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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JOHN SRAMEK et al., Plaintiffs and Appellants, v. ROBERT E. JACOBSEN et al., Defendants and Respondents.	A146069 (Contra Costa County Super. Ct. No. C0600162)

Plaintiffs John and Bernadette Sramek challenge the trial court's decision to dismiss with prejudice defendant Alise Malikyar from the underlying lawsuit. Plaintiffs claim the court should have granted their subsequent motion to dismiss Malikyar *without* prejudice, contending that plaintiffs generally have an absolute right to dismiss a defendant without prejudice before trial. Because plaintiffs have not provided us with a sufficient record upon which to render a decision, we now affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On January 23, 2006, plaintiffs filed a complaint against defendant Robert E. Jacobsen alleging breach of contract, fraud, and a variety of other legal theories in connection with a transaction involving a promissory note relating to real property located in Walnut Creek. The other named defendants are REJ Properties, Inc. (REJ), Michael Ray Alberson, Osprey Investments Corporation, Property Gallery, Mitchell House, House Appraisal Service, and North American Title Insurance Company.

On November 28, 2006, plaintiffs filed a first amended complaint (FAC) alleging 19 causes of action and adding Malikyar, Jacobsen's wife, as a defendant. The FAC

alleges, in part, that Jacobsen used the proceeds from plaintiffs' promissory note to wrongfully transfer funds to others, including Malikyar.

On March 13, 2007, REJ filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of Nevada.[1]

On April 18, 2007, the bankruptcy court transferred venue of REJ's case to the United States Bankruptcy Court for the Northern District of California.

On April 23, 2007, REJ removed the instant lawsuit to the bankruptcy court. The case had been set for trial on May 14, 2007.

On May 25, 2007, Jacobsen filed a Chapter 13 petition in the United States Bankruptcy Court for the Eastern District of Texas.

On June 4, 2007, the bankruptcy court in the Northern District of California entered an order dismissing REJ's bankruptcy petition with prejudice after agreeing with plaintiffs that the petition had been filed in bad faith.

On July 20, 2007, the trial court granted plaintiffs' motion for summary adjudication on the FAC's cause of action for breach of contract against REJ. Judgment was granted in favor of plaintiffs, to be entered after trial of the remaining causes of action.

On September 13, 2007, plaintiffs filed a proof of claim in Jacobsen's bankruptcy estate for $1,735,208.

On December 5, 2007, the Texas bankruptcy court entered an order converting Jacobsen's Chapter 13 bankruptcy to a case under Chapter 7.

On August 13, 2008, the Texas bankruptcy court entered an order overruling Jacobsen's objection to plaintiffs' proof of claim.

On June 4, 2009, the District Court for the Eastern District of Texas affirmed the Texas bankruptcy court's order.

On January 25, 2010, the Fifth Circuit Court of Appeals affirmed the judgment of the Texas district court.

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[1] Plaintiffs' amended motion for judicial notice is granted.

On October 28, 2011, a final judgment was entered against Jacobsen and in favor of plaintiffs in the Texas bankruptcy court in the amount of $1,735,208, plus interest.

On May 16, 2012, the Texas bankruptcy court entered its order granting plaintiffs' motion to register judgment.

On June 15, 2012, the District Court for the Northern District of California granted plaintiffs' motion to register the October 28, 2011 Texas judgment in California.

On April 7, 2014, the October 28, 2011 Texas judgment was affirmed by the Fifth Circuit Court of Appeals.

On December 19, 2014, plaintiffs filed an application in the trial court for entry of a sister state judgment (Sister State Case).

On January 15, 2015, the Texas bankruptcy court entered an order discharging the Chapter 7 trustee and closing Jacobsen's bankruptcy case.

On January 18, 2015, notice of entry of the Texas sister state judgment in favor of plaintiffs for $2,377,058 was personally served on Jacobsen.

On February 10, 2015, during an issue conference, plaintiffs' attorney requested in open court that Malikyar be dismissed *without* prejudice. The record supplied by plaintiffs on appeal suggests that this request followed Malikyar's own request for dismissal, which the trial court granted *with* prejudice.

On February 20, 2015, plaintiffs filed a motion for an order deeming the dismissal of Malikyar to be without prejudice, requesting they be allowed to file an amended dismissal. They asserted they had "an absolute right to dismiss MALIKYAR without prejudice on February 10, 2015."

On or about June 3, 2015, Malikyar served her opposition to plaintiffs' motion. She noted the trial court had entered judgment against Jacobsen in the Sister State Case. According to her moving papers, it was Malikyar, *not plaintiffs*, who had first requested the dismissal. The court then granted her request, with prejudice. Thus, Malikyar argued, plaintiffs no longer had any right to dismiss her.

On June 9, 2015, plaintiffs filed their reply brief pointing out that the judgment against Jacobsen had been entered in a *different* case (the Sister State Case), asserting

they still had an absolute right to dismiss Malikyar from the instant lawsuit without prejudice.

On June 23, 2015, the trial court filed its order denying plaintiffs' motion for an order deeming Malikyar's dismissal to be without prejudice. The order states, in relevant part: "Based on [Code of Civil Procedure section] 581, when this Court entered judgment against Defendant Robert Jacobsen based on the Texas Bankruptcy Court Judgment, this case was over. It was dismissed with Prejudice as to Alise Malikyar. The Dismissal with Prejudice will stand." This appeal followed.

DISCUSSION

Plaintiffs assert the standard of review here is de novo because this case involves the interpretation of the applicability of a statute. However, we need not address the standard of review, nor any of plaintiffs' remaining contentions. Because we have not been supplied with a sufficient record on appeal, we must affirm the judgment.

An appellate court presumes that the trial court's judgment and orders are correct and supported by the facts of the case, and any error must be affirmatively demonstrated. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 (*Ketchum*); *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) As a corollary to this rule of appellate review, an appellant is obligated to furnish us with a complete and adequate record: "The appellant must affirmatively demonstrate error by an adequate record. In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. '[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented.' " (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) When the record is inadequate to assess the errors raised, the claims are deemed to have been forfeited and must be rejected. (*Ketchum,* at pp. 1140–1141; *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46.)

The record provided by plaintiffs in this case is fatally deficient. It includes an appellant's appendix and several documents brought in under their request for judicial notice. However, plaintiffs have not provided a reporter's transcript of the hearing in

which the trial court granted Malikyar's motion to dismiss with prejudice. In fact, because Malikyar has not filed a respondent's brief, it is only from reading her opposition to plaintiffs' motion below (in the appellants' appendix) that we learned Malikyar was (apparently) the party who originally moved for dismissal, doing so only after judgment was entered in the Sister State Case.[2] Further, there is no document in the record reflecting the court's original dismissal determination. The page reference provided by plaintiffs is not to any court minute order or ruling, but to their own attorney's declaration that is attached to their motion seeking to amend the dismissal by entering it without prejudice. From this record, we cannot determine what oral arguments were made to the court when Malikyar's motion (apparently) was heard. Nor can we determine what, if any, concessions or stipulations were made, or what matters were the subject of objections by counsel. Without these important elements, we are unable to consider plaintiffs' challenge on appeal.

DISPOSITION

The judgment is affirmed.

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[2] From plaintiffs' opening brief, it was not clear how the initial dismissal came about. In their recitation of the factual background, they merely state: "On February 10, 2015, in open court at the Issue Conference, and over Plaintiffs' objection, the Court dismissed Malikyar with prejudice." The sentence leaves it ambiguous as to which party had sought the dismissal, or whether the court entered the dismissal on its own motion.

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Dondero, J.

We concur:

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Margulies, Acting P. J.

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Banke, J.