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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

HENRY COLANGELO,

Plaintiff and Appellant,

v.

JAMES CLAY,

Defendant and Respondent.

E054721

(Super.Ct.No. CIVSS707496)

OPINION

APPEAL from the Superior Court of San Bernardino County. Frank Gafkowski, Jr. (retired judge of the former L.A. Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), and Paul M. Bryant (retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Judges.¹ Affirmed.

Henry Colangelo, in pro. per., for Plaintiff and Appellant.

¹ Judge Bryant granted the order requiring the undertaking, while Judge Gafkowski dismissed the action.

Ferguson, Praet & Sherman and Steven A. Sherman for Defendant and Respondent.

Plaintiff and appellant Henry Colangelo (Colangelo) initiated this civil rights action against defendant and respondent police officer James Clay (Clay) and others,² based on a physical altercation in October 2006. Colangelo claimed he was forced to move from his home and out of state because of police intimidation. Because Colangelo had moved out of state, Clay sought and on September 1, 2009, was granted an order requiring Colangelo to post an undertaking in the amount of \$35,700.00 pursuant to Code of Civil Procedure³ section 1030, in order to ensure that Clay could recover costs and fees if he prevailed. Colangelo failed to post the bond and the trial court dismissed his action. Colangelo appeals.

I. PROCEDURAL BACKGROUND AND FACTS

Colangelo and Clay had been next-door neighbors for a number of years. Colangelo worked at “All About Flooring,” a family carpet and flooring business. Clay is a sergeant with the Fontana Police Department. In 2006, when Clay needed material, supplies, and labor to remodel his home, Colangelo assisted in getting a “family discount” and contacting labor. On October 16, 2006, Clay went to Colangelo’s place of

² Others included the City of Fontana, Fontana Police Department, and Officers Doug Locey, Brian Heaviside and Jeremy Hale. These parties were dismissed from the action, and Plaintiff’s appeal against them was dismissed by this court on November 14, 2011, as being untimely.

³ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

business to discuss delays in the remodeling work. A verbal dispute ensued, which led to a physical altercation. 911 was called and Fontana police officers arrived. After observing Clay, the officers placed Colangelo under arrest.

On October 17, 2007, Colangelo initiated this action. Following a few demurrers, he filed his second amended complaint on September 2, 2008, alleging violation of civil rights, violation of inalienable rights, harassment, assault, battery, false arrest/imprisonment, stalking, intentional infliction of emotional distress, negligent infliction of emotional distress, and liability pursuant to Government Code section 815.2. Colangelo claimed that Clay had arrived at Colangelo's flooring store, proceeded to yell and curse at Colangelo, and then attacked Colangelo. Colangelo further claimed he attempted to defend himself by picking up a pipe and then a tile scraper. According to Colangelo, Fontana police officers arrived and repeatedly beat him.

On October 16, 2008, Clay filed a separate action against Colangelo, alleging intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, slander, libel, violation of due process, and assault and battery. In December the parties stipulated to consolidate the actions and allow them to proceed under Colangelo's case.

On July 23, 2009, Clay moved for an order requiring Colangelo to file an undertaking pursuant to section 1030 in the amount of \$35,760.00 to secure an award of costs, which may be awarded to Clay. According to Clay, Colangelo was residing in Oregon and Clay wanted to ensure that upon his obtaining a favorable judgment there would be a source to secure any award of costs. In support of his motion, Clay

referenced the depositions of Colangelo and three witnesses, which established that Colangelo was a dishonest person who had assaulted Clay, and the arresting officers did not assault Colangelo. He further estimated the recoverable costs.

On August 26, 2009, Colangelo filed his opposition to the motion. Other than his self-serving declaration, he offered no evidence to contradict that offered by Clay. According to Colangelo, the court should deny the request because he had insufficient funds and poor credit, which prevented him from obtaining a bond; Clay failed to provide sufficient evidence to show a reasonable possibility of prevailing; Clay's projected costs were greatly inflated; and Colangelo was prepared to move back to California.

On September 1, 2009, the court granted Clay's motion and ordered Colangelo to obtain an undertaking in the amount of \$35,700.00. Upon Colangelo's failure to obtain such bond, Clay moved for and on November 4, 2009, was granted an order dismissing Colangelo's action. On August 3, 2011, Clay dismissed his action against Colangelo, which provided a final, appealable judgment. Thus, Colangelo appealed.

II. STANDARD OF REVIEW

Section 1030, in relevant part, provides: “(a) When the plaintiff in an action . . . resides out of the state . . . the defendant may at any time apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action [¶] (b) The motion shall be made on the grounds that the plaintiff resides out of the state . . . and that there is a reasonable possibility that the moving defendant will obtain judgment in the action [¶] . . . [¶] (d) The plaintiff shall file the undertaking not later than 30 days after service

of the court's order requiring it or within a greater time allowed by the court. If the plaintiff fails to file the undertaking within the time allowed, the plaintiff's action . . . shall be dismissed" (§ 1030, subs. (a), (b), (d).) An appeal from an order dismissing the case pursuant to section 1030 is reviewed for abuse of discretion. (*Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 431; *Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, 1433-1434 (*Baltayan*).) However, an appeal from an order requiring an undertaking is reviewed for the substantial evidence. (*Baltayan, supra*, at pp. 1432-1433.)

III. COLANGELO'S INDIGENCE

According to Colangelo, the trial court committed reversible error in failing to conduct a hearing to determine his financial inability to post an undertaking.

At both the trial level and in his opening brief, Colangelo offered the same argument regarding his alleged indigence. While Colangelo declared that (1) he was denied a bond due to his poor credit, (2) he did not have the money to purchase a bond or to post the security with the court, and (3) he did not have any friends or family who were able to loan him the money, he admitted that he was "prepared to offer [Clay] a promissory note in the amount of \$35,760.00, secured with a Second Trust Deed, based [on] the fact that there is sufficient equity in [his] Fontana house." Clearly, by Colangelo's own admission, he was not indigent.

Regarding his Fontana house, during the April 14, 2009, hearing on a prior request by another party for an undertaking, Colangelo's counsel argued that Colangelo "has a home here which is obviously an asset that the defense, if they were fortunate enough to

get a verdict to, [could go] after and file an abstract of judgment.” In response, the trial court stated: “The trouble is unless the economy changes, one, it’s a diminishing asset, and two, unless you agree to put a lien on the property for the bond which I think i[s] a sensible way to do business, there’s nothing to keep him from selling it between now and the time of the lawsuit and they would have no asset is what I think is the problem.”

Given the above, Colangelo failed to make a prima facie showing that he was unsuccessful in obtaining the required undertaking or that he was unable to furnish it. (*Baltayan, supra*, 90 Cal.App.4th at pp. 1433-1434, *Fuller v. State of California* (1969) 1 Cal.App.3d 664, 666-668 [determinative question is not whether plaintiff made a sufficient showing of indigence, but whether plaintiff made a showing of inability to furnish the undertaking].) Thus, the trial court did not err in failing to conduct a hearing to determine Colangelo’s financial ability to post an undertaking.

IV. REASONABLE POSSIBILITY CLAY WOULD PREVAIL

Next, Colangelo contends the evidence was insufficient to prove that Clay would prevail at trial because he failed to submit his own declaration. We disagree.

Instead of providing a self-serving declaration, Clay submitted excerpts from the depositions of three witnesses and Colangelo. Colangelo has not questioned nor refuted this evidence. According to Colangelo’s deposition, he admitted swinging a tile scraper at Clay. According to witness Joseph Grincerì, (1) Colangelo took “a full Babe Ruth swing” and “dropped” Clay; (2) Colangelo threw books at Clay; and (3) Colangelo’s brother stopped Colangelo from taking a second swing at Clay. Grincerì testified that he did not see Clay “lay any hands on [Colangelo].” Grincerì also stated that Colangelo

“has a tendency to exaggerate,” when it is in his best interest. Witness Nick Colangelo, who is also Colangelo’s brother, testified that Clay was leaving the store when Colangelo said something that caused Clay to head back. Nick heard “a loud thud” and saw Clay on the ground in the doorway of the office where Colangelo was standing in the office. Nick took the tile scrapper out of Colangelo’s hand and prevented Colangelo from hitting Clay a second time. Nick never heard Clay get loud or upset. Nick did not hear or see Clay threaten Colangelo, nor did he see any of the arresting officers kick and/or knee Colangelo, or ransack the office.

In contrast, Colangelo’s only evidence was his self-serving declaration that accused Clay and the arresting officers of physically attacking him. Comparing Colangelo’s evidence with that offered by Clay, we conclude substantial evidence supports a finding that there was a reasonable possibility that Clay would prevail on the merits of Colangelo’s claims.

Lastly, Colangelo claims that Clay’s request for an undertaking was disingenuous because he filed a separate action against Colangelo despite the fact that Colangelo was residing out of state. Colangelo offers no legal authority as to how this is relevant, and we are unaware of any. “Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, [they are] waived [Citations].” (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.)

V. DISPOSITION

The judgment is affirmed. Defendant and respondent shall recover his costs on appeal.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MCKINSTER

J.