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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FRANCESCHI LAW
CORPORATION,

Plaintiff and Respondent,

v.

SUE TSANG,

Defendant and Appellant.

B266937

(Los Angeles County
Super. Ct. No. BC533357)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Affirmed.

Sue Tsang, in pro. per., for Defendant and Appellant.

Franceschi Law Corporation and Ernest J. Franceschi, Jr.,
for Plaintiff and Respondent.

* * * * *

In this dispute between a law firm and its former client, the trial court imposed terminating sanctions against defendant Sue Tsang due to her recalcitrance during discovery. It then entered judgment awarding a portion of certain settlement funds to plaintiff Franceschi Law Corporation (the law firm) and the balance to Tsang. Tsang appealed the judgment. Acting without an attorney, Tsang did not provide a complete clerk's transcript and her briefs do not adequately address the salient issues or include sufficient citations to the record. Because she failed to carry her burden to demonstrate reversible error, we affirm.

BACKGROUND

According to the law firm's first amended complaint (FAC),¹ it represented Tsang in a legal malpractice action against her former attorney as a result of that attorney mishandling a dental malpractice case brought by Tsang. The parties entered an attorney-client agreement providing the law firm would be paid 45 percent of the gross amount of any recovery in the legal malpractice case. After the legal malpractice case was scheduled for trial, Tsang received a Code of Civil Procedure section 998 offer to settle for \$20,000. According to the law firm's complaint, Tsang accepted the offer on the record in open court and the court found Tsang entered the settlement knowingly and voluntarily.

Upon receiving the \$20,000 settlement, the law firm sent Tsang a "Disbursement Memorandum" accounting for all costs incurred in the lawsuit and the law firm's fee of 45 percent. The

¹ The law firm apparently filed a second amended complaint (SAC) reasserting the same claims as the FAC, but the FAC is the only complaint contained in the record. For the purpose of our decision, we will assume the basic facts did not change between the FAC and SAC.

Disbursement Memorandum indicated Tsang would receive \$6,958.83 and the law firm would retain the balance of \$13,041.17 (\$9,000 for fees plus \$4,041.17 for costs). The law firm requested Tsang sign and notarize the memorandum. Tsang repeatedly refused to sign the memorandum, disputing the amounts and contending she was entitled to the full \$20,000.

The law firm filed this lawsuit against Tsang for tortious breach of contract and declaratory relief. For both causes of action, the law firm sought damages in the amount of \$13,041.17—its portion of the \$20,000 settlement—plus unspecified consequential and punitive damages, prejudgment interest, and costs.

As litigation proceeded, Tsang deluged the trial court with lengthy and repetitive filings. Among them were several cross-complaints, characterized by the trial court as alleging the law firm “pressured [Tsang] to accept the \$20,000 settlement, fraudulently cashed the settlement check without her signature, improperly handled her case by hiring unnecessary expert witnesses, and failed to prepare Tsang for trial in the first case.” She sought \$19,700 of the \$20,000 settlement and other damages.

When Tsang disobeyed multiple court orders to appear for her deposition and respond to written discovery, the law firm moved for monetary and terminating sanctions. The court imposed monetary sanctions but declined the request for terminating sanctions. The court explained Tsang had failed to appear for her deposition on multiple dates, including after the court granted a motion to compel her attendance. She finally appeared but refused to proceed. The court found Tsang’s actions “constitute an abuse of the discovery process,” but her refusal amounted to “at most a violation of one court order.” Hence,

“terminating sanctions are a harsh sanction and the court is not convinced that less severe sanctions would not be effective at this stage.”

Tsang’s recalcitrance apparently continued because the court ultimately entered an order granting terminating sanctions, striking Tsang’s answer, and dismissing her cross-complaint with prejudice. The record does not contain the law firm’s motion requesting terminating sanctions, any explanation of the court’s reasoning, or any transcript of a hearing on the motion.

Tsang moved for reconsideration of that ruling, which the court denied. While the record includes the court’s tentative decision on the motion for reconsideration, the decision did not explain the basis for granting the motion initially. It simply concluded Tsang’s reconsideration motion “merely chronicles her dissatisfaction with the court, her former counsel, and Plaintiff” and attempts to “rehash arguments made during the hearing for terminating sanctions.”

The court entered judgment in favor of the law firm. Though the record contains no documentation, the judgment indicates the court held a “prove-up” hearing during which the law firm was present and Tsang was present for “portions of the hearing.” As reflected in the judgment, the court found: “Pursuant to the attorney-client agreement and the disbursement memorandum filed as exhibits one and two respectively to plaintiff’s prove-up brief, plaintiff is entitled to recover a total of \$13,041.17 of the proceeds received in settlement of the case *Tsang v. Roberts*, case no. 30-2012-00585513-CU-PN-CJC. The balance of \$6,958.83 is to be distributed to defendant. Cross-

Defendant is entitled to judgment in its favor.” The court awarded \$1,235 in costs to the law firm.²

Tsang appealed the judgment.

DISCUSSION

1. Mootness

The law firm filed a motion to dismiss the appeal as moot because Tsang cashed a check for \$5,723.83 from the law firm, which represented the \$6,958.83 awarded to her in the judgment minus \$1,235 in costs.³ We deny the motion.

The law firm does not contend the check represented any kind of settlement between the parties, so the question is whether Tsang’s act of cashing the check forfeited her right to appeal. “It is the general rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal, since the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is renunciation of the other.” (*Mathys v. Turner* (1956) 46 Cal.2d 364, 365.) But there is an exception “where the appellant is concededly entitled to the benefits which are accepted and a reversal will not affect the right to those benefits.” (*Ibid.*) This exception may apply in cases “where

² The record contains the law firm’s memorandum of costs in the amount of \$1,235 but does not contain an order awarding those costs. Nonetheless, the law firm indicates those costs were awarded and Tsang does not contend otherwise.

³ The law firm also raised this issue in its respondent’s brief. But because the argument rested on evidence outside the appellate record, the issue is properly raised in the law firm’s motion to dismiss. (*American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 557.)

portions of the judgment appealed from are conceptually severable from those portions accepted.” (*Trollope v. Jeffries* (1976) 55 Cal.App.3d 816, 825; see *Lee v. Brown* (1976) 18 Cal.3d 110, 115.) Similarly, “[a]n appeal is not inconsistent . . . where the appellant is simply attempting to augment the judgment and the relief sought would not jeopardize the amount already collected.” (*Heacock v. Ivorette-Texas, Inc.* (1993) 20 Cal.App.4th 1665, 1670.)

That is clearly the case here. In its complaint, the law firm sought payment of \$13,041.17 from the \$20,000 settlement, representing the fees and costs it claimed it was owed. These allegations tacitly conceded Tsang was entitled to \$6,958.83, the balance of the \$20,000. The judgment divided the funds exactly along that line: \$13,041.17 to the law firm; \$6,958.83 to Tsang. The law firm deducted its costs for this lawsuit from the amount Tsang was awarded, resulting in the check to her for \$5,723.83. The outcome of this appeal would have no effect on her entitlement to that amount: win or lose, Tsang would be entitled to *at least* \$5,723.83. Thus, cashing a check for that amount was not inconsistent with her challenge to the judgment. We will address the merits of her appeal.

2. Merits

Tsang filed an incomplete clerk’s transcript⁴ and her briefs focus on complaints she has with the law firm’s handling of the underlying legal malpractice case. Most of her points are not

⁴ The law firm attempted to file a respondent’s appendix but it was rejected because the law firm failed to designate it as part of the record. Unhelpfully, the law firm cited *only* its rejected respondent’s appendix to support the facts in its respondent’s brief.

supported by record citations. Where she does provide citations, they mostly point us to her own motions in the trial court, not to evidence. As appellant, Tsang bears the burden to demonstrate error by an adequate record. (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 (*Interinsurance Exchange*)). She was also required to include adequate citations to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) She is not exempt from these rules even though she is not represented by an attorney. (*Nwosu, supra*, at pp. 1246-1247.)

We will briefly address the issues we can identify that might have some impact on the judgment in this case, but we find none meritorious.

a. Motion to Transfer Venue

Tsang argues the trial court should have granted a motion to transfer the case to San Bernardino County because she resided there and the underlying acts occurred there. The court found the motion procedurally defective and found venue proper in Los Angeles County because the parties entered the retainer agreement in Los Angeles and the payment of fees was to be performed in Los Angeles.

We lack jurisdiction to review this ruling because “[r]eview of an order granting or denying a motion for change of venue lies only by petition for writ of mandate. (Code Civ. Proc., § 400.)” (*Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 41-42.)

b. Discovery Protective Order

Tsang argues the trial court should have granted a motion for a discovery protective order and sanctions against the law firm because the law firm made premature and repeated

demands to depose her without first meeting and conferring and because it served six sets of interrogatories comprised of 409 questions.

The court denied the motion for a protective order for Tsang's deposition because the motion was procedurally defective and untimely filed a month after her deposition was noticed.⁵ The court denied the motion for a protective order regarding the interrogatories because a hearing on the law firm's pending motion to compel responses was set for a few days later.⁶ The court imposed \$2,175 in sanctions against Tsang for her unsuccessful motion, implicitly finding Tsang did not act "with substantial justification" in filing it. (Code Civ. Proc., § 2031.060, subd. (h) [court shall impose monetary sanctions for unsuccessful motion for protective order "unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust"].)

We review the court's refusal to issue a protective order for abuse of discretion, which only occurs when the court's decision "'exceed[s] the bounds of reason.'" (*People v. Sarpas* (2014) 225 Cal.App.4th 1539, 1552.) "[W]here there is a [legal] basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court.'" (*Ibid.*) Tsang has failed to offer any cogent or factually

⁵ At the same time it considered her motion, the court granted the law firm's pending motion to compel Tsang's deposition and granted sanctions against Tsang in the amount of \$2,900.

⁶ The record contains a minute order indicating that motion to compel was granted, but the record does not contain an explanation for the court's decision.

supported argument why the court abused its discretion with these rulings. We therefore reject her challenge.

c. Designating as Limited Jurisdiction Case

Tsang challenges the trial court's refusal to designate the case as limited jurisdiction because the amount at issue was less than \$25,000. (Code Civ. Proc., § 85, subd. (a).) The trial court denied her request because the law firm had been given leave to amend the FAC and the issue of punitive damages was outstanding.

As noted above, the law firm filed an SAC, but it was not included in the clerk's transcript so we do not know precisely how the law firm amended the FAC. We do know the SAC again asserted claims for tortious breach of contract and declaratory relief. As the law firm argued and the trial court noted, declaratory relief is not available in a limited jurisdiction case with certain exceptions not applicable here. (Code Civ. Proc., § 580, subd. (b)(4); see *Minor v. Municipal Court* (1990) 219 Cal.App.3d 1541, 1547-1548.) The law firm's declaratory relief claim therefore prevented the court from designating the case as limited jurisdiction and Tsang's request was properly denied.

d. Terminating Sanctions

We review the trial court's imposition of terminating sanctions for abuse of discretion. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992.) Tsang asserts no coherent argument as to how the court abused its discretion in imposing sanctions striking her answer and cross-complaint. She has also failed to include any documents in the record explaining the court's rationale.

The court had authority to strike Tsang's pleadings as a sanction for her abuse of the discovery process. (Code Civ. Proc.,

§ 2023.030, subd. (d).) Presuming the court issued terminating sanctions because Tsang continued her pattern of refusing to comply with her discovery obligations, the record before us shows the court imposed terminating sanctions only after monetary sanctions did not succeed in compelling Tsang's compliance. (See *Doppes v. Bentley Motors, Inc.*, *supra*, 174 Cal.App.4th at p. 992 ["If a lesser sanction fails to curb misuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher sanctions until the sanction is reached that will curb the abuse."].) On this record, we will allow the sanctions to stand. (*Interinsurance Exchange*, *supra*, 30 Cal.App.4th at p. 1448 [allowing sanctions to stand when appellant failed to include record explaining reasoning for sanctions].)

DISPOSITION

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

HALL, J.*

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

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