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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KAVAN BERENJIAN,

Plaintiff, Cross-defendant and
Respondent,

v.

HOMEWORKS HOLDING CORP. et. al.,

Defendants, Cross-complainants and
Appellants;

LADY BIRD ENTOURAGE LIBERTY
LLC,

Defendant and Appellant.

D068602

(Super. Ct. No. 37-2012-00059212-
CU-BC-NC)

APPEAL from judgments of the Superior Court of San Diego County, Earl Maas,
III, Judge. Affirmed.

Mark C. Hargan for Defendants, Cross-complainants and Appellants.

Law Office of Foroozandeh and Majid Foroozandeh for Plaintiff, Cross-defendant
and Respondent.

INTRODUCTION

Kavan Berenjian (Kavan)¹ sued his son, Shazad Berenjian (Shazad), and two corporations Shazad controlled, Homeworks Holding Corporation (Homeworks) and Lady Bird Entourage Liberty, LLC (Lady Bird), alleging tort and contract claims. The court later entered defaults against Homeworks and Lady Bird.

Shortly before the scheduled trial, an attorney for Shazad, Homeworks and Lady Bird (collectively defendants) filed a motion seeking: (1) relief from the defaults under Code of Civil Procedure section 473, subdivision (b) (hereafter section 473(b)); (2) a request for a new trial readiness conference and/or leave to amend the joint trial readiness report to allow defendants to present their own witnesses and exhibits; and (3) a trial continuance. The court denied the motion. The court then conducted (1) a combined trial on Kavan's claims against Shazad and Shazad's cross-complaint against Kavan and (2) a prove up hearing on Kavan's claims against Homeworks and Lady Bird. After the proceeding, the court granted judgment against Shazad on the complaint and cross-complaint and default judgments against Homeworks and Lady Bird. The court also denied defendants' motion for a new trial. Defendants timely appealed. We affirm.

¹ We use the first name of the parties for convenience. We intend no disrespect.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2012, Kavan filed a complaint against Shazad and Homeworks alleging contract and tort claims. Shazad is Homeworks' president and sole shareholder.

Three months later, in March 2013, Shazad and Homeworks filed an answer and a cross-complaint against Kavan.

Six months later, in September 2013, Kavan filed an amended complaint adding Lady Bird as a party, but Lady Bird had already filed for bankruptcy. Shazad is Lady Bird's manager.

About three months later, on January 5, 2014, Shazad filed for personal bankruptcy. One week later, the court granted Homeworks and Shazad's attorney's motion to be relieved as counsel. The court gave Homeworks until February 19 to file a substitution of attorney, or its answer to the first amended complaint would be stricken.

On March 12, 2014, because Homeworks had failed to obtain counsel, the trial court entered an order striking Homeworks' answer to the first amended complaint. Two days later, the court entered a default against Homeworks.

About 11 days later, on March 25, Lady Bird's bankruptcy proceedings terminated, and Kavan served Lady Bird with his first amended complaint.

Three months later, at the scheduled trial readiness conference on June 27, the court dismissed the entire case without prejudice because none of the parties appeared.

One week later, Shazad's bankruptcy proceedings ended.

Four months later, on November 7, the court granted Kavan's motion to set aside the dismissal of the case and scheduled a trial readiness conference for February 27, 2015, and a trial for March 27, 2015. Shazad received notice of these dates.

Trial Readiness Conference

On February 27, 2015, the court held the joint trial readiness conference. Kavan's counsel appeared and filed a joint trial readiness report, but defendants did not appear. The court issued an advanced trial review order and confirmed the trial date. That same day, the court entered a default against Lady Bird.

In early March 2015, Attorney Mark Hargan, acting on behalf of the defendants, asked Kavan's counsel to stipulate to a continuance of the trial readiness conference and trial date to discuss settlement. Kavan's counsel refused to stipulate. On March 21, Hargan was retained to represent the defendants, and two days later, he formally substituted as counsel.

Motion to Amend Joint Trial Readiness Report, for Trial Continuance and for Relief from Defaults

On March 27, the date set for trial, Shazad's attorney orally requested a "possible continuance" of the trial, which Kavan opposed. The court continued the motion to April 1.

On March 30, defendants filed a written motion requesting (1) a continuance of the trial readiness conference and/or leave to amend the joint trial readiness report, (2) a trial continuance, and (3) setting aside of the defaults against Homeworks and Lady Bird. In support of their motion, Homeworks and Lady Bird submitted Shazad's

declaration stating that after the court dismissed the case in 2014, Shazad mistakenly believed that unless Kavan filed a new case, the matter could not proceed. Shazad's attorney also contended that the defaults against Homeworks and Lady Bird should be set aside on equitable grounds because Kavan failed to notify the court of the bankruptcy stays.

In support of the motions to set aside the defaults and to allow for a continuance, Shazad's counsel provided a declaration stating the dates of the bankruptcies, informing the court of dates he was available to try the case, and stating that plaintiff's counsel would not stipulate to a continuance. He also authenticated some documents to support a defense against Kavan's allegations, and also stated that he simply wanted to amend the exhibit list to add exhibits and only needed a brief continuance. He argued that Kavan had not been diligent in prosecuting his case, but nevertheless following its dismissal after a five-month hiatus, the court had showed Kavan great leniency by reinstating the case.

On April 1, 2015, the court heard oral argument on defendants' motion to continue trial. Two days later, the court denied the defendants' motion rejecting their requests to set aside the defaults and continue the trial. The court stated, "The history of [defendants'] failures to appear or participate are not cured by the last minute flurry of activity by the newly retained counsel." The court noted that Shazad was personally present when the court advised him that the corporations had to retain counsel by February 19, 2014, or their answers would be stricken, but the corporations took no action for over 12 months. The court also stated that defendants were aware of the trial

readiness conference, but did not participate and therefore did not provide a list of exhibits or witnesses for trial.

Trial

On April 3, the court conducted the combined trial against Shazad and a prove up hearing against Homeworks and Lady Bird. No court reporter was present. Based on its consideration of the evidence, the court ruled in Kavan's favor and entered a judgment for \$250,000 against all defendants on the contract causes of action, granted \$10,000 in damages against Shazad on the tort causes of action, and awarded Kavan \$10,000 in punitive damages against Shazad. The court also entered a default judgment for \$368,912.80 in favor of Kavan and against Homeworks and Lady Bird based on Kavan's testimony, written declaration and other evidence.

Later the court entered a judgment in favor of Kavan against Shazad for \$388,912.38. Included in the amended judgment were damages of \$270,000, prejudgment interest of \$101,674, costs of \$2,238.38, \$15,000 in late fees and \$75,254.42 attorney fees on the cross-complaint.

On June 5, 2015, the court denied defendants' motion for a new trial.

On July 10, 2015, defendants timely appealed the judgments.

DISCUSSION

I. Homeworks

A. *Homeworks' section 473(b) Motion was Untimely*

Although not clearly articulated at trial or on appeal, we construe Homeworks' and Lady Bird's claims for relief from default judgment under section 473(b) based on Shazad's mistake, as Homeworks' president and sole shareholder (and as Lady Bird's manager). After the court dismissed the case on June 27, 2014, Shazad contends he mistakenly believed that the case could not proceed unless Kavan filed a new case and that until then, Shazad did not need to do anything.

Motions under section 473(b) to set aside default judgments because of mistake, surprise or excusable neglect must be brought within six months of entry of default. This time limit is strictly enforced. (*Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, 345.) The trial court has discretion to vacate the judgment or entry of default, but that discretion can only be exercised if the moving party established a proper ground for relief, by the proper procedure, and within the time limit provided by section 473(b). (See *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.) A defaulted party has six months from the date of entry of default to bring a motion under section 473(b) for relief from default. The six-month time limit for granting statutory relief is jurisdictional, and the court may not consider a motion for relief after that time period has elapsed. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42.)

On January 10, 2014, the court relieved Homeworks' counsel and gave Homeworks until February 19, 2014 to substitute a new attorney because a corporation cannot proceed without representation. (See *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d. 724, 731.) Because Homeworks did not obtain counsel by the deadline, the court properly entered an order on March 12, 2014 striking Homeworks' answer to the complaint, placing it in default. On March 14, 2014, the court entered default against Homeworks.

Homeworks contends that the bankruptcy automatic stay provision in both Shazad's and Lady Bird's bankruptcies operated to stay the *entire case*, including the case against Homeworks.² However, the automatic stay applies only to stay the *case against the bankruptcy debtor*, the debtor's property and the property of the estate, but does not apply to property which is neither the debtor's nor the estate's. Each of the corporations is a distinct legal entity separate from its stockholders and from its officers. (*Barnett v. Lewis* (1985) 170 Cal.App.3d 1079, 1088.) Thus, the case was stayed only as to Shazad and Lady Bird respectively while each of them was in bankruptcy. However, the stay did not apply to Homeworks, a separate legal entity not in bankruptcy.

² Lady Bird was a debtor in a Chapter 11 Bankruptcy from August 28, 2013 until March 25, 2014, and Shazad was a debtor in an involuntary bankruptcy proceeding between January 5, 2014 and July 3, 2014.

In a related argument, Homeworks contends that the court *lacked jurisdiction* to enter the default against it on March 14, 2014, based on the same argument we have rejected, i.e., that the entire case, including the case against Homeworks, was stayed due to the automatic bankruptcy stays of Lady Bird and Shazad. However, as we have noted, the bankruptcy stays affected only Lady Bird and Shazad, but not Homeworks; thus, the court properly exercised its jurisdiction in entering the default against Homeworks.

Homeworks also contends that in computing the duration of the default, the trial court improperly included the time when the entire case was dismissed, between late June 2014 (after both sides failed to appear at the trial readiness conference), until the court reinstated the case in early November 2014. We agree that this period of temporary dismissal cannot be included in calculating the time that Homeworks remained in default. Nevertheless, even without counting this period, Homeworks remained in default for more than six months before seeking relief from default. Before the temporary dismissal, Homeworks was in default for over three months between the date of entry of default on March 14, 2014 and June 27, 2014, the date of the temporary dismissal of the case. In addition, after the court reinstated the case on November 7, 2014, the default period resumed and continued until the motion for relief from default was filed on March 30, 2015, a period of more than four months. Thus, when Homeworks finally moved to set aside the default, it had been in default for over seven months. The court lacked jurisdiction to set aside the default under section 473(b) because Homeworks did not move to set it aside within the mandatory six months after entry of default. (*Manson*,

Iver & York v. Black, supra, 176 Cal.App.4th at p. 42 ["The six-month time limit for granting statutory relief [under section 473(b)] is jurisdictional and the court may not consider a motion for relief made after that period has elapsed."].)

B. *Homeworks' Motion for Equitable Relief from Default*

To avoid the six-month time limit for setting aside a default under section 473(b), Homeworks contends the court should nevertheless have exercised its equitable powers to vacate Homeworks' default. The six-month time limit does not strictly apply where equitable relief is sought based on extrinsic fraud or mistake.

" 'Extrinsic fraud occurs when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented from fully participating in the proceeding. [Citation] Examples of extrinsic fraud are: failure to give notice of the action to the other party, and convincing the other party not to obtain counsel because the matter will not proceed (and then it does proceed). [Citation.] The essence of extrinsic fraud is one party's preventing the other from having his day in court.' [Citations.] Extrinsic fraud only arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense." (*Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1299-1300.)

"Extrinsic mistake is 'a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits.' " (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1044; see *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471-473 (*Kulchar*).)

Under either extrinsic fraud or extrinsic mistake, relief is not available if the party had notice and the opportunity to participate in the action. (*Kulchar, supra*, 1 Cal.3d at p. 472; *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 27.) Additionally, a party is not entitled to relief if the party contributed to the alleged extrinsic mistake. (*Kulchar*, at p. 473.) " 'If the complainant was guilty of negligence in permitting . . . the mistake to occur[,] equity will deny relief.' " (*Ibid.*)

When a default lasts for more than six months, the public policy favoring finality predominates, and equitable relief is only available in exceptional circumstances. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981-982; *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 314-315.) A moving party has the burden to show entitlement to equitable relief. (See *Moghaddam v. Bone* (2006) 142 Cal App.4th 283, 291.) An order denying a motion for equitable relief must be upheld unless the moving party establishes a manifest abuse of discretion. (*In re Marriage of Wipson* (1980) 113 Cal.App.3d 136, 141.) " 'All presumptions are in favor of the correctness of the order and the burden is upon the appellant to show that the court abused its discretion.' " (*Ibid.*)

Relying on California Rules of Court, rule 3.650,³ Homeworks contends that Kavan knew of Shazad's and Lady Bird's bankruptcies, but failed to notify the court, somehow making Kavan responsible for Homeworks' default. Rule 3.650 requires the party who requested the stay to serve notice on the court. The only time the opposing

³ All references to rules are to the California Rules of Court, unless otherwise specified.

party must notify the court is when the party requesting the stay has not appeared or is not subject to the jurisdiction of the court. Here, during the bankruptcies, Shazad was Homeworks' president and sole shareholder, Lady Bird's manager, and remained as an individually named defendant in the case. Despite the bankruptcies of Lady Bird and Shazad, Homeworks always remained a party in the case. Under these circumstances, Shazad, as an individual and as Homeworks' president, should have notified the court of the stay, but failed to do so. Under these circumstances, we reject Homeworks' argument that Kavan had any obligation under rule 3.650(a) to notify the court of the bankruptcies.

In any event, Homeworks does not establish that any failure of Kavan to notify the court of the bankruptcies constituted extrinsic fraud. Even assuming that Kavan should have notified the court, Homeworks cannot establish that Kavan's inaction prevented it from having its day in court. (*Rappleyea v. Campbell, supra*, 8 Cal.4th at pp. 981-982.) Nothing stopped Homeworks from participating in the action. Relief for extrinsic fraud is available only where the party seeking relief was denied the opportunity to be heard. (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1057, 1069.) Further, when a party requests equitable relief, it must demonstrate diligence in attempting to set aside the default once discovered. (*Ibid.*) In February 2014, the court admonished Homeworks that it had to retain counsel or suffer a dismissal, but Homeworks did not act. Over a year after entry of default until the eve of trial, Homeworks did nothing to set aside the default or to prepare for trial, leading the court to conclude that Homeworks displayed a complete lack of diligence. Its negligence negated its equitable claim. (*Kulchar, supra*, 1

Cal.3d at p. 473.) In short, on multiple grounds Homeworks' claim for equitable relief from entry of default judgment fails.

Since default was properly entered as to Homeworks, the court lacked jurisdiction to consider Homeworks' motion for a continuance or to allow Homeworks to present any evidence in its own behalf, other than in support of its section 473(b) motion. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-386; *W.A. Rose Co. v. Municipal Court (Fitzsimmons)* (1959) 176 Cal.App.2d 67, 71.)

II. Lady Bird

A. Court Properly Denied Lady Bird's Section 473(b) Motion

On March 25, 2014, shortly after Lady Bird emerged from bankruptcy, Kavan served Lady Bird with the first amended complaint, which alleged fraudulent transfer against Lady Bird. On June 27, 2014, the entire case against Lady Bird was dismissed but was reinstated on November 7, 2014. On February 27, 2015, the court entered a default against Lady Bird. Lady Bird took no action to set aside default until March 27, 2015, the day of trial, when the court allowed its attorney to file a motion to set aside default judgment as to Lady Bird.

Unlike Homeworks, Lady Bird's section 473(b) motion was not time barred because Lady Bird's default was not entered until about a month before it sought relief from default judgment. Nevertheless, for relief under section 473(b), Lady Bird had to establish that Shazad, its manager, did not answer Kavan's complaint because of his mistake, surprise or excusable neglect. (See *Cruz v. Fagor America, Inc.*, *supra*, 146 Cal.App.4th at p. 495 [Trial court has discretion to vacate default judgment, but

discretion can be exercised only if the moving party establishes a proper ground for relief, by the proper procedure.]") Liberally construing Shazad's arguments at trial and on appeal, Lady Bird contends that its section 473(b) motion is based on mistake, i.e., after dismissal of the case in June 2014, Shazad was unaware that the case was reinstated and continued to move forward. Shazad contends that he mistakenly believed that he was not required to take any action until Kavan filed a new case against him. However, in late September 2014, Kavan served Shazad and Homeworks with a notice of motion and motion to set aside the court dismissal. In addition, after the court granted Kavan's motion to set aside dismissal on November 7, 2014, Lady Bird and the other defendants were aware of the trial readiness conference on February 27, 2015, but did not participate. In assessing the situation, the court observed that Shazad had a long history of failing to participate in the case. For example, in January 2014, after the court advised him as Homeworks' sole shareholder that Homeworks needed to obtain counsel or its answer would be stricken, he did nothing, resulting in Homeworks' default. Under these circumstances, the court did not abuse its discretion in rejecting Shazad's claim of mistake. The court reasonably concluded that Shazad's inaction was explained not by his mistake, but rather by his deliberate avoidance of any involvement in the litigation, regardless of the consequences. (See *Cruz v. Fagor America, Inc.*, at p. 495.)

The record does not contain a transcript of oral argument on the motion to set aside the defaults. "It is well settled, of course, that a party challenging a judgment [or order] has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) " 'A judgment or order of the lower court is *presumed*

correct. All intendments and presumptions are indulged to support it on matters to which the record is silent" (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) Here, a minute order reflects that the court rejected Lady Bird's claim of mistake based on the evidence that Shazad knew the case was moving forward, yet knowingly failed to appear at the trial readiness conference, consistent with his history of failing to participate in the case despite his knowledge of adverse consequences. On this record, we cannot say that the court abused its discretion in rejecting Shazad's claim of mistake and in denying the section 473(b) motion.

Like Homeworks, Lady Bird contends that it is entitled to equitable relief because of extrinsic fraud due to Kavan's failure to notify the court of Shazad's and Lady Bird's bankruptcy stays. The argument lacks merit. The first amended complaint adding Lady Bird as a defendant was not served until the bankruptcy stays expired. In addition, the other reasons we have given for rejecting Homeworks' claim for equitable relief apply to Lady Bird's claim as well.

III. Shazad's Motion for a Continuance.

A. *Background*

In early March 2015, Hargan, who was becoming counsel for defendants, requested that Kavan's counsel stipulate to a continuance of the trial readiness conference and trial. On March 20, 2015, Hargan wrote to Kavan's counsel stating that he was counsel for defendants and was renewing their request for a continuance of the trial readiness conference and trial. However, Kavan's counsel would not stipulate to a continuance.

On March 27, 2015, the original trial date, defendants appeared and orally requested a "possible continuance" of the trial readiness conference and the trial date. The court continued the matter for several days until April 1, which allowed defendants to prepare a written motion for a continuance of the trial readiness conference and trial. In his papers Hargan wrote he was initially going to request a continuance for "at least a few months" but that once the court ruled on the outstanding motions, the "necessity of a continuance for such a long period of time [was] diminished." However, Hargan said he would not be available between April 6 and April 17, 2015, because he needed to attend his mother's funeral. In addition, before the trial could take place, he wished to schedule a trial readiness conference in late April or May to amend the joint trial readiness report and to add exhibits and witnesses.

After argument and review of the evidence, the court denied the motion. The court's minute entry⁴ stated "The history of [defendants'] failures to appear or participate [is] not cured by the last minute flurry of activity by newly retained counsel . . . with no action by any defendant. Defendants were aware of the Trial Readiness Conference and did not participate, thereby having no evidence, exhibits or witnesses available for trial."⁵

⁴ The record contains no reporter's transcript of the proceedings.

⁵ Superior Court of San Diego County, Local Rules, rule 2.1.15, titled Trial Readiness Conference, provides in pertinent part: "Failure to disclose and identify all trial exhibits and witnesses intended to be called at trial and all other items required by the [joint trial readiness] report may, in the court's discretion, result in exclusion or restriction of use at trial."

B. *Analysis.*

A trial court has broad discretion to grant or deny a continuance, and its discretion will be reversed only when an abuse of discretion is clear. (*Link v. Carter* (1998) 60 Cal.App.4th 1315, 1321.) Continuances of trials are disfavored and may be granted only on a showing of good cause. (Rule 3.1332(c); *Thurman v. Bayshore Transit Mgmt, Inc.* (2012) 203 Cal.App.4th 1112, 1127.) Dates assigned for trial are firm, and parties and their attorneys must regard these dates as certain to ensure prompt disposition of civil cases. Judges should vigorously insist that cases be heard and determined as promptly as circumstances permit. (*Midwest Television, Inc. v. Scott, Lancaster, Mills and Atha, Inc.* (1988) 205 Cal.App.3d 442, 456.) A balance must be struck, however, between the court's right to control its calendar and its obligation to provide a meaningful forum for litigants. (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395-1396.) Judges must consider each request for a continuance on its own merits and should grant a continuance when good cause for the continuance is shown. (See rule 3.1332(c).)

A motion for a continuance must be made by ex parte application or by formal noticed motion with supporting declarations. (Rule 3.1332(b).) In this case, on the day originally set for trial, Shazad's attorney made an oral motion for a continuance. The trial court could have properly denied the oral motion made on the day of trial for failing to file a properly noticed written motion with supporting affidavits. (See *County of*

San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal.App.3d 776, 783.)

Nevertheless, the trial judge afforded Shazad's counsel several additional days to prepare a motion.

The motion or ex parte application for a continuance must be made as soon as reasonably practicable once the necessity for a continuance is discovered. (Rule 3.1332(b).) Shazad's counsel knew in early March 2015 that he needed a continuance of the joint trial readiness conference as well as a trial continuance, but he did not bring his oral motion until the date of trial on March 27, 2015. The trial judge may consider the party's diligence in bringing the situation to the court's attention at the first available opportunity and could have denied the motion because of counsel's failure to timely apprise the court of its intent to move for a continuance. (See, e.g. *Zlotoff v. Tucker* (1984) 154 Cal.App.3d 988, 993-994 [judge properly denied continuance motion made two days before trial when counsel had known for 11 days of witness's unavailability]; *County of San Bernardino v. Doria Mining & Engineering Corp.*, *supra*, 72 Cal.App.3d at p. 783 [oral motion made on day of trial was not timely when attorney knew of grounds for continuance for over one week before trial].) Another related factor supporting denial of the continuance was the close proximity of the motion to the trial date because the motion to continue was not initially made until the day of trial (rule 1.1332 (d)(1)).

One reason for Shazad's request for a continuance was to allow him to list his exhibits and witnesses on a joint trial readiness report. The court reasonably considered Shazad's failure to list his exhibits and witnesses before trial as an indication of his lack

of reasonable due diligence in presenting his evidence, and denied his request for continuance. (Rule 3.1332(c); Code of Civ. Proc. § 595.4 [motion to postpone a trial "can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it"].) After taking no action for over a year, Shazad retained counsel on the eve of trial in what the court described as a "last minute flurry of activity." Shazad provided the court with no explanation for his failure to prepare his case for trial. Despite having been advised over a year before trial that the corporation would need legal representation or have its answer stricken, Shazad did nothing. Also, despite having been given notice, Shazad failed to appear at the trial readiness conference on February 27, 2015, resulting in the preclusion of his exhibits and witnesses at trial. Under these circumstances the court reasonably determined that Shazad had not acted with reasonable diligence.

Another relevant factor supporting denial of the continuance was counsel's failure to provide a firm date for the start of trial. Defense counsel initially stated he was considering a request for a continuance of at least a few months. Later, he stated he could try the case sooner, but would have to be absent for two weeks in April. He was also requesting that the court conduct another joint trial readiness conference in late April or May before the trial date. This confusion amounted to a request for a trial continuance of an indeterminate length and provided additional grounds for denial of the continuance. (See rule 3.1332(d)(3) [stating that the length of the continuance is a factor the court may consider].) Further, Kavan was ready to proceed with trial. Any continuance would have prejudiced Kavan. (See rule 1.332(d)(5).) Any delay would unnecessarily have required

him to devote more time and money to prepare again for trial under different circumstances, especially if the court allowed Shazad to tardily designate new witnesses and exhibits.

Finally, the record does not contain a transcript of the oral argument on this motion. "It is well settled, of course, that a party challenging a judgment [or order] has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe, supra*, 41 Cal.3d at p. 574.) " 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent.' " (*Rossiter v. Benoit, supra*, 88 Cal.App.3d at p. 712.) Appellants must affirmatively establish error by presenting an adequate record. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.) Taking into account the various factors on the record supporting denial of the continuance, the absence of a trial transcript of the hearing, and the discretion the trial court judge has in ruling on a motion for a continuance, we cannot say the court abused its discretion.

C. The Court Properly Denied Shazad's Motion For New Trial.

Shazad contends the trial court erred in denying his new trial motion because of irregularities and errors in law in the proceedings under Code of Civil Procedures section 657, subdivisions (1) and (7). We review an order denying a motion for a new trial under an abuse of discretion standard. However, in doing so, we must review the entire record to determine independently whether there were grounds for granting the motion. (*Santillas v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 733.)

Shazad's motion for a new trial rehashed the same arguments he made to support his motion to continue the trial and trial readiness conference and to set aside Homeworks' and Lady Bird's defaults. We have concluded that the court did not abuse its discretion in these matters. In addition, Shazad made several new arguments contending that at trial he was not allowed to cross-examine Kavan on the issue of punitive damages, suggesting that the court prevented him from calling witnesses from Kavan's exhibit list, and alleging that Kavan was allowed to treat the case as if it were a "pre-prove up."

However, Shazad's contentions are unsupported by the record, which does not contain a reporter's transcript of the proceedings. A fundamental rule of appellate review is that a challenged judgment or order is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564. " 'All intendments and presumptions are indulged to support in on matters as to which the record is silent, and error must be affirmatively shown.' " (*Id.* at p. 564; *see In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Moreover, on this record, there is nothing to reflect any attempt Shazad made at trial to call witnesses or present exhibits or to timely object to the court's procedures or to Kavan's evidence. Considering the record, Shazad has forfeited any right of appellate review based on these contentions. (See Evid. Code, § 353; *In re Marriage of Arceneaux, supra*, at p. 1133.) Furthermore, the limited record contradicts Shazad's assertions. In denying Shazad's motion for a new trial, the court in its minutes observed that the "recitation of counsel's recollection" of the proceedings in support of his motion for new trial was

"inaccurate."⁶ Based on our review of the entire record, we conclude that the trial court properly denied the motion for new trial.

DISPOSITION

The judgments are affirmed. Kavan is to recover his costs on appeal.

PRAGER, J.*

WE CONCUR:

BENKE, Acting P. J.

IRION, J.

⁶ In any event, in the absence of a reporter's transcript or other indication on the record, we cannot accept counsel's declaration characterizing what took place at trial when those assertions are unsupported by the record. (*Ballard v. Uribe, supra*, 41 Cal.3d at p. 574.)

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