

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANA J. KELLY,

Plaintiff and Appellant,

v.

MONEX DEPOSIT COMPANY et al.,

Defendants and Respondents.

G046569

(Super. Ct. No. 30-2009-00310248)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

Dana J. Kelly, in pro. per., for Plaintiff and Appellant.

Pistone & Wolder, Thomas A. Pistone for Defendants and Respondents.

INTRODUCTION

Dana J. Kelly, who is representing herself, appeals from a jury verdict in favor of Monex Deposit Company and one of its employees, Kyle Ferlic. Like many property owners in the palmy days before the recession, Kelly converted equity in her home into cash and started playing the markets. In her case, she began buying and selling precious metals, especially silver. She placed her trades through Monex; Ferlic handled her account.

Kelly used not only her own cash but also money borrowed from a Monex affiliate to fund her purchases. In June 2006, the bottom fell out of the silver market, and by November Kelly was nearly wiped out. Of the \$150,000 from her home equity line of credit, she salvaged only \$35,000.

Kelly sued Monex and Ferlic for, among other things, fraud and breach of fiduciary duty. The jury returned a defense verdict, finding that neither defendant had breached any fiduciary duty to her and that Ferlic had not defrauded her.

On appeal, Kelly does not argue with the verdict *per se*. Instead, she maintains the judge erroneously refused to give a jury instruction she proposed. By far the largest portion of her appeal, however, is taken up with complaints about the way her counsel tried this case. For example, she faults him for not calling certain witnesses and offering certain evidence. Other complaints concern the reporter's transcript, which she claims was deliberately falsified.

Given the frequency with which we have to remind *counsel* that an appellate court does not re-try cases, it is not surprising that a nonlawyer would want us to do the trial over. That, however, is not our function. Likewise, it is not our function to substitute a trial that did not happen – but an appellant believes should have happened – for the one that did happen. Our job is to look at the record before us, as it stands, and to

determine whether the appellant has identified anything that went wrong legally. Kelly has not identified any error supported by the record, and we therefore affirm.

FACTS

Monex buys and sells precious metals – gold, silver, platinum, and palladium. Its customers are on the other end of the transactions, whether selling or buying. If customers wanted to buy, their Monex account representatives quoted them the asking price. If customers wanted to sell, the representatives quoted the bid price. The customers then decided whether to accept the deal.

Customers could either take delivery of their purchases or store them through Monex.¹ Customers could also augment their accounts with money borrowed from a Monex affiliate. In 2006, when the transactions forming the basis of this lawsuit took place, Monex required customers to fund one-third of their accounts in cash. The rest could be borrowed.

Kelly contacted Monex in early April 2006 regarding investing in precious metals. She was directed to Ferlic. She told him she was a real estate broker who was interested in investing in gold coins.² Ferlic sent her a promotional package on gold, which included information on opening an account to borrow money to finance her purchases. Kelly entered into a purchase and sale agreement with Monex. She used a home equity line of credit to secure \$150,000 in cash. She also borrowed money from the Monex affiliate to increase her buying power.

Because Kelly wanted to trade actively, Ferlic recommended purchasing silver rather than gold, because silver was more volatile. On April 25, 2006, Kelly bought 30 bars of silver bullion. She continued to trade in April and May, in both gold and silver.

¹ If the customers elected to store their purchases through Monex, they signed a separate agreement to open an Atlas Account. The Atlas Account agreement was also used to document borrowing terms.

² In April 2006, Kelly was 50 years old and had been a real estate broker for 20 years.

In May 2006, the silver market started to slide downwards. In early June it crashed. Over the space of a few days in June, the price of silver fell from \$15 per ounce to \$9.50. Although Kelly was able to recoup some of her losses over the next two months, overall she continued to lose money. In November, she cashed out with \$35,717.

The complaint is not part of the record, so we do not know when Kelly sued Monex and Ferlic or what causes of action the complaint contained.³ From the jury instructions given at trial and the special verdict, we deduce that she asserted causes of action for intentional misrepresentation and breach of fiduciary duty. She also requested punitive damages from both defendants.

The court decided Ferlic owed Kelly a common-law fiduciary duty as a matter of law, so the special verdict asked the jury whether Ferlic had breached this duty, and, if he had, whether Monex had authorized or ratified his conduct. The intentional misrepresentation portion of the special verdict referred only to Ferlic.

The jury returned a defense verdict, finding that Ferlic had not breached his fiduciary duty to Kelly.⁴ It also found in Ferlic's favor on intentional misrepresentation. Judgment was entered in favor of Monex and Ferlic on January 11, 2012.

This court received a letter from Kelly on July 20, 2012, taken up in large part with complaints about the accuracy of the reporter's transcript. We construed this letter as a motion to settle the record and directed the superior court to hold a hearing on this matter if the parties could not agree on a transcript. The parties could not agree, and the superior court held the hearing on October 2, 2012. It determined that no correction

³ Kelly filed for bankruptcy protection in 2007, but she failed to tell the trustee about the money she had received from her Monex account. She also did not alert the trustee about her claims against Monex. She petitioned to reopen the bankruptcy to pursue these claims. The case was actually tried in the name of the bankruptcy trustee.

⁴ The court found that Monex could be liable for breach of fiduciary duty only if it authorized Ferlic's breach. In effect, it granted a nonsuit to Monex on the intentional misrepresentation cause of action by eliminating any question about Monex from the special verdict.

of the reporter's transcript was warranted. Unsatisfied, Kelly again petitioned this court to correct the transcript. We denied the request by order filed November 13, 2012.

DISCUSSION

The only issue Kelly has identified that is subject to appellate review is the trial court's refusal to give a jury instruction she wanted.⁵ After lengthy discussion with counsel, the court decided not to give CACI No. 4105 as Kelly had proposed, but rather a version presented by Monex. Kelly now identifies the omission of one portion of CACI No. 4105 as erroneous.

The trial court decided as a matter of law that Ferlic owed Kelly a fiduciary duty; the issue was the nature of that duty. Kelly wanted the court to give CACI No. 4105, with a few changes: "Duties of a Stockbroker – Speculative Securities.^[6] [¶] Stockbrokers who trade in speculative securities and advise clients have a fiduciary duty to those clients: [¶] 1. To make sure that the client understands the investment risks in light of his or her financial situation; [¶] 2. To inform the client that speculative investments are not suitable if the stockbroker believes that the client is unable to bear the financial risks involved; and [¶] 3. Not to solicit the client's purchase of speculative securities that the stockbroker considers to be beyond the client's risk threshold." Monex's counsel argued this instruction was not appropriate because neither Ferlic nor Monex was a stockbroker, and giving the instruction would mislead the jury into believing they had a duty, especially a "suitability" duty, they did not have.

The court at first decided to give an instruction that included the suitability language. Later on, however, after further reflection and study, the court decided not to

⁵ The statement of facts in Kelly's opening brief does not comply with California Rules of Court, rule 8.204(a)(2)(C), in that it is not limited to facts found in the record. Kelly repeatedly refers to trial exhibits, which are not part of this record. The statement also fails to comply with Rule 8.204(a)(1)(C); it does not give proper citations for matters that can be found in the record.

⁶ Kelly wanted to change "stockbroker" in the CACI instruction to "financial advisor" and "securities" to "investments." As defendants pointed out, an "investment advisor" is one who advises others as to the advisability of investing in securities. (See Corp. Code, § 25009; see also 15 U.S.C. § 80b-2(11).)

give that version of CACI No. 4105, but rather to give the version prepared by the defense. The version given to the jury read, “Defendants had these fiduciary duties to Dana Kelly. One, to make sure that she understood investment risks, and, two, to not solicit the purchase of precious metals that the defendants considered to be beyond her risk threshold. If these duties were met and the client still insists on purchasing speculative precious metal [¶] . . . investments, the defendants could advise the client about various speculative precious metals investments and purchase speculative investments that the client selects.” Kelly asserts that omitting the suitability portion of the instruction is reversible error.

We review the refusal to give a jury instruction to determine whether it was prejudicial. In other words, did the omission affect the outcome of the trial?⁷ (Code Civ. Proc., § 475; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1054; *Davis v. Ward* (1963) 219 Cal.App.2d 144, 151.) We review de novo the question whether an instruction correctly states the law. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 298.) In this case, the trial court correctly refused to give CACI No. 4105 as Kelly proposed.

The jury instruction Kelly sought applied to “stockbrokers who trade in speculative securities.” Neither Monex nor Ferlic fit this description. They were not stockbrokers, and they did not trade in securities of any kind. Kelly traded by buying and selling the metals themselves. These physical objects do not qualify as a “security” as the term is defined in Corporations Code section 25019. They are commodities. (See Corp. Code, §§ 29504, 29515.)⁸ The California Code of Regulations specifically excludes even “any discretionary account maintained by a customer with a commodity broker for

⁷ Although it is not entirely clear, Kelly’s counsel may have agreed to the jury instruction. Such an agreement would preclude any review on appeal unless the instruction incorrectly stated the law. (See *Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 760.)

⁸ Corporations Code sections 29500 et seq. comprise the “California Commodity Law of 1990,” which governs Monex’s activities in California.

trading in commodities” from the definition of “security” in the Corporations Code. (Cal. Code Regs., tit. 10, § 260.019.)⁹

Because Ferlic and Monex were not stockbrokers trading in speculative securities, it would have been misleading to the jury to give an instruction based on the assumption that they were. The “suitability” duty is one imposed by the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization that oversees securities firms and licensed persons doing business with the public. (See *McNabb v. Securities and Exchange Commission* (9th Cir. 2002) 298 F.3d 1126, 1130 & fn. 4; *Sacks v. Securities and Exchange Commission* (9th Cir. 2011) 648 F.3d 945, 948; see also *Mundheim, Professional Responsibilities of Broker-Dealers: The Suitability Doctrine* (1965) 3 Duke L.J. 445.)¹⁰ Kelly has presented us with no authority imposing a corresponding duty on commodity traders. Her own expert agreed that Monex was not subject to the FINRA suitability rule.

The risky nature of trading in precious metals was fully disclosed to Kelly before she opened her account, as was the warning that Monex was not directing her purchases and sales. The jury was instructed that Monex and Ferlic could not solicit purchases of precious metals beyond her risk threshold, an instruction carrying with it an implied suitability element. The omitted portion of the jury instruction would have imposed an additional, and unwarranted, duty. The trial court correctly refused to give the portion of jury instruction CACI No. 4105 sought by Kelly.

⁹ Monex went to great lengths to inform its customers that their accounts were under the customers’ sole control and were not managed by Monex. In addition to signing contracts to open accounts and borrow money that include these provisions, the customers have to listen to a presentation by their account representatives that reiterates this information, which presentation is recorded. An account representative could not place a trade alone; the customer had always to be on the line during the trade, and the transactions themselves were tape recorded. Although Monex account representatives could make recommendations, the final decision to buy, sell, or hold was the customer’s. Kelly acknowledged that she had received the information and agreed to these terms.

¹⁰ This function was formerly performed by the National Association of Securities Dealers Inc. (NASD) and an arm of the New York Stock Exchange, which merged in 2007. (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1128, fn. 2.)

As we have already indicated, our review is limited to what is in the record before us. (*In re James V.* (1979) 90 Cal.App.3d 300, 304.) Therefore, we cannot render an opinion regarding the witnesses Kelly's counsel did not call, or the questions he did not pose to witnesses, or the documents he did not seek to have admitted into evidence, or discrepancies between trial testimony and deposition testimony not introduced at trial. We cannot consider documents attached to or incorporated into appellate briefs that were not part of the record in the trial court or that cannot be judicially noticed. (*Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.)

We also cannot, in this context, review any of the numerous strategic decisions that go into conducting a trial. Ineffective assistance of counsel is not a principle that applies to a plaintiff in a civil suit. (See *Chevalier v. Dubin* (1980) 104 Cal.App.3d 975, 978; *Gibson v. Gibson* (1971) 15 Cal.App.3d 943, 949.)

We also cannot entertain Kelly's contention the reporter's transcript was compromised. The trial court held a hearing and determined the record was accurate. We have no basis for challenging this conclusion. (See *People v. Hardy* (1992) 2 Cal.4th 86,183, fn. 30.)

The judgment of the trial court is presumed correct, and it is the appellant's responsibility to show, by means of an adequate record, where the trial court erred. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) Kelly has not pointed to a place in the record where the case went off the track, and we therefore affirm the judgment.

DISPOSITION

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

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.