

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

SFO FORECAST, INC.,

Plaintiff and Respondent,

v.

EVERLASTING IMAGES, INC. et al.,

Defendants and Appellants.

A133780

(City & County of San Francisco  
Super. Ct. No. CGC-10-503681)

Respondent SFO Forecast, Inc. brought this proceeding against defendants and appellants Everlasting Images, Inc. and Rob Arra (collectively, Everlasting) to recover damages for breach of lease, common counts/money owed, breach of continuing guarantee, fraud, and negligent misrepresentation. The matter was tried in Arra's absence when he failed to appear for trial following the court's denial of his request for a continuance. The court found in favor of SFO Forecast for breach of lease and common counts against Everlasting and for breach of continuing guarantee against Arra, in the amount of \$129,121.73. On appeal from the resulting judgment, Everlasting contends the court abused its discretion in denying its motion for continuance. We affirm.

**I. FACTUAL AND PROCEDURAL HISTORY**

In June 2009, SFO Forecast and Everlasting executed an agreement under which Everlasting subleased a portion of SFO Forecast's retail store in Carmel for 42 months. Arra, president and co-owner of Everlasting signed a "continuing personal guarantee" where he personally guaranteed all of the terms and conditions of the sublease. In or about March 2010, Arra e-mailed SFO Forecast notifying it that Everlasting had left the

premises. At that point, Everlasting already owed SFO Forecast back rent. In May 2010, SFO Forecast served Everlasting with a “Notice of Belief of Abandonment,” and thereafter took possession of the premises.

On September 16, 2010, SFO Forecast filed a complaint alleging several causes of action against Everlasting. On February 4, 2011, the court set the trial date for August 22, 2011. On August 19, 2011, Arra moved for a continuance of trial date, arguing that due to a severe gastrointestinal infection, he was unable to travel. In support of his motion, his counsel averred that he was prepared to go to trial but that he could not effectively defend Everlasting without Arra’s presence. He also stated that he had not learned of Arra’s illness until the morning of August 18, 2011. Arra declared that he had suffered from a gastrointestinal condition for several years and that the condition was exacerbated by travel and sitting for long durations. He further stated that he returned to York, Maine, where he was currently located from Hyannis on Sunday, August 14, 2011, and began to take antibiotics on August 15, 2011. Arra also declared that he was a resident of Florida.

SFO Forecast opposed the motion. It argued that Arra had failed to attend two settlement conferences in June and August 2011 even though the court moved the latter conference to August 12, 2011 to accommodate Arra’s travel schedule. The court apparently excused his failure to appear, based on Arra’s representation that his doctor advised him to avoid unnecessary travel. According to Everlasting, Arra appeared at the conferences by telephone. SFO Forecast pointed out in its declaration that Arra was vacationing in Hyannis during the same week he was scheduled to attend the mandatory settlement conference. It urged the court to deny the request, noting that Arra had never provided any documentation of his condition for the court.

The court heard the motion on August 22, 2011 and ordered it submitted. The court ruled that Everlasting could file a medical declaration from Arra’s physician for the court’s consideration.

Everlasting subsequently submitted the declaration of Beth Hartsock, a family nurse practitioner, with York Family Practice in Maine. Hartsock averred that Arra’s

diagnosis was consistent with diverticulitis. He was being treated with antibiotics which he was currently taking and would be receiving a consultation with a surgeon. Hartsock stated that Arra's "[e]xpected recovery time depends on tolerance of medication plan and surgical opinion." Hartsock further stated that Arra "cannot travel while he is receiving antibiotic treatment for his diverticulitis" and "[his] ability to travel will be determined at surgical consultation by [his physician]."

The court denied the motion on the ground that Hartsock's declaration was insufficient to meet its requirements for a medical declaration. On the day of trial, Everlasting renewed the motion. Counsel for SFO Forecast again opposed the motion arguing that Arra had "a history of not appearing for court-ordered hearings. He didn't appear at the mandatory San Francisco Bar early settlement conference . . . . He did file a request not to have to appear at [the] settlement conference that was about a week and a half ago, [ ] with a lot of the same complaints he makes now. But interestingly in the declaration that he filed he [ ] mentioned that he had recently[ ] just returned from a trip to Hyannis at about the same time that he was supposed to be at the settlement conference and complaining of illness, et cetera. When we appeared for the trial call initially, this request was made and Judge Feinstein was very clear in what she requested be shown in order to consider continuing the trial, a declaration from a medical doctor, not a nurse practitioner. [¶] So while I appreciate that they have a lot of knowledge, but the Judge was clear, from a medical doctor that can talk about the duration of [his] treatment of Mr. Arra, about his current treatment, . . . and specifically addressing his inability to travel. And instead that came from a nurse practitioner that just saw him I guess for [the] first time yesterday and that's why the motion was denied . . . ." <sup>1</sup> Everlasting's counsel conceded that the court had requested something further than what it provided, but that a family nurse practitioner was able to diagnose illnesses. The court denied the motion, finding that Everlasting's showing was insufficient to justify granting the motion.

---

<sup>1</sup> Counsel for Everlasting acknowledged that Hartsock had examined Arra the day prior to the trial.

## II. DISCUSSION

“The decision to grant or deny a continuance is committed to the sound discretion of the trial court.” (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984.) A trial court’s exercise of discretion will be upheld if it is based on a “ ‘reasoned judgment’ ” and complies with legal principles and policies relevant to the particular case before the court. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 815.) An abuse of discretion occurs “ ‘where, considering all the relevant circumstances, the court has exceeded the bounds of reason or it can fairly be said that no judge would reasonably make the same order under the same circumstances.’ ” (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 7.)

A trial court’s discretion in granting or denying continuances is guided by the California Rules of Court, rule 3.1332. Under rule 3.1332(c), motions for “continuances of trials are disfavored.” Rule 3.1332(c) also provides that the court may grant a continuance only upon a showing of good cause, which includes the unavailability of a party or an essential lay or expert witness due to death, illness, or other excusable circumstances.

Everlasting contends that the trial court abused its discretion in denying the motion for a continuance because Arra’s illness made it impossible for him to travel and he was an essential witness at the trial for establishing the market value of the property. We conclude that Everlasting failed to show good cause for a continuance of trial.

First, Everlasting’s request for a continuance was filed at the eleventh hour, only three days before the scheduled trial date. Second, Everlasting failed to provide the medical declaration requested by the court. The record reveals that the court was specific as to the information it sought to justify a continuance based on illness. In particular, the court was interested in learning about the nature of Arra’s treatment and its duration, and the specifics of his inability to travel. Indeed, Everlasting admitted that the declaration it provided was lacking in this regard, but urged the court to accept the declaration submitted by Arra’s nurse practitioner.

In the declaration, Hartsock failed to disclose the course of treatment and its duration, and was inconsistent regarding Arra's ability to travel. While she stated that Arra was unable to travel while on antibiotics, she also stated that his ability to travel would not be determined until after he had a surgical consultation with Dr. Kevin Looser. There was no indication as to the projected length of Arra's treatment with antibiotics nor when he would meet with Dr. Looser. In short, there was insufficient information in the declaration to determine whether Arra had an adequate medical excuse for not appearing at trial.

Third, as counsel for SFO Forecast argued, Arra had a history in this case of not appearing for conferences due to travel and illness. The court, no doubt, was concerned that Arra's belated request for a continuance was yet another attempt to delay the proceedings. Further, the court learned that although defendant claimed he could not attend the mandatory settlement conference based on illness, he was instead vacationing in Hyannis that same week. Under these circumstances, we cannot conclude that the court abused its discretion in denying the continuance.

Finally, Arra failed to demonstrate that his testimony was essential to his defense of the case. While on appeal he argues that his testimony was essential to establish the market value of the property, he did not make an offer of proof below nor did he show that his testimony was the only means of establishing fair market value. It is well settled that "[t]o establish good cause for a continuance because of the unavailability of a witness, a party must show that he or she 'exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' [Citations.]" (*Jensen v. Superior Court* (2008) 160 Cal.App.4th 266, 270-271.) Here, Everlasting failed to show that the evidence concerning fair market value about which Arra planned to give testimony could not be proven by other means. As SFO Forecast argues, Everlasting could have presented an expert witness to testify to the valuation of the rental property. On the facts

before us, Everlasting failed to demonstrate good cause for a continuance. The trial court properly denied the motion.

**III. DISPOSITION**

The judgment is affirmed.

---

RIVERA, J.

We concur:

---

RUVOLO, P. J.

---

SEPULVEDA, J.\*

\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.