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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

NEAL BRADY,

Plaintiff and Appellant,

v.

KIMBERLY J. CLARK et al.,

Defendants and Respondents.

E078212

(Super.Ct.No. CIVDS1924495)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin,
Judge. Affirmed.

Revolve Law Group and Kimberly A. Wright for Plaintiff and Appellant.

Reid & Hellyer and Chris A. Johnson for Defendants and Respondents.

After a one-day bench trial, the trial court determined that defendants Kimberly and Michael Clark (collectively, the Clarks) were entitled to an offset of just over \$90,000 against the amount they owed to plaintiff Neal Brady pursuant to a pretrial settlement.¹ The trial court awarded the Clarks prejudgment interest in the amount of \$12,736.17 on the offset award. After the judgment was entered, the Clarks filed a memorandum of costs for \$15,085.23.

Brady argues that the award of prejudgment interest was erroneous and that the trial court abused its discretion by not finding him to be the prevailing party for the purpose of awarding costs under Code of Civil Procedure section 1032. (Undesignated statutory references are to the Code of Civil Procedure.) Brady did not object to the award of prejudgment interest in the trial court, file a motion to tax the Clarks' costs, or file his own memorandum of costs. We accordingly conclude that Brady's arguments are forfeited. We affirm the judgment and the award of costs to the Clarks.

BACKGROUND

In 2019, Brady sued the Clarks to dissolve a partnership, for a full accounting of the partnership, and to partition real property. The Clarks filed an answer to the complaint, asserting as an affirmative defense that any monetary damages owed to Brady should be offset by the amount he allegedly owed them.

Before trial, the parties entered into a partial settlement and "agreed on an amount of money Brady will accept from [Michael] to pay off the loans Brady made on the

¹ Because Michael and Kimberly have the same last name, we refer to them by their first names. No disrespect is intended.

equipment and real property acquired jointly over a nearly twenty year business relationship.” The parties agreed that four issues remained to be resolved by trial, including (1) whether Brady owed Michael \$47,616 for overcharging Michael interest on a jointly held real property, (2) whether Brady owed Michael \$43,750 for a tax credit denied to Michael after the sale of a jointly held real property, and (3) whether Michael is entitled to \$34,803.13 for postdissolution property maintenance costs. The parties agreed that the Clarks otherwise owed those amounts to Brady. At a hearing memorializing the settlement, Brady’s counsel explained: The amounts were “deducted from what is owed to Brady. So to the extent the Court concludes that any of those items are—that Clark is not entitled to any of those items, they would be—those amounts would need to be paid to Brady.”²

Before testimony began at the bench trial on the remaining issues, the parties resolved two of the four issues to be tried, leaving for trial only the issues concerning the allegedly overcharged interest and the tax credit. At the close of the one-day trial in May 2021, the trial court asked the parties to submit closing briefs, which they did. The court held a posttrial hearing, and the case was submitted. Brady asked the court to issue a written statement of decision pursuant to section 632.

In August 2021, the court issued a proposed statement of decision. The court found that Brady had overcharged the Clarks \$47,616 in interest on certain real property

² At the hearing, the parties agreed that the Clarks would pay Brady \$138,465 by a certain date. In the opening brief, Brady claims that the total amount of the settlement was \$264,634.13, which represents the amount the Clarks agreed to pay Brady and the amount they claimed Brady owed them.

and that Brady failed to establish that the Clarks were not entitled to \$43,750 from the sale of that property. The court thus concluded that the Clarks should receive credit in those amounts against the amount they owed to Brady, “such that no monies shall exchange hands.” The court further found that Brady owed the Clarks interest on all of the money Brady withheld, calculated at \$5,714 for the withheld amount of \$47,616 and \$5,250 for the withheld amount of \$43,750. The proposed judgment also included the award of interest to the Clarks as follows: (1) “[I]nterest on the principal sum of \$47,616.00 at six percent (6%) interest per annum from July 10, 2019 through judgment. Principal and interest from July 10, 2019 through August 30, 2021 (the date of filing of this proposed judgment) is in the sum of \$53,744.77 (interest in the amount of \$6,128.77 at a per diem rate of \$7.83),” and (2) “[I]nterest on the principal sum of \$43,750.00 at six percent (6%) interest per annum from July 10, 2019 through judgment. Principal and interest from July 10, 2019 through August 30, 2021 (the date of filing of this proposed judgment) is in the sum of \$49,381.16 (interest in the amount of \$5,631.16 at a per diem rate of \$7.19).”

Brady objected to the proposed statement of decision and to the proposed judgment. As to the proposed statement of decision, Brady objected to the court’s description of the issues left for trial and some of the evidence. He did not object to the proposed award of prejudgment interest to the Clarks. As to the proposed judgment, Brady repeated his objections to the proposed statement of decision and also noted that the proposed judgment was premature because the court had not yet ruled on the

objections. Brady again did not object to the proposed award to the Clarks of prejudgment interest.

The court held a hearing on Brady's objections to the statement of decision. Brady's counsel stated that there were "just a couple of statements in the statement of decision that are just factually inaccurate. They're not terribly controversial, I don't think. I don't see why there's an issue just making those corrections." After hearing argument, the court agreed to make the requested corrections. Brady's counsel responded, "That's all I have."

The court subsequently issued its final statement of decision. The legal findings concerning the Clarks' entitlement to an offset against the amount they owed Brady under the settlement and to prejudgment interest on the amount awarded to them remained the same as in the proposed statement of decision. Brady did not object to the final statement of decision. Nearly one month later, judgment was entered. The court adjudged that the Clarks were entitled to \$47,616 and \$43,750 from Brady, so those amounts were credited against the amount the Clarks owed to Brady under the settlement. The Clarks were awarded prejudgment interest of \$6,637.54 on the \$47,616 award and \$6,098.63 on the \$43,750 award.

Nearly one month after the judgment, the Clarks filed a memorandum of costs for \$15,085.23. Brady did not file a motion to tax costs or a memorandum of costs.

DISCUSSION

Although Brady did not object to the award of prejudgment interest in the trial court, he challenges it on appeal. He further contends that the trial court “abused its discretion by failing to conclude that [he] was the prevailing party” under section 1032 for the purpose of awarding costs. The Clarks contend that Brady has forfeited the arguments by failing to make them in the trial court, and we agree.

We ordinarily do not consider issues that could have been resolved in the trial court but were not raised. (*Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1131 (*Gonzalez*)). However, “the forfeiture rule is not automatic.” (*Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1709.) We have the “discretion to excuse such forfeiture.” (*Ibid.*) We decline to exercise that discretion here.

As to the issue of prejudgment interest, Brady had ample opportunity in the trial court to object to the award but did not. The proposed statement of decision included an award to the Clarks of prejudgment interest. Brady filed written objections to the proposed statement of decision and to the proposed judgment, and the court held a hearing on the objections. In both his written objections and at the hearing, Brady did not raise any objection to the award of prejudgment interest. On the contrary, at the hearing Brady’s counsel stated unequivocally that his only issues with the proposed statement of decision had to do with factual inaccuracies. Had Brady raised the issue of prejudgment interest with the trial court, the court would have had the opportunity to resolve it. We see no reason to exercise our discretion to consider the issue now.

We took the same approach in *Jones v. Wagner* (2001) 90 Cal.App.4th 466, in which the appellants challenged the award of prejudgment interest on appeal without having first objected to the award in the trial court (*id.* at p. 481). The trial court issued a proposed judgment that included an award of prejudgment interest, and the appellants objected to the proposed judgment on other grounds but did not object to the award of prejudgment interest. (*Ibid.*) On appeal, we concluded that there was no basis to exercise our discretion to consider an issue not raised in the trial court. (*Id.* at pp. 481-482.) *Jones* explained: Because the appellants “did not object to the award of prejudgment interest in the trial court, they may not do so now. In other words, ‘having failed to give the trial court an opportunity to correct the claimed defects in the statement of decision, [the appellants] cannot fairly be permitted to complain of them now.’” (*Ibid.*) We see no reason to depart from this court’s precedent concerning forfeiture of a challenge to the award of prejudgment interest when a party fails to object to the award in the trial court.³ (*Estate of Sapp* (2019) 36 Cal.App.5th 86, 109, fn. 9.)

We also reject Brady’s argument that “[t]he trial court abused its discretion by failing to conclude that Brady was the prevailing party” for the purpose of awarding costs under section 1032. The Clarks filed a memorandum of costs after the judgment, and Brady did not. Brady also did not move to tax the Clarks’ costs. By failing to do either

³ In his reply brief, Brady argues for the first time that “[t]he portion of the judgment awarding prejudgment interest is void because the trial court lacked jurisdiction to award it.” We decline to consider the argument because Brady did not raise it in the trial court (*Gonzalez, supra*, 122 Cal.App.4th at p. 1131) and also because he has not demonstrated good cause for failing to make the argument in his opening brief (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214).

of those things, Brady forfeited his challenge to the award of costs. (*Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 929 [“if the claimant fails to present a cost bill, a waiver of the right to costs results”]; *Douglas v. Willis* (1994) 27 Cal.App.4th 287, 289 [“The ‘failure to file a motion to tax costs constitutes a waiver of the right to object’”].)

DISPOSITION

We affirm the judgment and the postjudgment award of costs. The Clarks shall recover their costs of appeal.

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MENETREZ
J.

We concur:

SLOUGH
Acting P. J.
RAPHAEL
J.