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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARTIN SUMAN et al.,

Plaintiffs and Appellants,

v.

PAUL TASHNIZI,

Defendant and Respondent.

B235736

(Los Angeles County
Super. Ct. No. LC092804)

APPEAL from an order of the Superior Court of Los Angeles County, Richard A. Adler, Judge. Affirmed.

Melvin Teitelbaum for Plaintiffs and Appellants.

Law Offices of Michael C. Murphy and Michael C. Murphy for Defendant and Respondent.

I. INTRODUCTION

Plaintiffs, Martin Suman, as trustee of the Suman Family Trust Under Trust Dated June 2, 1992 and Gilad Suman, appeal from an order granting a special motion to strike. The special motion to strike was filed by defendant, Paul Tashnizi. We affirm.

II. PROCEDURAL HISTORY

The complaint alleges that in April 2008, defendant engaged in fraudulent conduct during the mediation of a pending lawsuit. Defendant and 11 codefendants allegedly misled plaintiffs during the mediation concerning the true identity of Moshe Lugassy. Mr. Lugassy appeared at the mediation of the pending lawsuit using the alias of Simon Sage. Defendant is alleged to have known that Mr. Lugassy was at the mediation using the name of Mr. Sage. However, defendant misrepresented to the mediator and plaintiffs that Mr. Lugassy was unavailable. And, Mr. Lugassy allegedly used a number of other aliases in which he used the surname “Sage,” each with different social security numbers. The complaint contains causes of action for fraud, contract breach and intentional concealment.

Defendant moved to strike the complaint pursuant to Code of Civil Procedure section 425.16. In support of the special motion to strike, defendant declared that he is an attorney. On April 7, 2008, defendant appeared at a mediation of a pending lawsuit to represent “a few marginal co-defendants” as a favor to a friend. The key defendant in the pending lawsuit was present at the mediation. That defendant’s lawyer was also present. At the mediation, the parties involved in the pending lawsuit appeared to know each other very well. They had been working together on certain projects. Defendant had never previously met any of the parties or their attorneys involved in the pending lawsuit. Plaintiffs were present but the individuals defendant was asked to represent were not present. At the conclusion of the mediation, the pending lawsuit settled. Defendant had been given authorization to sign for the parties he was representing. Defendant argued:

the complaint in the current action is based solely on communications and statements made during the mediation; the alleged conduct is protected and absolutely privileged; and Evidence Code section 1119, subdivision (a) precludes plaintiffs from using any statements or communications made during the mediation.

The special motion to strike was granted. In its order, the trial court ruled: defendant's conduct arose from "protected activity"; defendant's declaration indicated that he was unaware of the parties' true identities so he did not concede fraud or illegality as required by *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320; plaintiffs did not meet their burden of showing a probability of prevailing on the merits; plaintiffs did not produce any evidence demonstrating the litigation privilege did not apply to the statements made during the mediation; and Evidence Code section 1119, subdivision (a) made the statements confidential under *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 124-129. This timely appeal followed.

III. DISCUSSION

On May 4, 2012, we requested the parties address the effect of plaintiffs' failure to provide a reporter's transcript of the special motion to strike hearing. Plaintiffs chose to proceed without designating a reporter's transcript. A judgment is presumed to be correct and plaintiffs have a duty to provide us with an adequate record to demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 [transfer order]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [attorney fee motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived and the minor consented to informal

adjudication]; *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1672 [transcript of judge's ruling on an instruction request]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [trial transcript when attorney fees sought]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [surcharge hearing]; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [nonsuit motion where trial transcript not provided]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [monetary sanctions hearing]; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532 [reporter's transcript fails to reflect content of special instructions]; *Buckhart v. San Francisco Residential Rent etc. Bd.* (1988) 197 Cal.App.3d 1032, 1036 [hearing on Code Civ. Proc., § 1094.5 petition]; *Sui v. Landin* (1985) 163 Cal.App.3d 383, 385-386 [motion to dissolve preliminary injunction hearing]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 713-714 [demurrer hearing]; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71-73 [transcript of argument to the jury]; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 462 [failure to secure reporter's transcript or settled statement as to offers of proof]; *Wetsel v. Garibaldi* (1958) 159 Cal.App.2d 4, 10 [order confirming arbitration award].) Because the record is inadequate to assess error, we will not presume any occurred.

Even if the record were adequate, we would affirm. Plaintiffs' claims arise out of litigation related conduct; i.e., the mediation of a pending lawsuit. (Code Civ. Proc., § 425.16, subd. (b)(1); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115-1116; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 964-967.) Thus, the burden of proof shifted to plaintiffs to demonstrate their claims have minimal merit. (Code Civ. Proc., § 425.16, subd. (b)(1); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76; *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1306.) All of the statements made during the mediation involving the then pending lawsuit are inadmissible. (Evid. Code § 1119, subd. (a); *Cassel v. Superior Court*, *supra*, 51 Cal.4th at pp. 123-138; *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1302-1303.) Plaintiffs are therefore unable to make their minimal merit showing. The special motion to strike was properly granted.

IV. DISPOSITION

The order is affirmed. Defendant, Paul Tashnizi, is awarded his costs on appeal, from plaintiffs, Martin Suman, as trustee of the Suman Family Trust Dated June 2, 1992, and Gilad Suman.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.