

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE LONGFORD
CONDOMINIUM ASSOCIATION,

Plaintiff and Respondent,

v.

HEIDI TABIB et al.,

Defendants and Appellants.

B279182

(Los Angeles County
Super. Ct. No. BC494408)

APPEAL from the judgment of the Superior Court of Los Angeles County. Frederick C. Shaller, Judge. Affirmed.

Heidi Tabib and Roya Tabib, in pro. per., for Defendants and Appellants.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, Norman S. Wisnicki and Johnny White for Plaintiff and Respondent.

* * * * *

Defendant sisters Heidi and Roya Tabib appeal the trial court's judgment against them. Defendants own a condominium

managed by plaintiff Longford Condominium Association. Plaintiff sued defendants for breaching the covenants, conditions, and restrictions of the complex, and for nuisance, alleging that defendants repeatedly threatened members of the Association, residents, employees and guests, and that their unit was maintained in unclean and unsanitary condition. The trial court granted plaintiff's request for a preliminary injunction addressing defendants' conduct and the condition of their unit. After a court trial at which the court relied on facts deemed admitted by defendants, the injunction was made permanent, and plaintiff was awarded its attorney fees.

On appeal, defendants contend the trial court abused its discretion when it denied their ex parte application to file a cross-complaint, and their ex parte application to continue trial so that the court could hear their motion to set aside their deemed admissions. Defendants contend they were the "victims of their own counsel," and were wrongly deprived the opportunity for a trial on the merits. Finding no abuse of discretion, we affirm.

FACTS

Plaintiff filed its complaint in October 2012. Following the filing of this action, there were a number of delays, sometimes by stipulation of the parties, but often at the request of defendants. For example, the hearing on the motion for a preliminary injunction, which was originally calendared for January 10, 2013, was not heard until February 11, 2014. Continuances of the hearing on the motion for a preliminary injunction resulted in continuances of the trial date.

After the trial court granted plaintiff's request for a preliminary injunction, new counsel, Arshak Bartoumian, substituted in to represent defendants. On February 25, 2014,

defendants filed an ex parte application seeking various remedies, including a continuance of the April 9, 2014 trial date, reconsideration of the trial court's ruling on the preliminary injunction, a temporary restraining order to stop plaintiff from inspecting defendants' unit (pursuant to the order granting the preliminary injunction), and for leave to file a cross-complaint.

No declaration was provided by counsel explaining why a continuance of trial was necessary, or why a cross-complaint was required or had not been filed earlier. Instead, the defendants provided extensive and rambling declarations, purporting to describe the history of the acrimony between the parties, and wrongdoing by various neighbors and plaintiff's employees. Defendants' declarations asked for a continuance of trial so that "new counsel will be able to conduct discovery, which was previously requested from [our] former attorney." The declarations did not explain what discovery had been conducted, or what additional discovery was needed. Regarding the cross-complaint, the declarations simply stated, "[our] request would be to have the exhibit 'H', as [our] cross complaint to be able to be filed as there was never any cross complaint filed by [us] although [we] requested [our] former attorney to do so." A proposed cross-complaint was appended to the application.

The trial court denied "[t]he entire ex parte application . . . for failure to comply with California Rule of Court 3.1202(c)."

The case was reassigned to a trial department, the defendants again moved ex parte for a trial continuance, and their application was granted. The April 9, 2014 trial date was continued until June 25, 2014. Notwithstanding the continuation of the trial date, defendants never sought leave to file a cross-complaint.

In April 2014, defendants appealed the trial court's order granting a preliminary injunction, and proceedings in the trial court were stayed. While defendants' appeal was pending, their attorney was suspended from the practice of law, and another member of his law firm, Patrick Swanstrom, made appearances for the defendants in this action, and prosecuted their appeal. No substitution of attorney was filed.

Defendants' appeal was dismissed on August 12, 2014, after defendants failed to deposit the fees to prepare a clerk's transcript. We granted defendants' motion to vacate the dismissal, but the appeal was dismissed after defendants again failed to deposit fees with the court. Remittitur issued on March 18, 2015, proceedings in the trial court were reinstated, and trial was set for June 29, 2016.

On November 12, 2015, plaintiff moved to have the court deem admitted the matters specified in plaintiff's requests for admission, to which defendants gave no response. The requests for admission, and motions, were served on the individual defendants, and also on their ostensible attorney, Mr. Swanstrom. A November 9, 2015 email from defendant Heidi Tabib was appended to plaintiff's motions. In it, Ms. Tabib represented that defendants would not respond to the discovery requests because defendants were not represented by counsel, and that they would not respond until they had legal representation.

Defendants did not oppose the motions, but appeared at the March 4, 2016 hearing. The trial court granted the motions to deem admitted as true the matters specified in the requests for admission. No reporter's transcript of the hearing appears in the record on appeal.

On June 10, 2016, defendants, then self-represented, filed an ex parte application to continue the trial. According to the application, both defendants were suffering from health problems. The trial court granted the application, and continued the trial until August 10, 2016. On July 5, 2016, trial was continued again, this time at the request of plaintiff, until August 24, 2016.

On August 8, 2016, plaintiff filed a motion in limine seeking to exclude from trial all evidence disputing the matters deemed admitted pursuant to its motions. Defendants would be barred from introducing evidence denying that they yelled at and threatened Association members, residents, guests and employees, or that their unit was unclean and unsanitary.

On August 15, 2016, defendants retained new counsel. On August 23, defendants' counsel filed an ex parte application for an order continuing trial 30 days, and for an order shortening time on a motion to seek relief from the deemed admissions. Counsel's declaration averred that a short continuance should be granted so that defendants' motion could be heard, and they could have a trial on the merits. The application was set for hearing on August 24, 2016, the day the trial was to begin.

Attached to the ex parte application was the proposed motion to vacate the deemed admissions, and a supporting declaration from defendant Heidi Tabib. Ms. Tabib testified that defendants' former counsel, Mr. Bartoumian, had been placed on involuntary inactive status by the state bar on July 11, 2014, and that defendants believed that they were thereafter being represented by Mr. Swanstrom.¹ Defendants attempted to

¹ Defendants subsequently learned that Mr. Swanstrom had also been suspended from the practice of law. In January 2016,

contact both Bartoumian and Swanstrom about the requests for admission which were served upon them, but did not receive a response. They were unable to respond to the requests for admission, or to the motion to have the requests deemed admitted, without the assistance of counsel. Between March 4, 2016, and August 12, 2016, defendants attempted to find new counsel, but their case was either rejected by the attorneys they consulted, or they could not afford the services offered.

Notwithstanding counsel's initial request for a 30-day continuance of trial, counsel filed a supplemental declaration on the day trial was supposed to start, requesting an *indefinite* continuance because counsel had just learned that criminal charges for hoarding were pending against defendants, and that "I had expected to call Defendants . . . as witnesses to testify as to the lack of any need for permanent injunctive relief in this matter. However, in the view of the pending criminal charges against them, Defendants . . . must now assert their right against self-incrimination . . . and it will consequently be impossible for them to testify at trial of this matter."

Plaintiff opposed the ex parte application, arguing that defendants had not made a showing of good cause.

On August 24, 2016, the trial court denied the request for a continuance, and for an order shortening time on defendants' motion for relief from their deemed admissions. No transcript of the proceedings appears in the record on appeal. The court's

defendants learned that he died from a heart attack in November 2015. They also learned, in approximately August 2015, that Mr. Bartoumian had been suspended from the practice of law as of June 2014.

statement of decision indicates that there was “extensive argument and consideration of the issues” of defendants’ request to continue trial. The court concluded there was an “inadequate showing of good cause and reasonable diligence on the part of Defendants to continue the matter once again.” The court conducted a court trial, and found for plaintiff based on the deemed admissions. This timely appeal followed.

DISCUSSION

Defendants contend the trial court abused its discretion when it denied their request for leave to file a cross-complaint, and that their motion for relief from their deemed admissions “should have been allowed to be heard.”

1. Leave to File a Cross-complaint

The trial court denied defendants’ ex parte application for leave to file a cross-complaint because the application “fail[ed] to comply with California Rule of Court 3.1202(c).” California Rules of Court, rule 3.1202(c) provides that an ex parte application “must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte.” We review a trial court’s ruling on an ex parte application for abuse of discretion. (See, e.g., *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1060-1061.)

Here, the ex parte application seeking leave to file a cross-complaint did not explain why the relief was being belatedly sought, on the eve of trial, on an ex parte basis, depriving plaintiff of an opportunity to meaningfully oppose the request. A party who fails to timely file a cross-complaint must seek leave of the court to do so by noticed motion. (See Code Civ. Proc.,

§§ 426.50, 428.50.) Defendants' ex parte application did not provide *any* evidence of "irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." (Cal. Rules of Court, rule 3.1202(c).)

Moreover, defendants have not attempted to demonstrate how they were prejudiced. They never again sought leave to file a cross-complaint, even though trial was continued a number of times, and there was ample time to do so. Defendants have not explained what other outcome may have been reached had they been permitted to file a cross-complaint. (Cal. Const., art. VI, § 13; Civ. Code, § 475; *Arnett v. Nall* (1921) 51 Cal.App. 194, 195 [the burden to demonstrate prejudice is on the appellant].)

2. Trial Continuance

The trial court denied defendants' last ex parte application for a continuance and for an order shortening time on their motion for relief from their deemed admissions, finding that defendants had failed to demonstrate good cause and reasonable diligence. "Continuances are granted only on an affirmative showing of good cause requiring a continuance." (*In re Marriage of Falcone and Fyke* (2008) 164 Cal.App.4th 814, 823; see also Cal. Rules of Court, rule 3.1332(d).) Trial courts generally have broad discretion in deciding whether to grant a request for a continuance. (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.)

Here, the action had been pending for nearly four years, and trial had already been continued a number of times. The case was also long delayed by defendants' prosecution of their appeal, which was *twice* dismissed for failure to deposit required fees. Defendants did not request a short continuance to resolve their motion for relief from deemed admissions; they requested

an *indefinite* continuance due to the pendency of criminal charges against them, claiming they would be *unable to testify* even if relieved from their deemed admissions. Moreover, although defendants complain of the failures of their counsel below, defendants were not diligent in seeking replacement counsel. We can discern no abuse of discretion on this record.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

ROGAN, J.*

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