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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

JANET CHENG,

Plaintiff and Appellant,

v.

ARTHUR E. OSTERBACK et al.,

Defendants and Respondents.

H038043

(Santa Clara County

Super. Ct. No. CV149123)

The former owners of San José rental property, Janet Cheng (Appellant) and William Cheng, husband and wife (hereinafter, collectively, the Chengs), brought an action challenging a nonjudicial foreclosure sale involving their former rental property. Appellant filed this appeal from a March 16, 2012 postjudgment order awarding attorney fees and costs in favor of respondent PLM Lender Services, Inc. (PLM).<sup>1</sup> That order also imposed sanctions against Appellant. We conclude that the trial court did not abuse its discretion in awarding attorney fees and costs to PLM, and in imposing sanctions against Appellant. Accordingly, we will affirm the March 16, 2012 postjudgment order.

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<sup>1</sup> William Cheng was not included as an appellant in the notice of appeal. Appellant argues in her brief that her husband was not a litigant in the underlying action. The record before us, including the amended judgment of September 22, 2011, and the order awarding attorney fees filed March 16, 2012 (discussed *post*), belie Appellant's contention that William Cheng was not a party to the action below.

## PROCEDURAL BACKGROUND<sup>2</sup>

It is apparent that on August 5, 2009, the Chengs filed a complaint captioned as one for declaratory relief, injunctive relief, cancellation of a notice of default, and slander of title.<sup>3</sup> The named defendants included, among other parties (see fn. 2, *ante*), Arthur E. Osterback (Osterback), Trustee of The Arthur E. Osterback Trust (Trust), and PLM Lender Services, Inc. (PLM). The action arose out of a November 2004 loan of \$100,000 from the Trust to the Chengs that was secured by a deed of trust encumbering real property located at 310 Oakberry Way in San José. PLM was the authorized servicing agent for the loan. The Chengs defaulted on the loan in 2009, and PLM thereafter recorded a notice of default and a notice of trustee's sale. The foreclosure sale occurred in or about September 2009.

On September 22, 2011, the court entered an amended judgment of dismissal with prejudice of the action against the Chengs and in favor of Osterback, PLM, and First American Title Insurance Company (First American). In that amended judgment, the court (1) granted the motion of Osterback, as trustee of the Trust, for sanctions and attorney fees, pursuant to Code of Civil Procedure section 128.7, in the amount of \$65,031.94; (2) granted PLM's request for sanctions in the amount of \$30,232.00; (3)

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<sup>2</sup> The underlying action was the subject of a prior appeal in which the Chengs were the appellants. That appeal arose out of a judgment entered on November 3, 2011, against the Chengs in favor of other defendants, Dennis C. Brening, The Dennis C. Brening Trust, Verdeo Capital Group, and Placer Foreclosure, Inc. On January 8, 2013, we filed an unpublished opinion affirming that judgment. (See *Cheng v. Brening* (Jan. 8, 2013, H037702) [nonpub. opn.].) We take judicial notice of that prior unpublished opinion pursuant to Evidence Code sections 452, subdivision (d) and 459, subdivision (a), because it "help[s] complete the context of this case." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 306, fn. 2)

<sup>3</sup> The complaint is not part of the appellate record. Our recital of its filing date and substance is taken from the appeal previously decided by us (*Cheng v. Brening, supra*, H037702) [nonpub. opn.], which in turn was derived from the description of the complaint by the court and respondents' counsel at trial.

ordered that the Chengs were jointly and severally liable for the obligations arising out of the two sanctions orders; and (4) found Osterback, PLM, and First American to be the prevailing parties in the action and therefore entitled to statutory costs.

At some date prior to December 12, 2011, PLM filed a motion for attorney fees and costs.<sup>4</sup> Appellant opposed the motion. In her opposition, Appellant argued the underlying merits of the case and requested that the court set aside the amended judgment. PLM's attorney fee motion was heard by the court on January 5, 2012. Prior to the hearing, the court issued a tentative ruling granting PLM's motion. After argument, the matter was submitted. On March 16, 2012, the court filed an order (hereafter, the PLM attorney fee order) granting PLM's motion, awarding it \$59,197.90 in attorney fees and \$5,420.80 in costs as against the Chengs. In addition, the court awarded PLM sanctions in the amount of \$1,722.50 against Appellant, finding that she had violated a prior order of the court.<sup>5</sup>

On March 13, 2012, Appellant filed a notice of appeal.<sup>6</sup>

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<sup>4</sup> PLM's motion for attorney fees and costs is not part of the appellate record. We understand that such motion was filed prior to December 12, 2011, because that is the date Appellant filed her opposition to the motion, which pleading is included in the record.

<sup>5</sup> The court indicated in its order awarding sanctions that "Janet Cheng violated its Order of November 1, 2011[,] conditionally granting PLM sanctions in the amount of \$1,722.50 if Janet Cheng filed another motion seeking to set aside the Amended Judgment."

<sup>6</sup> Subsequent to the filing of the notice of appeal, on April 5, 2012, the court entered a second amended judgment after dismissal. The document included the orders and findings of the September 22, 2011 amended judgment, and supplemented it with the subsequent orders awarding PLM attorney fees of \$59,197.90 and costs of \$5,420.80, and awarding Osterback, as Trustee of the Trust, attorney fees and costs totaling \$28,358.10.

## DISCUSSION

### I. *Scope of Appeal*

The notice of appeal filed by Appellant herein is ambiguous. In identifying the matter from which the appeal is taken, Appellant checked the box “Other” and listed the following:<sup>7</sup> (1) “9-22-2011 Plaintiff was denied Due Process right”; (2) “3-1-2012 motion to set aside judgments and amended judgment were denied before Plaintiff presenting [*sic*] the evidence of unsigned amended judgment”; (3) “March 1, 2012 motion to set aside amended judgment and sanctions was denied. Huge amount of sanction was imposed to suppress the evidences [*sic*] of unsigned amended judgment. Huge amount of Sanctions was imposed to suppress the payoff check of 6-1-2005 of 310 Oakberry Way. Plaintiff was denied Due process right. All judgments<sub>[,]</sub> including the fraudulent amended judgment<sub>[,]</sub> were entered without any hearing and without statement of decision by Court. Defendants and the Court violated the rule of court and Due Pross Plaintiff right.” (*Sic.*) Attached to the notice of appeal were copies of a check and the September 22, 2011 amended judgment of dismissal.

On April 17, 2012, PLM filed a motion to dismiss the appeal, which was opposed by Appellant. On May 16, 2012, this court granted PLM’s motion in part. We concluded that any purported appeal from the September 22, 2011 amended judgment was untimely and therefore ordered it dismissed. We also ordered: “The appeal from the March 1, 2012 order awarding fees, costs and sanctions is deemed filed as of the date of the entry of that order on March 15, 2012 [filed March 16, 2012], and as such, is timely filed. The appeal shall proceed as to the March 15, 2012 order only.”<sup>8</sup>

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<sup>7</sup> Appellant’s description of the matter from which the appeal is taken is handwritten and difficult to read. We have endeavored to accurately set forth its contents.

<sup>8</sup> In granting the motion to dismiss in part, we granted both PLM’s and Appellant’s separate requests for judicial notice of certain pleadings filed below.

Thereafter, Appellant filed an opening brief, which this court ordered stricken. We directed Appellant “to file an opening brief which complies with this court’s May 16, 2012 order within 30 days of this order.” Appellant filed a new opening brief on October 9, 2012.

II. *Order Granting PLM’s Attorney Fees and Costs*

A. *Standard of Review*

“Civil Code section 1717 provides that ‘[r]easonable attorney’s fees shall be fixed by the court.’ . . . [T]his requirement reflects the legislative purpose ‘to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions.’ [Citation.] Consistent with that purpose, the trial court has broad authority to determine the amount of a reasonable fee. [Citations.] . . . ‘The “experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong’ ”—meaning that it abused its discretion. [Citations.]” (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094-1095.) Under this standard, “ ‘[d]iscretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.’ [Citations.]” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

Likewise, an order imposing sanctions based upon improper litigation conduct is reviewed for abuse of discretion. (*Guillemín v. Stein* (2002) 104 Cal.App.4th 156, 167 [trial court’s award of sanctions under Code of Civil Procedure section 128.7 reviewed under abuse of discretion standard]; *On v. Cow Hollow Properties* (1990) 222 Cal.App.3d 1568, 1575-1576 [reasonableness of attorney fees awarded as sanctions under

Code of Civil Procedure section 128.5 for actions in bad faith or tactics that are frivolous or solely intended to cause delay reviewed for abuse of discretion].)

B. *Appellant's Challenge to Order Has No Merit*

Appellant challenges the PLM attorney fee order. But she has failed to produce an adequate record permitting this court to evaluate that contention.

The party challenging a ruling by the trial court has the burden of showing reversible error by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) When there is an inadequate record, we must presume any matters that could have been presented to support the trial court's order were in fact presented, and may affirm the trial court's determination on that basis. (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) An appellant's failure to present an adequate record will result in the issue being resolved against appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [appellants' failure to procure adequate record of attorney fee proceedings mandated that their challenge be resolved against them]; see also *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259 [failure of appellant to include transcript of hearing foreclosed court's review of claim of error].)

For instance, where an appellant challenged the court's granting of a motion to tax costs but failed to include in the appellate record the transcript of the hearing on the motion, the claim was rejected. (*Moreno v. City of King* (2005) 127 Cal.App.4th 17, 30.) We reasoned in that case: "[Appellant] has provided us with a record that is silent with regard to why the trial court taxed his deposition and process costs. '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.' (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) On the record before us, we must presume that the trial court was presented with a sound basis at the hearing on the motion to support its implied findings that [appellant] had not 'actually incurred' process costs and had not needed to conduct any depositions." (*Ibid.*)

Here, Appellant has failed to include any of the papers (either moving or reply) filed by PLM in support of its motion for attorney fees, costs, and sanctions.<sup>9</sup> We therefore have no information as to the arguments presented by PLM, or the documentation it provided in support of its requests that ultimately resulted in the court's awarding it attorney fees and costs of \$59,197.90 and \$5,420.80, respectively, and imposing sanctions of \$1,722.50 against Appellant. We will presume that any matters that could have been presented by PLM to support the trial court's order were in fact presented. (*Bennett v. McCall*, *supra*, 19 Cal.App.4th at p. 127.) Because Appellant has failed to provide an adequate record from which we may evaluate her claim that the court erred in granting PLM's request for attorney fees, costs, and sanctions, we will resolve that claim against her. (*Maria P. v. Riles*, *supra*, 43 Cal.3d at p. 1295-1296.)<sup>10</sup>

Furthermore, even were we to overlook this fundamental deficiency, Appellant has presented nothing in her appellate briefs that would suggest that the court abused its discretion. Her challenge is limited to the most conclusory of statements. She repeatedly states in her opening brief<sup>11</sup> that the court abused its discretion by granting PLM's motion

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<sup>9</sup> Although PLM's motion for attorney fees and costs is not part of the appellate record, the record does include a copy of PLM's request for judicial notice in support of its attorney fee motion, which was an exhibit to Appellant's opposition to the motion. That document simply contains a detailed list of documents for which PLM requested judicial notice. It provides no insight into the substance of PLM's attorney fee motion, such as an indication of the amount of fees and costs requested, the basis upon which the sums were calculated, or the basis for PLM's sanctions request.

<sup>10</sup> We acknowledge that Appellant is representing herself in connection with this appeal. However, the rules of civil procedure apply with equal force to self-represented parties as they do to those represented by attorneys. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Thus, "[w]hen a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys." (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638; see also *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

<sup>11</sup> Appellant also filed a reply brief. Although it is 15 pages in length, it contains no argument at all directly addressing her challenge to the PLM attorney fee order.

for attorney fees, costs, and sanctions, without providing any substantive argument in support of that bald statement. “Conclusory assertions of error are ineffective in raising issues on appeal. [Citation.]” (*Howard v. American Nat. Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 533, citing Cal. Rules of Court, rule 8.204(a)(1)(B).) As we have explained: “We are not bound to develop appellants’ argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.” (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830; see also *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.) Thus, any claim that the court abused its discretion in its entry of the PLM attorney fee order is waived as a result of Appellant’s failure to develop the argument in any way.

Despite Appellant’s failure to provide an adequate record and her undeveloped, conclusory argument that the court abused its discretion, we will address her two additional arguments concerning the challenged order. First, she contends that the PLM attorney fee order “violated” prior orders of the trial court in which requests for fees and costs were denied. Appellant refers to two orders. One order, which was entered nearly two years before entry of the PLM attorney fee order (and well before the case was dismissed in favor of defendants PLM, Osterback, and First American), involved the court’s denial of a motion by Osterback and the Trust for sanctions pursuant to Code of Civil Procedure section 128.7. It did not address any relief requested by PLM, and was in no way inconsistent with a later award of attorney fees and costs to PLM as a prevailing party. Likewise, the second order—a July 2010 order after a demurrer by First American—gave no indication that PLM would not be entitled to recover attorney fees and costs if it were ultimately the prevailing party in the litigation.

Second, Appellant challenges the PLM attorney fee order because the court did not rule in PLM’s favor at the time of the hearing on January 5, 2012. As noted, the court issued a tentative ruling in favor of PLM before the hearing on January 5, 2012;

Appellant appeared in court to contest that tentative ruling. There is was no recital by the court that it was adopting its tentative ruling. Instead, the motion was submitted after argument on January 5, 2012. The court's subsequent entry of the formal order granting PLM's motion was not improper. Appellant having failed to present any evidence to the contrary, we presume the order was supported by an adequate showing. (*Bennett v. McCall, supra*, 19 Cal.App.4th at p. 127.) There is no inconsistency between the court's comments at the hearing (after which the court submitted the matter), and the language in the subsequently written PLM attorney fee order.

For all of these reasons, the court did not abuse its discretion by awarding attorney fees, costs, and sanctions in favor of PLM.<sup>12</sup>

### III. *Other Matters Raised in Appellant's Briefs*

Appellant raises a number of additional issues in her opening and reply briefs that, for the reasons discussed below, have no merit.

First, Appellant includes a lengthy discussion setting forth what she contends to be the relevant facts that preceded the lawsuit. Specifically, she recites her contentions regarding the facts leading up to the foreclosure, an occurrence which she asserts repeatedly was based upon fraudulent conduct and documents. This recitation of the

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<sup>12</sup> On December 21, 2011, Appellant filed a "motion to set aside 12-8-2011 order [granting] defendant Arthur Osterback \$28,358.10 attorney fees." (Capitalization omitted.) In an order filed March 1, 2012, the court denied Appellant's motion, and imposed additional sanctions against Appellant in favor of Osterback in amounts of \$1,875.50 and \$1,674.00. (The court also granted a request by PLM for sanctions and ordered that Appellant pay \$1,722.50 to Osterback's attorney within 20 days of notice of the order.) The scope of the appeal here is limited to the PLM attorney fee order, and Appellant does not raise a challenge in her briefs to the March 1, 2012 order denying her motion to set aside the prior order awarding attorney fees to Osterback. Since her "motion to set aside" was in reality a motion for reconsideration, any challenge thereto would not be cognizable on appeal in any event. (See *Morton v. Wagner* (2007) 156 Cal.App.4th 963, [dismissing appeal of order denying motion for reconsideration, observing that majority of courts have held that orders denying motions for reconsideration are not appealable].)

alleged underlying facts is wholly unsupported by proper citation to the clerk's transcript. Appellant is therefore not in compliance with rules of appellate practice. (Cal Rules of Court, rule 8.204(a)(1)(B); see *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 800-801 [failure to include citations to appellate record in brief may result in forfeiture of claim].) Moreover, since the court below determined in September 2011 that PLM was the prevailing party and therefore entitled to statutory costs—and that determination, made in the amended judgment, is not a subject of this appeal—the facts underlying the subject foreclosure are not relevant to this appeal. The only issue here is whether the court abused its discretion in awarding PLM attorney fees, costs, and sanctions in the PLM attorney fee order filed March 16, 2012.

Second, Appellant argues at various locations in her appellate briefs that entry of the amended judgment of September 22, 2011, was improper. To the extent Appellant challenges the amended judgment of September 22, 2011, through these statements she is in violation of this court's order of May 16, 2012, wherein we dismissed the appeal as to that judgment and ordered that "[t]he appeal shall proceed as to the March 15, 2012 order only."

Third, Appellant's briefs include repeated challenges to the second amended judgment entered April 5, 2012. While the second amended judgment is part of the appellate record, it is not a subject of this appeal. Accordingly, we will disregard any challenge by Appellant to this second amended judgment.

Fourth, there are a number of references in Appellant's briefs to alleged procedural facts relating to matters occurring in court, including but not limited to the court's entry of the PLM attorney fee order and the second amended judgment, and contacts by PLM's attorney with the court. Contrary to mandatory rules of appellate practice, Appellant does not include any citations to the record in support of these alleged procedural matters. To the extent any argument challenging the PLM attorney fees order is based upon these unsupported facts, we will disregard them. (Cal Rules of Court, rule

8.204(a)(1)(B); *Dietz v. Meisenheimer & Herron*, *supra*, 177 Cal.App.4th at pp. 800-801.)

Fifth, Appellant has taken the liberty of appending some seven pages of documents to her opening brief and 12 pages to her reply brief. This appears to be another procedural violation of appellate practice, particularly in the case of the attachments to the reply brief. (See Cal. Rules of Court, rule 8.204(d) [attachments to briefs may not exceed a total of 10 pages].) Further, it is unclear whether the documents attached to the reply brief are part of the record below as required by rule 8.204(d). (See *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 [documents not presented to trial court generally may not be included in record on appeal].)<sup>13</sup> We will disregard any factual assertions made by Appellant which are not contained in the record and will disregard any attachments to her briefs when we cannot determine that the documents were part of the record below. (See rule 8.204(a)(2)(C); *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 947; *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.)

Lastly, after briefing was completed, Appellant filed a request for judicial notice on June 28, 2013. Her request consists of a 14-page pleading (which includes a significant amount of argument beyond the scope of a proper request for judicial notice) and approximately 150 pages of exhibits. To the extent this request includes argument that should have properly appeared in Appellant's opening and reply briefs, we will disregard it. The documents for which judicial notice is sought are, for the most part, pleadings from another superior court action that is not part of this appeal (*PLM Lender Services, Inc. v. Cheng, et al*, Santa Clara Superior Court case number 1-10-CV-171062). A number of the remaining documents for which judicial notice is sought are already part

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<sup>13</sup> In fact, four pages of the attachments are from other Santa Clara Superior Court actions.

of the appellate record. We will therefore deny Appellant's request for judicial notice. (See *People v. McKinzie* (2012) 54 Cal.4th 1302, 1326 [court will only take judicial notice of relevant matter].)

DISPOSITION

The postjudgment order filed March 16, 2012, awarding attorney fees, costs, and sanctions in favor of PLM, is affirmed.

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Márquez, J.

WE CONCUR:

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Elia, Acting P.J.

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Bamattre-Manoukian, J.