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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

GARY WAYNE ADKISSON,

Plaintiff and Appellant,

v.

MARILYN PONT ADKISSON,

Defendant and Respondent.

A142964

(Napa County  
Super. Ct. No. 26-62260)

After plaintiff and appellant Gary Wayne Adkisson filed his opening brief in propria persona (pro. per.) on appeal, defendant and respondent Marilyn Pont Adkisson moved to strike the brief, dismiss the appeal, and impose sanctions for the filing of a frivolous appeal.<sup>1</sup> Marilyn contends that Gary's appeal must be dismissed due to the lack of an adequate record. We agree that the appeal should be dismissed but are not convinced that sanctions are warranted.

**BACKGROUND**

This appeal is taken from a judgment of dismissal entered after the trial court granted Marilyn's motion for judgment on the pleadings. The record on appeal consists solely of the court's minute order granting the motion, a notice of entry of a written order granting the motion and dismissing the action, the notice of appeal, and the notice designating the record on appeal. Because the record is so limited, we are necessarily restricted in our ability to describe the proceedings below. The trial court's minute order

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<sup>1</sup>Because the parties share the same last name, we refer to them by their first names.

contains a brief summary of the complaint and the basis for the court's ruling, which we summarize below.

As set forth by the trial court in its minute order, the gravamen of Gary's complaint is that Marilyn—whom we can infer was Gary's spouse—purportedly defrauded him in 2010 by telling him there were no community property or personal funds available to pay \$25,000 in restitution in a pending criminal elder abuse action against Gary. Gary claimed there were, in fact, funds available in an IRA account that Marilyn allegedly transferred to herself. Marilyn sought judgment on the pleadings on res judicata grounds, arguing that Gary's claim had been raised and litigated in the parties' prior marital dissolution action. The trial court took judicial notice of various documents from the dissolution action, which revealed that Gary had "made an essentially identical claim of fraud [in the dissolution action] and asked the court to order immediate restitution of the full amount of the IRA." The court granted the motion for judgment on the pleadings, concluding the new action was barred by the doctrine of res judicata.

Following entry of an order dismissing the complaint, Gary appealed. In the notice designating the record on appeal, Gary designated only certain "required documents," such as the appealed judgment and notice of appeal, but failed to designate any other documents for inclusion in the record on appeal.

Gary filed his opening brief on appeal on March 20, 2015. He included a recitation of the facts supported by citation to an appendix submitted with his brief. His appendix is 10 pages long and consists of a mandatory settlement conference statement he purportedly filed in the trial court as well as five other documents that he claims support his factual allegations, including IRA statements, a postal receipt, a power of attorney, and a partial narrative from a police report. There is no indication that any of these documents, aside from the mandatory settlement conference statement, were filed or lodged in the trial court. None of the documents in the appendix is contained in the record on appeal.

Shortly after the opening brief was filed, Marilyn filed a motion to strike the brief and dismiss the appeal. She contends that Gary has failed to procure a sufficient record and has failed to support his factual assertions with citations to the record. She also seeks sanctions for what she describes as a frivolous appeal. Gary opposes the motion.

### DISCUSSION

It is a fundamental rule of “appellate review that a judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown.” (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187.) “ ‘A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.’ ” (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) It is the appellant’s burden to provide an adequate record. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

Inadequacy of the record warrants dismissal of an appeal. (*In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 463.) We are aware that Gary brings this appeal without the benefit of legal representation, but his status as a pro. per. litigant does not exempt him from the rules of appellate procedure or relieve him of his burden on appeal. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247.) We treat pro. per. litigants like any other party, affording them “ ‘the same, but no greater consideration than other litigants and attorneys.’ ” (*Id.* at p. 1247.)

In this case, the record on appeal is patently inadequate to allow appellate review of the challenged trial court decision. The record on appeal does not contain the complaint, the papers supporting and opposing the motion, or the documents from the dissolution action that were the subject of judicial notice. As a consequence of the inadequate record, Gary’s opening brief violates the California Rules of Court because it does not support factual assertions with citations to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C) & (a)(2)(C).) The record deficiency is not remedied by the 10-page appendix submitted with the opening brief because the appendix does not contain the

filings necessary to evaluate the order granting Marilyn’s motion for judgment on the pleadings. In any event, the appendix violates the California Rules of Court, which permit a party to attach to a brief up to 10 pages of “copies of exhibits or other materials *in the appellate record . . .*” (Cal. Rules of Court, rule 8.204(d), italics added.) As noted above, the documents included in the appendix are not contained in the limited record on appeal.

Gary argues that he has procured a sufficient appellate record, pointing out that he did not receive any notice from the court that the record was deficient. But the mere fact an appellant procures some form of appellate record—and thus avoids receiving a default notice from the court’s clerk—does not mean the record is adequate for purposes of appeal. It is not the role of the trial court or the reviewing court to ensure the sufficiency of the appellate record; that burden rests with the appellant, even if he or she is a pro. per. litigant.

Gary further contends, in effect, that he should not suffer the consequence of dismissal for an inadequate record because he was unaware of the record’s deficiencies and relied upon an agency that performs legal support services to order the record. We are not persuaded. The record before this court reflects that Gary himself signed the record designation filed in the trial court. In addition, he was served with a copy of the clerk’s transcript and received a notice from this court confirming the filing of the record and informing him that his opening brief was due. If he did not receive a copy of the clerk’s transcript, then he should have sought an extension of time to file his opening brief until he had an opportunity to receive and review it. It was his obligation to augment or otherwise supplement the record before filing his brief if the record as originally prepared was insufficient for purposes of appeal.

Rule 8.204(e) of the California Rules of Court permits a reviewing court to strike a party’s brief that is not in compliance with the rules of court and to allow the party to file a corrected brief within a specified period of time. Gary urges the court to exercise its discretion under this rule of court and allow him to file a corrected brief. We would be inclined to do so if the noncompliance were limited to a failure to cite to the appellate

record, but the problem extends beyond the formatting and content of the brief. In the absence of a sufficient record, there is no point in revising the brief to comply with applicable rules of court.

Insofar as Gary requests that we allow him to redesignate or augment the record, we decline to do so at this stage of the appeal. After Marilyn was required to incur the time and expense of responding to a procedurally defective opening brief, it would be fundamentally unfair to allow Gary to effectively start the appeal anew, designate a proper record, and remedy the procedural deficiencies Marilyn was forced to point out.

As a final matter, we decline to consider imposing sanctions against Gary. (Cal. Rules of Court, rule 8.276(c) [court will not consider imposing sanctions unless it has first given notice].) The facts here are not nearly as egregious as those in *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, on which Marilyn relies. There, the failure to comply with applicable rules of court was one of many reasons supporting the imposition of sanctions. (*Id.* at pp. 29–33.) The absence of a sufficient record for purposes of appeal may merit dismissal of the appeal, but it does not necessarily support a finding the appeal is frivolous. (Cf. *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649 [discussing objective and subjective standards for assessing whether appeal is frivolous].)

#### **DISPOSITION**

The opening brief is ordered stricken and the appeal is dismissed. The request for sanctions is denied. Respondent shall be entitled to her costs on appeal.

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McGuinness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.