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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PETER JOHN BACOGIANNIS, et al.
Plaintiffs and Respondents,
v.
DAVID MARTIN CHERVIN,
Defendant and Appellant.

A141565

(Alameda County
Super. Ct. No. HG11580282)

Defendant David Martin Chervin appeals the trial court's order enforcing a Code of Civil Procedure section 998 Offer to Compromise (Section 998 Offer) on the ground there was never any meeting of the minds as to the agreed terms of settlement. He also claims error in the trial court's denial of his motions to reconsider and to reduce the amount of the judgment. We find no merit to any of these points of error and therefore affirm.

I. STATEMENT OF FACTS

Respondents Peter Bacogiannis and Scott Murphy (respectively Bacogiannis and Murphy or collectively "plaintiffs") were injured in a rear-end collision caused by appellant David Martin Chervin on August 21, 2009. Because Bacogiannis and Murphy were acting within the scope of their employment when they were injured, Endurance Reinsurance Corporation ("Endurance") paid their medical expenses and workers' compensation claims.

Bacogiannis and Murphy filed separate suits against Chervin for the injuries they sustained in the collision, in June and August of 2011, and Endurance filed a complaint in

intervention in December of that year to recover the costs of the workers' compensation benefits it paid to plaintiffs. These actions were consolidated on February 3, 2012.

On June 10, 2013, Chervin attempted to settle Endurance's complaint in intervention with a Section 998 Offer. Endurance accepted the Section 998 Offer unconditionally, returned a signed copy to Chervin, and the offer to compromise and acceptance were filed with the trial court on June 21, 2013.

To memorialize the agreed compromise, Chervin sent Endurance a proposed written settlement agreement which included an assignment of workers' compensation lien rights to Chervin. This was a significant modification of the original offer because Endurance held a total of $161,322.05 in lien rights ($98,182.13 for Bacogiannis and $63,139.92 for Murphy). Because the Section 998 Offer made no mention of an assignment of workers' compensation lien rights, Endurance responded by sending its own draft of a settlement agreement without the assignment of lien rights. Chervin refused to sign, and negotiations came to a standstill.

The consolidated cases went to jury trial on June 24, 2013, but proceeded to verdict solely on the complaints by Bacogiannis and Murphy. Even though the terms of settlement resolving Endurance's complaint in intervention were never memorialized by written settlement agreement, Endurance dismissed its complaint at the outset of trial in exchange for an assignment to plaintiffs of lien rights to the medical expense and workers' compensation payments it had made to them.

The terms of the agreement to assign the lien rights are not disclosed in the record, but counsel for Endurance signed a declaration indicating that, when the settlement with the plaintiffs was negotiated, the parties "contemplated enforcement of the 998 Offers." Endurance's counsel also acknowledged in court that plaintiffs paid money for the assignment of the lien rights, and that plaintiffs would not receive a double recovery because they "would still be reimbursing Endurance for the lien."

Consistent with its conduct and with these representations to the court, Endurance prepared, filed and served on all parties a notice of assignment, stating in the notice that "these assignments are made pursuant to and as a condition of the settlement reached

between Plaintiffs Bacogiannis and Murphy and Intervenor Endurance Reinsurance Company."

On July 3, 2013, the jury awarded Bacogiannis $83,548 and Murphy $99,660, or a total of $183,208. Included in the award were amounts for medical expenses ($13,867 to Murphy, and $10,970 to Bacogiannis), past lost earnings ($60,093 to Murphy, and $46,078 to Bacogiannis), and general damages ($25,700 to Murphy, and $26,500 to Bacogiannis).

On September 9, 2013, plaintiffs filed a post-trial motion to enforce the Section 998 Offer. Chervin opposed the motion on grounds that (1) there had never been a meeting of the minds between Chervin and Endurance so that a binding contract was never entered; and (2) plaintiffs did not have standing to enforce the settlement agreement. After the court granted the motion on November 26, 2013, Chervin filed a motion for reconsideration and a motion to reduce the judgment by $35,000, claiming if he were forced to pay both the settlement amount and the judgment, it would give plaintiffs a double recovery in the amount of $35,000. Finding that Chervin had presented no evidence of double recovery, the trial court denied both motions.

Chervin timely appealed.

II. DISCUSSION

Chervin grounds his appeal on three points. First, he alleges the trial court erroneously granted the plaintiffs' motion to enforce a settlement based on the Section 998 Offer. Second, he alleges the court abused its discretion in denying his motion for reconsideration. Third, he claims the trial court erroneously denied his motion to reduce the judgment to prevent double recovery.

A. *The Court's Order Enforcing the Section 998 Offer*

1. Standard of Review

Chervin contends the facts surrounding the Section 998 Offer are not in dispute and therefore our review of the court's enforcement of that offer is de novo. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888; *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 797.) Plaintiffs, on the other hand, contend

the facts are in dispute and thus our standard of review is for substantial evidence. (See *Scott v. Common Council* (1996) 44 Cal.App.4th 684, 689; see also *Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360 (*Osumi*) ["The trial court's factual findings on a motion to enforce a settlement pursuant to section 664.6 'are subject to limited appellate review and will not be disturbed if supported by substantial evidence.' "].) Plaintiffs are correct that our standard of review on the settlement enforceability issue is for substantial evidence. (*Osumi*, at p. 1360.)

2. The Court's Determination the Parties Had Agreed to a Settlement is Supported by Substantial Evidence

A settlement agreement is a form of contract subject to general principles of contract law. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810.) As with all written contracts, the intention of the parties to the agreement is generally ascertained by the writing alone. (Civ. Code, § 1638.) Section 998 offers, once given, are interpreted only by the terms and conditions stated at the time of the offer. (Code Civ. Proc., § 998, subd. (b).) Ambiguities in the offer are interpreted against the offeror. (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 727.)

Chervin contends the terms of the Section 998 Offer are not enforceable as a settlement because there was never a meeting of the minds between Endurance and himself as to what they were agreeing upon. In support of this argument, he emphasizes that one of the material terms of the Section 998 Offer was the "notarized execution and transmittal of a written settlement agreement and general release."

To the extent Chervin actually intended the settlement agreement to include assignment of lien rights to him, a secret or uncommunicated intention is irrelevant to the formation of a contract. (Civ. Code, § 1565; *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579–580.) The court was entitled to find that, by its plain meaning, the language anticipating a settlement agreement meant simply that memorialization of the terms of the Section 998 Offer in the form of a written contract was an expected formality and that the settlement agreement would reflect the same terms stated explicitly in the Section 998 Offer. Reading it instead as an open-ended invitation to negotiate, as Chervin does, would have been contrary to the purpose of the section 998 procedure, which as invoked

here sought to bring about a definitive resolution to the pending dispute concerning Endurance.

Once Endurance accepted the Section 998 Offer, Chervin prepared a proposed settlement agreement, but included a clause assigning Endurance's workers' compensation liens to himself, which materially changed the parties' bargain. Because Endurance was unwilling to agree to this new term, Chervin insists there was a failure to agree upon anything in the first instance. (*Lindsay v. Lewandowski* (2006) 139 Cal.App.4th 1618, 1622 (*Lindsay*) ["A settlement agreement, like any other contract, is unenforceable if the parties fail to agree on a material term or if a material term is not reasonably certain."].) But the impasse came too late to be characterized as a failure to agree on anything enforceable. At most, it evidenced a refusal by Endurance to re-open a completed negotiation. The trial court was entitled to find, as it impliedly did, that at the moment Endurance unconditionally accepted the Section 998 Offer, there was a binding and enforceable contract. (See Civ. Code, §§ 1565, 1580–1583; see also *Berg*, *supra*, 120 Cal.App.4th at 727.)

The court was also entitled to find that an assignment of lien rights was not part of the contract. The Section 998 Offer—which Chervin wrote—stated he would pay Endurance a sum of $35,000 in exchange for Endurance's execution of (1) a request for dismissal of the action with prejudice and (2) a written settlement agreement and general release. There was nothing indefinite or uncertain about these terms. Unlike the *Lindsay* case, where it was not clear what a settlement stipulation meant in referring to resolution of future disputes by " 'binding mediation,' " the Section 998 Offer here, by its terms, was clear enough to be enforceable and did not invite or require further negotiation. (*Lindsay*, *supra*, 139 Cal.App.4th at pp. 1622–1623.)

Chervin claims that statements on the record by Endurance and by the trial court confirm there was no settlement. The statements to which he refers are taken out of context. We do not read them to mean the parties never agreed to anything, or agreed to something uncertain in meaning, or simply agreed to continue negotiating. We take them to mean only that the parties could not resolve their disagreement over the new lien-

assignment term Chervin demanded. Nor are we persuaded that an assignment of lien rights was necessarily implied in the term "settlement agreement." There was bargained-for consideration on both sides without a lien assignment. The inclusion of an assignment of lien rights might well have given Chervin a better deal, but its inclusion was not essential to an enforceable contract.

We conclude the trial court's finding of an enforceable settlement contract here is supported by substantial evidence. Chervin has failed to provide an adequate record to overcome the presumption of correctness to which that finding is entitled. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

B. *The Court Did Not Abuse Its Discretion in Denying Chervin's Motion for Reconsideration*

A motion for reconsideration must be based on new or different facts, circumstances, or law, and the moving party must explain why he did not provide that evidence previously. (Code Civ. Proc., § 1008, subd. (a); *Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1027–1028.) Trial courts are afforded broad deference when ruling on motions for reconsideration and their decisions can only be reviewed for an abuse of discretion. (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 265.)

Chervin's motion for reconsideration was based on the material terms of the Section 998 Offer, which states unequivocally that Endurance must provide an entry of a request for dismissal *with* prejudice. Chervin asserts that, if there was an enforceable contract between them, Endurance committed a breach when, after the parties could not agree to Chervin's new terms, it placed a lien on plaintiffs' recovery, assigned the lien rights to plaintiffs, and dismissed its complaint-in-intervention *without* prejudice.

Whether Endurance breached the contract by failing to meet its end of the bargain is not an issue before us. Our determination of whether the trial court abused its discretion by denying Chervin's motion for reconsideration only concerns whether he presented new law or facts in bringing his motion. (See Code Civ. Proc., § 1008, subd. (a).) He did not. His motion for reconsideration is exclusively based on facts he

already alleged in his opposition to plaintiffs' motion to enforce the settlement. Although he failed to argue the point that Endurance's dismissal of the suit without prejudice amounted to a breach, the facts upon which that argument is based were before the court, and thus the argument was impliedly rejected. Making a new argument based on the same facts does not meet the standard of Code of Civil Procedure section 1008. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 690.)

We note that the contingent way in which Chervin presented his motion for reconsideration suggests little faith in its strength. After plaintiffs opposed the motion for failure to allege new facts, Chervin's counsel managed to respond at argument with nothing more than the comment, "I assume that there are new facts stated." This lack of commitment to the grounds for reconsideration continues on appeal. Although plaintiffs address the reconsideration argument in some depth in their responding brief, Chervin does not respond at all in his reply brief.

We conclude that the trial court correctly denied Chervin's reconsideration motion for failure to meet the standards set forth in Code of Civil Procedure section 1008.

C. *The Court Correctly Denied Chervin's Motion to Reduce Judgment*

1. Standard of Review

Here again the parties disagree on the applicable standard of review. Chervin once more asks for de novo review because, in his view, he is challenging the trial court's application of law to settled facts. We disagree. As with the facts surrounding the enforceability of the Section 998 Offer, the facts pertinent to this issue are contested and in many respects uncertain, as we shall explain in discussing the record. Thus, our standard of review is for substantial evidence. (*Osumi*, *supra*, 151 Cal.App.4th at p. 1360.)

2. Chervin Failed to Provide an Adequate Record

Chervin asserts the order to enforce the section 998 settlement will result in double recovery in the amount of $35,000. Of course, we agree plaintiffs should not be allowed to recover twice for the same losses. (*Witt v. Jackson* (1961) 57 Cal.2d 57, 73; *Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 Cal.2d 452, 455–456 (*Woodcock*).)

But whether there was a double recovery here is not something we can determine on the record we have been provided. The portions of the record bearing on this issue are too murky and opaque for us to sustain Chervin's claim of error.

It is Chervin's burden on appeal to provide us with a reporter's transcript of all pertinent aspects of the record if he intends to raise any issues that require consideration of the oral proceedings from the trial court. (Cal. Rules of Court, rule 8.120(b); *Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1034, fn. 5.) In the case of substantial evidence or abuse of discretion review, a reporter's transcript or an agreed or settled statement of the proceedings is indispensable. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.)

Chervin has not given us anything close to a full record of the trial proceedings. The record we have includes only four slim volumes of a reporter's transcript, two of which are from post-trial proceedings. We also note that the clerk's transcript omits the jury instructions, which, for obvious reasons, could have a bearing on the nature of the jury's verdict and what it means. (Cf. *Woodcock*, *supra*, 69 Cal.2d at p. 459 [reversing, based on jury instructions, a trial court's incorrect interpretation of jury's damages award as a net amount calculated by subtracting worker's compensation recovery rather than a gross amount calculated without taking worker's compensation recovery into account].)

We might assume the trial court gave the jury the standard instructions for settlement, which would have required the jury to make its damage calculations without considering whether a settlement had been made. (BAJI No. 14.64; CACI No. 3926.) Indulging that assumption would appear to cut in Chervin's favor, but we note that the trial court—which certainly knew what jury instructions it had given—was unconvinced that a double recovery had occurred, and, indeed, took the view that Chervin had failed to carry his burden of proof to show enforcement of the settlement would result in double recovery. The presumption of correctness requires that we assume nothing in the jury instructions contradicted the court's determination on the double recovery issue.

The few transcripts Chervin has provided shed little light on the jury's calculation of plaintiffs' damage award or on the details of the reimbursement payments for which Endurance transferred lien rights to plaintiffs. These details are necessary in order to

compare what Endurance paid the plaintiffs to what the jury awarded. For example, any determination of whether plaintiffs might be receiving a double recovery would have to take into account the amounts plaintiffs paid Endurance for its lien rights, which we do not know, and we cannot tell whether the jury knew either. Chervin never mentions these amounts, nor has he explained how they would affect a calculation of plaintiffs' ultimate recovery, if at all.

Although we have a record of the jury being informed of the amount of medical expenses Endurance covered and of the fact Endurance had put a lien on plaintiffs' recovery, it is unclear whether the jury deducted those amounts from plaintiffs' recovery in calculating their damages or whether it was asked to do so. We do not even have the parties' closing arguments showing how the damages claims were framed by counsel, which might at least provide some basis to infer how the jury made its calculations. Without more information about the relevant points of comparison and briefing explaining how this represents a double recovery one can only surmise that there might be duplication, but surmise is not enough for Chervin to carry his burden on appeal.

Given the deficient record and briefing, Chervin has failed to demonstrate error and is not entitled to relief.

III. DISPOSITION

Affirmed.

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Streeter, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.