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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MED-TRANS CORPORATION,

Plaintiff and Appellant,

v.

CITY OF CALIFORNIA CITY,

Defendant and Respondent.

F061553

(Super. Ct. No. CV-253230)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Thomas J. Anton for Plaintiff and Appellant.

Lemieux & O'Neill, W. Keith Lemieux and Michael Silander for Defendant and Respondent.

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Med-Trans Corporation (Med-Trans) appeals from a judgment entered in favor of City of California City (City) after the trial court granted the City's petition to confirm a contractual arbitration award, which awarded the City attorney fees and costs. On appeal, Med-Trans asserts the referee who conducted the arbitration erred in granting two

judgments on the pleadings that resulted in the dismissal of two causes of action alleged in its fourth amended complaint and in awarding attorney fees to the City. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The record on appeal, which consists only of the clerk's transcript containing 14 documents, discloses the following background.¹ On April 29, 2005, Med-Trans filed a fourth amended complaint against the City. Med-Trans alleged that on January 7, 2002, it entered into a written contract with the City to facilitate continuous helicopter ambulance service for patients within the City and surrounding areas. Under the contract, the City was to dispatch calls to Med-Trans, who provided the helicopter service. Before Med-Trans entered into the contract, the City's fire chief, Michael Antonucci, made representations to Med-Trans about the call volumes Med-Trans would receive. He presented Med-Trans with historical call volume based on dispatch data for the City's fire department and told Med-Trans that based on the historical data, it would receive at least 870 calls per year.

The complaint alleges two causes of action: (1) fraud in the inducement of the contract; and (2) breach of contract. In the fraud cause of action, Med-Trans alleges

¹ Med-Trans designated 11 documents to be included in the clerk's transcript: (1) the fourth amended complaint, filed April 29, 2005; (2) the answer to the fourth amended complaint, filed May 27, 2005; (3) stipulation for order appointing referee, filed November 6, 2008; (4) December 4, 2008, minute order; (5) order appointing referee, filed January 23, 2009; (6) petition to confirm contractual arbitration award, filed March 29, 2010, and attached exhibits; (7) June 11, 2010 minute order; (8) judgment for attorney fees and costs for City and against Med-Trans, filed August 30, 2010; (9) order granting petition to confirm contractual arbitration award, filed September 17, 2010; (10) notice of entry of judgment, filed September 30, 2010; and (11) notice of appeal filed November 23, 2010.

On August 2, 2011, Med-Trans filed a motion to augment the appellate record with nine documents comprised of the moving papers, opposition papers and rulings on two judgments on the pleadings filed by the City. The City opposed the motion, arguing it was untimely and good cause had not been shown for the delay. By order dated August 19, 2011, we denied the motion for lack of good cause shown.

(1) the statements regarding the anticipated call volume were not opinion, but instead were presented as being factually accurate and reliable; (2) when the statements were made, Med-Trans had no experience providing air ambulance service to the City area, while Antonucci had superior knowledge of the call volume; (3) Med-Trans relied on Antonucci's representations and entered into the contract based on them and, but for those representations, it would not have agreed to expend more than two million dollars to place a helicopter in the City; (4) the City did not have the appropriate infrastructure in place to properly dispatch calls to Med-Trans and the call volume was not at the level represented; (5) by entering into the contract, Med-Trans was induced to and did rely on the City's promises, and absent the representations, it would not have entered into the contract; and (6) on or about August 19, 2003, it received enough facts and evidence to establish not only that Antonucci's misrepresentations induced it to enter into the contract, but that the contract was breached due to the City's failure to provide calls to Med-Trans for air ambulance support. Med-Trans alleged it was entitled to recover damages and restitution.

In the second cause of action for breach of contract, Med-Trans alleged that in reliance on the contract, it continued to prepare and supply the necessary support personnel and equipment to provide air ambulance services to the City, thus foregoing other corporate income opportunities in reliance on the contract and the City's false promises. Med-Trans alleged the City breached the contract by (1) not providing the proper infrastructure to dispatch calls, and (2) failing to acquire and maintain the permits, authorizations and licenses necessary for the operation of the helicopter landing, storage, fuel facilities, duty room and air ambulance operation within Kern County, as required by paragraph 3(g) of the contract. Med-Trans claimed entitlement to compensatory and contractual damages. The City filed an answer to the fourth amended complaint on May 27, 2005.

The written contract contained an agreement to arbitrate disputes as an alternative to court action. In accordance with this provision, in November 2008 the parties stipulated to the appointment of a referee pursuant to Code of Civil Procedure section 638 to resolve all issues in dispute. The trial court subsequently vacated the trial date and stayed the matter pending conclusion of the reference proceedings or dismissal of the case. On January 30, 2009, an order was filed appointing the referee, with the authority to hear and determine all issues in the action, whether of fact or law, and requiring the referee to provide a written statement of decision.

On March 29, 2010, the City filed a petition to confirm a contractual arbitration award. The petition asserted (1) the parties had entered into a stipulation for order appointing the referee, who was to resolve all issues, (2) an arbitration hearing was conducted on three days, June 24 and September 16, 2009, and January 7, 2010, and (3) on February 23, 2010, the referee made an arbitration award which required Med-Trans to pay \$351,470 to the City in attorney fees and costs pursuant to the City's granted motion, and to dismiss the underlying complaint, rendering the City the prevailing party. The City requested the court confirm the award and enter judgment accordingly.

Attached to the petition is the City's motion for attorney fees and costs as the prevailing party under the contract provisions, which its attorney signed on August 17, 2009 and submitted to the referee. In the memorandum of points and authorities, the City asserted it was the prevailing party on the contract cause of action, as the referee dismissed that claim after the City moved on June 24, 2009 to dismiss it on the ground the court lacked jurisdiction because the allegations in that cause of action were beyond the scope of the tort claim. The City asserted that because it was the prevailing party, it was entitled to \$414,621.50 in attorney fees and \$21,183.50 in costs, as the contract contained a provision entitling the prevailing party in an action to enforce the contract to recover reasonable costs of suit and attorney fees.

The City argued it was the prevailing party on the contract, even though the fraud in the inducement claim remained, because such a claim does not entitle the prevailing party to attorney fees under Civil Code section 1717. It further asserted it was entitled to compensation for all hours reasonably spent at an hourly rate that reflected the reasonable market value of such services in the community, and the attorney fees it reasonably incurred up to June 24, 2009, when the breach of contract cause of action was dismissed, totaled \$414,621.50.

The City requested the referee apply an upward multiplier based on the complexity of the case and the public benefit in defending the litigation. The City argued the case was complex because Med-Trans had filed three “flawed” complaints since it commenced the action in June 2004, to which the City successfully demurred, and rather than amending the defective pleadings, Med-Trans fought each demurrer and finally filed the operative pleading – the fourth amended complaint – which ultimately was also found to be unsound. Moreover, Med-Trans later unsuccessfully sought leave to file a fifth amended complaint. The City explained that once the case was at issue, the parties engaged in discovery that included several lengthy depositions and bulky document production, Med-Trans’ “ever-changing allegations” forced the City to conduct extensive discovery and file several motions, and on March 26, 2006, the trial court granted a motion to disqualify Med-Trans’ counsel from continuing as counsel for Med-Trans, which Med-Trans appealed.

On February 23, 2010, the referee entered a written order on the attorney fees motion. The written order states that after prevailing on both causes of action in Med-Trans’ operative complaint, the City filed the motion for attorney fees that was before the referee for determination. The referee explained it was undisputed that the fraud in the inducement claim could not be the basis for an award of attorney fees, noting his previous ruling that Med-Trans’ tort claim was in derogation of the complaint, but the City nevertheless sought all of its attorney fees without apportionment between the fraud and

contract causes of action on the ground that it was forced to defend against the tort claim in order to prevail on the contract claim. Med-Trans, on the other hand, claimed the City was required to segregate the fees incurred on the contract claim in order to recover them and had made no effort to do so.

The referee identified issues for resolution and ruled on them as follows: (1) the City was not required to apportion its fees between the two causes of action, as “it was crystal clear from reading the original through fourth amended complaints that in order to defeat [Med-Trans]’s contract cause of action [the City] also had to defeat the tort cause of action”; (2) the City was not entitled to recover fees incurred in its unsuccessful attempt to disqualify Med-Trans’ counsel because the motion was ultimately unsuccessful, as the disqualification was reversed on appeal; (3) the City was not entitled to recover fees incurred in preparing its motion to file a cross-complaint, as the motion was totally meritless; (4) the City was not entitled to award of a multiplier, as no trial was necessary, the grounds for defeating both causes of action were known from the inception of the case, and the grounds were “straight forward Administrative Law 101”; (5) the City was not entitled to recover fees for two attorneys who appeared at the same court proceeding; and (6) the City was not entitled to recover fees incurred after June 2009, except fees incurred in connection with the attorney fees motion. The referee directed the City’s attorney to prepare a judgment that included (1) the referee’s prior rulings relating to the first and second causes of action of the operative complaint, and (2) the amount of attorney fees and costs to which the City is entitled in conformance with the order.

On June 11, 2010, the trial court granted the City’s timely petition to confirm the February 23, 2010 contractual arbitration award and ordered the City’s counsel to submit proposed forms of formal order and judgment. On September 17, 2010, a written order granting the petition and a \$351,470 judgment in the City’s favor, and against Med-Trans, was filed.

DISCUSSION

Med-Trans challenges the referee's dismissal of the two causes of action alleged in the fourth amended complaint after the City brought separate motions for judgment on the pleadings with respect to each cause of action. The first motion, granted on June 24, 2009, addressed the contract cause of action, while the second, granted on September 16, 2009, addressed the fraud cause of action. Med-Trans contends the referee erred in granting the City's first motion, in which the City claimed the breach of contract allegations did not correspond to the allegations in the tort claim, because his "narrow reading of the Tort Claim is not supported by the applicable case law." With respect to the second motion, Med-Trans asserts the referee erred in allowing the City to introduce extrinsic evidence on the motion, consisting of documents, declarations, deposition transcripts and discovery responses. It also asserts the referee erred in finding the City was immune from the fraud claim under Government Code section 818.8, as the fraud action was based on contract. Med-Trans also challenges the award of attorney fees, arguing none of the fees attributable to the defense of the fraud claim were recoverable because the referee ruled the City was immune from suit on that claim on the ground the claim was not contract-based or brought to enforce the contract.

We are unable to evaluate any of these contentions because Med-Trans failed to provide us with an adequate appellate record. Med-Trans does not include the City's motions for judgment on the pleadings, Med-Trans' oppositions, the extrinsic evidence it claims was wrongly admitted, or the referee's rulings on those motions. Although Med-Trans asserts its contract claim is encompassed in its tort claim, the tort claim is not in the record. While Med-Trans includes a motion for attorney fees and the referee's ruling on the motion, it does not include the opposition papers, or the City's reply. It also does not include the other documents on which the referee relied in reaching his decision on the attorney fees motion, namely the previous complaints filed in the action.

As the City points out, the burden is on Med-Trans to affirmatively demonstrate error by an adequate record. (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) Failure to provide an adequate record requires the issues on appeal be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) When the appellate record is devoid of necessary documents, the appellant cannot affirmatively demonstrate error. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [a party's failure to provide an adequate record on an issue requires the issue be resolved against that party; an appellant cannot demonstrate error in court's granting of motion where appellate record fails to include the motion, any opposition and the court's order].)

“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, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) “[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.” (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

The clerk's transcript is patently insufficient to allow us to review any of Med-Trans' claims. Accordingly, we cannot find any error that would warrant reversal of the referee's orders.

DISPOSITION

The judgment is affirmed. The City of California City is to recover its costs on appeal.

Gomes, J.

WE CONCUR:

Levy, Acting P.J.

Detjen, J.