

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Plaintiff and Respondent,

v.

TSARINA BRANYAN,

Defendant and Appellant.

G049701

(Super. Ct. No. 30-2012-00539767)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Andrew P. Banks, Judge. Affirmed.

Law Offices of Tsarina Branyan, Tsarina Branyan, Megan E. Ross; Barry Coleman for Defendant and Appellant.

W. Dean Cloud; Lewis Brisbois Bisgaard & Smith and Michael W. Connally for Plaintiff and Respondent.

Tsarina Branyan appeals from a judgment after a bench trial in which the trial court awarded First American Title Insurance Company (First American) \$85,000 for breach of contract or alternatively for quasi contract and money paid. Branyan argues the trial court erred by denying her a jury trial, ruling for First American on its three causes of action, and failing to address her objections in its statement of decision. As we explain below, the trial court properly denied Branyan's untimely request for a jury trial, she has not established the trial court's judgment was erroneous, and the court's statement of decision was adequate. We affirm the judgment.

FACTS

A. Substantive Facts

Branyan, a licensed California attorney, owned a parcel of real property located at 6923 West Alta Vista Road, Laveen, Arizona, 85339 (the Arizona Property); she also owned property in Huntington Beach. Bank of America (the Bank) held the senior note and a trust deed on the Arizona property, and it also held a note and a trust deed on the Huntington Beach property.

When Branyan refinanced the loan on the Arizona property through IndyMac Bank (IndyMac), the escrow company erroneously paid off the Bank of America loan on the Huntington Beach property instead of the Arizona property. This resulted in Bank of America retaining its first trust deed on the Arizona property and IndyMac holding a junior note. This error also resulted in Branyan owning the Huntington Beach house free and clear. Both the Bank and IndyMac began foreclosure proceedings on the Arizona property.

When IndyMac realized it did not have a first trust deed on the Arizona property because of the escrow error, it made a title insurance claim with its insurer First American. IndyMac subsequently foreclosed in a trustee's sale on the Property. First American settled the claim by purchasing an assignment of the Bank's senior note for \$85,000.

B. Pretrial

In January 2012, First American filed a complaint against Branyan on the note it acquired from the Bank for \$85,000. After the trial court vacated entry of default judgment in October 2012, the court scheduled a case management conference (CMC) for January 7, 2013, at 9:00 a.m. Branyan filed a demurrer, which the trial court scheduled for February 1, 2013. On October 30, 2012, the court clerk served the parties with notice of the CMC.

In November 2012, First American filed a first amended complaint (FAC) alleging causes of action for breach of contract, quasi contract, and money paid. Branyan filed a demurrer. On December 10, 2012, First American served Branyan with notice of the CMC. First American filed opposition to the demurrer.

Branyan did not appear at the CMC on January 7, 2013. First American waived jury trial, and the court trial was set for September 3, 2013. Branyan filed a reply to First American's opposition to the demurrer a few weeks later. On February 1, 2013, there was a hearing on Branyan's demurrer (neither the minutes nor an oral transcript of the proceeding is part of the record on appeal). Branyan later filed an answer.

Six months later, on August 5, 2013, Branyan filed a notice of posting jury fees pursuant to Code of Civil Procedure section 631, subdivision (b) (all further statutory references are to the Code of Civil Procedure). First American filed an objection and request to strike Branyan's posting of jury fees on the following grounds: Branyan improperly posted jury fees seven months after the CMC (§ 631, subds. (c) & (f)(5)); none of section 631, subdivision (c)'s exceptions applied; and First American would suffer prejudice because it prepared the case on the premise it would be a bench trial.

Branyan filed an ex parte application, supported by her declaration and exhibits, to deny First American's request to strike posting of jury fees or in the alternative for relief from her involuntary waiver of trial. Branyan argued a jury trial was

proper and relief from any waiver was appropriate for the following reasons: it was her fundamental right, citing generally to the California Constitution and section 631, subd. (a); she did not have notice of the CMC on January 7, 2013, which was premature because her demurrer was pending and she had not filed an answer; she received notice of trial on or about January 10, 2013; and she requested a jury trial at the hearing on February 1, 2013, and thus First American was on notice and suffered no prejudice.

In her declaration, Branyan stated she did not receive notice of and was unaware of the CMC scheduled for January 7, 2013, and that she would have “demanded a jury trial” had she attended. She asserted, “I posted jury fees that was required 25 days before trial on August 5, 2013.” She added counsel for First American failed to meet and confer before the CMC (Cal. Rules of Court, rule 3.724). Branyan also stated “[She] demanded a jury trial on February 11, 2013[,] at the conclusion of the [d]emurrer [h]earing.”¹ She asserted that when she filed her answer on February 11, 2013, the case was “at ‘issue.’” One of the exhibits was the first and fifth pages of the case management statement First American’s counsel served on Branyan.

First American filed an opposition, supported by its counsel’s declaration and exhibits, to Branyan’s ex parte application to deny First American’s request to strike her posting of jury fees. Citing to section 631, First American argued Branyan waived her right to a jury trial because she did not timely post the required fees. First American asserted both it and the trial court gave Branyan notice of the January 7, 2013, CMC, and Branyan was required to post the jury fee by that date (§ 631, subd. (c)). It added that Branyan included an exhibit to her application, the first and fifth pages of the CMC statement it served on her on December 10, 2012, which indicates the CMC was scheduled on January 7, 2012. First American alternatively argued Branyan waived her right to a jury trial because she did not post jury fees within five days of receiving notice

¹ We assume Branyan means the hearing on February 1, 2013.

of the trial date (§ 631, subd. (f)(4)). It noted that in her ex parte application Branyan stated she received notice of the trial date on January 10, 2013. It added that Branyan stated she waited until February 1, 2013, the hearing on the demurrer, to request a jury trial, but noted she did not include in the appellate record the oral transcript of the proceedings or a minute order. First American contended that even if the CMC was premature because a demurrer was pending, a point it did not concede, Branyan was alternatively required to post jury fees within one year of the filing on the initial complaint, by January 24, 2013 (§ 631, subd. (c)(2)). Finally, First American contended it would be prejudiced by a jury trial because it prepared as if there would be a bench trial, i.e., its discovery plan was different for a bench trial than it would have been for a jury trial, it did not file any in limine motions, and it did not prepare jury instructions.

In his declaration, First American's counsel, W. Dean Cloud, stated he served a CMC statement on Branyan on December 10, 2012, and he referenced the trial court's notice of CMC served on Branyan on October 30, 2012, at an address she previously admitted was her home address. Cloud stated he was at the February 1, 2013, demurrer hearing and "[he did] not recall hearing [Branyan] demand a jury trial." Cloud explained First American would suffer prejudice because it prepared for a bench trial, a jury trial will take longer than a bench trial, it did not prepare in limine motions or jury instructions, and it could not do further discovery because discovery cutoff had passed.

At the hearing on August 20, 2014, the trial court denied Branyan's request for a jury trial because her request was untimely. The court reasoned both it and First American served notice of the CMC, Branyan did not appear at the CMC, and she did not post the fee on or before the CMC. When Branyan contended she requested a jury trial at the February 1, 2013, demurrer hearing, the court responded as follows: "That's fine. You can -- you can do that all you want. That's good. But you have to post the fees. And you didn't do it until six months later." After Branyan stated she did not receive notice of the CMC, the court said that as a licensed California attorney, she was required

to know the court rules. When the court said she should have posted them within a week of the demurrer hearing, Branyan said, “Actually, I didn’t even know about the ruling.” The court again said she was charged with knowing court rules, and Branyan argued the court denied her constitutional right to a jury trial. The court concluded it was within his discretion to deny her request, citing to the length of delay and the prejudice to First American in having to prepare for a jury trial on the eve of trial.

C. Trial

At a three-day bench trial,² a Bank operations analyst, Dulce Marroquin, Cloud, and Branyan testified and the trial court admitted numerous exhibits into evidence. In a minute order the following week, the trial court adopted its three-page tentative decision as its final ruling in favor of First American, awarding it \$85,000 on its breach of contract cause of action. The court reasoned First American was the Bank’s assignee under exhibit No. 11, the Bank’s Equity Maximizer Agreement and Disclosure Statement with Branyan. The court noted Branyan spent much time arguing an ineffective allonge pursuant to *Pribus v. Bush* (1981) 118 Cal.App.3d 1003 (*Pribus*). The court assumed without deciding Branyan was correct, that pursuant to *Pribus* First American was an assignee and not a holder in due course. The court noted though *Pribus* involved former California Uniform Commercial Code section 3202.³ Additionally, the court ruled Arizona’s antideficiency statutes were inapplicable because exhibit No. 11 was not a purchase-money loan and First American could waive the security and sue on

² Over First American’s objection, we granted Branyan’s motion to augment the record on appeal with the reporter’s transcript from September 3, 4, and 5, 2013, which included the entire bench trial.

³ *Pribus, supra*, 118 Cal.App.3d 1003, interprets former California Uniform Commercial Code section 3202, subdivision (2), which was superseded by the enactment of California Uniform Commercial Code section 3204 in 1992. (See also Cal. U. Com. Code, com. 1, 23A pt. 2 West’s Ann. Cal. Com. Code (2002) foll. § 3204, p. 251 [“The last sentence of subsection (a) is based on subsection (2) of former Section 3-202”].)

the note (*Baker v. Gardner* (1988) 160 Ariz. 98, 99 (*Baker*); *Resolution Trust Corp. v. Segel* (1992) 173 Ariz. 42, 43 (*Resolution Trust*)). Alternatively, the court awarded First American \$85,000 on its quasi contact and money paid causes of action because of the refinancing error on the Huntington Beach property. The court opined First American became subrogated to IndyMac regarding money paid on the Huntington Beach property and Branyan unjustly received the benefit of that property's increased value.

Branyan filed a motion for reconsideration, and a request for a statement of decision and clarification. In her motion for reconsideration, Branyan argued Arizona antideficiency law (A.R.S. § 33-814(G)) was applicable. She added, *for the first time*, section 726 applied. In her request for a statement of decision and clarification, Branyan asked the trial court to clarify its tentative ruling Arizona antideficiency law does not protect her because *Resolution Trust* and *Baker* involved *junior* lien holders.

After First American filed a proposed judgment and statement of decision, Branyan filed objections to both. In her objection to the statement of decision Branyan raised eight objections, including as relevant here, the trial court's analysis concerning *Pribus, supra*, 118 Cal.App.3d 1003, was faulty, and Arizona and California antideficiency laws apply (§§ 580, 726).

Branyan filed an amended motion for reconsideration contending the trial court failed to address California antideficiency law (§ 726), the court applied the wrong Arizona law, neither Arizona nor California law permit recovery for unjust enrichment, and the statutes of limitations had run. In opposition, First American asserted the motions for reconsideration were invalid (§ 1008). Branyan filed a reply to First American's opposition, contending the trial court had the inherent authority to reconsider its ruling. The trial court denied Branyan's motion for reconsideration (§ 1008).

On December 6, 2013, the trial court filed its judgment and its statement of decision. The court's statement of decision is identical to its tentative decision awarding First American \$85,000 on its first cause of action for breach of contract and alternatively

\$85,000 on the causes of action for quasi contract and money paid. However, the court added Branyan's request for clarification was unclear and *Resolution Trust* and *Baker* did not turn on whether the lien holder was senior or junior but instead on whether the loans were purchase money loans covered by the antideficiency statutes. The court stated the note First American purchased from the Bank was not a purchase money loan so it had the option to waive its security and sue on the note.

A few days later, the trial court, in a minute order, overruled Branyan's objections to the judgment and statement of decision without comment. On December 18, 2013, the court filed notice of entry of judgment. Branyan filed a notice of appeal on February 18, 2014.

DISCUSSION

I. Request for Jury Trial

Branyan argues the trial court erred by denying her constitutional right to a jury trial. We disagree.

Section 631 governs jury trials in civil cases. Section 631, subdivision (a), codifies the constitutional right to jury trial in civil cases as set forth in California Constitution, article I, section 16. Section 631, subdivision (b), requires a party demanding a jury trial to pay a nonrefundable fee of \$150.

At the time First American filed its initial complaint, section 631, subdivision (b), provided the fee was payable "at least 25 calendar days before the date initially set for trial." (Stats. 2002, ch. 806, § 15, p. 4023; Stats. 1988, ch. 10, § 3, p. 38.) Before Branyan filed her demurrer and First American filed its FAC, the California Legislature amended section 631. On June 27, 2012, the Legislature amended section 631 to require the fee to be due on or before the date of the first CMC. (Stats. 2012,

ch. 41, § 3, p. 1868.)⁴ That has been the state of the law since the trial court and First American served Branyan with notice of the CMC.

Section 631, subdivision (f), states a party may waive a jury trial in a civil case in a number of ways, including as relevant here failing to pay the required fee before the initial CMC (§ 631, subd. (f)(5)). A trial court has the discretion to allow a jury trial despite the waiver of that right (§ 631, subd. (g)).

“‘It has been a general rule in California that once a party has waived his right to a jury trial waiver cannot thereafter be withdrawn except in the discretion of the trial court.’ [Citations.] Because the matter is one addressed to the discretion of the trial court, that court’s denial of a request for relief of jury waiver cannot be reversed in the absence of proof of abuse of discretion. [Citations.] As with all actions by a trial court within the exercise of its discretion, as long as there exists ‘a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action.’ [Citation.]”
(*Gonzales v. Nork* (1978) 20 Cal.3d 500, 506-507.)

Branyan’s argument the trial court abused its discretion by denying her request for a jury trial rests largely on her assertion she did not have notice of the CMC on January 7, 2013. She contends that because she did not have notice of that CMC, she “mistakenly posted jury fees according to the old rule,” which required the posting of fees 25 days before trial instead of the new rule, which required posting of fees no later than the first CMC. Additionally, she claims First American failed to serve her with various documents, and court rules were not followed. None of her contentions have merit.

⁴ The change in law was effective immediately, instead of January 1 of the following year, because it was part of the Budget Act of 2012. (Stats. 2012, ch. 41, § 122, p. 1948.)

A writ of mandate was the proper remedy to secure a jury trial where it was allegedly being improperly withheld by a trial court. (*Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654 (*Byram*)). In *Byram*, the court explained: “Perhaps the most important, though seldom articulated reason for allowing the determination of a trial court to stand is . . . ‘[d]efendants cannot play “Heads I win, Tails you lose” with the trial court.’ Reversal of the trial court’s refusal to allow a jury trial after a trial to the court would require reversal of the judgment and a new trial. It is then reasonable to require a showing of actual prejudice on the record to overcome the presumption that a fair trial was had and prejudice will not be presumed from the fact that trial was to the court or to a jury. [Citation.]” (*Id.* at p. 653.)

Here, after the trial court denied Branyan’s belated request for a jury trial, she did not seek writ review of the court’s denial. Instead, she waited until after the bench trial, where she was unsuccessful, and sought appellate review. (*McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 364 [defendant failed to utilize proper remedy of writ review of denial of jury trial] (*McIntosh*)). Additionally, Branyan has made no effort to establish she did not receive a fair trial and suffered actual prejudice. Although during trial Branyan asserted the trial judge was biased against her and requested he recuse himself, our review of the record demonstrates that accusation was unfounded. In fact, the trial court went to great pains to ensure Branyan, who we again note is a licensed California attorney, had a fair trial. Indeed, the trial judge assisted Branyan with making objections, offering evidence, and establishing any affirmative defenses.

Finally, the trial court properly considered the relevant factors, i.e., the timeliness of the request, delay in rescheduling a jury trial, and prejudice to all the parties, and concluded First American would be prejudiced by granting Branyan’s request for a jury trial less than a month before the scheduled trial date. (*March v. Pettis* (1977) 66 Cal.App.3d 473, 480.) Thus, Branyan has not established the trial court acted

arbitrarily in denying her request. (*McIntosh, supra*, 151 Cal.App.3d at p. 363 [trial court acted reasonably and not arbitrarily in considering factors and denying request].)

II. Trial Court's Ruling

A. First Cause of Action-Breach of Contract

Branyan argues the trial court erred by ruling in favor of First American in violation of *California's* antideficiency laws. (§§ 580a-580d, 726.) However, in her trial brief, which Branyan did not include in her appellant's appendix, she argued Arizona's antideficiency statutes apply.⁵ On page 10, she states: "[Branyan] is protected by [Arizona] anti-deficiency Statue [*sic*] § 33-814([G])." (Caps. omitted.) On page 12, she states, "[First American] is suing on the deficiency, within the meaning of § 33-814(G)." (Caps. omitted.) Although on page 3 she states, "both Arizona and California anti-deficiency status [*sic*] bar such plaintiff's action[,]" she does not cite to or discuss California's antideficiency statutes (§§ 580a-580d, 726). She cites only to Arizona statutes and case authority on this point.

In its trial brief, First American argued Arizona law applied because the trust deed and Equity Maximizer Agreement and Disclosure Statement between the Bank and Branyan both stated Arizona law applied. Branyan did not file a supplemental trial brief arguing California antideficiency law applied and during trial she argued only Arizona law. And the trial court applied Arizona's antideficiency laws.

With respect to Branyan's contention California antideficiency laws apply, she cannot switch her theory of the case on appeal. "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change [her] position and adopt a new and different theory on appeal. To permit [her] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing

⁵ On our own motion, and for good cause, we augment the record on appeal with Branyan's and First American's trial briefs both filed September 3, 2013. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

litigant. [Citation.]” [Citations.]’ [Citation.]” (*Martin v. PacifiCare of California* (2011) 198 Cal.App.4th 1390, 1409.) Additionally, Branyan’s reliance on *Pribus, supra*, 118 Cal.App.3d 1003, is misplaced as that case involved a statute that has been superseded, and Branyan has not explained how its replacement, California Uniform Commercial Code section 3204, is applicable here.

As to her contention Arizona antideficiency laws protect her, Branyan did not argue their applicability in her opening brief and she cannot raise a new argument for the first time in a reply brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4 [arguments not raised in opening brief forfeited unless good cause shown].) In any event, Arizona law does not support her contention.

In *Baker, supra*, 160 Ariz. at page 99, the Arizona Supreme Court addressed the interplay of Arizona’s antideficiency and election of remedies statutes, A.R.S. section 33-729(A)), which concerns purchase money mortgages, A.R.S. section 33-814(E) (now A.R.S. section 33-814(F)), concerning deeds of trust, and A.R.S. section 33-722, which allows creditors to elect remedies. The *Baker* court concluded that when a deed of trust is involved, and A.R.S. section 33-814(G) applies, the antideficiency provision prevents a creditor from waiving the security and bringing an action on the note. (*Baker, supra*, 160 Ariz. at p. 104.)

The following year, in a supplemental opinion after a motion for reconsideration, the *Baker* court clarified its ruling and addressed the question of whether, under *Baker*, creditors who made nonpurchase money loans secured by deeds of trust were prohibited from waiving the security and suing on the note pursuant to A.R.S. section 33-722. (*Baker, supra*, 160 Ariz. at pp. 105-106.) The *Baker* court explained the mortgage antideficiency statute, A.R.S. section 33-729(A), only applies to purchase money mortgages, but the deed of trust antideficiency statute, A.R.S. section 33-814(G), is not limited to purchase money collateral. (*Baker, supra*, 160 Ariz. at p. 107.) However, the *Baker* court concluded that if a deed of trust beneficiary chooses to

foreclose judicially, as is done with a mortgage, the creditor can elect to waive the security under A.R.S. section 33-722 and sue on the note. (*Baker, supra*, 160 Ariz. at p. 107.) The court concluded, “[b]y choosing judicial foreclosure, the creditor can obtain a deficiency judgment in all cases except those dealing with purchase money collateral on the residential property described in [A.R.S. section] 33-729(A).” (*Baker, supra*, 160 Ariz. at p. 107.)

In *Resolution Trust, supra*, 173 Ariz. at page 42, the Court of Appeal examined the *Baker* holding on the issue of whether plaintiff, a non-purchase money lender who made four loans secured by deeds of trust on residential property, could waive its security and sue on the notes. Plaintiff’s deeds of trust were junior to first deeds of trust held by other lenders. (*Id.* at p. 43.) The senior lenders scheduled trustee’s sales of the residences, and plaintiff sued debtor to recover the amounts due on the promissory notes. (*Ibid.*) The court explained that because plaintiff did not institute the trustee’s sales and the mortgage antideficiency statute did not prevent the plaintiff from obtaining a deficiency judgment against the debtor, the plaintiff could waive its security and sue on the notes pursuant to A.R.S. section 33-722. (*Resolution Trust, supra*, 173 Ariz. at pp. 44-45.) The court stated plaintiff’s action on the second position notes constituted a wholly separate action that was unaffected by the senior lenders’ proceedings. (*Id.* at p. 46.) The court concluded plaintiff’s right to elect remedies was not affected by other lenders’ choices to hold trustee’s sales, and plaintiff could choose to waive its security and sue on the note. (*Ibid.*)

Here, First American was the Bank’s assignee under exhibit No. 11, the Bank’s Equity Maximizer Agreement and Disclosure Statement with Branyan, which was a nonpurchase money loan. Although IndyMac foreclosed in a trustee’s sale, First American sued Branyan to recover the amount due after the purchase of the assignment. Pursuant to *Baker* and *Resolution Trust*, First American could waive its security and sue

on the note. Therefore, Branyan has not established the trial court erred by awarding First American \$85,000 on its first cause of action for breach of contract.

B. Second and Third Causes of Action-Quasi Contract and Money Paid

Branyan asserts the trial court erred by ruling First American established equitable claims for quasi contract and money paid. With respect to the quasi contract cause of action, she asserts there was a valid contract and thus quasi contract is inapplicable, the statute of limitations has run, and the applicable elements are not satisfied. As to the money paid cause of action, she argues the applicable elements are not satisfied and the statute of limitations has run.

As we explain above, the trial court awarded First American \$85,000 on its first cause of action for breach of contract. In the *alternative*, the court awarded First American \$85,000 on its second and third causes of action for quasi contract and money paid. This was an alternative theory of granting the same relief. Because Branyan has not carried her burden on appeal of establishing the trial court's ruling on the first cause of action was erroneous, we need not address Branyan's claims as to the second and third causes of action.

C. Statement of Decision

Branyan contends the trial court committed reversible error by failing to address her eight objections in its statement of decision. We disagree.

“The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial.” (§ 632.) ““The court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case.” [Citations.]’ [Citation.]” (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 500.)

Here, Branyan does not discuss any of her objections or explain how the trial court erred by failing to address them in its statement of decision. She neither

identifies the principal controverted issues nor does she present deficiencies or inconsistencies in the court's findings of ultimate facts. These failings alone permit us to disregard her challenge to the trial court's statement of decision because it is her burden to overcome the presumption of correctness on appeal with reasoned argument and legal authority. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) It is not enough to merely state the trial court erred by not addressing them without cogent legal discussion as to why the trial court erred by overruling them. Nevertheless, based on our review of the statement of decision, we conclude the trial court adequately explained the basis for its ruling on all the issues this action presented.

DISPOSITION

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

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.