Filed 4/26/18 Deuschel v. USC Faculty Dental Practice CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL DEUSCHEL, Plaintiff and Appellant, v. USC FACULTY DENTAL PRACTICE et al., Defendants and Respondents.	B270403 (Los Angeles County Super. Ct. No. BC496684)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Raphael, Judge. Affirmed.

Michael Deuschel, in pro. per., for Plaintiff and Appellant.

Fraser Watson & Croutch, Alexander M. Watson and Daniel K. Dik for Defendants and Respondents.

Plaintiff Michael Deuschel (plaintiff), representing himself, sued USC Faculty Dental Practice and USC Ostrow School of Dentistry (defendants) for dental malpractice and breach of contract. During the litigation, he requested multiple stays and continuances due to medical issues. The court denied certain of plaintiff's requested stays and continuances and ultimately granted defendants' unopposed motion for summary judgment. Plaintiff appeals the court's denial of his requests, which he claims should have been analyzed as requests for accommodation under Rule 1.100 of the California Rules of Court (Rule 1.100). We are asked to decide whether plaintiff has affirmatively shown the trial court erred on the record presented, which includes no reporter's transcripts of the hearings during which the court considered plaintiff's requests and which, so far as we can discern, reveals plaintiff did not present the legal theory on which he now seeks reversal.

I. BACKGROUND

A. Complaint and Demurrers

In December of 2012, plaintiff filed a complaint in propria persona against defendants and several individual dentists alleging dental malpractice and breach of contract. Following three demurrers, plaintiff engaged an attorney to file a third amended complaint (the operative complaint). The parties subsequently stipulated to the dismissal of the individual dentists.

The case moved fairly slowly. In June 2014, before the court had ruled on defendants' demurrer to the operative complaint, the parties stipulated to continue the trial from October 2014 to January 2015. Several days later, the Personal

Injury Court transferred the case to an Independent Calendar Court and vacated all pending motion and trial dates.

Defendants answered plaintiff's operative complaint in September 2014 and, two months later, moved to compel discovery responses. Soon afterward, plaintiff's attorney asked to be relieved as counsel due to a "complete breakdown" in the attorney-client relationship. The court granted the attorney's motion, and plaintiff returned to self-represented status. Trial was set for September 2015.

B. Plaintiff's Requests to Stay Proceedings and Continue Trial

Plaintiff requested stays on at least four occasions in 2015: once in February, twice in September, and once in October.

In February, plaintiff filed an "Ex Parte Application to Continue the Trial and Stay All Judicial and Procedural Actions and Matters Due to Medical Incapacitation." Asserting that he had upcoming medical appointments and surgeries, plaintiff requested "a six month continuance of the trial to about March 22, 2016 and a six month stay of all judicial and procedural actions and matters including depositions, discovery and motions to about August 24, 2015." Plaintiff states in his opening brief that the court granted a three-month stay in response to his request, but the court's ruling is not included in the appellate record. The only reference to this stay in the record is found in defendants' Notice of Ruling following a May 2015 case management conference. That notice states, "[a]fter a brief discussion of the status of plaintiff's health," the court ruled that

a stay "previously issued in the case" would remain in effect until July 31, 2015.[1]

One week before a September 2015 case management conference and hearing on defendants' discovery motion, plaintiff filed a "Notice of and Plaintiff's Response to Motion to Show Cause and His Request to Stay All Matters due to His Medical Incapacitation." Again, plaintiff asserted he was "medically incapacitated due to multiple medical disorders and injuries," including "multiple surgeries." Once again, the only information we have regarding the court's ruling on this request is found in defendants' Notice of Ruling following the case management conference. The Notice of Ruling states that the court continued the hearing on defendants' discovery motion to October 2015 and denied plaintiff's request.

Shortly after the September 2015 case management conference, plaintiff filed an "Ex Parte Request for Reconsideration of his Request to Stay All Matters due to His Medical Incapacitation, and His Response to the Order to Show Cause and to Sanction Him." Plaintiff emphasized that he had been "medically incapacitated for all of 2014 and 2015 to date" and that he had several more surgeries scheduled for the end of September. Defendants opposed plaintiff's request and submitted evidence suggesting that plaintiff's medical conditions and treatment did not prevent him from doing litigation-related work. Specifically, the evidence submitted indicates plaintiff was litigating at least eight other cases in the Los Angeles County

---

[1] Defendants' case management statement suggests that the September 2015 trial date was vacated at some point prior to the May 2015 case management conference.

Superior Court, plus two matters in arbitration, and had filed lengthy documents in several of these cases in 2014 and 2015. The court denied plaintiff's request for reconsideration in a September 2015 minute order. The minute order indicates no reporter was present at the hearing.

On the same date that plaintiff filed his ex parte application for reconsideration, defendants filed a motion for summary judgment. Plaintiff did not oppose the motion. Instead, weeks later on October 15, 2015, he filed a "Third Request to Stay All Matters and Opposition to the Defendants' Order to Show Cause and to Sanction Him." Plaintiff argued that his recovery from recent surgeries and the need for additional surgeries warranted a "stay of all matters including Defendants' Discovery due dates and the MSJ to mid-January 2016 . . . ." The appellate record does not include a trial court ruling on this October 2015 stay request, and plaintiff claims there is no ruling because the court "ignored" his request.

One week after plaintiff filed this last request for a stay of the proceedings, the trial court held a hearing on defendants' discovery motion. There is no transcript of this (or any other) hearing in the record, but plaintiff claims the court discussed his medical issues and his ability to litigate. According to plaintiff, the court explained in either a tentative or final order (neither of which is included in the record) that "'Plaintiff . . . spent time on September 9 and 29, 2015, litigating an ex parte request to stay matters and a motion for reconsideration of the denial of that request. While Plaintiff may well have serious medical issues, the Court is convinced that any individual who could have litigated the ex parte motion and reconsideration could have directed the same energies toward responding to the 18 requests

for admission. Further, plaintiff's recent medical issues do not begin to explain the failure to respond to the 18 requests between October 2014 and this date.'"

In December 2015, the court granted defendants' unopposed motion for summary judgment. In its written ruling, the court found that defendant's unrebutted expert testimony compelled summary judgment on the malpractice cause of action and that the breach of contract cause of action was "one of tort rather than contract." The court entered judgment in defendants' favor.

II. DISCUSSION

Plaintiff's appeal fails for two independent reasons. First, it is his obligation to affirmatively demonstrate the trial court erred based on an adequate record of the proceedings below. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) No such record has been presented here, where we have no reporter's transcripts of the relevant hearings and where there are several pertinent orders and filings missing as well. Second, insofar as we can determine what occurred in the trial court, plaintiff seeks reversal on a theory that he did not present below. He argues the trial court violated Rule 1.100 when denying his stay and continuance requests, but he did not rely on the rule, in form or substance, in the trial court. Having failed to raise below the legal theory on which he now seeks reversal, the argument is forfeited.

A. Plaintiff's Failure to Include Reporter's Transcripts and Relevant Written Rulings in the Appellate Record Requires Affirmance

Plaintiff challenges the court's denial of his continuance and stay requests as an abuse of the trial court's discretion, but the record includes little information regarding the court's reasons for denying the requests. Plaintiff's briefs emphasize that his medical status was discussed at hearings, but there are no reporter's transcripts (nor suitable substitutes therefor) that reliably reveal what transpired. There are also no written rulings memorializing the court's reasons for denying the stays. (*Rhule v. WaveFront Technology, Inc.* (2017) 8 Cal.App.5th 1223, 1229, fn. 5 [explaining that "succinct" written rulings are a "further indication that a reliable record of what transpired at the hearings is indispensable for our review"] (*Rhule*).)

"As the party asserting error, it is plaintiff's burden to supply an adequate record." (*Rhule*, *supra*, 8 Cal.App.5th at p. 1227.) We must presume the trial court's judgment is correct, and "'[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent . . . .'" (*Denham*, *supra*, 2 Cal.3d at p. 564.) Under these circumstances, this presumption is fatal to plaintiff's appeal.

B. Plaintiff Forfeited His Rule 1.100 Argument

The appellate record does include all of plaintiff's stay and continuance requests, and none mentions Rule 1.100. It is well settled that an appellant may not raise an argument for the first time on appeal. (See, e.g., *Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603 [citing the "established rules that a party to an action may not, for the first time on appeal, change the theory of the

cause of action [citations] and that issues not raised in the trial court cannot be raised for the first time on appeal . . . .'"]; *Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 621 [explaining that "theories not raised in the trial court cannot be asserted for the first time on appeal" because "it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal" and that this rule "reflects principles of estoppel and waiver"].) Plaintiff contends the court was required to evaluate his requests under Rule 1.100, despite his failure to cite the rule, but we are not persuaded by either of his arguments for why this should be so.

First, plaintiff emphasizes his "ignorance of law" and "ignorance of the value of the [Americans with Disabilities Act (ADA)]." Whatever plaintiff's level of sophistication—we note that he has more litigation experience than many self-represented litigants—the mere fact of his self-represented status did not obligate the court to invoke Rule 1.100. '"'When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys [citations]". . . .' [Citations.] In other words, when a litigant accepts the risks of proceeding without counsel, he or she is stuck with the outcome, and has no greater opportunity to cast off an unfavorable judgment than he or she would if represented by counsel." (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267.)

Second, plaintiff suggests that, despite his failure to invoke Rule 1.100, the rule required the trial court and court staff to investigate plaintiff's condition and assist him in requesting an accommodation under the rule. He argues, for instance, that "Judicial Officers are lawfully bound to assist and provide the

means and method of requesting ADA accommodations including the form MC-410 to submit an ADA request. If they had provided it [to plaintiff] in February, [plaintiff] would have been alerted to the value of his rights and exercised them." Plaintiff's argument appears to rest on his assumption that Rule 1.100, subdivision (c)(1) requires the court to forward any request that conceivably *might* be framed as a request for an accommodation under Rule 1.100 to the court's ADA coordinator as a request under Rule 1.100. Subdivision (c)(1) of the rule, however, provides that "[r]equests for accommodations under this rule may be presented ex parte on a form approved by the Judicial Council, in another written format, or orally. Requests must be forwarded to the ADA coordinator, also known as the access coordinator, or designee . . . ." The context makes clear that parties—not the court—have at least a minimal duty to articulate, in substance if not in form, Rule 1.100 as a basis for relief. So far as the record reveals, plaintiff did not comply with that duty here.

Finally, plaintiff cites the ADA, the Unruh Civil Rights Act, and California Government Code section 11135 generally for their prohibitions against discrimination and guarantees of access. However, plaintiff identifies no authority that establishes every request for a stay based on medical issues should be treated as a Rule 1.100 request. Plaintiff's failure to advance a Rule 1.100 theory below is therefore fatal to his attempt to invoke it here.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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