (See *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 6 [where the trial court clearly intended to dispose of plaintiff's complaint by granting summary judgment, the reviewing court can amend the order to make it an effective judgment]; *Holt v Booth* (1991)

1 Cal.App.4th 1074, 1081 ["'the [appellate] court may, in its discretion, where the intention of the trial court was clear, order judgment rather than send the case back for performance of that act'"].)

DISPOSITION

The March 21, 2011 order is directed to be entered nunc pro tunc as the judgment in the action. The judgment entered October 27, 2014 is vacated. The denial of the motion to dismiss for failure to prosecute is affirmed. Kohn is to recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

MENETREZ, J.*

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