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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PAUL W. HERBERT, Plaintiff, Cross-defendant and Respondent, v. DONALD K. DAVIES et al., Defendants, Cross-complainants and Appellants.	B236933 (Los Angeles County Super. Ct. No. BC368713)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kevin C. Brazile, Judge. Affirmed in part and dismissed in part.

Law Offices of Mark S. Novak and Mark S. Novak, for Defendants, Cross-complainants and Appellants.

Herzlich & Blum and Allan Herzlich; Law Office of Bruce Adelstein and Bruce Adelstein for Plaintiff, Cross-defendant and Respondent.

In the underlying action, appellants noticed an appeal from a judgment confirming an arbitration award, but dismissed the appeal before filing a motion for a new trial based on the absence of an adequate appellate record. After the trial court denied the new trial motion, appellants noticed the appeal before us, which is taken from the judgment and the denial of their new trial motion. We conclude that appellants' abandonment of their first appeal bars their renewed appeal from the judgment, and otherwise reject their challenges to the denial of the new trial motion. We therefore dismiss the appeal to the extent it is taken from the judgment, and affirm the denial of the new trial motion.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In the 1980's, appellant Donald K. Davies and respondent Paul W. Herbert became business partners and operated as real estate dealers. In March 2007, Herbert initiated the underlying action against Davies and the other appellants, who are affiliated with Davies.[1] Shortly afterwards, Davies filed a cross-complaint against Herbert. Herbert's first amended complaint asserted claims for breach of an oral agreement, breach of fiduciary duty, and fraud, as well numerous other causes of action.[2] Davies's first amended cross-complaint contained claims for

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[1] The remaining appellants are Pamela Monroe Davies, T2 Holdings, Inc., Stonegate Ventures, Inc., Residential Ventures, Inc., DHP Investments, Inc., Tower One Properties, Inc., and FPB Holding, Inc.

[2] The first amended complaint also named Ralph Manuel Ramirez and Ira Freidman as defendants. It was later amended to name Nationwide Real Estate Solutions, Inc., and Derek Davies as "Doe" defendants. These individuals and entities have not appeared on appeal.

breach of a partnership agreement, breach of fiduciary duty, constructive fraud, imposition of a constructive trust, and indemnity.[3]

In 2009, the parties agreed to an arbitration of their claims before Retired Superior Court Judge Alan B. Haber. On February 10, 2010, following an evidentiary hearing, Judge Haber issued his award, containing a written decision with findings of fact and conclusions of law.[4] He found that the arbitration concerned the dissolution of the partnership between Herbert and Davies, who had developed a successful method of soliciting homes for purchase using direct mailers. Their oral partnership agreement required them to share profits and losses equally. However, after Davies ended the partnership in April 2005, he wrongfully denied Herbert access to partnership assets and used them for his own purposes, including distributing them to other defendants. Judge Haber concluded that defendants had engaged in "conversion, intentional fraud . . . , and fraudulent transfer," and awarded Herbert a total of $1,627,657 in damages and interest. In addition, Judge Haber concluded that Davies had failed to prove the claims asserted in his first amended cross-complaint.

Herbert filed a petition to confirm the award and enter a judgment on it. While the petition was pending, appellants requested clarification and correction of the award, asserting that it contained errors. On April 21, 2010, Judge Haber rejected the request for clarification and correction, but amended the award to include an award of $8,450 in attorney fees to Herbert.

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[3] Also named as a cross-defendant is TBC Investments, Inc. This entity has not appeared on appeal.

[4] Judge Haber denominated the February 10, 2010 award an "Amended Arbitration Award" because it corrected typographical errors in a previous award. We refer to it simply as "the award."

Herbert filed a second petition to confirm the award as amended and enter judgment on it. Following a hearing, the trial court granted the petition. On June 29, 2010, judgment on the amended award was entered. Notice of entry of judgment was served on July 7, 2010. Appellants noticed an appeal from the judgment.

In October 2010, appellants filed a motion for an order permitting them to proceed by settled statement on appeal (Cal. Rules of Court, rule 8.137). The supporting declaration from their counsel stated: "A [reporter's] transcript is unavailable because the arbitration proceedings were not reported." On February 9, 2011, the trial court issued a ruling under which it found that "[t]he [a]rbitration proceedings before Judge Haber were not reported." The ruling further stated: "It is therefore ordered that [appellants'] [m]otion be . . . granted and the Court further orders that the requested settlement statement on appeal shall be determined by judicial reference to Judge Haber, so long as Judge Haber first determines he has the right or duty to determine such settled statement on appeal. [¶] It is further ordered that Judge Haber shall issue a ruling pursuant to his determination as to whether or not he has the right or duty to determine such settled statement on appeal . . . . [¶] It is further ordered that, in the event Judge Haber determines he does have [a] legal right or duty [to] determine such settled statement on appeal, he shall file such settled statement . . . . [¶] It is further ordered that[] if Judge Haber determines he is unable to determine a settled statement on appeal in this matter for any reasons, such as, of having discarded his written notes, or erased his computer entries, or lack of memory, he shall confirm this in writing . . . ." (Capitals deleted.)

In a letter dated March 21, 2011, Judge Haber informed the trial court: "It is my understanding and belief that since the . . . [a]rbitration is final that I am not

legally able to prepare a settled statement on appeal. Furthermore, in reviewing my [a]rbitration folder, the only materials left in the folder [were] a copy of the [award] . . . and some written outline papers, but not all the documents and notes taken during the [a]rbitration hearings. It has been my practice to keep my files only after [*sic*] approximately eight to ten months."[5] On June 20, 2011, appellants voluntarily abandoned their appeal. Two days later, the trial court filed an order referring to Judge Haber's letter and stating, "It is hereby ordered that no settled statement shall be prepared for [the] appeal."

Appellants filed a motion under Code of Civil Procedure section 914 to vacate the judgment and order a new trial.[6] They argued that the unavailability of a reporter's transcript and settled statement regarding the arbitration proceedings was fatal to their right to appeal from the judgment. On August 30, 2011, the trial court denied the motion. On October 27, 2011, appellant noticed the appeal before us from the order denying the motion for a new trial and the June 29, 2010 judgment.

DISCUSSION

Appellants contend the trial court erred in denying their new trial motion. As explained below, they are mistaken.

A. *Scope of Appeal*

At the threshold of our inquiry, we examine Herbert's contention that appellants have improperly noticed their appeal from the June 29, 2010 judgment.

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5 After Judge Haber sent this letter, appellants suggested to Herbert that the parties submit a settled statement by stipulation, but Herbert rejected the proposal.

6 All further statutory citations are to the Code of Civil Procedure.

Generally, "[a]n appealable judgment or order is a jurisdictional prerequisite to an appeal. [Citations.]" (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 392.) Here, Herbert does not dispute that appellants noticed a timely appeal from the denial of their new trial motion, which is separately appealable as a post-judgment order (*Fickett v. Rauch* (1947) 31 Cal.2d 110, 111; *Weisbecker v. Weisbecker* (1945) 71 Cal.App.2d 41, 45; § 904.1, subd. (a)(2)). However, he maintains that the appeal is improper insofar as it purports to be taken from the judgment. We agree.

Appellants' voluntary abandonment of their first appeal from the judgment. bars their second appeal from it. As explained in *Conservatorship of Oliver* (1961) 192 Cal.App.2d 832, 836, when a party voluntarily abandons an appeal from a judgment prior to the filing of the record on appeal and does not expressly state that the abandonment is "without prejudice," the abandonment constitutes a dismissal that is "an affirmance of the judgment." Accordingly, in order to file a second appeal from the judgment, the party must apply to the trial court for relief from the abandonment. (*Ibid*.) Here, appellants voluntarily abandoned their first appeal pursuant to rule 8.244(b) of California Rules of Court, which permits a voluntary abandonment "[b]efore the record is filed in the Court of Appeal" (Cal. Rules of Court, rule 8.244(b)(1). Their notice contains no statement that the abandonment was without prejudice. Accordingly, as they never sought relief from the abandonment, their appeal must be dismissed to the extent it is taken from the judgment. (*Conservatorship of Oliver*, *supra*, 192 Cal.App.2d at pp. 836-837.)

B. *New Trial Motion*

We turn to appellants' challenges to the denial of their motion for a new trial under section 914. That section states: "When the right to a phonographic report

has not been waived and when it shall be impossible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule, because of the death or disability of a reporter who participated as a stenographic reporter at the trial or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the trial court or a judge thereof, or the reviewing court shall have power to set aside and vacate the judgment . . . from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding."

We review the trial court's ruling on the new trial motion for an abuse of discretion. (*Caminetti v. Edward Brown & Sons* (1943) 23 Cal.2d 511, 514.) In denying the new trial motion, the trial court found (1) that appellants had abandoned their appeal, (2) that appellants had not demonstrated that a reporter's transcript was necessary for their appeal, and (3) that a reporter's transcript of the arbitration proceedings was unavailable only because the parties had not arranged to have a reporter attend the proceedings. We see no error in these determinations.

1. *Abandonment of Appeal*

As noted above, section 914 limits the relief it provides to judgments "from which an appeal has been taken or is to be taken." Here, appellants filed their new trial motion after voluntarily abandoning their appeal and never sought to have the abandonment set aside. Accordingly, when the trial court ruled on the new trial motion, no appeal was pending or *could be taken* from the judgment (see pt. A., *ante*). Because appellants were not then entitled to appeal from the judgment, the unavailability of a reporter's transcript was not a proper basis for a new trial.

Pointing to *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, appellants contend they were required to abandon their appeal in order to assert a

new trial motion under section 914. We disagree. *Varian Medical Systems* stands for the proposition that subject to various exceptions, an appeal from a judgment transfers jurisdiction over the judgment from the trial court to the reviewing court. (35 Cal.4th at pp. 189-190.) The statutory basis for this proposition is subdivision (a) of section 916, which states in pertinent part: "[T]he perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

Because sections 914 and 916 belong to the statutory scheme codifying "basic appellate principles" (*In re Natasha A.* (1996) 42 Cal.App.4th 28, 39), they must be construed together and harmonized (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387, 1390-1391). Section 914 states that "*the trial court or a judge thereof* . . . shall have power to set aside and vacate the judgment." (Italics added.) In view of this language, appellate courts have repeatedly concluded that the trial court is authorized to grant relief after a notice of appeal has been filed. (*Hennigan v. United Pacific Ins. Co.* (1975) 53 Cal.App.3d 1, 6 ["[S]ection 914 unequivocally indicates [that] an appellant may file a notice of appeal . . . , order a transcript, find in due time that the reporter cannot furnish a transcript, and still move for a new trial under section 914."]; see *Caminetti v. Edward Brown & Sons*, *supra*, 23 Cal.2d at p. 514 [explaining steps party must take after filing of notice of appeal to obtain relief from trial court under materially similar predecessor statute]; *Weisbecker v. Weisbecker*, *supra*, 71 Cal.App.2d at pp. 42-47 [concluding that trial court erred under materially similar predecessor statute in denying relief to a party after filing of notice of appeal].)

Appellants were thus not required to abandon their appeal in order to file the new trial motion.

2. *Failure to Show Necessity for Reporter's Transcript*

Under section 914, the party seeking a new trial must identify "substantial issues" to be presented on appeal "establishing the necessity of a transcript." (*Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 147.) Here, appellants intended to appeal from a judgment confirming an arbitration award, which is ordinarily subject to a highly circumscribed review. As our Supreme Court explained in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9-10, the finality of arbitration awards is rooted in the parties' agreement to bypass the judicial system. For this reason, neither the validity of the arbitrator's reasoning nor the sufficiency of the evidence supporting the arbitrator's awards is generally subject to judicial review. (*Id*. at p. 11.) "Thus, . . . with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law." (*Ibid*.)

Here, appellants failed to show the necessity of a reporter's transcript for their proposed appeal because the issues they identified fell outside these limits on judicial review. In seeking a new trial, appellants described four issues they intended to present on appeal, each of which challenged the adequacy of the evidence underlying Judge Haber's findings. Appellants maintained there was no evidence (1) that Herbert suffered damages from the misconduct found by Judge Haber, (2) that the financial records upon which Judge Haber based his decision were reliable, (3) that Davies transferred any assets to the other defendants, or (4) that Davies failed to pay certain outstanding debts. As explained above, issues of

this type are ordinarily not cognizable on an appeal from the judgment confirming the arbitration award.

Appellants contend the amended arbitration award is exempt from the restrictions ordinarily imposed on appellate review of arbitration awards. They rely on their initial stipulation for arbitration dated August 7, 2009, which stated that "each party reserve[d] the right to appeal." The crux of their argument is that this provision abrogated the usual limits on review of arbitration awards. We disagree.

Generally, parties who agreed to binding arbitration are subject to the statutory scheme regulating private arbitration (§ 1280 et seq.). (*Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at pp. 9-10.) Although the statutory scheme accords parties a narrow right to challenge the award on appeal (*id.* at pp. 9-11), they may waive this right (*Pratt v. Gursey, Schneider & Co.* (2000) 80 Cal.App.4th 1105, 1108). They may also enlarge the right by contract to encompass judicial review of rulings of law or fact, but only if they "explicitly and unambiguously" agree to an expanded scope of review. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1361; *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1439.)

Here, the trial court, in denying the new trial motion, concluded that appellants had agreed to binding arbitration under the statutory scheme. There is ample evidence to support this determination, notwithstanding the provision in the initial stipulation.[7] On December 29, 2009, prior to the proceedings before Judge

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[7] We review the determination for the existence of substantial evidence. (*Trabuco Highlands Community Assn. v. Head* (2002) 96 Cal.App.4th 1183, 1189.)

Haber, all the parties to the underlying action signed a stipulation entitled "Stipulation for Binding Arbitration."[8]

Because the award was subject to the statutory scheme, appellants were obliged to state in explicit and unambiguous terms that they intended to secure the right to judicial review of Judge Haber's factual determinations. This they did not do. As the initial stipulation for arbitration provided only that "each party reserve[d] the right to appeal," it is reasonably understood to preserve nothing more than the narrow right of appeal ordinarily accorded parties to a binding arbitration. The trial court thus properly concluded (1) that the amended award was subject to the restrictions usually imposed on the review of arbitration awards, and (2) that appellants had not identified substantial issues that could be raised on an appeal confined within these boundaries. In sum, appellants failed to establish the necessity of a reporter's transcript for an appeal.

3. *Failure to Arrange for Reporter's Transcript*

Section 914 also limits relief to situations in which "the right to a phonographic report has not been waived" but the reporter is unable to provide a report due to "death or disability" or "the loss or destruction" of the reporter's notes. Thus, a trial court lacks authority under section 914 to order a new trial in other circumstances. (*Williams v. Davis* (1944) 67 Cal.App.2d 274, 277 [under materially similar predecessor statute, "[t]he trial court [was] without jurisdiction to grant a motion for a new trial . . . unless the phonographic reporter (a) is dead or

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[8] Although no copy of this stipulation was presented to the trial court in connection with the new trial motion, Herbert submitted a copy in support of his motion to confirm the award. Furthermore, the trial court expressly noted the existence of the stipulation for binding arbitration in its initial order regarding

(b) suffers a physical or mental disability . . . ."]; see *Hennigan v. United Pacific Ins. Co.*, *supra*, 53 Cal.App.3d at pp.7-8 [relief available under section 914 is limited to that provided in the statute].) Here, a reporter's transcript was unavailable only because the parties to the arbitration failed to arrange for a reporter to record the proceedings. Accordingly, the trial court properly concluded that appellants established no basis for a new trial under section 914.

Appellants contend they are entitled to relief under section 914, arguing that under the trial court's orders regarding their motion for a settled statement, Judge Haber was akin to a reporter unable to provide a transcript due to a loss of notes. We reject this contention. Generally, a settled statement is an alternative remedy to that provided in section 914 for the absence of a reporter's transcript. (*Weinstein v. E.F. Hutton & Co.* (1990) 220 Cal.App.3d 364, 368-369.) Thus, it may be an abuse of discretion for a court to deny a new trial motion under section 914 (former § 953e) if a reporter's transcript is unavailable due to the circumstances specified in the statute *and* no adequate settled statement can be prepared. (*Weisbecker v. Weisbecker*, *supra*, 71 Cal.App.2d at pp. 47-49.) Nonetheless, the trial court lacks authority to grant relief under section 914 when the circumstances specified in the statute are *not* satisfied. (*Williams v. Davis*, *supra*, 67 Cal.App.2d at pp. 277-278 [trial court erred in ordering new trial under materially similar predecessor statute when there was no showing that reporter's transcript could not be prepared].) As explained above, that is the case here.

Furthermore, appellants have failed to show that the trial court's orders regarding their motion for a settlement statement effectively placed Judge Haber in the position of a reporter, for purposes of section 914. The statute specifies that a

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appellant's motion for a settled statement, which appellants included in their showing in support of the new trial motion.

new trial may be ordered only when a reporter's transcript "as provided by law or by rule" is unavailable. Here, the trial court's initial order granted the motion for a settled statement subject to several conditions, including that Judge Haber was to determine whether he was legally obliged to supply the settled statement. In declining to provide a settled statement, Judge Haber concluded that he had no legal duty to do so because the award was final. Following this determination, the trial court denied appellants' motion for a settled statement.

Appellants' sole challenge to Judge Haber's determination is that the award was not final because the initial arbitration stipulation preserved their right to appeal the award. However, as explained above (see pt. B.2., *ante*), that stipulation did not enlarge appellants' narrow right to appeal from an arbitration award. Because this narrow right is fully consistent with the finality of the award (*Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at pp. 9-11), appellants have shown no error in Judge Haber's determination that he was not required to provide the settled statement. Judge Haber thus cannot be viewed as having declined to supply a settled statement "as provided by law or by rule," for purposes of section 914. In sum, the trial court did not err in denying the new trial motion.

DISPOSITION

The appeal is dismissed to the extent that it is taken from the judgment. The order denying appellants' new trial motion is affirmed. Herbert is awarded his costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.