Filed 6/29/11; pub. & mod. order 7/29/11 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MARY MUSAELIAN, Plaintiff, v. WILLIAM ADAMS et al. Defendants and Respondents; JOHN G. WARNER Objector and Appellant.	A126240 (Sonoma County Super. Ct. No. SCV236208)

John G. Warner appeals orders denying his motion for attorney fees on appeal under Code of Civil Procedure[1] section 128.7 and taxing costs on appeal. We affirm.

I. BACKGROUND

We are familiar with the background of this case through our review of two previous appeals in this action (*Musaelian v. Adams* (July 25, 2007, A112906) [nonpub. opn.] (*Musaelian I*)[2] and *Musaelian v. Adams* (May 18, 2010, A116412) [nonpub. opn.] (*Musaelian III*), and an appeal in the underlying action (*Reiter v. Musaelian* (June 30, 2006, A110100 [nonpub. opn.] (*Reiter*).)

In *Musaelian II*, our Supreme Court summarized the background of this controversy as follows: "Plaintiff Mary Musaelian is married to Andrew Musaelian. Joseph Reiter, represented by Attorney William L. Adams, brought suit against Andrew Musaelian and Andrew Musaelian's business, Attorney Legal Research (ALR), seeking

[1] All undesignated statutory references are to the Code of Civil Procedure.

[2] Our Supreme Court granted review of *Musaelian I*, and affirmed our judgment in *Musaelian v. Adams* (2009) 45 Cal.4th 512 (*Musaelian II*).

damages for conduct relating to litigation between Reiter and one of ALR's clients. Reiter obtained default judgments against both Andrew Musaelian and ALR. Reiter then sought partial satisfaction of the judgments by means of a forced sale of a residence Andrew Musaelian owned jointly with plaintiff. Plaintiff sought to avoid the sale by filing a third party claim of ownership of the residence, but the superior court denied her claim. Plaintiff and Andrew Musaelian sought to protect their home by filing for chapter 13 relief in the United States Bankruptcy Court for the Northern District of California. Reiter filed claims against the bankruptcy estate to recover sums representing the judgments against Andrew Musaelian and ALR. The bankruptcy court dismissed the claim for the sum represented by the judgment against ALR, reasoning that claim could be satisfied only from ALR's assets, which did not include plaintiff's home. The Ninth Circuit Bankruptcy Appellate Panel affirmed.

"Plaintiff, represented by Attorney John G. Warner, then filed this action against Reiter and Adams, seeking damages on theories of negligence, intentional infliction of emotional distress, abuse of process, slander of title, invasion of privacy and malicious prosecution, all based on Reiter's attempts to force the sale of plaintiff's home to satisfy the default judgment entered against ALR. Adams, representing himself and joined by Reiter, demurred on the grounds the first five causes of action were subject to the litigation privilege of Civil Code section 47, and the sixth cause of action, for malicious prosecution, lacked merit because the state court action had terminated in Reiter's favor. Adams and Reiter also moved under section 128.7 for sanctions including attorney fees against plaintiff and Warner.

"The trial court sustained defendants' demurrers without leave to amend. It later granted the motions for sanctions, finding Reiter had been the prevailing party throughout the state court proceedings, no reasonable person or party could have believed plaintiff's lawsuit had merit, and it was clear the suit was filed for an improper purpose to delay, harass, increase the cost of litigation or otherwise acquire a bargaining chip usable in the ongoing litigation between the parties. The court ordered plaintiff and Warner to pay $25,050 to Adams as 'reasonable sanctions including attorney fees,' a sum matching the

amount of attorney fees sought by Adams." (*Musaelian II*, *supra*, 45 Cal.4th at pp. 515-516.)

Warner and Mary Musaelian appealed the sanction order. Mary Musaelian thereafter reached a settlement with Reiter, and this court dismissed the appeal as to her, leaving only Warner as an appellant. (*Musaelian I*, *supra*, A112906 at p. 9.) We reversed the award of attorney fees to Adams, concluding that because Adams had represented himself, he had not 'incurred' attorney fees for purposes of sanctions under section 128.7. We also concluded Mary Musaelian's action was not frivolous. Our Supreme Court granted review, and affirmed our judgment.[3] (*Musaelian II*, *supra*, 45 Cal.4th at pp. 514-515, 521.)

A remittitur issued from this court, which provided that appellant was to recover his costs on appeal. Warner thereupon submitted a memorandum of costs on appeal, seeking $29,934.93 in costs. Among the costs Warner claimed was $13,276.33 in attorney fees. Warner also filed a separate motion for those attorney fees. Adams moved to tax or strike costs, and opposed the motion for attorney fees.

The trial court denied Warner's motion for attorney fees on the ground that the moving papers were inadequate, and granted in part the motion to tax costs, setting Warner's recoverable costs at $1,259.44. Warner appealed these orders.

II. DISCUSSION

A. Attorney Fees

Warner contends attorney fees should have been awarded under section 128.7. Section 128.7, subdivision (b), provides that by presenting a pleading, petition, notice of motion, or other similar paper to the court, "an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief," after reasonable inquiry, the paper is not being presented primarily for an improper purpose,

[3] The high court limited the issues on review to the question: "Was [Adams], an attorney representing himself in a civil action, entitled to an award of attorney fees as a sanction against the plaintiff under Code of Civil Procedure section 128.7 for engaging in frivolous litigation?" (*Musaelian II*, *supra*, S156045, Supreme Ct. Mins., Apr. 11, 2007.)

such as harassment or unnecessary delay or increase in cost; the legal contentions are "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," the factual contentions have or are likely to have evidentiary support, and the denials are warranted either by the evidence or are reasonably based on lack of information or belief.

Section 128.7, subdivision (c), upon which Warner relies for his claim of attorney fees, provides in pertinent part: "If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence. [¶] (1) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). . . . *If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion*." (Italics added.)

The trial court based its denial on the request for attorney fees on Warner's failure to invoke section 128.7, describe the specific sanction being sought, or name the parties to whom it was addressed. The court stated, "A judge ought not be required to search a memorandum of points and authorities or supporting declarations to determine the justification for making some order which is not specified in the moving papers, by which a potentially serious sanction might be imposed upon a lawyer or party not identified in the moving parties, supported by a mandatory (cf. Code Civ. Proc. § 128.7[,] sub. (e)) description of the conduct determined to justify the sanction imposed. [¶] This judge declines to do so." Warner argues the trial court erroneously treated his request for attorney fees as an independent motion for sanctions—rather than a request for fees incurred in opposing *Adams's* motion for sanctions—and erred in failing to consider his request on the merits as a result of the procedural defects. He asks us to direct the trial court to consider the merits of his claim for attorney fees.

We reject Warner's invitation to reverse the trial court's decision on this issue. First, as Warner concedes, the notice of motion did not comply with California Rules of Court, rule 3.1112(d), under which a motion must identify the party or parties bringing the motion, name the parties to whom it was addressed, briefly state the basis for the motion and the relief sought, and state the specific portion of any pleading that is challenged. In particular, the notice of motion did not mention the statutory basis of the motion, section 128.7.

Even assuming the trial court erred in not excusing these procedural defects, an award of attorney fees would not be proper. Attorney fees may be awarded to the party prevailing on a motion for sanctions under section 128.7 only "[i]f warranted." (*Ibid*.) The parties have drawn our attention to no California case discussing when such an award is warranted, and our own research has disclosed none. We may look for guidance, however, to cases construing the virtually identical provision of rule 11 of the Federal Rules of Civil Procedure (28 U.S.C.) (Rule 11), upon which section 128.7 was modeled. (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1168-1169.)[4] As stated in *Safe-Strap Co., Inc. v. Koala Corp.* (S.D.N.Y. 2003) 270 F.Supp.2d 407, 421, in discussing the provision in question, " 'the filing of a motion for sanctions is itself subject to the requirements of [Rule 11] and can lead to sanctions.' " Attorney fees incurred in defending against a Rule 11 motion are " 'infrequently granted where the motion was not clearly frivolous, filed for an improper purpose, or not well-grounded in fact or law.' " (*E. Gluck Corp. v. Rothenhaus* (S.D.N.Y. 2008) 252 F.R.D. 175, 183; see also *Richelson v. Yost* (E.D.Pa. 2010) 738 F.Supp.2d 589, 602 [denying request for attorney fees incurred in defending against Rule 11 motion in part because (1) party had supplied no reason for awarding fees except its conduct was not sanctionable, and (2) motion was not objectively unreasonable]; *Haniotakis v. Nassan (In re Zion)* (W.D.Pa.

[4] Rule 11 provides in pertinent part: "A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). . . . If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion." (Fed. Rules Civ.Proc., rule 11(c)(2), 28 U.S.C.)

2010) 727 F.Supp.2d 388, 413 [declining to address plaintiffs' demand for counsel fees incurred in responding to Rule 11 motion where plaintiffs had not filed motion and likelihood of award in their favor was "remote" because motion did not appear frivolous]; *G-I Holdings, Inc. v. Baron & Budd* (S.D.N.Y. Aug. 21, 2002, 01 Civ. 0216 (RWS)) 2002 U.S.Dist. Lexis 15443 [attorney fees for cost of defending against Rule 11 motion not warranted where motion was "not clearly frivolous and in fact presented a close question"].) Thus, although Rule 11 does not explicitly require a separate finding of violation of Rule 11 to award attorney fees incurred in opposing a Rule 11 motion, it appears that such fees are normally not awarded if the Rule 11 motion was not frivolous, unfounded, filed for an improper purpose, or otherwise unreasonable. Such a conclusion is consistent with the purpose of section 128.7, as well, which is " 'to deter frivolous filings.' " (*Hart v. Avetoom* (2002) 95 Cal.App.4th 410, 414.)

Although Adams was ultimately unsuccessful in his motion for sanctions, his motion was not frivolous. We would be hard pressed to conclude otherwise, in light of the fact that the trial court ruled in his favor. (See *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383-384 [denial of summary judgment motion establishes probable cause to sue].) Moreover, in reversing the trial court's order, we did not rely simply on established law; rather, we disagreed with two published appellate decisions, concluding that a different result was compelled by an earlier decision of the California Supreme Court, and in *Musaelian II* our high court disapproved those decisions. (*Musaelian II, supra*, 45 Cal.4th at pp. 519-520, disapproving *Laborde v. Aronson* (2001) 92 Cal.App.4th 459 and *Abandonato v. Coldren* (1995) 41 Cal.App.4th 264, and following *Trope v. Katz* (1995) 11 Cal.4th 274; see also *Musaelian III, supra*, A116412 at pp. 9-15.) In the circumstances, attorney fees for Warner's costs in opposing the motion for sanctions are not warranted.

B. Apportionment of Costs

Among the costs on appeal claimed by Warner were $755 in filing fees and $325 for preparation of the reporter's transcript. The trial court reduced these amounts by half, to reflect the portion of the costs for which Mary Musaelian—who had originally been an

appellant before being dismissed voluntarily—was responsible. Warner contends the trial court exceeded its authority in apportioning costs in this manner.

The right to recover costs on appeal is governed by California Rules of Court, rule 8.278 (rule 8.278). (See § 1034; *Lavine v. Jessup* (1959) 175 Cal.App.2d 136, 138 (*Lavine*).) Rule 8.278 (a) provides in part: "(1) Except as provided in this rule, the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal. . . . (5) In the interests of justice, the Court of Appeal may also award or deny costs as it deems proper." The right to recover costs depends on four conditions: "(1) There must be a valid judgment awarding costs to the party claiming them; (2) the item must be one allowed by rule or statute; (3) the amount claimed must have been actually incurred; (4) the amount claimed must be reasonable." (*Wilson v. Board of Retirement* (1959) 176 Cal.App.2d 320, 323 [discussing entitlement to costs on appeal].)

Interpreting a predecessor to this rule, the court in *Ramirez v. St. Paul Fire & Marine Ins. Co.* (1995) 35 Cal.App.4th 473, 477-479 (*Ramirez*), faced the question of "whether, when an appellate court simply awards costs to one of the parties to an appeal without further direction, the trial court on a motion to tax costs is empowered to apportion those costs among the opposing parties." (*Id.* at p. 477.) The court concluded the authority to apportion costs among the *opposing parties* resided only in the Court of Appeal, stating, " 'It has long been settled that an appellate court by its judgment determines the final award of costs on appeal (who shall recover the same), and the trial court determines the specific judgment (what items of costs the entitled party may recover under the general award) [citation].' [Citation.] When an appellate court directs in its opinion that the appellant is to recover its costs on appeal, 'no one, neither the lower court nor any of the unsuccessful respondents . . . [is] entitled to overrule [the] court by analyzing . . . [its] order[] awarding costs and in part setting aside [the] order[] for judgment.' [Citation.]. [¶] Consequently, a losing party seeking an allocation of costs on appeal must direct its request to the appellate court. Further, the request should normally be made before the court loses its jurisdiction over the matter by issuance of the remittitur. [Citations.]" (*Id.* at p. 478.)

The court in *Ramirez* distinguished *Schwartz v. Schwartz* (1969) 268 Cal.App.2d 685 (*Schwartz*), and other cases that concluded "that a trial court, although not empowered to modify an appellate court's award of costs, may nonetheless endeavor to resolve ambiguities in it" (*Ramirez, supra*, 35 Cal.App.4th at p. 479) on the ground that in those cases, the appellate court did not mention costs in its opinion. The court went on, "The remittitur [in those cases] was found to be ambiguous and therefore subject to interpretation by the trial court. The ambiguity arose not from the remittitur itself but from the appellate court's failure to address the subject of costs." (*Ibid*.; see also *Schwartz*, *supra*, 268 Cal.App.2d at p. 690 [" 'The interpretation of a remittitur requires that the court's opinion be consulted, especially in case of ambiguity [citations], and that meaning given to it which harmonizes with the court's ruling.' "]; accord *In re Marriage of Jovel* (1996) 49 Cal.App.4th 575, 590-591 [where appellate court awarded costs to prevailing party, trial court did not have authority to apportion costs among opposing parties].)

Warner contends this case is governed by the rule of *Ramirez*, and that the trial court lacked authority to apportion costs on appeal between himself and Mary Musaelian. This case differs from *Ramirez* in at least one important respect—the issue here is not whether the trial court has authority to apportion costs among losing parties, but whether the trial court has authority to interpret the remittitur to allow to the prevailing party only those costs that were reasonably attributable to that party.[5] As we have noted, Mary Musaelian was originally a party to *Musaelian I*, but was dismissed from the appeal at her request after the record on appeal had been filed. In its authority to decide what items Warner was entitled to receive (see *Ramirez, supra*, 35 Cal.App.4th at p. 478), the trial court could reasonably order that Warner only recover *his own* costs, rather than those of Mary Musaelian.[6] In the circumstances of this case, we see no error in the trial court's determination.

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[5] Our opinion in *Musaelian I* did not mention costs.

[6] In the context of an award of trial court costs under section 1032, the court in *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 986, disapproved on another ground in

C. Interest on Cash Deposit in Lieu of Appeal Bond

1. Procedural Background

After appealing from the award of sanctions at issue in *Musaelian I* and *Musaelian II*, Mary Musaelian and Warner on January 30, 2006, deposited $37,575 in lieu of a bond, pursuant to section 995.710, subd. (a)(1). As part of his memorandum of costs on appeal, Warner sought $14,859.16 as "[o]ther expenses reasonably necessary to secure surety bond." The attached worksheet showed that the claimed costs were based on interest on the cash deposit at the rate of 10 percent a year.[7] Adams challenged this item in his motion to tax costs on the ground that interest on a cash deposit was not recoverable, arguing Warner had not obtained a loan or incurred interest expenses in tendering the cash deposit to the court.[8]

In his opposition to the motion to tax costs, Warner argued that he was entitled to interest at the legal rate of 10 percent per year.[9] In support of his opposition, he submitted a declaration attaching redacted statements from Washington Mutual Bank, which he said showed that the average rate of interest charged by the bank for his line of

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Goodman v. Lozano (2010) 47 Cal.4th 1327, stated, " 'A prevailing party is entitled to recover only those costs actually incurred by that party or on that party's behalf in prosecuting or defending the action. When a prevailing party has incurred costs jointly with one or more other parties who are not prevailing parties for purposes of an award of costs, the judge must apportion the costs between the parties.' [Citations.]")

[7] On January 5, 2007, the trial court had ordered the clerk to disburse $30,797 from the deposit to cover Mary Musaelian's obligations under her settlement agreement. The propriety of that disbursement was the subject of the appeal in *Musaelian III*. (*Musaelian III*, *supra*, A116412 at p. 3.) The worksheet included separate interest calculations for the period the full $35,575.00 deposit remained with the court, and for the period only the remaining cash deposit of $6,778 remained (after $30,797 had been disbursed).

[8] Adams appeared to have the impression the interest Warner sought was lost interest—that is, interest he would have been able to earn if he had not had to make the deposit—rather than interest on a loan obtained to fund the deposit.

[9] For this rate of interest, Warner cited section 685.010(a), which sets at 10 percent the interest rate on the principal amount of an unsatisfied money judgment.

credit during the relevant period of time was 6.376 percent per year. The statements included a statement with the account number redacted out, and an entry for a check advance in the amount of $37,575 on February 2, 2006. They also included three statements for Warner's "WaMu Equity Plus" account: one for the period of January 9, 2007 through February 5, 2007, showing the names and address of Warner and Geraldine R. Warner, and an annual percentage rate of 8.300 percent; one for the period of January 3, 2008 through February 2, 2008, showing an annual percentage rate of 6.425 percent; and one for the period of February 14, 2009 through March 16, 2009, showing an annual percentage rate of 2.740 percent. These statements are otherwise virtually fully redacted, and do not show what amounts were owed on the line of credit or how much interest was paid. Neither do we see anything in these statements that show they are from the same account as the $37,575 check. The opposition included two alternative memorandum of cost worksheets, one calculating the interest at the rate of 10 percent, this time for a total of $14,972.62, and one using the "Washington Mutual line of credit rate" of 6.376 percent, for a total of $11,999.22.

In his reply, Adams argued that Warner had not presented admissible evidence showing he borrowed the $37,575 cash deposit or the actual interest expense he incurred. After Adams had filed his reply—and four court days before the hearing on the motion—Warner filed a supplemental declaration in opposition to the motion to tax costs. The supplemental declaration stated that none of the principal sum of the bank loan he obtained to fund the cash deposit had been repaid, and that the interest that had been charged to the loan was correctly stated in the worksheet attached to his opposition to the motion. Adams objected to the supplemental declaration on the ground Warner was not entitled to submit new evidence after Adams—the moving party—had filed his reply brief, and that the papers were untimely under section 1005, subdivision (b), which required all papers opposing a noticed motion to be filed at least nine court days before the hearing.

The motion was argued on June 1, 2009. At the hearing, the judge indicated he had not yet received Warner's supplemental declaration. Two weeks later, on June 15,

2009, Warner filed a "*Further* Supplemental Declaration" in opposition to the motion to tax costs, taking the position that the correct legal rate of interest to be applied to the cash deposit was the prejudgment interest rate of seven percent, and attaching a revised interest calculation of $10,395.51.

The trial court issued its "Order Taxing Costs on Appeal" on June 17, 2009.[10] The court stated that it was disregarding Warner's May 26, 2009, supplemental declaration as untimely. The court went on: "Notwithstanding the foregoing, however, the conclusion is reached that there has not been provided an evidentiary showing of sufficient clarity and reliability to demonstrate that the claimed item for 'interest' represents an expense reasonably and necessarily incurred by Warner in order to fund the deposit in lieu of undertaking on appeal given for the support of his appeal, as differentiated from the appeal of Mary Musaelian. Accordingly, the component of $8,081.16 is disallowed in its entirety. [¶] The second . . . component[] of item 10 is 'remaining deposit of $6,778[.'] This claim appears to be a claim for the remainder of a cash deposit in lieu of an appeal bond given by Musaelian and Warner on January 30, 2006, after its partial appropriation pursuant to an order filed January 5, 2007. [¶] An order was made herein on June 2, 2009, that the full balance of the deposit be disbursed to Warner and the claim is disallowed for that reason."

[10] The order was dated June 12, 2009, three days before Warner filed his further supplemental declaration, but filed on June 17, 2009.

2. Analysis

Warner contends on appeal that this ruling was error, and the trial court should have awarded him interest on the deposit. As we have explained, the right to recover costs on appeal is governed by rule 8.278, which does not mention interest on a loan used to fund a cash deposit as a cost item. However, one recoverable item is "[t]he cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary." (Rule 8.278(d)(F).)

The court in *Cooper v. Westbrook Torrey Hills* (2000) 81 Cal.App.4th 1294 (*Cooper*), concluded that, although the expense of making a cash deposit was not explicitly mentioned in the governing rule, the appellant there was nevertheless entitled to the reasonable and necessary interest expenses associated with making his cash deposit in lieu of a bond. Under former rule 26(c)(6) (a predecessor to rule 8.278), among the recoverable costs on appeal were the premium on a surety bond and other necessary expenses, such as the expense of acquiring a letter of credit. (*Cooper, supra*, 81 Cal.App.4th at p. 1298.) The court in *Cooper* attempted to harmonize this provision with section 995.730, which provides: " 'A deposit given instead of a bond has the *same force and effect*, is treated the same, and is subject to the same conditions, liability, and statutory provisions, including provisions for increase and decrease of amount, as the bond.' " (*Cooper, supra*, 81 Cal.App.4th at p. 1298.) The court concluded that "[b]ecause under rule 26(c)(6) the cost of obtaining a bond is recoverable, the cost of making a cash deposit is also recoverable. Thus, . . . Cooper was entitled to recover the reasonable and necessary expenses he incurred in making the cash deposit." (*Cooper, supra*, 81 Cal.App.4th at p. 1300.)

In reaching this conclusion, the court in *Cooper* rejected the respondent's reliance on *Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281 (*Sequoia*). In *Sequoia*, Division Two of the First Appellate District held that the respondents were not entitled to interest on cash they borrowed and deposited as an undertaking. The court there noted that the premium on a surety bond was a proper item of costs, but pointed out

that "courts have strictly construed the statutes permitting costs and only those items specifically enumerated are recoverable. [Citation.] The necessity to set limits is obvious and dictates a close adherence to the clearly expressed legislative intent. [Citations.] For example, the extension here urged would logically permit a party who was not required to borrow but could deposit his own money, to claim as costs the interest which he might otherwise be acquiring through investment elsewhere. The claim must be denied." (*Sequoia*, *supra*, 229 Cal.App.2d at p. 289.) The court in *Cooper* declined to adhere to this rule, noting that the Judicial Council had amended rule 26 to permit the recovery of other expenses needed to obtain a bond, including the cost of obtaining a letter of credit, and concluded that in order to treat a cash deposit in the same way as a surety bond, it was necessary to allow the expenses incurred in making a cash deposit—including the cost of interest—to be recovered as an item of costs on appeal. (*Cooper*, *supra*, 81 Cal.App.4th at p. 1300.)[11]

We need not decide whether the rule of *Sequoia* is no longer valid because we agree with the trial court that Warner failed to meet his evidentiary burden. "If the items on a verified cost bill appear [to be] proper charges, they are prima facie evidence that the costs, expenses and services therein listed were necessarily incurred. [Citations.] Where the items are properly objected to, they are put in issue, and the burden of proof is upon the party claiming them as costs. [Citation.]" (*Rappenecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256, 266; see also *Fennessy v. DeLeuw-Cather Corp.* (1990) 218 Cal.App.3d 1192, 1195-1196.)

Adams's motion to tax costs sufficed to put at issue the question of whether Warner had incurred costs to obtain a loan to fund the cash deposit. We agree with the trial court that Warner's showing in opposition was inadequate to meet his burden to show he reasonably and necessarily incurred the costs he claimed. The evidence Warner

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[11] The question of whether rule 8.278(d)(1)(F), which allows a successful appellant to recover "the cost to obtain a letter of credit as collateral" allows the recovery of interest paid on sums borrowed to fund a letter of credit used to secure a surety bond, is currently pending before the California Supreme Court. (*Rossa v. D.L. Falk Construction*, S183523, review granted Aug. 11, 2010.)

submitted showed only an entry for a check advance in the amount of $37,575 on February 2, 2006, from an unspecified Washington Mutual account—three days after the deposit had been made—and entirely redacted statements from an unspecified "WaMu Equity Plus" account. These statements showed various annual percentage rates, but did not show what equity loan amount, if any, was outstanding for the various periods. Nor did Warner's accompanying declaration provide evidence that he had actually incurred interest costs on the full $37,575 during the time period at issue, instead stating in relevant part only: "5. Attached to this opposition as Exhibit D are true and correct copies of various redacted statements from my line of credit at Washington Mutual Bank during the relevant period of time. Those line of credit statements show that the average rate of interest charged by the bank during this period of time has been 6.376% per annum. [¶] 6. Attached to this opposition as Exhibit E is a worksheet showing how much interest I am entitled to receive if the legal rate of interest of 10% per annum is applied. [¶] 7. Attached to this opposition as Exhibit F is a worksheet showing how much interest I am entitled to receive if the Washington Mutual rate of interest of 6.376% per annum is applied." In the circumstances, we agree that Warner did not provide a sufficient evidentiary showing that the claimed interest represents an expense reasonably and necessarily incurred to fund the deposit.[12]

We are not persuaded otherwise by Warner's reliance on a case from more than 150 years ago, *Heyman & Co. v. Landers* (1859) 12 Cal.107 (*Heyman*). In considering the correct rate of interest to be applied to an undertaking made pending a trial court action, our Supreme Court stated that "[t]he only damages which the law allows for the detention of money under its process is the legal interest." (*Id*. at pp. 107-108, 111.)

[12] The trial court did not consider Warner's untimely supplemental declaration, and Warner does not challenge this ruling on appeal. We recognize that the trial court also reasoned that Warner's showing did not establish that he reasonably and necessarily paid interest to fund the amount of the deposit attributable to his *own* appeal, rather than to that of Mary Musaelian. We have already concluded the trial court could reasonably interpret the remittitur to encompass only Warner's own costs. In any case, it is clear that the trial court concluded Warner's evidentiary showing lacked the necessary clarity and reliability, and the record amply supports this conclusion.

Heyman, however, does not consider costs on appeal, which are governed solely by rule 8.278. (See *Lavine*, *supra*, 175 Cal.App.2d at p. 138.) *Cooper*—even assuming we agreed with its reasoning—holds not that an appellant is entitled to the legal rate of interest on the deposit as damages, but that an appellant may recover "*the reasonable and necessary expenses he incurred in making the cash deposit*." (*Cooper*, *supra*, 81 Cal.App.4th at p. 1300, italics added.) Warner failed to meet his burden to show what those expenses were.

III. DISPOSITION

The orders are affirmed.

_____
RIVERA, J.

We concur:

_____
READON, Acting P.J.

_____
SEPULVEDA, J.

Filed 7/29/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MARY MUSAELIAN, Plaintiff, v. WILLIAM ADAMS et al. Defendants and Respondents; JOHN G. WARNER Objector and Appellant.	A126240 (Sonoma County Super. Ct. No. SCV236208) ORDER MODIFYING OPINION AND DENYING REHEARING, CERTIFYING OPINION FOR PARTIAL PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on June 29, 2011, be modified as follows:

1. On page 1, second sentence of the first paragraph, after the words "We affirm," add as footnote 2 the following footnote, which will require renumbering of all subsequent footnotes:

> [2] In the unpublished portion of this opinion, we consider and reject Warner's contention that his costs on appeal included the interest on a loan with which he asserts he funded his cash deposit in lieu of appeal bond.

There is no change in the judgment.

The petition for rehearing is denied.

The opinion filed herein on June 29, 2011, is certified for publication with the exception of II. C. and it is hereby ordered that the opinion be published in the Official Reports.

Date:_____ _____P. J.

Counsel for Appellant and Objector:	John G. Warner, in pro. per.
Counsel for Defendants and Respondents:	Mark T. Clausen Attorney at Law and Mark T. Clausen