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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HASNAA NOUR,

Plaintiff and Respondent,

v.

KARIM DAHLAN,

Defendant and Appellant.

G047753

(Super. Ct. No. 30-2011-00462599)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed.

C. Keila Nakasaka for Defendant and Appellant.

Michael Creamer for Plaintiff and Respondent.

* * *

Karim Dahlan appeals from a judgment after a bench trial where the trial court entered judgment in favor of Hasnaa Nour. Nour, a real estate agent and investor, sued Dahlan, her former business associate, after their business relationship failed.

Dahlan contends the following: (1) the trial court erred by denying him a jury trial;

(2) Nour lacked standing to sue on behalf of Red Hawk Business Services, Inc. (Red Hawk); (3) Nour made statements of false conclusions of fact that constituted extrinsic fraud; and (4) the trial judge made an extrinsic mistake by failing to take judicial notice of a trial exhibit. Because Dahlan has failed to meet his appellate burden to establish prejudicial error, we affirm the judgment.

FACTS

In 2010, Nour entered a business relationship with Dahlan. In exchange for Nour's investment in Dahlan's company, Dahlan promised Nour payments of \$1,500 a month for six months. Nour made funds available to Dahlan through a bank account; Nour's deposits totaled \$134,920. But by October 2012, the bank account had been closed. Bank records showed Nour withdrew only \$118,735 from the account, leaving a \$16,185 difference from her total deposits. Dahlan had not made the \$1,500 monthly payments to Nour. An additional dispute arose over two transactions totaling \$8,000.

Hany Faltas was Nour's neighbor and business associate. In November 2010, Nour asked Faltas to deliver \$29,500 in cash he was holding for her to Las Vegas, Nevada, purportedly to purchase some cars. When Faltas met Nour in Las Vegas, Dahlan was also present. After Faltas, Nour, and Dahlan all counted the money, Faltas saw Nour give all the cash to Dahlan. Nour's lawsuit against Dahlan arose from these events.

In August, 2011, Nour and Red Hawk filed an amended complaint against Dahlan and Karim Dahlan DBA Crown Investments (collectively Dahlan), alleging fraud, breach of contract, negligent misrepresentation, breach of fiduciary duty, and

conversion.¹ Dahlan answered and filed a cross-complaint against Nour for fraud and defamation.

On November 16, 2011, Dahlan filed a case management statement where, under section five, entitled, “Jury or nonjury trial,” the box indicating a request for “a nonjury trial” had been checked. In April 2012, upon Nour’s request, the trial court dismissed Red Hawk from the case, leaving Nour as the sole plaintiff. After a two-day bench trial in October 2012, the trial court awarded Nour \$62,685; it awarded Dahlan

¹ Nour attached the contract to the amended complaint but it is not included in the appellate record. Indeed, Dahlan has failed to designate an adequate record for this court to evaluate his claims. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) The clerk’s transcript includes the register of actions, the trial court’s October 2, 2012, minute order, the judgment, the notice of appeal, and Dahlan’s notice designating the record on appeal.

Additionally, Dahlan did not file a notice requesting the exhibits be transmitted to this court as required by California Rules of Court, rule 8.122(a)(3). Therefore, trial exhibit No. 105, the amended complaint and the attached contract, and an unspecific trial exhibit concerning a California Secretary of State business record are not before us. “Where exhibits are missing we will not presume they would undermine the judgment. [Citation.]” (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291; see also *Heyman v. Franchise Mortgage Acceptance Corp.* (2003) 107 Cal.App.4th 921, 925, fn. 1.)

Finally, Dahlan asks this court to take judicial notice of three other documents: (1) the trial court’s October 2, 2012, minute order; (2) the judgment; and (3) “the attached Exhibit A, which is [a] Secretary of State’s [b]usiness [e]ntity filing.” The first two documents are before us, and we may rely on them. Therefore, Dahlan’s request for judicial notice of these documents is denied. With respect to the last document, it was not “attached.” In any event, “[O]ur review on direct appeal is limited to the appellate record.” [Citation.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 952.) If it was not before the trial court, we may not consider it. To the extent the trial court did consider it, Dahlan did not designate it as part of the record or request to have it transmitted to this court.

nothing on his cross-complaint. The court entered judgment in favor of Nour on November 20, 2012. Dahlan appealed.²

DISCUSSION

Jury Trial

Dahlan argues the trial court erred in denying him a jury trial. We disagree.

Code of Civil Procedure section 631, subdivision (f), provides: “A party waives trial by jury in any of the following ways: [¶] . . . [¶] (2) By written consent filed with the clerk or judge. [¶] . . . [¶] (5) By failing to timely pay the fee described in subdivision (b), unless another party on the same side of the case has paid that fee.” (See *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956-957.)

Here, Dahlan waived his right to a jury trial when he requested a non-jury trial in the case management statement he filed on November 16, 2011. Additionally, Dahlan does not cite to any evidence in the record to establish he paid or attempted to pay the statutorily required jury fees. Therefore, Dahlan waived his right to a jury trial. Dahlan cannot sit idly by until the end of trial and then request a jury trial after requesting a court trial in the first instance. (*Taylor v. Union Pac. R.R. Corp.* (1976) 16 Cal.3d 893, 896, 899-901 [party cannot without objection try his case before a court without a jury, lose it, and then complain it was not tried by jury].)

Standing

Although difficult to discern, Dahlan contends Nour lacked standing to sue Dahlan on behalf of Red Hawk because Nour did not have an ownership interest in Red Hawk. As we explain anon, Red Hawk was dismissed from the action.

² Dahlan appealed from the trial court’s minute order on October 2, 2012, awarding judgment in favor of Nour, which is not an appealable order. Nevertheless, we have the discretion to save the appeal by treating the notice of appeal as being taken from the existing judgment. (*Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 69.)

“In general, a named plaintiff must have standing to prosecute an action. (Code Civ. Proc., § 367 [‘Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute’].) ‘Standing is typically treated as a threshold issue, in that without it no justiciable controversy exists.’ [Citation.] . . . ‘Without standing, there is no actual or justiciable controversy, and courts will not entertain such cases. [Citation.]’ [Citation.] Alternatively stated, ‘[a] litigant’s standing to sue is a threshold issue to be resolved before the matter can be reached on its merits. [Citation.]’ [Citations.]” (*CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273, 286.)

Here, the trial court dismissed Red Hawk from the action on April 2, 2012, nearly six months before trial began. At that point, Nour maintained the action in her individual capacity against Dahlan, and the judgment entered was in favor of Nour in her individual capacity. Thus, Nour did not prosecute the action on behalf of Red Hawk but instead on behalf of her interests individually.³

Extrinsic Fraud

Dahlan asks this court to grant equitable relief based on extrinsic fraud because Nour allegedly made false statements of fact. Not so.

““Extrinsic fraud occurs when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented from fully participating in the proceeding. [Citation.] Examples of extrinsic fraud are: . . . failure to give notice of the action to the other party, and convincing the other party not to obtain counsel because the matter will not proceed (and then it does proceed). [Citation.] The essence of extrinsic fraud is one party’s preventing the other from having his day in court.” [Citations.] Extrinsic fraud

³ Nour asserts this argument, and the entire appeal, is frivolous, and states he intends to file a motion for sanctions. We have no such motion before us.

only arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense. [Citations.]’ [Citation.]” (*Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290.)

As to this point, Dahlan states: “False [c]onclusions of [f]act or [l]aw [e]qually [c]ondemned. Statements of false conclusions of fact or law made by a fiduciary to a beneficiary are condemned equally with untrue factual statements *Estate of Anderson* (1983) 149 Cal.App.3d 336, 350.” (Bold omitted, parenthesis omitted.) That is all. Dahlan does not specify what factually untrue statements Nour made to support his contention. Additionally, he fails to cite to anything in the record to support his contentions Nour made factually untrue statements. Finally, he does not explain how he was prevented from having his day in court. Thus, this claim is waived. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [when appellant raises issue “but fails to support it with reasoned argument and citations to authority, we treat the point as waived”]; see also *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [same]; Cal. Rules of Court, rule 8.204(a)(1)(B).)

Extrinsic Mistake

Dahlan claims the trial judge made an extrinsic mistake by failing to take judicial notice of the contract included as an exhibit to the amended complaint. He seems to believe the trial court was required to take judicial notice of the contract terms, and because he did not prevail, the court made an extrinsic mistake.

Dahlan misunderstands that even if the trial court failed to take judicial notice of the contract (an assertion he fails to support), the contract’s terms were still disputable and open to the trial court’s interpretation. (See *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113 [when judicial notice is taken of document, its truthfulness and interpretation are still disputable].) Regardless, it is clear the trial court was aware of the existence of the contract and considered its terms when

making its ruling. Upon making his ruling, the trial court stated, “I think it is very clear that the agreement governed the actions of the parties.” Therefore, there is no evidence the trial court made an extrinsic mistake by failing to consider the contract.

Additional Issues

Dahlan makes additional claims, including Nour made untimely filings and distracted the court’s focus with her “female beauty.” Dahlan cites to no legal authority to support his claims. We caution Dahlan in accusing a bench officer of bias without any evidentiary support. Baseless accusations are counterproductive to assessing the merits of the legal arguments before the court.

DISPOSITION

The judgment is affirmed. Respondent is awarded her costs on appeal.

O’LEARY, P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.