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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DISCOUNTLAND, INC., et al.,

Plaintiffs, Cross-defendants and
Respondents,

v.

RICHARD DEAN FREENY et al.,

Defendants, Cross-complainants and
Appellants.

F069760

(Super. Ct. No. S-1500-CV-269951)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Law Offices of Olaf Landsgaard and Olaf Arthur Landsgaard for Defendants, Cross-complainants and Appellants.

Dake, Braun & Monje and Craig N. Braun for Plaintiffs, Cross-defendants and Respondents.

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Appellants appeal from the judgment of nonsuit entered in the trial court. The record provided, however, is inadequate for the review of such a judgment. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants' briefs indicate they were cross-complainants in the trial court and, after plaintiff, Discountland, dismissed its complaint, their cross-complaint proceeded to jury trial against cross-defendants Discountland and Barry Pressman. Appellants are appealing from the judgment of nonsuit entered against them after they presented their evidence at trial.

DISCUSSION

After a plaintiff has presented its evidence in a jury trial, the defendant may move for a judgment of nonsuit. (Code Civ. Proc., § 581c, subd. (a).) A motion for nonsuit challenges the sufficiency of the plaintiff's evidence to submit the case to the jury. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117.) "Judgment of nonsuit can be entered only if the evidence, viewed in the light most advantageous to the plaintiff, resolving all conflicts therein in his favor, and giving him the benefit of every fact and inference pertaining to the issues involved which may be reasonably deduced therefrom, would not justify a verdict and judgment in his favor."

A judgment of nonsuit is reviewed de novo. (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 669; *Klopfenstein v. Rentmaster Trailer Co.* (1969) 270 Cal.App.2d 811, 814.) Unlike most appeals, where the reviewing court must "indulge every reasonable intendment in favor of sustaining the trial court," in reviewing a judgment of nonsuit, the appellate court "must view the evidence in the light most favorable to the appellant, must disregard all inconsistencies and draw only inferences from the evidence which can reasonably be drawn which are favorable to the appellant." (*Van Zyl v. Spiegelberg* (1969) 2 Cal.App.3d 367, 371-372.)

The appellant bears the burden of establishing error on appeal. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) The appellant also bears the burden of presenting a record adequate to demonstrate the trial court's error. (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324 (*Nielsen*).) In order to review the sufficiency of

appellants' evidence to go to the jury and to view the evidence in the light most favorable to appellants, the reviewing court must know the causes of action alleged in their pleading, the issues litigated in the trial court, and appellants' position on the various issues. We are unable to review the nonsuit in this case, because the necessary information is not contained in the record on appeal. The record does not contain the cross-complaint on which the challenged judgment was entered. It contains no trial briefs. We do not know what causes of action appellants sued on, what facts they alleged gave rise to their claims against respondents, or what issues were presented at trial.

Further, a motion for nonsuit must state the precise grounds on which it is made, and only those grounds should be considered by the appellate court on review. (*Timmsen v. Forest E. Olson, Inc.* (1970) 6 Cal.App.3d 860, 868.) Respondents' motion for nonsuit is not part of the record on appeal.

“When an appellant desires to present any point which requires consideration of the oral proceedings, he must obtain and file in the appellate court a reporter's transcript, certified by the reporter; or, where a transcript is unavailable, a settled statement of the oral proceedings prepared by the parties and settled by the judge who heard the matter; or an agreed statement prepared by the parties, consisting of a condensed statement of the relevant proceedings.” (*LeFont v. Rankin* (1959) 167 Cal.App.2d 433, 436-437; Cal. Rules of Court, rule 8.120(b).) When the appellant fails to designate any reporter's transcript or provide another form of record of the oral proceedings, the appeal is on the judgment roll, and the reviewing court “““must conclusively presume that the evidence is ample to sustain the [trial court's] findings.””” (*Nielsen, supra*, 178 Cal.App.4th at p. 324.) The absence of a reporter's transcript from the record precludes the appellant from raising any evidentiary issues on appeal. (*Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657.)

A reporter's transcript or other record of the oral proceedings is necessary to an appeal of a judgment of nonsuit. (*Ehrhardt v. YWCA* (1938) 28 Cal.App.2d 275, 276.) In

order to effectively review a judgment of nonsuit, the reviewing court must have before it the evidence presented by the plaintiff at the trial. The record in this appeal does not include a reporter's transcript of the trial proceedings, or an agreed or settled statement. Thus, we cannot review the evidence plaintiffs presented at trial to determine whether the trial court was correct in concluding plaintiffs' evidence was insufficient to submit the case to the jury.

The clerk's transcript contains a number of exhibits that were presented at trial and appellants rely heavily on them in attempting to show there was adequate evidence for the jury to hear their case. Including exhibits in the clerk's transcript, however, is appropriate only as a supplement to a reporter's transcript. (*Tibbets v. Robb* (1958) 158 Cal.App.2d 330, 337.) An appellant cannot obtain review of exhibits or other matters on file in the trial court without a record of the oral proceedings; they are part of the oral proceedings and must be presented on appeal only by one of the forms of record authorized for presentation of oral proceedings (i.e., a reporter's transcript or a settled or agreed statement). (*Lentfoehr v. Lentfoehr* (1955) 134 Cal.App.2d Supp. 905, 907.) The appellant cannot broaden the scope of the reviewing court's inquiry by including in the clerk's transcript documentary evidence received at the trial. (*Lakeside Park Assn. v. Sweeney* (1958) 157 Cal.App.2d 101, 103.)

The clerk's transcript also contains a copy of the transcript of the deposition of respondent Pressman. In *Estate of Larson* (1949) 92 Cal.App.2d 267 (*Larson*), the appellant did not designate a reporter's transcript. After the clerk's transcript was filed, the appellant attempted to have the appellate court consider a portion of the oral proceedings, including depositions of witnesses, by filing a designation of documents to be transmitted to the appellate court. (*Id.* at pp. 268-269.) The court declined to consider the depositions and other documents, stating:

“It is the theory of the appellant that this court should now consider, as the record on appeal, the clerk's transcript proper, that is, the judgment roll, all

documents, affidavits and exhibits on file in the office of the clerk of the trial court, and some of the oral proceedings, that is, certain depositions used on the trial, even though there has not been prepared, as required by the rules, a total or partial reporter's transcript, or an agreed or settled statement. In his reply brief, and on the oral argument, appellant has referred to portions of this evidence and expects this court to wade through this mass of uncorrelated material and evaluate it without a total or partial reporter's transcript or without a settled or agreed statement. By this confused procedure appellant would have the clerk's transcript type of record imperfectly perform the functions which another, and authorized, type of record might have accomplished." (*Larson, supra*, 92 Cal.App.2d at p. 269.)

Similarly, here, appellants have included the Pressman deposition transcript in the clerk's transcript instead of presenting a properly designated or prepared record of the oral proceedings. They have also included in the clerk's transcript numerous exhibits, without a record of the oral proceedings to explain them and put them in context. We decline to "wade through this mass of uncorrelated material and evaluate it without" a proper record of the oral proceedings to provide an understandable factual background. (*Larson, supra*, 92 Cal.App.2d at p. 269.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

HILL, P.J.

WE CONCUR:

GOMES, J.

SMITH, J.