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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

IMPACT REALTY, INC.,

Plaintiff and Appellant,

v.

CAROL ORTEGA,

Defendant and Respondent.

B272040

(Los Angeles County
Super. Ct. No. BC562514)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Law Offices of John Amoroso and John Amoroso for Plaintiff and Appellant.

King, Holmes, Paterno & Soriano, Howard E. King and Stephen D. Rothschild for Defendant and Respondent.

Impact Realty, Inc. (Impact) appeals from a judgment granting judgment on the pleadings and nonsuit in its cause of action for conspiracy to defraud against Carol Ortega (Ortega), and awarding \$25,073 in attorney fees to Ortega. We modify the judgment and affirm.

In a first amended complaint (FAC) filed January 9, 2015, Impact alleged that Leticia Soto Fernandez (Fernandez), Ortega, and Lotus Escrow were each the agent of the other and acting within the scope of that agency. The first cause of action, breach of contract against Fernandez, alleged that on April 4, 2013, Fernandez signed a one-year listing agreement with Joann Verduzco, an Impact agent, to sell a house Fernandez owned in West Covina. The agreement provided that Fernandez would pay Impact four percent of the purchase price. The FAC also alleged that under the agreement, “[i]n case of dispute regarding the obligation to pay compensation the prevailing party shall be entitled to reasonable attorney fees and costs.” Impact advertised the property for sale. Fernandez sold the property during the listing period, and refused to pay any broker’s compensation to Impact. Fernandez’s breach of contract caused Impact \$17,800 in damages “and attorneys fees and costs.”

The second cause of action, conspiracy to defraud, alleged that all three defendants conspired to deny Impact

its broker's compensation. When Fernandez learned of an interested buyer, she telephoned another Impact agent, Sandra Morrison, to execute a one-month listing agreement from September 5, 2013 to October 5, 2013, with a reduced selling price. On October 18, 2013, Ortega, a broker with another agency representing the prospective buyers, executed a purchase offer which stated that the property was for sale by owner (Fernandez). Impact alleged that this statement was false, because up to the time of sale Ortega dealt with Morrison, who Ortega knew was representing Fernandez as her broker. On October 28, 2013, during negotiations over price reductions, Fernandez issued an addendum to the purchase agreement stating that she was representing herself with no listing agent or office, which was also false. Before escrow closed, Impact learned of the sale and provided the escrow company with a copy of the initial listing agreement covering April 4, 2013 to April 4, 2014. The escrow company conspired with Fernandez and Ortega to commit fraud and deny Impact its commission. Impact asked for \$17,800 in damages with interest, punitive damages of \$100,000, "reasonable attorneys fees pursuant to Paragraph 16 of the Residential Listing Agreement," and costs.

On October 28, 2015, the trial court dismissed the FAC as against Ortega, and granted judgment on the pleadings and nonsuit under Code of Civil Procedure, section 581 "after plaintiff's opening statement and after providing plaintiff's counsel the opportunity to supplement his opening

statement with allegations supporting plaintiff's claims against Ortega." The court entered judgment on November 13, 2015, holding: "[P]laintiff failed in the FAC and his opening statement to identify any fraudulent act undertaken by Ortega; any involvement by Ortega in the transaction at issue before the expiration of the alleged listing agreement between plaintiff and Fernandez; or any action undertaken by Ortega to conspire in any fraudulent activity including, but not limited to, with plaintiff's agent Sandra Morrison, whom plaintiff failed to name as a party herein." Ortega was to recover costs of suit and attorney fees.

Impact settled with the escrow company. After a court trial as to the remaining defendant, Fernandez, a minute order dated December 12, 2015 stated that the one-month listing agreement was invalid, and did not terminate the one-year agreement. The court entered judgment for Impact on its breach of contract claim against Fernandez, ordering Fernandez to pay Impact \$17,800 (its share of the broker's commission) plus interest and attorney fees "if appropriately allowed in the listing agreement." The court also found Impact did not present sufficient evidence to prove its second cause of action against Fernandez, conspiracy to defraud.

On January 12, 2016 Ortega filed a motion for attorney fees in the amount of \$25,073, and Impact filed "Comments" on the attorney fees motion on January 21, 2016. Ortega filed a motion to correct the November 13, 2015 judgment in Ortega's favor, which by a clerical error used the plaintiff's

name as set forth in the original complaint, rather than the correct name in the FAC. The trial court filed a corrected judgment on April 12, 2016, awarding Ortega \$25,073 in attorney fees. Impact filed a notice of appeal on May 12, 2016 as to Ortega only.

DISCUSSION

I. The trial court properly granted nonsuit.

“The granting of a motion for nonsuit is warranted when, disregarding conflicting evidence, giving plaintiff’s evidence all the value to which it is legally entitled, and indulging in every legitimate inference that may be drawn from the evidence, the trial court determines that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff.’ [Citations.] [¶] Plaintiff cannot prevail unless he can demonstrate *substantial* evidence in the record to support each claim asserted.” (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580.) When, as here, a nonsuit is based on the plaintiff’s opening statement, “we assume plaintiff can prove all the favorable facts alleged. [Citations.] The court may consider as part of the opening statement exhibits that would probably become evidence at trial. [Citation.] A nonsuit on the opening statement is proper only when the court concludes that there will be no evidence which would support a judgment in favor of the plaintiff.” (*Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, 272.)

Our review is de novo. (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541–1542.)

We begin with the presumption that the judgment is correct, and “the appellant must prepare a record that adequately establishes the trial court committed prejudicial error.” (*Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 122 (*Ritschel*)). The clerk’s transcript presented by Impact does not contain reporters’ transcripts of any of the proceedings in the trial court, including as relevant to Impact’s substantive case against Ortega only the complaint, the FAC, Ortega’s answer, an exhibit list, and the judgment dismissing the FAC’s allegations against Ortega.

“An appellate court’s review of a judgment after the grant of a nonsuit ‘must be based on the whole record, not just excerpts chosen by the appellant.’” (*Ritschel, supra*, 137 Cal.App.4th at p. 124.) In the absence of a reporter’s transcript, we cannot assess whether Impact presented sufficient evidence to support a judgment in its favor. “Where no reporter’s transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter’s transcript will be precluded from raising an argument as to the sufficiency of the evidence.” (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) Without a reporter’s transcript of Impact’s opening statement, we cannot evaluate whether

Impact proffered enough evidence to support a verdict in its favor. “ ‘[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.)

We therefore presume the judgment to be correct, and reject Impact’s claim that the court erred in granting nonsuit as to Ortega on its cause of action for conspiracy to defraud. In any event, the court found in its December 1, 2015 order that Impact had not presented sufficient evidence for conspiracy to defraud against Fernandez, so it necessarily follows that there was insufficient evidence that Ortega conspired with Fernandez to defraud Impact.

II. The trial court properly awarded attorney fees.

Impact argues that the court abused its discretion in awarding attorney fees to Ortega because Impact sued her for fraud, not for breach of contract. Paragraph 16 of the listing agreement states: “In any action . . . between Seller and Broker regarding the obligation to pay compensation under this Agreement, the prevailing Seller or Broker shall be entitled to reasonable attorney fees and costs from the non-prevailing Seller or Broker” We conclude this fee provision is broad enough to justify the award of fees to Ortega.

We interpret the fee provision in the light of Civil Code section 1717, which applies to contracts with fee provisions authorizing recovery of attorney fees by a prevailing party.

“conspired . . . to deny [Impact] its rightful listing broker’s compensation.” After Morrison executed the one-month broker’s contract with Fernandez (and after the month was over), Ortega executed a purchase offer which stated that the property was for sale by its owner, Fernandez (which Fernandez affirmed in an addendum to the purchase agreement). These actions by Fernandez and Ortega, in conspiracy with the escrow company, “defraud[ed] [Impact] of its rightful compensation as listing broker for the sale.” It is unquestionable that these allegations are “regarding the obligation to pay compensation under this Agreement,” in the words of the attorney fees provision. We also note that Impact’s FAC requested an award of attorney fees from Ortega, citing the provision in the listing agreement. “Section 1717 . . . was originally enacted in order to limit ‘unfairly one-sided’ attorney fee provisions in contracts.” (*Khan v. Shim, supra*, 7 Cal.App.5th at pp. 55–56.)

The trial court was correct to award attorney fees to Ortega.

III. The trial court properly corrected the judgment.

Impact argues that the trial court should not have corrected the judgment because the change in plaintiff’s name (from “Tawfiq Bishara” as in the initial complaint, to Impact, as in the FAC) did not correct a clerical error. Code of Civil Procedure section 473, subdivision (d), states: “The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed.”

It is “beyond doubt” that the omission of a party’s name is a clerical error, and an attorney’s drafting mistake is also clerical error. (*Zisk v. City of Roseville* (1976) 56 Cal.App.3d 41, 47.) In the motion to correct the judgment, Ortega’s attorney stated in a declaration that he drafted the judgment and inadvertently used the plaintiff name from the initial complaint, Tawfiq Bishara (who is Impact Realty’s principal, manager, officer and agent). The trial court did not err in correcting the judgment.

Impact also argues that the corrected judgment incorrectly awards Ortega \$25,073 as costs of suit rather than as attorney fees. The trial court wrote \$25,073 (the exact amount of fees requested by Ortega) in the blank following “costs of suit” rather than in the blank following “attorney fees.” We will modify the end of the final sentence of the judgment to state “Ortega shall recover from plaintiff her attorney fees in the amount of \$25,073.” (Code Civ. Proc., § 906.)

DISPOSITION

The trial court's April 12, 2016 judgment is modified to provide, at the end of the final sentence, "Ortega shall recover from plaintiff her attorney fees in the amount of \$25,073." In all other respects, the judgment is affirmed. Carol Ortega is awarded her costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.