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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

DON H. LEE,

Plaintiff and Appellant,

v.

COUNTY OF EL DORADO,

Defendant and Respondent.

C069049

(Super. Ct. No.
PC20070061)

Plaintiff Don H. Lee appeals pro se from a post-judgment order denying his motion to tax costs. Lee contends the trial court erred in awarding defendant County of El Dorado (the County) \$456 in "estimated" costs for preparing a clerk's transcript in connection with Lee's underlying unsuccessful appeal. We agree that, under the circumstances, the trial court should have granted Lee's motion to tax the cost of preparing a clerk's transcript.

FACTS AND PROCEEDINGS

Lee sued the County in the underlying action for negligence, intentional infliction of emotional distress, and declaratory relief, after his two pit bulls were temporarily seized. The trial court sustained the County's demurrer and granted its motion to dismiss, and Lee appealed. (*Lee v. County of El Dorado* (Nov. 16, 2010, C061500 [nonpub. opn.].) In an unpublished opinion, this court affirmed the trial court's order of dismissal, rejecting Lee's claims on appeal and awarding costs to the County. (*Lee v. County of El Dorado, supra*, C061500.)

The County filed a "memorandum of costs on appeal" in the trial court seeking \$1,297.36 in costs, including \$456 for the preparation of a clerk's transcript.

Lee then brought the instant motion to tax costs, challenging the clerk's transcript fee as "unsupported and entire[ly] speculative." In the declaration submitted in support of his motion, Lee averred that, as appellant in the underlying appeal, he proceeded on a fee waiver, which covered the cost of preparing the clerk's transcript.

Opposing the motion to tax costs, the County argued that Government Code section 6103.5 authorizes public entities to recover as costs the expense of preparation of a clerk's transcript if the court so orders. It also asserted that because Lee had provided only a partial clerk's transcript, it had ordered the entire clerk's transcript "to give the court of

appeal a full and complete record." The County also submitted the declaration of legal assistant Natalie B., who averred that she prepared the memorandum of costs and "[t]o estimate the anticipated costs for the preparation of the Clerk's Transcript, I spoke with Clerk [L.C.] by telephone on or about December 16, 2010, who advised me that the estimated cost of transcript preparation was \$456 for the transcript applicable to this case."

Lee objected to Natalie B.'s declaration as inadmissible hearsay as to the cost of preparing a clerk's transcript, and also replied that the County's opposition (1) erroneously states he only ordered 17 pages of clerk's transcript; and (2) unfairly suggests that the court should order the preparation and certification of a clerk's transcript after the fact merely to "create a cost after the cost bill has been submitted and contested."

Government Code section 6103.5 provides in pertinent part "(a) Whenever a judgment is recovered by a public agency named in Section 6103, either as plaintiff or petitioner or as defendant or respondent, in any action or proceeding to begin, or to defend, which under the provisions of Section 6103 no fee for any official service rendered by the clerk of the court, including, but not limited to, the services of filing, certifying, and preparing transcripts, nor fee for service of process or notices by a sheriff or marshal has been paid, other than in a condemnation proceeding, quiet title action, action for the forfeiture of a fish net or nets or action for the

forfeiture of an automobile or automobiles, the clerk entering the judgment shall include as a part of the judgment the amount of the filing fee, and the amount of the fee for the service of process or notices which would have been paid but for Section 6103, designating it as such. The clerk entering the judgment shall include as part of the judgment the amount of the fees for certifying and preparing transcripts if the court has, in its discretion, ordered those fees to be paid.”

At a hearing at which both parties appeared and argued, counsel for the County reported he had received no declaration from the superior court clerk regarding the cost of preparing a clerk’s transcript.

The trial court issued a statement of decision granting in part and denying in part Lee’s motion to tax costs, and (as relevant to this appeal) “upheld the award of \$456.00 for preparation and certification of the Clerk’s Transcript.”

DISCUSSION

Lee contends on appeal that the trial court erred in awarding the County \$456 in costs for preparing a clerk’s transcript based solely on Natalie B.’s hearsay declaration that she obtained an “estimate” of the cost by telephone from the trial court clerk.

Lee does not dispute the statutory authority for awarding such costs to a public agency that has successfully defended against a lawsuit. Government Code section 6103 states that no public agency “nor any county, city, district, or other

political subdivision" named as a litigant "shall pay . . . any fee for the filing of any document or paper, . . . [or] for the performance of any official service" (Gov. Code, § 6103.) Fees associated with the preparation of a clerk's transcript, however, which are incurred but not paid are recoverable under the general costs statute, i.e., Code of Civil Procedure section 1032, by a successful defendant public entity litigant "if the court has, in its discretion, ordered those fees to be paid." (Gov. Code, § 6103.5, subd. (a); cf. *Guillemín v. Stein* (2002) 104 Cal.App.4th 156, 164, 166 (*Guillemín*).)

Rather, Lee challenges the evidence submitted by the County to justify the amount of its claim for preparation of the clerk's transcript in opposition to his motion to tax costs. His argument has merit.

"If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs. [Citations.] . . . [B]ecause the right to costs is governed strictly by statute [citation] a court has no discretion to award costs not statutorily authorized. [Citations.]" (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774 and cases cited therein; see also *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 855.)

A verified memorandum of costs requires the attorney claiming the costs to state, under penalty of perjury, that "[t]o the best of my knowledge, the items of cost are correct and were necessarily incurred in this case on appeal" and, the memorandum constitutes prima facie evidence of the propriety of the costs. (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1486-1487; *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 910.) Under these circumstances, however, such a verification is of limited utility in establishing prima facie evidence that the cost items claimed were "necessarily incurred," as the Government Code expressly permits public entities to seek as costs such expenses as filing fees and "the amount of the fees for certifying and preparing transcripts" (Gov. Code, § 6103.5, subd.(a)), although the public entity will not actually have incurred those fees during the course of litigation. (Gov. Code, § 6103.) However, as this court explained in *Guillemín*, public entities and officers (while exempt from any obligation to pay court costs up front by Government Code section 6103) nonetheless "accrue" an obligation under Government Code section 6103.5, which they may recover as prevailing parties on behalf of the governmental agencies to which they would normally have been paid (e.g., clerk of the court). (*Guillemín, supra*, 104 Cal.App.4th at pp. 163, 165-166.)

Thus, when Lee challenged the County's \$456 claim for the preparation of a clerk's transcript, the burden of proof shifted

to the County to justify the item. (See *Ladas v. California State Auto. Assn.*, *supra*, 19 Cal.App.4th at p. 774.)

The County's submission of Natalie B.'s declaration failed to meet that burden. The legal assistant's report of her telephone conversation with the trial court clerk was offered to support the truth of the County's claim that it accrued a cost of \$456 in preparing the clerk's transcript. It is plainly inadmissible hearsay, as it is "evidence of a statement that was made other than by a witness while testifying at the hearing . . . that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.)

We reject the County's unsupported assertion in its responsive brief that the cost bill itself falls within the business record exception to the hearsay rule.

Finally, Natalie B.'s use of the word "estimate" in her declaration to describe the information she received from the trial court clerk is ambiguous. It is unclear from the context whether the clerk intended to make "a statement of the cost of work to be done" or merely a "rough or approximate calculation." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 428.)

Under the circumstances, the trial court's award to the County of \$456 for the preparation of a clerk's transcript constituted an abuse of discretion.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court to vacate its order granting in part and denying in

part Lee's motion to tax costs and enter a new order taxing costs in accordance with the views expressed in this opinion. Lee shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

_____ HULL _____, J.

We concur:

_____ RAYE _____, P. J.

_____ BLEASE _____, J.