Filed 2/23/11 Haddad v. Ma CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

YOUSEF HADDAD, Plaintiff and Appellant, v. RONGJIE MA et al., Defendants and Respondents.	A125561 (San Mateo County Super. Ct. No. CIV 468483)

Yousef Haddad appeals from a judgment following a jury trial, contending the trial court abused its discretion by refusing to grant a third continuance of the trial to permit his attorneys to depose the respondents' expert witnesses. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises out of a dispute over the construction of a house. Appellant Yousef Haddad, individually and doing business as Hi-Tech Construction, sued respondents Rongjie and Dunhua Ma for breach of contract and to foreclose on a mechanic's lien. Appellant alleged in his complaint that respondents hired him to construct a home on property the respondents owned in Millbrae. He further alleged the respondents breached the contract by instructing him to stop work and by prohibiting him from completing the work. Respondents filed a cross-complaint against appellant, alleging claims for breach of contract, negligence, elder abuse, and negligent and intentional misrepresentation.[1]

[1] The cross-complaint is not included in the record on appeal. However, the record does contain a verdict form completed by the jury, which reflects that such a cross-complaint was considered by the jury.

Trial was originally set for October 6, 2008. On August 8, 2008, the parties filed a stipulated motion to continue the trial date. The court granted the motion and continued the trial to December 15, 2008.

The parties disclosed their expert witnesses in August 2008. The parties thereafter served notices reflecting their intention to take the depositions of their respective experts on December 4 and 5, 2008. On November 21, 2008, before the dates of the scheduled expert depositions, appellant filed a second motion to continue the trial date. Respondents joined in the motion. The presiding judge granted the motion and continued the trial date to February 2, 2009. With the trial date continued an additional seven weeks, the parties took the expert depositions scheduled for early December 2008 off calendar, with the understanding they would be rescheduled on dates "mutually convenient to counsel, the parties, and the witnesses."

On December 18, 2008, appellant's counsel served amended notices setting the depositions of respondents' experts for January 13, 2009. In a letter dated December 22, 2008, counsel for respondents advised that he had a conflict on the scheduled date and recommended rescheduling the depositions to the week of January 26, 2009, the week before trial was scheduled to commence. In that same letter, respondents' counsel advised that he was disclosing Leonardo Redada as a non-retained expert.

In a letter dated December 30, 2008, appellant's counsel stated he would be available for the depositions of the experts on only four days in January 2009—the 6th, 7th (morning only), 13th, and 27th. In a response sent January 5, 2009, an assistant to respondents' trial counsel reported that counsel's only available dates for the expert depositions were during the weeks of January 19 and 26, 2009. Although the dates proposed by respondents' counsel were only two weeks before trial, and technically past the cutoff for expert discovery (see Code Civ. Proc., § 2024.030), appellant's counsel did not insist that the depositions occur sooner or file a motion to compel the timely depositions of respondents' experts. Instead, appellant's counsel requested that respondents' counsel stipulate to a third continuance of the trial. Respondents' counsel agreed.

Appellant's counsel understood there was no guarantee the continuance would be granted, as reflected in letters dated January 6 and 13, 2009. In the January 13 letter, appellant's counsel wrote that he was re-scheduling all of the parties' expert depositions to be taken on January 27, 2009.

According to appellant's counsel, he presented the *ex parte* application to the court clerk on January 15, 2009. The continuance was denied and the clerk returned the application to appellant's counsel with the notation, "No good cause shown. Two prior continuances."

Following the denial of the continuance, appellant's counsel re-noticed the depositions of respondents' experts for January 27, 2009. Respondents' counsel responded that he would not be producing his experts on January 27 but that they were available to be deposed on either January 29 or 30. The parties were unable to agree upon a deposition schedule and consequently appeared for trial call on February 2, 2009, without having deposed any experts.

According to appellant's counsel, both he and counsel for respondents told the presiding judge the matter was not ready for trial at the time the matter was called for assignment to a courtroom. Counsel for respondents disputes this version of events, claiming that he told the presiding judge—or otherwise implied—he was prepared to proceed. According to appellant's counsel, the presiding judge did not rule on his request for a continuance but instead deferred the matter to the judge assigned to hear the trial.

Appellant's counsel claims the attorneys renewed their request for a continuance in the courtroom to which the trial was assigned. Respondents' counsel again disputes this version of events, contending that he informed the assigned judge he was ready to proceed. According to appellant's counsel, the trial court refused to consider the request for a continuance after informing the attorneys that a request for a continuance must be decided by the presiding judge.

Both parties filed motions *in limine* to preclude the other party's experts from testifying at trial. Following a hearing held on February 3, 2009, the trial court granted in part and denied in part appellant's motion *in limine* to preclude respondents' experts from

testifying. The court granted the motion with respect to Leonardo Renada on the basis that he had been belatedly disclosed as an expert. The court otherwise denied the parties' motions seeking to preclude expert testimony. The court determined that the moving parties had not established an unreasonable refusal to produce expert witnesses for deposition, as follows: "There are allegations on both sides that the other side, in essence, was acting unreasonably in trying to prevent depositions from being rescheduled. The Court is not persuaded by the evidence that either side acted unreasonably." The court further explained: "I think you were trying to resolve the case from all of the correspondence that I reviewed that you attached to your respective motions and oppositions, but you were trying to resolve the case, and so you didn't want to spend the money on taking expert depos, and then it got to where you saw you couldn't resolve the case, and it was going to trial, and you even stipulated to a continuance, but our Court doesn't just grant continuances based on stipulation of counsel, as you both learned the hard way. Therefore, you got down to the wire and no depos were taken."

Although the court denied the motion to exclude expert testimony (with the exception of non-retained expert Leonardo Renada), the court nonetheless took steps to mitigate any potential prejudice by specifying that the parties would have to make their experts available for deposition on days the court was not in session. Specifically, the court ruled: "I am going to order, in denying the motion as to the experts that I am, that in order for you to be able to call your experts as trial witnesses, you need to make sure that they're made available for their depositions on this Friday or next Monday morning. . . . [¶] But I'm making it a condition that if you want to be able to call your expert witnesses at a trial, you have to make your witnesses available for deposition either this Friday or next Monday morning when we're not in session, and you can attend those depositions, [counsel for appellant], with your experts so that they can hear firsthand what the expert is testifying to, and there will be no prejudice to your expert, then, preparing for his or her rebuttal testimony." The court subsequently expanded its order to include Saturday as an option for taking the depositions. The court further clarified that if one side chose not to take expert

depositions for financial or other reasons, the experts would still be allowed to testify at trial, assuming they had been made available for deposition.

Counsel for appellant asked for a continuance of trial in order to allow the depositions to be taken. The court denied the motion, explaining that "only the Presiding Judge continues trials, and you tried that, and it didn't work."

According to a declaration filed by respondents' counsel, the attorneys eventually agreed to proceed with the expert witness depositions on Saturday, February 7, 2009. However, respondents' counsel thereafter received a telephone call from appellant's counsel in which he "advised that he had determined together with his client to forego the depositions to save the costs and expenses that would have occurred." Appellant's counsel confirmed the decision not to conduct expert depositions in a letter to respondents' counsel.

Therefore, trial proceeded without any party taking a deposition of the opposing party's experts. As reflected in a declaration filed by respondents' counsel, "trial proceeded and both attorneys had the opportunity, and did, cross-examine each other's experts at trial."

At the conclusion of the trial, the jury returned a verdict in favor of respondents on the causes of action for breach of contract, negligence, negligent misrepresentation, and intentional misrepresentation. The jury further found in favor of respondents on appellant's breach of contract cause of action, but it found in favor of appellant on respondents' elder abuse claim. The court entered judgment in favor of respondents for $643,235.12, an amount that included an award for attorney fees and costs. Appellant timely appealed the judgment.

DISCUSSION

Appellant's sole claim on appeal is that the trial court abused its discretion when it denied a third continuance of the trial date in mid-January 2009 and on several occasions at the outset of trial in early February 2009. He claims the denial resulted in an unfair trial and a miscarriage of justice.

1. *Standard of review*

The denial of a requested trial continuance is reviewed for abuse of discretion. (*Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1603.) To the extent appellant

challenges the ruling denying his motion *in limine* seeking to exclude expert testimony, our review of that decision, too, is governed by the abuse of discretion standard. (See *People v. Nakai* (2010) 183 Cal.App.4th 499, 516 [*in limine* motions seeking to exclude evidence reviewed for abuse of discretion].)

The appellant bears the burden of establishing an abuse of discretion. (Cf. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) In general, a trial court's discretionary ruling will be disturbed on appeal only upon a showing of a clear case of abuse and a miscarriage of justice. (*Ibid.*)

2. *Inadequate record*

On appeal, we presume the judgment to be correct and indulge all intendments and presumptions to support it regarding matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; accord *People v. Garza* (2005) 35 Cal.4th 866, 881; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) "Error is never presumed and appellant has the burden to show error." (*People v. Nitschmann* (1995) 35 Cal.App.4th 677, 684.) Further, an appellant bears the burden of overcoming the presumption of correctness by providing an adequate record that affirmatively demonstrates error. (See *Defend Bayview Hunters Point Com. v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 859-860.)

Here, one of appellant's main contentions is that the trial court abused its discretion when, on January 15, 2009, it denied the *ex parte* motion for a continuance. Appellant complains that the granting of " 'two prior continuances' " was not a proper basis on which to deny the motion, and he further questions whether the *ex parte* motion ever found its way to the presiding judge, speculating that "[t]he clerk may, or may not, have presented the application to a judge." In addition, appellant argues that the court never ruled on the oral request for a continuance he allegedly made on the first day of trial. He contends the presiding judge passed the matter on to the assigned judge, who in turn stated that the matter had to be decided by the presiding judge.

The problem with appellant's arguments, as respondents point out, is that the record on appeal is inadequate to assess the claims of error. Appellant apparently concluded the

trial court denied the *ex parte* motion solely because there had already been two prior continuances. However, because there is no hearing transcript of any *ex parte* proceeding, we have no record to assess what factors the court actually considered. Absent a record affirmatively demonstrating trial court error, we will not assume the court abused or failed to exercise its discretion. Speculation about what might have transpired is insufficient to overcome the presumption of correctness.

Further, with respect to the claims that the court failed to rule on appellant's continuance motion on the first day of trial, the record is utterly inadequate to support the allegations. Not only is there no transcription of the events on which the appeal is based, but there is no minute order or docket entry reflecting that the motion was made, much less denied. The only support in the record for appellant's factual claims is a declaration prepared by appellant's counsel in support of a motion for a new trial. Moreover, this unofficial "record" of events is challenged—respondents dispute the assertion that the parties jointly moved for a continuance on the first day of trial.

Appellant argues that it is impossible to provide a transcript or other official record because the San Mateo County Superior Court does not record the types of matters that are the subject of this appeal. We disagree with the notion it is impossible to create a proper appellate record in circumstances such as this one. Appellant could have taken steps to create a record of the court's actions. For example, the record reflects that on the first day of trial, the court and counsel held an "unreported conference in chambers" for nearly one and one-half hours, a period of time during which appellant's counsel purportedly sought a further continuance. Counsel could have requested that the matter be reported or, at a minimum, made his continuance motion in open court so that there would be a record of it. In addition, in cases in which proceedings are not transcribed, an appellant may create a record permitting appellate review by following procedures for settled statements outlined in the California Rules of Court. (See Cal. Rules of Court, rule 8.137(a)(2)(B).) Appellant did not follow such procedures in this case. As a result, we are left without a record of the actions that are the focus of the appeal.

The appeal suffers from an even more fundamental problem resulting from the lack of an adequate record. Specifically, even assuming the trial court erred in denying a further continuance of trial, there is no record from which this court could assess whether appellant was prejudiced by the error. Appellant asserts he was "severely prejudiced" by being "forced to put on his case without any pre-trial expert witness discovery." In his opening brief, he indicates his counsel "was completely surprised as to the nature and substance" of the testimony offered by respondents' experts, and he claims his experts were "unprepared" to refute the testimony.

We have no basis on which to assess appellant's claims of prejudice because he failed to include the reporter's transcript of trial as part of the appellate record. Indeed, nowhere in appellant's briefs does he even indicate who testified as an expert at trial, much less the substance of the expert testimony that was supposedly a surprise to his counsel. In short, the inadequate appellate record precludes any assessment of whether appellant was in fact prejudiced by the denial of his motion for a continuance.

It is a fundamental rule of appellate procedure that "[n]o judgment shall be set aside . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) " 'The effect of this provision is to eliminate any presumption of injury from error, and to require that the appellate court examine the evidence to determine whether the error did in fact prejudice the defendant.' " (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) Although errors of a constitutional magnitude may require reversal regardless of whether prejudice is shown,[2] when the error asserted is a simple trial error occurring under California law, the general rule is that reversal is required " 'only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*Id.* at p. 800.)

[2] Appellant has offered no support for a claim that the purported trial court error requires reversal per se, without regard to whether he was actually prejudiced by the error.

Because the appellate record does not permit this court to assess whether it is reasonably probable the result would have been more favorable to appellant if the court had granted the requested continuance, appellant's claim necessarily fails. We cannot presume error—or prejudice from any asserted error—in the absence of an adequate record.

To avoid the suggestion that appellant's claims would have had merit but for the fatally defective record, we briefly address below appellant's contention that the court abused its discretion by refusing to grant a third continuance.

3. *Abuse of discretion*

"There is no policy in this state of indulgence or liberality in favor of parties seeking continuances. Rather, the granting of continuances is not favored and the party seeking a continuance must make a proper showing of good cause. [Citations.]" (*Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 448.) A party may obtain a continuance of a trial date only upon an affirmative showing of good cause. (Cal. Rules of Court, rule 3.1332(c).)

Here, the trial court acted well within its discretion in denying the January 15, 2009 *ex parte* motion to continue the trial. The primary reason offered for the continuance as set forth in the *ex parte* application was so that the parties could complete expert discovery before the trial date. Yet, based upon representations in the *ex parte* application, the parties had already agreed that their respective experts could be deposed on January 27, 2009. The trial court could reasonably have concluded that a third continuance was unnecessary insofar as expert discovery was expected to be completed before the trial date.

Further, the court could reasonably have concluded that appellant had not demonstrated sufficient diligence in conducting expert discovery. As indicated in the *ex parte* application, the parties' experts had been disclosed in August 2008. Five months and two continuances later, the parties still had not completed their expert discovery. While there may have been various reasons for the delay, including attempts to settle the case, it was not unreasonable for the court to conclude that the parties had been less than diligent in completing expert discovery. (See *Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 18 [given expressed statutory policy preference concerning need for timely expert depositions, it was

not abuse of discretion to deny belated continuance request premised on need to conduct expert discovery].)

Appellate cites Code of Civil Procedure section 595.2 and *Pham v. Nguyen, supra,* for the proposition that the court was bound to grant the continuance unless it was impractical to do so. However, as noted in *Pham v. Nguyen,* section 595.2 of the Code of Civil Procedure[3]—which provides that a court "shall" postpone a trial for up to 30 days when all parties agree to the postponement—is not mandatory but is directory only. (*Pham v. Nguyen, supra,* 54 Cal.App.4th at p. 15.) Moreover, the court in *Pham v. Nguyen* expressly determined it was not an abuse of discretion for a trial court to deny a stipulated request for a trial continuance to allow the parties to depose expert witnesses. (*Id.* at pp. 17-18.)

The trial court also acted within its discretion in denying the continuance allegedly requested on the first day of trial. As noted above, there is no record that appellant made such a request or that it was denied, aside from a post-trial declaration prepared by appellant's counsel that contains facts disputed by respondents' counsel. Nevertheless, even assuming there were a proper record of the motion, the court was justified in denying any such motion. In connection with the court's consideration of appellant's motion *in limine* to exclude expert testimony at trial, the court clearly stated its assessment that neither side acted unreasonably in preventing expert depositions from taking place. The court further explained that the parties apparently did not want to spend money taking expert depositions and "learned the hard way" when the court refused to grant a further continuance based upon the parties' stipulation. The court's statements show that it believed the parties' predicament was of their own making, reflecting a lack of diligence.

In any event, even if the court erred in denying a further continuance, we would still conclude that appellant cannot demonstrate prejudice. Appellant had the opportunity to take the depositions of respondents' experts during the early phase of the trial on days when

---

[3] Section 595.2 of the Code of Civil Procedure provides: "In all cases, the court shall postpone a trial, or the hearing of any motion or demurrer, for a period not to exceed thirty (30) days, when all attorneys of record or parties who have appeared in the action agree in writing to such postponement."

court was not in session. The available evidence in the record indicates that appellant declined to proceed with the depositions in order to save money. While allowing expert depositions to be taken during the early phases of trial might not have been ideal from appellant's perspective, it nevertheless provided an opportunity to learn what the experts would say at trial and thus avoid the alleged surprise that appellant now claims was prejudicial. Any prejudice resulted from appellant's own tactical decision to save money by foregoing expert depositions. It is well settled that "where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error." (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.)

We conclude the court acted within its discretion in denying a third continuance of the trial. If appellant suffered any prejudice as a result of that denial—a determination we cannot make on the limited appellate record provided to us—the fault largely rests with appellant as a result of his own decision to forego expert depositions to save costs.

DISPOSITION

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

_____
McGuiness, P.J.

We concur:

_____
Siggins, J.

_____
Jenkins, J.