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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JAROSLAV J. MARIK, Plaintiff and Appellant, v. YVONNE MAKKINK et al., Defendants and Respondents.	B225884 (Los Angeles County Super. Ct. No. SC097032)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth A. Grimes, Judge. Affirmed.

Law Offices of Richard Weiss and Richard Weiss for Plaintiff and Appellant.

Carlsen Law Corporation and Miles Carlsen for Defendants and Respondents.

Doctor Jaroslav J. Marik appeals from a judgment after a bench trial to determine payments owed to him under two contracts for medical and surrogacy services. The court awarded appellant $15,446.88 against respondent Yvonne Makkink but made no award against respondent Gary Carlson. Appellant argues that the court abused its discretion in not responding to his objections to the statement of decision. By itself, the court's failure to respond to appellant's objections does not constitute reversible error. Appellant insists he does not challenge the sufficiency of the evidence; yet he also claims that the court's statement of decision is not supported by the evidence. Appellant's scant citations to the record and reliance on arguments made in respondents' trial briefs fail to substantiate this claim. His alternative argument—that the statement of decision is inconsistent with the court's own factual findings—is based on a selective citation of these findings. We conclude that appellant has not met his burden of showing reversible error, and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY[1]

Appellant, an obstetrician-gynecologist and fertility specialist doing business as Tyler Medical Clinic, entered into a contract for medical services with Makkink in 1999. Appellant's patient ledger for Makkink indicates that she owed him $44,665.88 as of July 31, 2002, and that a payment of $30,000 was applied to this amount on July 31, 2002, reducing the balance to $14,665.88. This credit was reversed on April 17, 2006. Additionally, Makkink owed a total of $781 for office visits in December 2003, January 2004, and February 2004. Under the contract, finance charges of 10 percent per year were assessed on unpaid bills older than 120 days.

In 2001, respondent Carlson and appellant on behalf of Tyler Medical Clinic signed a retainer agreement for surrogacy services. Makkink, who was in a relationship with Carlson, was listed as a party to the retainer agreement but did not sign it. Under

[1] Appellant's briefs include scant citations to the record. We have had to rely on respondents' brief and our own review of the record to compile a balanced statement of facts.

this agreement, Tyler Medical Clinic was to provide surrogacy services for a projected fee of $40,400, with a maximum additional fee of $3,500 (plus actual surrogate expenses) for any additional surrogates. If the $40,400 projected fee exceeded the actual expenses, respondents were to be reimbursed. On August 2, 2001 and March 29, 2002, Tyler Medical Clinic sent respondents statements of the various projected costs that comprised the $40,400 fee, including the following: legal fee ($2,750); administration fee ($1,975); surrogate fee ($18,000); surrogate screening fee ($2,500); surrogate monthly expenses ($2,400); transfer ($1,200); embryologist ($3,600); insurance for surrogate ($3,400); and fees for office visits, laboratory, and ultrasound services ($4,575). The first statement reflected a payment of $4,000. A payment of $30,000 appeared on the second statement, leaving a balance of $10,400.

On February 11, 2008, appellant sued respondents for breach of contract. The first amended complaint sought $52,245 plus interest against Makkink under the 1999 contract and the same amount against Carlson under the 2001 contract; it also included an open book account claim.

The evidence at trial was that Carlson paid appellant $31,000 for surrogacy services with three checks drawn on his account at Dermatology Associates of Westlake Village: $1,000 in April 2001, $4,000 in July 2001, and $26,000 in August 2001. The latter two checks were made out to Tyler Medical Supply, and Makkink delivered them to appellant's office manager, who was authorized to receive payments and accepted the checks. The $1,000 check was immediately credited to Makkink's account; the remaining $30,000 was credited to her account in July 2002. Appellant testified that, in 2006, he reversed the $30,000 credit because he did not receive this payment. He cited the same reason for not opening a trust account as required by the surrogacy agreement. There was some evidence that appellant suspected his office manager of embezzling funds. But Makkink testified that appellant acknowledged receipt of the checks, telling her that the surrogacy process could begin.

Three unsuccessful embryo transfers were made to two surrogates in August 2001, October 2001, and May 2002. Makkink was notified of the negative results and agreed to

the use of the second surrogate. In 2003, an office fire destroyed some of appellant's records, including the surrogates' charts, which contained their fees for office visits, laboratory, and ultrasound services, and copies of the contracts signed by them. Two surrogate ledgers were introduced at trial, one indicating $8,385 and another indicating $4,309 in costs for services. Appellant had no evidence to establish what fees the surrogates were paid or whether insurance was bought for them. He estimated they were paid for monthly expenses in the usual amount ($2,400 or more). Appellant claimed the legal fee was a standard fee charged for such contracts, and the surrogate screening, transfer, and embryologist fees were actually incurred. Appellant acknowledged generally that, if a surrogacy is unsuccessful, the costs are lower than the projected amount, and his policy is to issue a refund for any excess payment.

The trial court issued a statement of decision even though no party requested one. The court concluded that Makkink was obligated to pay for services only under the 1999 contract, whereas Carlson's sole obligation was under the 2001 surrogacy agreement. The court awarded appellant $14,665.88, the amount Makkink owed as of July 31, 2002, together with $781 for her three subsequent office visits, plus interest. The court concluded that Makkink was not liable for an additional $30,000 since a payment for that amount was applied to her account for four years, during which she received monthly statements indicating her reduced liability. The court found that Carlson paid $30,000 for surrogacy services, and that three attempts to impregnate two surrogates were made. The court found that appellant failed to prove the amounts he sought in surrogate-related expenses and did not award any damages under the surrogacy agreement.

Appellant filed objections to the proposed decision. In a case review on the same day, the court noted that a statement of decision was not requested by the parties and ordered appellant to prepare a proposed judgment. Appellant then sought a clarification of the court's failure to respond to the objections. The court did not act on the request for clarification, and a judgment was issued based on the statement of decision. This timely appeal followed.

DISCUSSION

I

Appellant contends the trial court abused its discretion in not responding to his objections to the statement of decision, and this procedural error requires reversal. He relies on a footnote in *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 476-477, fn. 7, a family law case, where the trial court issued a formal statement of decision on its own accord. The appellant objected that the statement of decision did not specify the factual or legal basis for future step-downs in spousal support. (*Ibid*.) The appellate court did not reverse on procedural grounds. Thus, under appellant's cited authority, the trial court's failure to respond to appellant's objections is not erroneous per se. Rather, the appellate court looked to the trial court's written statement of decision to determine whether the decision was supported by the facts and the law, and reversed only because the trial court had not specified the reasons for its step-down order. (*Id.* at p. 476-477, fn. 7, 478.)

The effect of appellant's objections to the statement of decision is that we will not imply findings in respondents' favor on controverted issues if the trial court's omission or ambiguous resolution of those issues was brought to its attention. (Code Civ. Proc., § 634; *In re Marriage of Arceneaux* (1990) 51 Cal. 3d 1130, 1133-1134.) The general rule is that "only when [a statement of decision] fails to make findings on a material issue which would fairly disclose the trial court's determination would reversible error result. [Citations.] Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings. [Citation.]" (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.)

Due to appellant's scant and one-sided citations to the record, we deem he forfeited any claim that could properly be characterized as challenging the sufficiency of the evidence. (See *Hauselt v. County of Butte* (2009) 172 Cal.App.4th 550, 563.)

We proceed to consider appellant's substantive challenges to the statement of decision.

II

Appellant argues that both respondents should have been found liable under the surrogacy agreement since in their trial briefs they admitted that Carlson loaned Makkink $31,000 for surrogacy services, the checks were delivered before the surrogacy agreement was signed, and the funds were applied to Makkink's account. Although appellant purports to challenge ambiguities in the trial court's decision, in essence he asks us to find that the court should have weighed the evidence in his favor.

The trial court's decision to credit Carlson $31,000 for surrogacy services is consistent with the court's finding that Carlson was liable only under the surrogacy agreement. That finding, in turn, is supported by Carlson's testimony that he did not agree to accept responsibility for Makkink's medical bills under the 1999 contract. The court explained that appellant's redirection of Carlson's payments to Makkink's account did not change the fact that Carlson made the payments for surrogacy services. Moreover, appellant ignores evidence that his office manager also notified respondents in 2002 that $30,000 had been applied to the projected surrogacy costs. Because appellant directed the same payments to balances owed under two different contracts, he cannot rely on his own accounting to establish the purpose of the payments.

Appellant argues further that Makkink incurred liability under the surrogacy agreement because she delivered the checks and agreed to the surrogacy procedure. The agreement by its terms is "binding on the undersigned," but Makkink never signed it, and appellant presented no evidence that she ever agreed to pay him or his clinic for surrogacy services. Appellant relies heavily on a footnote in respondents' trial briefs, which states that the evidence will show "Dr. Carlson, as a favor to Ms. Makkink, loaned her $31,000.00 to pay [Tyler Medical Clinic] for the surrogacy services . . . ." Appellant argues this is a judicial admission that the amount was to be applied to Makkink's, not Carlson's, liability. A judicial admission is a fact established in a pleading. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.) Complaints, demurrers,

answers, and cross-complaints are the only pleadings allowed in civil actions. (*Ibid.*, citing Code Civ. Proc., § 422.10.) Appellant's assumption that a trial brief is a pleading is not legally warranted. In effect, he contends that the trial court should have treated as evidence a statement respondents' counsel made in a brief and should have weighed that statement more heavily than the actual evidence adduced at trial.

The court's conclusion that only Carlson is liable under the surrogacy agreement is not ambiguous and it is supported by substantial evidence.

III

Alternatively, appellant argues that the trial court incorrectly absolved Carlson of any liability under the surrogacy agreement in excess of the $31,000 he paid. The trial court explained its reasoning for not awarding damages under the surrogacy agreement when it stated that "in addition to the IVF procedures that plaintiff performed as referenced in exhibit 42, plaintiff seeks recovery from defendants for the services performed to examine the two surrogates as referenced in exhibit 60 and other expenses related to the surrogates in amounts that plaintiff did not prove." Appellant does not address this part of the statement of decision or the exhibits the court referenced in it, and we see no omission or ambiguity in it.

Trial exhibit 42 was one of Makkink's patient ledgers. Appellant acknowledged at trial that the services reflected on Makkink's ledger pertained to Makkink, not to the surrogates. Trial exhibit 60 was a five-page redacted document, consisting of two surrogate ledgers reflecting services to two anonymous surrogates in the amounts of $8,385 and $4,309 respectively. Both surrogate ledgers show a $0 balance and a write-off by appellant. Appellant's trial and deposition testimony was that the $40,400 fee in the surrogacy agreement was based on projected surrogacy expenses, the actual costs for an unsuccessful surrogacy are usually lower, and not all surrogate-related expenses may have been incurred in this case.

A breach of contract claim requires proof of recoverable damages. (*Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 Cal.App.3d 887.) "'There is no requirement that the trial court set out either its computations, or the particular evidence upon which it may

have relied in determining the amount of damages. Nor is an appellate court concerned with the weight of testimony, particularly with reference to the amount of damages. The pertinent inquiry is whether there was substantial support in the evidence for the finding as to damages, and the appellants have the burden of demonstrating that the determination as to the amount of damages was erroneous.' [Citation.]" (*Id*. at pp. 913-914)

Appellant relies exclusively on the $40,400 fee due under the surrogacy agreement, interpreting that agreement to require this fee for each surrogate, plus an additional fee of $3,500 for the second attempt on the same surrogate, for a total of $84,300. He argues that, since the court found two surrogates were actually used, the correct measure of damages must be $84,300. This amount is higher than the $52,245 appellant sought under the surrogacy agreement in the amended complaint and even higher than his trial estimate of $42,232.10 in actually incurred outstanding surrogacy charges. The record does not show that the trial court was presented with or accepted $84,300 as the measure of damages under the surrogacy agreement. The court's findings that two surrogates were used and that appellant did not prove the surrogacy-related expenses he sought are not inconsistent. Nor are appellant's admittedly projected surrogacy expenses a reliable basis for damages in light of evidence they may have been overstated and in the absence of records of actual expenses exceeding the $31,000 Carlson paid for surrogacy services.

Moreover, a claim of inadequate damages involving factual issues must first be made in a motion for a new trial. (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1121.) If appellant believed that his testimony and records were sufficient to establish his actual damages under the surrogacy agreement with reasonable certainty, he should have brought a motion for a new trial. His objections to the statement of decision cannot function as such a motion.

IV

Appellant argues that the court improperly applied a $31,000 credit to Makkink's liability for medical services because the evidence was that the money was to be used for

surrogacy services. The trial court's reasoning is more complex than appellant acknowledges. The court reasoned that, because appellant credited $30,000 to Makkink's patient ledger for several years before reversing the credit in 2006, and in the interim sent Makkink monthly statements reflecting her reduced liability, he "cannot be heard to argue that the $30,000.00 should be applied only for surrogacy services and not to reduce Ms. Makkink's indebtedness . . . ."

In his objections, appellant argued that the court's statement of decision did not indicate "under what authority" Makkink was credited the $31,000 that had been incorrectly applied to her patient ledger. Appellant's objections appear to have been directed at the court's legal conclusion, which essentially was that his misdirection of payments to Makkink's ledger and his monthly notices indicating that her indebtedness had been reduced estopped him from seeking to recover previously credited amounts. On appeal, he fails to address or even acknowledge the trial court's reasoning. Instead, he argues that, if a credit was to be issued to either party, it should have been issued to Makkink. In the absence of adequate factual or legal analysis of this issue, we deem it forfeited. (*Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com.* (2006) 135 Cal.App.4th 793, 814.)

V

Appellant acknowledges that he did not object to the trial court's failure to rule on his open book account claims against Carlson and Makkink. In California, money due under an express contract is not recoverable in an action on an open book account unless there is a contrary agreement by the parties. (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co*. (2004) 116 Cal.App.4th 1375, 1395, fn. 9.) We imply a finding against appellant and in favor of the judgment on this issue. (See *In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at pp. 1133-1134.)[2]

[2] Since we affirm the judgment on other grounds, we do not address respondents' argument that appellant's claim for damages against Carlson is time barred. We do not address the trial court's ruling that the statute of limitation did not bar appellant's claim against Makkink because no party challenges that ruling.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.