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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GLORIA YBARRA,

Plaintiff and Respondent,

v.

READY PRODUCTS CORPORATION et
al.,

Defendants and Appellants.

E053406

(Super.Ct.No. CIVRS803019)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kenneth Andreen (retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to art VI, § 6 of the Cal. Const.), and Janet M. Frangie, Judges.¹
Affirmed.

Edward M. Murphy II for Defendants and Appellants.

¹ Judge Andreen signed the first judgment, while Judge Frangie signed the corrected judgment.

The Giardinelli Law Group, Kelly A. Neavel; Ritchie, Klinkert & McCallion and James E. Klinkert for Plaintiff and Respondent.

Defendants and appellants Ready Products Corporation and Gary Hunt (Defendants) appeal the judgment entered on February 23, 2011 (February 23 judgment) in favor of plaintiff and respondent Gloria Ybarra (Ybarra) on the grounds that it erroneously “corrects clerical errors in the first judgment,” which had been entered on December 3, 2010 (December 3 judgment). Defendants contend the trial court failed to “make a clear evidentiary showing of clerical error.” (Capitalization omitted.) They further challenge the award of attorney fees as to Gary Hunt.

I. PROCEDURAL BACKGROUND AND FACTS

It is difficult to discern the underlying facts because Defendants have failed to provide an adequate record, along with citations to the record, in support of each statement of fact. Nonetheless, the parties do not dispute that the underlying action involved the validity of a \$46,000 Installment Note (the Note) owned by Defendants, who sought to enforce it against Ybarra. The parties agree the issue of the validity of the Note was presented to a jury, which found in favor of Ybarra. The primary issues involve Ybarra’s entitlement to attorney fees and the trial court’s authority to amend the judgment.

On November 19, 2010, a jury found in favor of Ybarra and against Defendants on Ybarra’s complaint for, inter alia, forgery, violation of the Mortgage Foreclosure Consultant Act, and cancellation of written instruments. Ybarra was awarded damages in excess of \$20,000. On November 30, 2010, at a further hearing on the issue of

declaratory relief, the trial court found the Note is “invalid and not enforceable based upon the finding of the jury and the concession by Defendants.” Counsel for Ybarra was directed “to prepare order/judgment and cost bill.” During the correspondence between counsel regarding the contents of the judgment, Defendants’ counsel argued the judgment should provide that the parties bear their own costs and attorney fees. Before the issue was resolved, defense counsel sent a Proposed Judgment to the court, which was signed on December 3, 2010. This December 3 judgment reflected each party bearing his/her own costs and attorney fees. That same day, Ybarra moved for her attorney fees and costs.

On December 23, 2010, Ybarra moved to correct the clerical error in the December 3 judgment on the grounds that it failed to accurately reflect the court’s decision. On January 24, 2011, Defendants opposed the motion and opposed Ybarra’s motion for attorney fees and costs. At the hearing on February 3, both matters were taken under submission. However, as to the motion to correct the error in the December 3 judgment, counsel stipulated that the court (Judge Janet M. Frangie) would contact Judge Andreen for his input.

On February 23, 2011, the trial court granted Ybarra’s motion to correct clerical error in the December 3 judgment and granted her motion for attorney fees and costs. Judge Frangie had contacted Judge Andreen, who stated “he did not intend to sign a Judgment which denied [Ybarra] her costs; and . . . he made no order regarding” an award of attorney fees. On that same day, judgment was entered “Nunc Pro Tunc,” awarding Ybarra her attorney fees and costs against Defendants, “jointly and severally.”

II. AWARD OF ATTORNEY FEES AGAINST HUNT

Hunt contends the trial court erred in awarding attorney fees against him when he was not a party to the Note. In response, Ybarra argues that Hunt has waived this issue because he failed to raise it at the trial level when he opposed her motion for attorney fees. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 681.) We need not decide the issue of waiver because we are unable to reach the merits of Hunt's argument given the record before this court. While Hunt claims he was not a party to the Note, the record shows that neither was Ready Products Corporation. Rather, the Note was originally between Allied Corporate Investments and Ybarra. Defendants claim it was later assigned to Ready Products Corporation. However, the record is void of any document that establishes this assignment. ““All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.”” [Citation.] As . . . explained in *Maria P. [v. Riles]* (1987) 43 Cal.3d 1281, 1295-1296]: ‘It is the burden of the party challenging the fee award on appeal to provide an adequate record to assess error. [Citations.] . . . Because [Hunt has] failed to furnish an adequate record . . . [Ybarra’s] claim must be resolved against [him].’ [Citation.]” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.)

In addition, Ybarra contends that if she prevails on this appeal, she is entitled to recover her appellate attorney fees. We agree. “Pursuant to California Civil Code section 1717, where a written contract expressly provides for the award of attorney fees, the prevailing party in an action under or relating to the contract is entitled to recover its

fees, whether incurred at trial or on appeal. [Citations.]” (*Starpoint Properties, LLC. v. Namvar* (2011) 201 Cal.App.4th 1101, 1111.)

III. CORRECTION OF JUDGMENT

Defendants contend the trial court failed to make a clear evidentiary showing of a clerical error when it decided to enter a second judgment on February 23. Because of the lack of showing of a clerical error, Defendants argue the change was substantive and thus outside the jurisdiction of the court. In response, Ybarra contends the trial court acted within its discretion when it entered a second judgment on February 23 to correct the errors in the December 3 judgment. (*Conservatorship of Tobias* (1989) 208 Cal.App.3d 1031, 1034-1035.) We agree with Ybarra.

“It is well settled that a court has the inherent power to correct clerical error in its judgment so that the judgment will reflect the true facts. [Citation.] . . . [¶] A clerical error in the judgment includes inadvertent errors made by the court ‘which cannot reasonably be attributed to the exercise of judicial consideration or discretion.’

[Citations.] ‘Clerical error . . . is to be distinguished from judicial error which cannot be corrected by amendment. The distinction between clerical error and judicial error is “whether the error was made in rendering the judgment, or in recording the judgment rendered.” [Citation.] Any attempt by a court, under the guise of correcting clerical error, to “revise its deliberately exercised judicial discretion” is not permitted.

[Citation.]’ [Citation.] A judicial error is the deliberate result of judicial reasoning and determination. [Citation.] [¶] The court’s inherent power to correct clerical errors includes errors made in the entry of the judgment or due to inadvertence of the court.

‘The term “clerical error” covers all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. If an error, mistake, or omission is the result of inadvertence, but for which a different judgment would have been rendered, the error is clerical and the judgment may be corrected’ [Citation.] *The signing of a judgment, which does not express the actual judicial intention of the court, is clerical rather than judicial error.* [Citations.]” (*Conservatorship of Tobias, supra*, 208 Cal.App.3d at pp. 1034-1035, italics added.)

Here, the issue was whether the December 3 judgment correctly reflected Judge Andreen’s intended ruling. At the trial level, Defendants vehemently argued that because Judge Andreen placed his signature a mere two inches below the line stating there would be no attorney fees and costs, “at the moment he signed it, he decided, made a judicial decision in a judgment.” In response, Judge Frangie observed that the failure to award costs amounted to a clerical error, given Judge Andreen’s earlier decision to award costs to Ybarra. More importantly, when Judge Frangie asked if counsel would “feel better” if she asked Judge Andreen to comment on this issue, Defendants’ counsel said, “Yeah, I would ask that you do call him and say, ‘Does this judgment reflect my [(Defendants’)] judgment?’ And if it does, these [(Ybarra’s motions)] have to be denied. [¶] And if it doesn’t, well then, okay, then I guess something from him would change the matter.” Judge Frangie contacted Judge Andreen, who “communicated that there was inadvertent error in that (1) he did not intend to sign a Judgment which denied [Ybarra] her costs; and

(2) that he made no order regarding items 4 through 6^[2] in any proceedings before him.

Judge Andreen further communicated to the court that [Ybarra] was the prevailing party.”

Given the above, we conclude the February 23 judgment entered nunc pro tunc is a valid judgment that corrected clerical errors made in the December 3 judgment.

Defendants’ counsel’s submission of a Proposed Judgment that omitted an award of costs to Ybarra suggests unethical conduct. (Rules of Professional Conduct, rule 5-200 [“In presenting a matter to a tribunal, a member: . . . [¶] (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.”].)

IV. DISPOSITION

The judgment is affirmed. Ybarra shall recover her costs and attorney fees on appeal, the amount of which shall be determined by the trial court.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

CODRINGTON

J.

² The December 3 judgment provides, in part: “4. Any and all other stays, restraining orders, or injunctions issued by this court are immediately dissolved and vacated. [¶] . . . [¶] The parties may set-off this judgment against other obligations between the parties. [¶] 6. Each party to bear their own costs and attorney fees.”