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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CORNELL MITCHELL,

Plaintiff and Appellant,

v.

BRIDGITTE REGINA HAMILTON,

Defendant and Respondent.

B243002

(Los Angeles County  
Super. Ct. No. BC468163)

Appeal from a judgment of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Cornell Mitchell, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

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## **SUMMARY**

Appellant Cornell Mitchell contends his constitutional rights were violated when the trial court refused to grant his request to enter respondent Bridgitte Hamilton's default, and permitted Hamilton belatedly to file an answer to the complaint over Mitchell's objections. We affirm due to Mitchell's failure to provide an adequate record to permit appellate review.

## **BACKGROUND**

Our recitation of the background is drawn from the extremely thin clerk's transcript in this matter and allegations in the opening brief filed by Mitchell, who relies primarily on an uncertified docket summary prepared by the trial court clerk in an effort to substantiate his factual assertions on appeal.

Mitchell claims that in August 2011 Hamilton was served with the complaint in this action for defamation. Mitchell allegedly served Hamilton with the complaint again in October 2011, after the trial court ordered him to meet and confer with her regarding the issues in this case. When they met, Mitchell claims to have admonished Hamilton "regarding filing a responsive pleading in this matter, pursuant to Code Of Civil Procedures [sic] 585 (b)." Hamilton took no action until March 23, 2012, about seven months after the complaint was filed, when she filed an answer to the complaint.

On July 23, 2012, following a bench trial at which Mitchell and Hamilton each appeared in pro. per., the trial court entered judgment in favor of Hamilton. Mitchell filed a timely notice of appeal from the judgment.

## **DISCUSSION**

Mitchell points to the docket sheet, which indicates he filed requests for entry of Hamilton's default in October and again in December 2011. Apparently, both efforts were rejected due to Mitchell's failure to satisfy procedural requirements for entry of default.

Mitchell contends on appeal that the clerk failed to perform its ministerial duty to enter Hamilton's default. He also asserts that the trial court erred in continuing this matter several times, all of which occurred over Mitchell's alleged objections, given

Hamilton’s failure to timely file a responsive pleading. Mitchell argues that these errors violated Code of Civil Procedure section 585, subdivision (b), by allowing the matter to proceed notwithstanding Hamilton’s failure to respond to the complaint within 30 days of service. Taken together, Mitchell claims the clerk’s and court’s errors violated his State and Federal Constitutional due process and equal protection rights.

The record is insufficient to permit us to conduct an adequate review of Mitchell’s contentions or the trial court’s rulings—we simply cannot ascertain what the court’s determinations (prior to the judgment were), or the legal bases for those rulings. “Error is *never presumed* on appeal. To the contrary, appealed judgments and order are *presumed correct* [citation]; and appellant has the burden of overcoming this presumption by affirmatively showing error on an *adequate record*.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2012) ¶ 4:2, citing *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140–1141.) An appellant’s preparation of a sufficient record is pivotal to his or her potential to succeed on appeal.

The only items Mitchell designated for inclusion in the appellate record were Hamilton’s answer to the complaint, the notice of entry of judgment (if any) and judgment, and the notices of appeal and designating the record on appeal. Mitchell checked a box requesting that the record include certain exhibits admitted, refused or lodged at trial, but failed to specify any exhibit. Mitchell failed to designate the complaint, let alone any documents reflecting his alleged multiple attempts to serve Hamilton and obtain her default, or the clerk’s or the court’s rejection of those efforts. There is nothing in the record to support Mitchell’s claim that he ever objected to continuance of the trial, nor does any document shed light on the reasoning underlying the court’s decision to continue the trial over Mitchell’s objections.<sup>1</sup> Appellate review is

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<sup>1</sup> The civil case summary indicates an “Objection Document (TO COURT’S CONTINUANCE IN THIS CASE)” was filed in April 2012. But that document was filed by “Defendant & Defendant in Pro Per” (i.e., Hamilton). Mitchell did file two unspecified “Objection Document[s] in February and March 2012. Nothing indicates

not possible without an adequate record explaining what occurred. It is Mitchell's burden to demonstrate prejudicial error on an adequate record. He has not met that burden here.

In *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, the court found that appellant was unable to carry his burden on appeal to demonstrate error in a trial court's ruling granting a motion to strike portions of a complaint when the only record on appeal was appellant's appendix (in lieu of a clerk's transcript) containing the notice of ruling. (*Id.* at p. 502.) Without a copy of the motion to strike, any opposition thereto or the court's order granting the motion, the appellate court was unable to review the basis of the trial court's ruling. (*Ibid.*) This appeal is similarly doomed by Mitchell's provision of a selective and inadequate clerk's transcript. (See *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435 [inadequate record may be ground for default if appellant predicates error on selective record, and fails to present portions of the proceedings below which may provide grounds to affirm trial court's decision].) Nor will the trial court's exercise of discretion be disturbed on appeal where, as here, an appellant fails to provide a record sufficient to ascertain whether he has been prejudiced by a trial court's decision to continue the trial. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136.) Finally, an appellant cannot, as Mitchell does here, assert defects in a document filed in the trial court unless the record includes a copy of that document. (*Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1102; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1143.)

Further, Mitchell elected to proceed on appeal without a reporter's transcript for any hearing or for the trial. In checking the box electing to proceed without reporters' transcripts, Mitchell specifically acknowledged his understanding that, "without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to

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those filings were directed at the court's decision to continue the trial. Indeed, it is unlikely that the first "Objection" took issue with that ruling, given that it was filed before Mitchell and Hamilton met and conferred, and before Hamilton's answer was filed in March.

consider what was said during those proceedings in determining whether an error was made in the superior court proceedings.” A party who chooses not to include a record of pivotal oral proceedings in the appellate record does so at great risk. (See *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039 [“in the absence of a required reporter’s transcript and other documents, we presume the judgment is correct”].)

The record Mitchell has provided is woefully inadequate to enable us to determine whether the clerk erred by refusing to enter Hamilton’s default, or whether the trial court abused its discretion by continuing the matter and permitting Hamilton belatedly to file an answer. Mitchell cannot obtain reversal based on the trial court’s allegedly erroneous discretionary orders in the absence of a record explaining what occurred at the hearings or the court’s reasoning. (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448.) Mitchell’s failure to meet his burden to provide an adequate record demonstrating these alleged errors dooms his appeal. Where “the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.” (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) Mitchell has not sustained his burden on appeal to show error.

### **DISPOSITION**

The judgment is affirmed.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.