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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CHO YIU KWAN,

Cross-Complainant and  
Appellant,

v.

MEGAN HOFFERTH,

Cross-Defendant and  
Respondent.

B264489

(Los Angeles County  
Super. Ct. No. SC111389)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lawrence Cho, Judge. Affirmed.

Armen L. George for Cross-Complainant and Appellant.

No appearance for Cross-Defendant and Respondent.

This appeal arises in connection with three lawsuits filed concerning landslides that occurred in the Malibu area in 2010 and 2011. The suits were consolidated, and the majority of the claims were resolved via a settlement agreement and a series of stipulated judgments. Cross-complainant and appellant Cho Yiu Kwan (Kwan) declined to participate in the settlement and continued to pursue his claims against the other parties, including cross-defendant and respondent Megan Hofferth (Hofferth). The trial court ultimately presided over an uncontested bench trial at which Kwan presented evidence in an effort to establish Hofferth and her co-defendant husband, A. Dean Isaacson (Isaacson), were liable for certain damages. The trial court determined Isaacson was liable but found Hofferth was not. Kwan appeals the trial court's judgment insofar as it finds Hofferth was not liable, asking us to consider whether the trial court exceeded its jurisdiction and violated Kwan's due process rights by, in his words, "*de facto, sua sponte* granting . . . Hofferth relief by disregarding the facts admitted by way of [her] default and multiple, stipulated, adverse judgments admitting liability."

## I. BACKGROUND

The record in this matter (which in some respects is incomplete) is fairly voluminous. Because the issues raised on appeal do not depend on a full recitation of the factual and procedural history of the case, we focus on those portions of the record that concern the facts and proceedings relevant to Kwan's asserted grounds for reversal.

*A. Overview of the Litigation*

In 2010 and 2011, two landslides in Malibu damaged homes and roadways on and around Rambla Pacifica Street. Kwan owned a luxury home in the area, and he claimed the landslides damaged the roadways leading to his home and adversely impacted his use of the home.

Kwan's Third Amended Cross-Complaint, which we understand to be the operative pleading, alleged claims for "negligence, nuisance, trespass" against, among others, Isaacson, Hofferth, and A. Dean Isaacson Company, all of whom Kwan collectively referred to as "the Isaacson Defendants" or "the Isaacson Parties." In short, Kwan alleged the landslides were caused at least in part by the negligence of cross-defendant Isaacson who was, at the time, a general contractor and responsible for overseeing the grading of the hillside where the landslides occurred. Kwan further alleged the damage caused by the landslides had lowered the value of his home, impaired its marketability, and deprived him of the ability to make full use of the property.

*B. Kwan's Case Against the Isaacson Parties*

It appears the Isaacson Parties, including Hofferth, were represented by counsel during earlier stages of the proceedings and participated in the litigation until at least December 2012.

At a hearing later in March 2015, the trial court asked counsel for Kwan whether Kwan still had "active cross-complaints against defaulted non-appearing cross-defendants[.]" Counsel for Kwan explained the "Isaacson Parties" were not defaulted and "their defaults weren't taken." The trial court sought further clarification of the situation, asking, "So with

respect to Mr. Isaacson . . . he was not defaulted? He answered to your cross-complaint?” Counsel for Kwan responded, “They answered—originally, they filed an answer with—when he was represented by counsel, they did . . .” After additional discussion with Kwan’s attorney, the trial court summed up the then-existing procedural posture: “The point is that you still have an active cross-complaint against Isaacson. And since he did answer, then you wish to proceed on a prove-up [basis] against him.” The court set a new date for trial that would “includ[e] the Kwans’ prove-ups against any answered, but non-appearing defendants.”

At trial on Kwan’s claims against the Isaacson Parties, Hofferth did not make an appearance. Kwan’s attorney told the trial court that “[t]he liability for Miss Hofferth is basically by way of . . . dec relief. She’s Mr. Isaacson’s wife and a spouse is liable for the negligence, you know, of another spouse.” Over the course of two days, Kwan’s lawyer examined a number of witnesses and otherwise presented evidence intended to describe the landslide, explain how Isaacson’s negligence was responsible for the landslide, establish Kwan had rented his property out for various filming and photography purposes, and calculate the amount of money Kwan was paid for those rentals. Near the end of the presentation of evidence, Kwan’s attorney read deposition testimony from Hofferth into the record to establish she married Isaacson in 2006, separated from him in 2009, and was still legally married to him as of January 6, 2015.

The trial court rendered its verdict later in April 2015, granting judgment for Kwan as against Isaacson but not against

Hofferth. Kwan thereafter moved to amend the judgment, and he also moved for a new trial.<sup>1</sup>

At the hearing on the motions, Kwan argued the judgment should be amended because the trial court had not awarded him the full amount of damages he sought, and because, in his view, Hofferth should also have been held liable because “she was in default.” Hofferth *did* make an appearance at this motion hearing, although the court remarked she was legally “not entitled to be [t]here” because “this was a default prove-up.” Hofferth told the court she had received several emails from Kwan’s counsel, was not sure whether she was supposed to show up to court or not, and did not know what was going on with the case. The court took the motions under submission.

The court issued an amended judgment in May 2015. It noted Isaacson and Hofferth “filed answers to Kwan’s cross-complaint but failed to appear at trial, so [the] cross-complaint went by way of uncontested prove up . . . .” Substantively, the court’s amended judgment increased the amount of damages Kwan recovered against Isaacson but again found Hofferth was not liable for any damages. Kwan thereafter noticed this appeal.

## II. DISCUSSION

The gist of Kwan’s argument in this court—which is presented over three pages in his 10-page appellate brief—is that the trial court exceeded its jurisdiction and violated his due process rights by entering judgment in Hofferth’s favor. Kwan

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<sup>1</sup> These motions are missing from the appellate record. But the record does include a minute order memorializing the court’s rulings on the motions.

believes the trial court exceeded its jurisdiction in entering judgment for Hofferth because (1) she admitted liability in stipulated judgments entered pursuant to the settlement agreement with other parties to the litigation, and (2) she defaulted, which meant she effectively admitted all of the allegations in the complaint. Neither assertion carries the day.<sup>2</sup> Kwan provides no citation to the record supporting his latter contention (we independently see no indication Hofferth’s default was ever entered), and his first contention is squarely contradicted by the evidence he does cite. Kwan’s due process argument is premised on these same faulty assertions, and it fails for the same reasons.

*A. Kwan Has Not Shown the Trial Court Exceeded Its Jurisdiction by Rendering a Verdict in Hofferth’s Favor*

“On appeal . . . from any judgment, it is the appellant’s responsibility to affirmatively demonstrate error . . . .” (*Teachers’ Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1028.)

““When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.” (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862[ ].) ‘We are not bound to develop appellants’ arguments for them. [Citation.] The absence

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<sup>2</sup> Although Hofferth has not filed a Respondent’s Brief, Kwan still bears “the ‘affirmative burden to show error whether or not the respondent’s brief has been filed,’ and we ‘examine the record and reverse only if prejudicial error is found.’ (*In re Marriage of Davies* (1983) 143 Cal.App.3d 851, 854, 192 Cal.Rptr. 212.)” (*Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1078.)

of cogent legal argument or citation to authority allows this court to treat the contention as waived.’ [Citations.]” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956; see also *Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241, 1252-1253 [“‘[I]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived.’” [Citation.]; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 & fn. 16 [record citations in statement of facts do not cure failure to include pertinent record citations in argument portion of brief].)

Although Kwan asserts Hofferth admitted liability for the landslides in the settlement agreement entered into among the other parties and the related stipulated judgments, the documents themselves contradict Kwan’s position. Neither the stipulated judgments nor the settlement agreement contain any admissions of liability. To the contrary, the settlement agreement contains a provision which specifically provides none of the settling parties were, by entering into the agreement, admitting to liability or fault, or the truth of any allegations made in the litigation. Kwan cites to no other documents in the record that would suggest otherwise. To the extent Kwan argues Hofferth’s mere action of stipulating to the judgment constituted an admission of liability, that argument is unsupported by any authority and is therefore waived.

Kwan’s second contention, that Hofferth “admitted all charging allegations against her” by “failing to move for relief from default,” is similarly unsupported. Here, Kwan fails to cite any document in the record indicating default was in fact entered against Hofferth, and that failure alone dooms his argument under the authority we have already cited. But even if we were

to evaluate this argument based on the record provided to us, the result would be the same. The clerk's transcript does not include an answer filed by Hofferth,<sup>3</sup> but the case summary docket sheet lists no notation indicating the clerk ever entered Hofferth's default. Moreover, counsel for Kwan acknowledged in open court that Hofferth and Isaacson had previously filed answers to Kwan's cross-complaint. Thus, on this record, not only was there no default entered against Hofferth, a default could not have been entered against her. (*Wilson v. Goldman* (1969) 274 Cal.App.2d 573, 577 ["Where a defendant has filed an answer, neither the clerk nor the court has the power to enter a default based upon the defendant's failure to appear at trial . . ."] (*Wilson*).)<sup>4</sup>

Kwan therefore bore the burden of proving the essential allegations of his complaint. The trial court determined he had

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<sup>3</sup> There are a number of "answers" to Kwan's cross-complaint referenced in the case summary docket sheet that is included in the appellate record, but the docket sheet does not indicate which parties filed those answers.

<sup>4</sup> As *Wilson* explains, a party's failure to appear for trial after filing an answer is not the same as failing to answer a complaint and suffering the entry of default. (*Wilson, supra*, 274 Cal.App.2d at p. 577, fn. 1 ["[W]here a defendant who has answered fails to appear for trial, the correct procedure is to proceed with the trial for which the defendant has had notice to which he has failed to respond. The trial is uncontested only in the sense the defendant is not present to participate. His answer is on file and is effective. Thus the plaintiff is required to prove all the essential allegations of the complaint controverted by the answer"].)



done so as to Isaacson, but not Hofferth. Kwan has not affirmatively demonstrated the trial court erred in so finding.<sup>5</sup>

*B. Kwan Has Not Demonstrated the Trial Court Violated His Due Process Rights*

Kwan's second argument, that the trial court violated his due process rights, similarly fails. Kwan posits the trial court "necessarily must have" considered evidence he was not permitted to address in reaching its finding because Hofferth had admitted liability. As already discussed, Kwan has not established Hofferth made any such admissions. Further, his suggestion that the trial court considered evidence of which he was not given notice is mere conjecture. "An appellate court "must presume that the record contains evidence to support every finding of fact . . . ." [Citations.] It is the appellant's

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<sup>5</sup> Kwan appears to argue, with only a passing reference to authority, that because Hofferth and Isaacson were married and because the trial court had previously determined Isaacson's conduct did not rise to the level of being criminal, Hofferth should have been found liable at least to the extent of her share of community property assets. Assuming Kwan would need to reach community assets in order to satisfy the judgment against Isaacson, he nevertheless had no right to judgment against Hofferth simply because she was Isaacson's wife. (Fam. Code, § 1000, subd. (a) ["A married person is not liable for any injury or damage caused by the other spouse except in cases where the married person would be liable therefor if the marriage did not exist"]; see also *11601 Wilshire Associates v. Grebow* (1998) 64 Cal.App.4th 453, 457 [the plaintiff could not state a cause of action against defendant's spouse simply to afford the plaintiff "greater rights" as a judgment creditor where there were no allegations the spouse committed any wrongful act].)

burden . . . to identify and establish deficiencies in the evidence. [Citation.]” (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.) Kwan has not carried that burden.

#### DISPOSITION

The judgment is affirmed. Because respondent did not appear on appeal, no party shall recover costs. (Cal. Rules of Court, rule 8.278(a)(5).)

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

RAPHAEL, J.\*

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