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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

WALDTRAUT BETCHART,
Plaintiff and Respondent,
v.

LUDWIG BETCHART, INC.
Defendant;

ANTHONY BETCHART,
Intervener and Appellant.

A131137

(Alameda County
Super. Ct. No. HG08414575)

Intervener Anthony Betchart (Tony) appeals from an order that awarded him \$5,370.65 in costs after he requested the sum of \$20,816.87 in costs. He contends that he was entitled to costs that the trial court disallowed. We are not persuaded by Tony's arguments and affirm the trial court's costs order.

BACKGROUND

Waldtraut Betchart (Wally) was married to Ludwig Betchart (Ludwig), and they had six children. One of the children is Tony. Wally and Ludwig had a family business, Ludwig Betchart, Inc. (LBI), which rents out heavy construction equipment.

Ludwig died in 2003. Two years later Wally, who had been actively involved in the family business, made Tony president and a 51 percent shareholder of LBI. Wally, who was 75 years old at that time, retained a 46 percent ownership interest. Another son held a three percent ownership interest.

On October 10, 2008, Wally filed a verified complaint against LBI seeking dissolution under Corporations Code section 1800. Wally alleged that Tony had engaged in a course of self-dealing, consisting of siphoning off hundreds of thousands of dollars in cash and transferring equipment belonging to LBI to his wholly-owned companies. LBI, through its attorney, J. Michael Brown, answered the complaint, denied the material allegations, and filed a cross-complaint against Wally.

On December 14, 2009, the trial court granted Wally's request to appoint a receiver to take over the management and operation of LBI. Subsequently, after a hearing, on January 21, 2010, the court confirmed the appointment of a receiver.

Tony, through his attorney, Brown, filed a request to intervene. On February 25, 2010, the trial court granted Tony's request to intervene. On March 1, 2010, Tony filed his amended complaint in intervention.

On March 12, 2010, the trial court granted the application of the receiver to discharge Brown as the attorney for LBI. The court authorized the receiver to retain new counsel, Brad C. Brereton, to represent the corporation for all pending litigation. Brown continued to provide legal representation to Tony.

The trial was scheduled to start on May 21, 2010. On that date, Brown appeared on behalf of Tony, Brereton appeared by conference call for LBI, and Wally had her own counsel. Only counsel for Tony and Wally were present for the court trial on May 24 through May 27, June 2, July 8, and July 12. On June 1, 2010, Brereton appeared on behalf of the receiver for LBI and counsel for Wally and Tony appeared.

The court filed its statement of decision on September 3, 2010. The court found that Wally had failed to prove by a preponderance of the evidence any of her claims against Tony, and that she had not proved that LBI should be dissolved. The court entered its judgment on September 15, 2010.

On September 24, 2010, Brown filed a memorandum of costs, asking for a total of \$20,816.87. On October 13, 2010, Wally filed a motion to tax costs. She requested that the following costs not be allowed: filing and motion fees in the amount of \$320 on the grounds that intervener Tony did not file an answer; mileage costs for the deposition in

the amount of \$324 on the grounds that there was no supporting documentation; expert witness fees in the amount of \$1,050 on the grounds that the fee was not properly chargeable; deposition fees of \$6,502.22 on the basis that the depositions occurred before Tony was a party to the lawsuit; court-ordered transcripts in the amount of \$250 on the ground that there were no court-ordered transcripts for the dates identified; and mediation fees in the amount of \$7,000 on the ground that the mediation occurred when Tony had not yet become a party to this action.

The trial court ordered the parties to appear for a hearing on the motion to tax costs. At the hearing on December 2, 2010, Brown argued that the costs were for the work he had done while representing LBI and his legal work for Tony. The court explained that there was no statutory basis for the \$324 mileage cost associated with the deposition or the \$1050 expert witness fee. The court added that the \$6,502.22 deposition costs and the \$7,000 mediation fees were not the obligation of Tony, as an individual. The court noted that the \$250 “court ordered transcripts were not in fact court ordered.” Counsel for Wally argued that the mediation fees also were not recoverable because the court did not order mediation.

Brown admitted that Tony was not a party at the time the mediation and deposition costs were incurred, but maintained that he was entitled to the fees because he represented LBI at that time. Brown acknowledged that the transcripts were not court ordered, but insisted that the court wanted the transcripts for consideration. Brown conceded that he was not entitled to the expert witness fees. Counsel for Wally responded that LBI did not make a motion for costs and there was no statutory basis for awarding fees to Brown as counsel for Tony when the legal work was done before Tony had become a party in the action.

On December 6, 2010, the court issued its order granting in part Wally’s motion to tax costs. The court ruled that “all amounts are taxed or disallowed except for five-thousand, three-hundred and seventy dollars and sixty-five cents (\$5,370.65) now awarded to” Tony.

On February 8, 2011, Tony filed a timely notice of appeal from this order.

After the notice of appeal was filed, on February 23, 2011, Breton, counsel for LBI, filed a memorandum of costs seeking costs in the amount of \$14,146. On May 3, 2011, Brown substituted in for Brereton as the counsel for LBI.¹

On June 3, 2011, Wally filed a motion to tax the costs of LBI. In addition to objecting to specific costs, Wally asserted that LBI had waived its right to recover costs by failing to comply with the mandatory deadline for submitting a memorandum of costs. Brown, as counsel for LBI, filed the opposition to Wally's motion to tax costs.

The trial court filed its order on August 2, 2011, granting Wally's motion to tax costs. The court found that LBI did not provide the court with information to substantiate the claimed cost of \$320 for filing and motion fees. The court also found that LBI did not provide the court with sufficient facts or details to support the reasonableness of the total amount of \$6,826 deposition costs or any lesser amount, and there was no documentation establishing that these charges were related to the current action rather than to other pending actions. The court noted that the mediation was not a court-ordered mediation and LBI did not provide the court with sufficient facts or details to support the reasonableness of the total amount of \$7,000 or any lesser amount. The court added, "The mediation attempted to resolve several pending actions between the parties."

On November 29, 2011, this court granted Wally's unopposed request for judicial notice of documents in the trial court that were not included in the appendix submitted by Tony. Subsequently, Tony filed a request for judicial notice of additional documents in the trial court and this court deferred any decision on this request. We hereby grant Tony's request for judicial notice of the three documents in the trial court related to LBI's requests to tax costs.

¹ In May 2011, a writ of execution in favor of LBI for \$15,234.10 was issued and, shortly thereafter, a levy of Wally's bank account was issued. Wally filed a motion to vacate the writ of execution. On May 19, 2011, the court issued an order that the writ was not to be enforced and all seized funds were to be released to counsel for Wally to hold in trust pending further order of the court.

DISCUSSION

Tony requested costs in the amount of \$20,816.87, and the court awarded him \$5,370.65. Tony maintains that this was error. We review the trial court's award of costs for an abuse of discretion and the court abuses its discretion if it refuses to award costs mandated by the statute. (See *Heller v. Pillsbury, Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1395.)

Preliminarily, Tony argues that we "must assume that the trial court's order sustained all the objections [he] made to the costs in the motion to tax costs." His argument has no merit. Firstly, Tony fails to make any citation to the record and never specifies what objections he made. Secondly, he has not demonstrated that he requested any ruling on his objections. The transcript of the hearing on Tony's motion to tax costs establishes that he made no such request, and there was no discussion of any objections. Consequently, contrary to Tony's argument, we presume the court denied his objections and any objections he may have had were waived. (See, e.g., *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1421.)

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b).)² Here, it is undisputed that Tony was the prevailing party. The trial court did award him costs but he objects to the amount awarded, and claims that the court disallowed costs that he should have received.

Tony argues that the trial court rejected his request for costs on the basis that the fees were incurred before he became a party in the lawsuit. He maintains that the court accepted all the costs as necessarily incurred as "[a] verified memorandum of costs is prima facie evidence that costs claimed have been necessarily incurred." (*Jeffers v. Screen Extras Guild, Inc.* (1955) 134 Cal.App.2d 622, 623.)

In arguing that Brown was entitled to ask for the costs of litigation for both Tony and LBI even though Brown was not LBI's counsel at the time the request for costs was

² All further unspecified code sections refer to the Code of Civil Procedure.

made, Tony relies on *Gustafson v. Dunman, Inc.* (1962) 204 Cal.App.2d 10 (*Gustafson*). In *Gustafson*, four individual defendants filed a cost bill, and the appellate court held that “it was not shown” that the defendants were “not united in interest” and therefore the costs should have been apportioned “in the discretion of the court among the parties ‘on the same or adverse sides’ [citation].” (*Id.* at p. 14.)

In the present case, the issue is not apportionment. No attorney in *Gustafson*—as is the situation in the present case—was attempting to collect costs on behalf of defendant who was not that attorney’s client at the time the request was made.

Here, the party that allegedly incurred the costs, LBI, failed to submit a timely memorandum of costs. (See Cal. Rules of Court, rule 3.1700(a)(1).) The trial court properly disallowed costs requested by Tony that were incurred when Tony was not a party to the lawsuit. Brown may have completed this work on behalf of LBI but Brown was not counsel for LBI when the memorandum of costs was filed on September 24, 2010. Brown did not substitute in for Brereton as the attorney for LBI until May 3, 2011.

Allowable costs are identified in section 1033.5, subdivision (a) and costs not allowed are set forth in this same statute at subdivision (b). Fees of experts not ordered by the court are, as Tony conceded, clearly not permitted. (§ 1033.5, subd. (b)(1).) Accordingly, the court properly rejected the claim for \$1050 for expert witness fees. Additionally, “[t]ranscripts of court proceedings not ordered by the court” are not allowed. (1033.5, subd. (b)(5).) Tony maintains that the court requested the transcript, but he cites no such order in the record establishing this. Thus, the fee of \$250 that he claimed for court-ordered transcripts was not permitted under the statute.

Tony also contends that he was entitled to the costs of \$324 for his mileage to the depositions. The trial court, however, found that this travel to the deposition was done before Tony was a party to the lawsuit. Tony does not dispute this but claims that he is entitled to these costs as LBI was a party to the lawsuit and his attorney was counsel for LBI at that time. As already discussed, we reject this argument. In his brief in this court, Tony does not raise any other specific challenge to the trial court’s ruling on his claim for \$6,502.22 in deposition costs. He has therefore not shown that these costs were incurred

after he became a party to the action or that these costs were associated with the present action rather than other pending lawsuits. Accordingly, Tony has failed to establish that the court abused its discretion when it taxed his requested deposition costs.

Tony also challenges the trial court's ruling that he was not entitled to the cost of mediation. Subdivisions (a) and (b) of section 1033.5 do not mention mediation. However, the court has the discretion to awarded costs in a reasonable amount if the costs are "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (§ 1033.5, subds. (c)(2) & (3).)

In urging us to find that the trial court abused its discretion when deducting the costs associated with the mediation, Tony cites *Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202. The court in *Gibson* held that an award of mediator fees is not statutorily prohibited. The *Gibson* court concluded that a court-ordered, unsuccessful mediation, should be awarded after trial to a prevailing party at the sound discretion of the trial court. (*Id.* at p. 1209.) The court, however, declined to decide whether a prevailing party after a trial is entitled to costs when the mediation is voluntary and unsuccessful. (*Ibid.* at fn. 7.)

In the present case, the court did not order mediation, and the mediation occurred before Tony became a party to this action. Furthermore, it is clear from the trial court's later order regarding costs requested by LBI that the mediation was an attempt to resolve several pending actions between the parties. Given that the mediation involved several cases, we conclude that Tony has failed to show that the mediation was reasonably necessary to the present litigation.

Tony has not established that the costs at issue were recoverable as a matter of law. Furthermore, we conclude that the trial court acted within its discretionary powers when it awarded Tony costs in the amount of \$5,370.65 rather than his requested amount of \$20,816.87.

DISPOSITION

The order awarding costs is affirmed. Tony is to pay the costs of appeal.

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.