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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HEMLA FARAHIK,

Plaintiff and Respondent,

v.

VICTORIA RUIZ,

Defendant and Appellant.

B263968

(Los Angeles County
Super. Ct. No. TC027663)

APPEAL from a judgment of the Superior Court of Los Angeles County, William P. Barry, Judge. Affirmed as modified.

Nehoray Legal Group and Mac E. Nehoray, for Defendant and Appellant.

Netzah & Shem-Tov and Shalem Shem-Tov, for Plaintiff and Respondent.

The appellate record presented by defendant and appellant Victoria Ruiz does not include the following: the complaint filed by plaintiff Hemla Farahnik; Ruiz's answer; plaintiff's trial brief; plaintiff's memorandum of costs; the in limine motions; plaintiff's memorandum of costs and motion for attorney fees; Ruiz's opposition to the motion for attorney fees; plaintiff's reply to the opposition to the motion for attorney fees; and all minute orders of the proceedings. The record contains only one of approximately two dozen trial exhibits. We conclude Ruiz's substantive challenges to the judgment must be rejected because she has failed to present a complete record demonstrating both error and prejudice. Based on a concession by Farahnik that the trial court denied her motion for attorney fees, we order the judgment amended to delete the \$10,879.90 attorney fee award, but reject Ruiz's argument that costs also should be stricken. As modified, the judgment is affirmed.

Ruiz appeals from the judgment entered on March 9, 2015, granting Farahnik specific performance with respect to the transfer of two properties jointly owned by Farahnik and Ruiz, damages, attorney fees, and costs. On appeal, Ruiz argues: there are two different versions of the judgment, and the one which contains no award of costs should be deemed the operative judgment; it was error to order specific performance; damages should not have been awarded, and as a result there cannot be interest on the damages award; and the award of attorney fees is improper because the agreement at issue does not provide for attorney fees.

After the record on appeal was filed with this court, but prior to briefing on the merits, the presiding justice of this division issued the following order: "In their briefs, the parties are to discuss the effect of defendant's failure to provide most of the relevant papers as part of the record in an appendix or pursuant to an augmentation order. (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46; *Hernandez v. California Hosp. Med. Ctr.* (2000) 78 Cal.App.4th 498, 502.)" Ruiz responded with a motion to augment the record with two trial exhibits—an undated stipulated settlement of

an earlier action and e-mail correspondence relating to Ruiz's bankruptcy. Augmentation was granted as to the first exhibit, but denied as to the second.

The record includes a reporter's transcript of the testimony at trial, but the clerk's transcript is clearly insufficient to provide the complete record necessary for review of Ruiz's contentions relating to liability. "It is an appellant's duty to present a record from which the appellate court can determine whether there has been error; failure to do so results in affirmance. (*Roberts v. Home Ins. Indem. Co.* (1975) 48 Cal.App.3d 313, 316; see also *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.)" (*Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1509 [record is inadequate for appellate review when it does not include the cross-complaint and answer].) Without the operative complaint and the answer, we cannot properly review Ruiz's appellate contentions. (*Ibid.*) The operative pleadings frame the issues for trial, and without those documents, the record is insufficient to determine what issues were pled and what defenses were tendered.

The appellate record is also inadequate because it includes only one of approximately two dozen exhibits admitted at trial. Pursuant to rule 8.122(b)(3)(B) of the California Rules of Court, trial exhibits are considered part of the record, but must be designated by the appellant for inclusion in the clerk's transcript. Ruiz's designation of the record requested inclusion of only three exhibits, none of which were included in the clerk's transcript. In response to this court's order regarding the sufficiency of the record, Ruiz requested augmentation with two exhibits, which was granted as to one. Numerous exhibits were used at trial to substantiate the rights of the parties, explain their conduct, and support and challenge credibility. Without these exhibits, Ruiz has not presented a record adequate to satisfy her burden of showing the trial court's substantive rulings were the result of prejudicial error. (*Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.* (2009) 179 Cal.App.4th 1401, 1405, fn. 1 [designation of the record was inadequate to permit challenge to trial court's factual findings where "the record does not include the vast majority of the exhibits referenced by the testimony of the witnesses at trial, which exhibits are necessary to fully understand the testimony"].)

We apply the settled rule that a judgment is presumed correct. (*Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 564.) “It is the duty of an appellant to provide an adequate record to the court establishing error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)” (*Barak v. The Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 660.) In the absence of the complaint and answer, we cannot discern how the issues were framed by the pleadings, and the lack of exhibits precludes a full understanding of the witnesses’ testimony upon which the judgment was based. (See *Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348; *Hernandez v. California Hospital Medical Center, supra*, 78 Cal.App.4th at p. 502.)

All that remains for discussion is Ruiz’s claim relating to the two judgments contained in the record. Ruiz argues that one judgment incorrectly includes an award of \$2,434.76 in costs, and that attorney fees were not authorized. According to the case summary in the clerk’s transcript, Ruiz did not file a motion to tax costs. The record on appeal does not include plaintiff’s cost bill. There is no reporter’s transcript or suitable substitute, such as a settled or agreed statement, of a hearing on costs. Ruiz therefore has not presented a record showing error in the costs award. On the other hand, Farahnik concedes on appeal that although the judgment includes an award of \$10,879.90 in attorney fees, in reality her motion for attorney fees was denied by the trial court. Although Farahnik argues that Ruiz’s remedy to correct this error lies in the trial court, we see no reason not to strike the award of attorney fees based on Farahnik’s judicial admission that the fee request was denied.

DISPOSITION

The judgment is ordered amended to delete the award of \$10,879.90 in attorney fees. In all other respects the judgment is affirmed. Farahnik is awarded costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.