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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

PATRICK BULMER, Plaintiff and Respondent, v. RUDY M.A. COSIO, Defendant and Appellant.	B267989 (Los Angeles County Super. Ct. No. NC058919)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed.

Thomas Armstrong, for Defendant and Appellant.

Patrick Bulmer, in pro. per.

INTRODUCTION

Defendant Rudy Cosio appeals an order denying his motion for judgment notwithstanding the verdict (JNOV) following a jury trial. The jury returned a verdict against him and in favor of plaintiff Patrick Bulmer on Bulmer's claim for equitable indemnification. Cosio contends this was error because he owed no duty of care to Bulmer. We affirm.

FACTUAL AND PROCEDURAL HISTORY

This appeal arises out of a lawsuit filed by Bulmer in 2013 against Cosio, an attorney, and two of Cosio's clients, Aidy Yang and Maria Avila. Bulmer, who works as a professional receiver, alleged he incurred damages based on two prior lawsuits, which we will discuss briefly to provide the necessary background.

I. *The Avila Lawsuit*

In the original case, Yang and Avila, represented by Cosio, sued Ming Tang Lin over a joint agricultural venture (the Avila lawsuit). A jury found for Yang and Avila and awarded $1,853,000 in damages against Lin. On July 26, 2012, the same day the jury returned its verdict, Yang and Avila filed an ex parte application seeking a temporary restraining order enjoining Lin from transferring any assets and freezing his bank accounts, and requesting appointment of a receiver. The application claimed that Lin was a flight risk and likely to transfer his assets to "attempt to evade paying plaintiffs for any judgment awarded." In the application, Yang and Avila nominated Receiver Specialists of Los Angeles as the requested receiver and attached a declaration from Cosio attesting to its reputation.

The court granted the ex parte application the same day, but made no specific provisions regarding the receivership. On July 30, 2012, the court signed an order appointing a receiver,

adopting a proposed order submitted by Cosio. The receivership order appointed Bulmer, of California Receivership Services, as the receiver, rather than the entity listed in the ex parte application. The order also waived the imposition of a receiver's bond, and set forth provisions for monthly payment to the receiver of fees and expenses incurred, with quarterly review by the court.

Following his appointment as receiver, Bulmer seized approximately $24,000 in assets from Lin. Bulmer also paid himself $10,800.40 out of the seized funds, which he claimed was for fees and expenses incurred as receiver.

In the meantime, Lin filed a motion to vacate the receivership order on the grounds, among others, that Yang and Avila, as the applicants, had failed to post the requisite bond. (See Code of Civ. Proc.,[1] § 566, subd.(b) [requiring bond by applicant for ex parte receivership].) On September 11, 2012, the court granted Lin's motion and declared the receivership void. The court found that the ex parte appointment of the receiver was "null and void" because no bond was posted and, additionally, because Bulmer was "not the same receiver nominated in the ex parte application." On October 29, 2012, the court ordered Bulmer to "disgorge the fees and expenses he had previously paid himself and to return all funds seized" to Lin.

Bulmer moved for reconsideration. The court denied the motion.

Bulmer appealed the court's order vacating the receivership. In an unpublished opinion, the Fourth District Court of Appeal affirmed the trial court's ruling that the

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[1] All further code citations are to the Code of Civil Procedure unless otherwise indicated.

receivership was void, citing section 566, subdivision (b) and noting the "black letter law" that an order appointing a receiver upon an ex parte application without the required undertaking from the applicant "is void." (*Avila v. Lin* (November 17, 2014, G049947 [nonpub. opn.]).)

II. *The Lin Lawsuit*

On November 5, 2012, Lin sued Bulmer (the Lin lawsuit) alleging abuse of process, conversion, and related claims based on Bulmer's conduct as receiver and his refusal to return any of the $23,414.18 he had seized from Lin. Lin alleged that Cosio had substituted Bulmer as the receiver into the proposed receivership order "without disclosure to the court or Lin's counsel." Further, Lin claimed that after his appointment, Bulmer took several payments directly from Cosio "without disclosure to, or approval by, the court." As receiver, Bulmer allegedly "unleashed a hyper-aggressive campaign of harassment and intimidation" against Lin, his family and employees, seizing over $23,000 in assets and paying himself almost $11,000 from those funds without court approval.

Bulmer returned all seized funds to Lin on November 6, 2012. Bulmer filed a demurrer and a special motion to strike the complaint pursuant to section 425.16 (anti-SLAPP motion). While those motions were pending, the parties reached a settlement and Lin dismissed his lawsuit with prejudice on March 6, 2013.

III. *The Bulmer Lawsuit*

A. *Bulmer's complaint*

Bulmer filed his complaint in the instant matter on June 18, 2013 against Cosio and his law office, as well as his clients, Yang and Avila, seeking to recover his receiver fees as well as the

cost of defending against the Lin lawsuit. He alleged he had worked as a court-appointed receiver on numerous cases since 2001. On July 29, 2012, Bulmer alleged he received a voicemail message from Cosio, informing Bulmer that the court had ordered appointment of a receiver in the Avila lawsuit and that Cosio intended to nominate Bulmer as the receiver. The next morning, July 30, 2012, Bulmer emailed Cosio's office a copy of his "model order provisions," which included his rates for serving as a receiver and his requirement of a $2,000 "startup fee to be paid by the moving party."

According to Bulmer, he and Cosio met on July 31, 2012 to discuss the Avila lawsuit. Cosio had appeared in court ex parte the day before regarding the requested receivership. He told Bulmer the court signed plaintiffs' proposed receivership order , which Cosio had drafted without the benefit of Bulmer's sample provisions. The order therefore did not contain a provision regarding payment of Bulmer's fees and expenses as receiver. However, Cosio stated that the court had reviewed Bulmer's model order during the ex parte hearing and "approved of [Bulmer's] appointment as receiver under the terms included in" Bulmer's model order. Cosio also reported that the court found that Yang and Avila were indigent, and therefore had waived the bond required for ex parte appointment of the receiver. At the conclusion of this meeting, Cosio paid Bulmer his "one-time startup fee" of $2,000.

Bulmer then "commenced his duties as receiver" in the Avila lawsuit, including paying himself $10,800.40 from funds held in the receivership estate. He claimed that amount was owed to him as "fees and expenses incurred" between July 31, 2012 and August 24, 2012.

Once the court declared the receivership void and ordered Bulmer to return the funds seized to Lin, Bulmer demanded that Cosio reimburse him for $10,800.40 of the amount to be disgorged, to account for Bulmer's fees and expenses. Cosio did not respond to this demand. Bulmer ultimately repaid Lin the full amount due, "without assistance or contribution" from Cosio, Yang, or Avila. Bulmer also alleged that he had to retain an attorney to assist with his defense in the Lin lawsuit.

Bulmer's complaint alleged causes of action for fraud, common counts, and indemnification against all defendants. The fraud claim was stricken pursuant to an anti-SLAPP motion filed by defendants. In denying defendants' anti-SLAPP motion as to Bulmer's other two claims, the court noted that Bulmer's indemnification claim "arises from the fact[] that [Bulmer] had to disgorge the receiver's fees he had earned and paid himself from the estate. The cost should equitably be indemnified from the parties who were responsible for an applicant's bond but did not post one."

Bulmer filed a first amended complaint, deleting the fraud claim. He added the allegation that during their July 31, 2012 meeting, Cosio promised to "advance fees and expenses for the receivership on behalf of his clients as they became due." In his first cause of action for common counts, Bulmer sought reimbursement of over $60,000 in "professional fees and expenses" he had incurred in his work as a receiver in the Avila lawsuit and over $15,000 in attorney fees he had paid to defend the Lin lawsuit. In his second cause of action for equitable indemnification, Bulmer alleged the same two amounts in damages incurred as a result of "defendants' failure to post an

applicant's bond when procuring Plaintiff's appointment as receiver," resulting in the void receivership.

B. *Trial*

Trial in this matter began on June 22, 2015. The parties presented testimony over the course of three days. On appeal, Cosio has provided the trial exhibits submitted into evidence by the parties. There was no court reporter present at trial. On June 26, 2015, the jury found in favor of all defendants on the first cause of action for common counts. On the second cause of action for equitable indemnification, the jury found in favor of Bulmer and against Cosio, and awarded damages of $10,000 to Bulmer.[2]

The court entered judgment on July 31, 2015. Cosio moved for judgment notwithstanding the verdict, "on the ground that the evidence received at trial is insufficient as a matter of law to support the jury's verdict." In support of that motion, Cosio's attorney filed a declaration recounting his recollection of Bulmer's trial testimony and closing argument regarding his damages. Bulmer objected to this evidence as hearsay.[3] The court entered an order denying Cosio's motion, from which Cosio timely appealed.

DISCUSSION

Cosio argues that the trial court erred in denying his motion for JNOV. "The trial court's power to grant a motion for judgment notwithstanding the verdict is the same as its power to

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[2] The jury found in favor of Yang and Avila on the second cause of action. They are not parties to this appeal.

[3] There is no ruling by the trial court on this objection in the record before us. However, Cosio does not argue that these statements were admissible.

grant a directed verdict. [Citation.] 'A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.' [Citations.] On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citations.] If there is, we must affirm the denial of the motion. [Citations.] If the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions, however, our review is de novo. [Citation.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.)

Cosio's sole argument on appeal is that he owed no duty, sounding in either contract or tort, to Bulmer and therefore that the jury lacked substantial evidence to find that he should be liable for indemnification to Bulmer.[4] On its face, Bulmer's second cause of action sought indemnification based on equitable principles. Cosio contends that "such a tort-based recovery presumes that Mr. Cosio owed a duty to Mr. Bulmer, a non-client, to act with reasonable care." Cosio asserts that he owed no such duty to Bulmer as a matter of law, because Bulmer was not his

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[4] We reject Bulmer's contention that Cosio forfeited this argument by failing to raise it below. Although Cosio now attempts to characterize his argument as a purely legal one, his motion for JNOV focused on the purported lack of substantial evidence to support the verdict. Nevertheless, in substance Cosio's argument on appeal is nearly identical to the final argument he raised in his motion for JNOV below. As such, Cosio has not forfeited his ability to raise this issue on appeal.

client and did not fall within any of the exceptions under which an attorney might have a duty to a third party.

This argument merges the concepts of negligence and equitable indemnification. Cosio relies on cases discussing claims for professional negligence, which require the court to perform a balancing of numerous factors to determine whether an attorney owes a duty of care to a non-client. (See *Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 528 [holding that successor fiduciary of probate estate may assert a professional negligence claim against tax counsel engaged by the prior fiduciary]; *Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1034-1041 [analyzing factors relevant to determination of attorney's duty in non-client's claim for professional negligence]; *Daniels v. DeSimone* (1993) 13 Cal.App.4th 600, 607 [claim for attorney malpractice].) In the absence of such a duty, a non-client cannot assert a claim for professional negligence. Cosio argues that this analysis applies here—that he did not owe a duty to Bulmer and therefore could not be liable to Bulmer for any alleged injuries.

In this case, however, Bulmer did not allege negligence. He claimed he was entitled to equitable indemnification from the defendants (Cosio, Yang, and Avila) because the defendants failed to properly secure a valid receivership order.

"In general, indemnity refers to 'the obligation resting on one party to make good a loss or damage another party has incurred.' [Citation.]" (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1157.) Equitable indemnity has two forms: (1) "traditional equitable indemnity," which "'is premised on a joint legal obligation to another for damages'"; and (2) "implied contractual indemnity," which is "indemnity implied from a contract not specifically mentioning indemnity." (*Id.* at pp. 1157-

1158 (citations omitted) [explaining that "implied contractual indemnity" is now viewed simply as "a form of equitable indemnity"]; see also *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 573.) "Although traditional equitable indemnity once operated to shift the entire loss upon the one bound to indemnify, the doctrine is now subject to allocation of fault principles and comparative equitable apportionment of loss." (*Prince, supra*, 45 Cal.4th at p. 1158.)

It is not clear how Bulmer framed his indemnification claim. The indemnification jury instruction that he requested, and which the trial court gave, was a modified version of the CACI instruction on implied contractual indemnity (CACI 3801). However, Bulmer's modified version excluded any reference to a contract between the parties.

Instead, the instruction given simply stated that Bulmer had to prove: "1. That Rudy M.A. Cosio failed to use reasonable care in procuring the appointment of Patrick Bulmer as receiver in the *Avila v. Lin* matter; and 2. That Rudy M.A. Cosio's conduct was a substantial factor in causing Patrick Bulmer's harm."[5] There are no transcripts from the trial, so we do not know how

[5] The parties argue over whether Cosio forfeited his right to challenge this jury instruction by failing to object in the trial court. However, the forfeiture issue is moot, as Cosio did not raise a challenge to any jury instructions in his appeal. While Cosio did discuss the jury instruction on indemnification, this discussion was part of Cosio's argument analyzing whether Bulmer had claimed indemnification sounding in contract or tort. Cosio has not articulated a claim of error regarding this jury instruction; thus we need not address the potential forfeiture of any such claim.

Bulmer framed his argument that the evidence established his right to indemnification from Cosio.

In any event, the parties appear to agree that Bulmer neither alleged nor proved that Cosio had any obligations to Bulmer arising from a contract between them. Thus, to the extent Bulmer proceeded under an indemnification theory, it would have been traditional equitable indemnity. Under this theory, Bulmer was not required to prove Cosio owed him a duty of care. (See, e.g., *Jocer, supra*, 183 Cal.App.4th at p. 573 [explaining that equitable indemnity requires both tortfeasors (here, theoretically, Cosio and Bulmer) to have liability and a duty to the injured party (again, theoretically, Lin), but not to each other]; *Jaffe v. Huxley Architecture* (1988) 200 Cal.App.3d 1188, 1191 [traditional equitable indemnity "is concerned not with duties owed by one tortfeasor to another, but rather with the joint and several liability of tortfeasors - each of whom owes a duty to the party injured"].) Therefore, Cosio's argument that a verdict against him for equitable indemnification failed because he did not owe a duty in tort to Bulmer is incorrect as a matter of law.

It is not apparent from the limited record before us that either type of equitable indemnity would fit the circumstances of this case, or the damages Bulmer claimed. To the extent Bulmer's theory of liability, whatever he may have called it, was actually premised on alleged negligence by Cosio, the issue of duty becomes relevant. However, there is no indication in the record that Cosio presented this issue to the trial court or to the jury, other than in his motion for JNOV. If a determination of duty was required but was not made, Cosio has forfeited any right to raise this issue now.

Additionally, as Cosio acknowledges, the determination of whether Cosio owed a duty in tort to Bulmer, who was not his client, "involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.) Cosio suggests that the balancing of these factors "cannot result in imposing a duty" on Cosio toward Bulmer.

But we cannot evaluate this argument without all of the evidence presented at trial. The judgment and orders of the trial court are presumed correct on appeal, "'and all intendments and presumptions are indulged'" in their favor. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718, quoting *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) The appellant bears the burden of overcoming this presumption by showing error on an adequate record. Without a reporter's transcript, "it is presumed that the unreported trial testimony would demonstrate the absence of error." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992; see also *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639, 646–647; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1320–1321.) "Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant]." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) Cosio cannot meet his burden on appeal by selectively citing evidence from a partial record and claiming such evidence supports his position.

In sum, we conclude that the trial court did not err in denying Cosio's motion for JNOV.[6]

DISPOSITION

Judgment is affirmed.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.

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[6] Cosio also filed a motion for sanctions on appeal, based on Bulmer's failure to transmit certain original trial exhibits to this court. Bulmer initially stated that copies of the exhibits were equally available to both parties and objected to having to provide them; he then responded that he never received the original trial exhibits from the trial court after trial. Ultimately, Cosio provided copies of the exhibits to complete the record on appeal. Based upon this record, Cosio's motion for sanctions is denied.