APPENDIX A

Filed 1/24/20 MacDonald v. Kempinsky CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAMES MACDONALD, Plaintiff and Appellant, v. LOUIS E. KEMPINSKY et al., Defendants and Respondents.	B283424 Los Angeles County Super. Ct. No. BC635970

APPEALS from orders of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed.

James MacDonald, in pro. per, for Plaintiff and Appellant.

Kaufman Dolowich Voluck, Andrew J. Waxler and Courtney E. Curtis-Ives for Defendants and Respondents Louis E. Kempinsky and Kempinsky Law Ltd.

Gaglione Dolan & Kaplan, Robert T. Dolan and Amy J. Cooper for Defendants and Respondents Shereen Arazm, David R. Hilty and OOC Hollywood 1, LLC.

Nemecek & Cole, Jonathan B. Cole, Michael McCarthy and Mark Schaeffer for Defendants and Respondents Martin D. Singer, Lavely & Singer and Andrew Brettler.

INTRODUCTION

In this consolidated appeal, plaintiff and appellant James MacDonald (plaintiff) filed four notices of appeal challenging a variety of orders entered by the trial court. Plaintiff's briefing, however, appears to focus only on orders granting special motions to strike his complaint under Code of Civil Procedure section 425.16 in favor of two sets of defendants who are respondents in the present appeal: attorney Louis E. Kempinsky, Kempinsky Law Ltd., Shereen Arazm, David R. Hilty, and OOC Hollywood 1, LLC (Kempinsky defendants), and attorney Martin D. Singer, attorney Andrew Brettler, and Lavely & Singer (Singer defendants).

To obtain a reversal of a judgment or order, an appellant must affirmatively establish both error by the trial court and prejudice from that error. And to facilitate appellate review of rulings made in the trial court, an appellant must provide the reviewing court with a record containing all material relevant to the orders or judgment challenged in the appeal, cite to that record throughout the appellate briefing, and present a coherent legal argument applying pertinent legal authority to the relevant facts.

Although plaintiff represents himself on appeal, he is nevertheless required to follow the basic rules of appellate practice. And as an experienced litigant in the Court of Appeal, plaintiff should now be familiar with these requirements as well

as his obligation to comply with them. Here, even giving his brief the most generous reading, we are unable to discern a coherent legal argument supported by matters contained in the appellate record. Accordingly, we affirm the orders of the trial court without reaching the merits of plaintiff's contentions.

FACTS AND PROCEDURAL BACKGROUND

A portion of the relevant factual background is set forth in a prior opinion of this Division (*MacDonald v. Singer et al.* (Jan. 23, 2018, B261024) [nonpub. opn.]) as well as a published decision by our colleagues in Division Four of this court *Malin v. Singer* (2013) 217 Cal.App.4th 1283.

Summarized briefly, Shereen Arazm and her former business partners, Michael Moore and Lonnie Malin, and others, have been involved in multiple actions in the trial court arising from failed business dealings. In *MacDonald v. Singer et al.*, *supra*, B261024 (the prior appeal), the underlying litigation related to a demand letter sent to Moore and Malin by Arazm and her attorney, Martin D. Singer, as the partnership deteriorated. The demand letter attached a draft complaint which contained salacious details about unnamed parties' sexual activities; the letter threatened to fill in the blanks, thereby revealing that Malin had, among other things, been using company money to arrange sexual liaisons.

Plaintiff (who worked as a controller for business ventures of the partnership) sued Singer, Brettler, and Singer's law firm, as well as Arazm and her husband, Oren Koules, for violation of civil rights, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff contended he was one of the targets of the demand letter and that Singer, Arazm, and Koules had each contacted him and threatened to

name him and disclose his sexual proclivities in the complaint. The defendants filed special motions to strike plaintiff's complaint under Code of Civil Procedure section 425.16 (anti-SLAPP statute), contending their conduct was speech protected by the anti-SLAPP statute and which is absolutely protected by the litigation privilege. The trial court agreed, and we affirmed. (*MacDonald v. Singer et al., supra*, B261024.)

In the present case, plaintiff has sued the Singer defendants and the Kempinsky defendants, alleging those parties committed wrongful acts during the litigation that was the subject of the prior appeal. Both sets of defendants filed special motions to strike plaintiff's complaint under the anti-SLAPP statute, again contending their conduct falls within the scope of the anti-SLAPP statute and is absolutely protected by the litigation privilege. The court granted both motions and awarded attorney's fees as required under the anti-SLAPP statute. Plaintiff filed timely notices of appeal from those orders.

DISCUSSION

As noted, plaintiff represents himself on appeal. Nonetheless, he is bound to follow the most fundamental rule of appellate review which is that the judgment or order challenged on appeal is presumed to be correct, and "it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) " 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To overcome this presumption, an appellant must provide a record that allows for meaningful review of the challenged order. (*Ibid.*) If the record does not include all the evidence and materials the

trial court relied on in making its determination, we will not find error. (*Haywood v. Superior Court* (2000) 77 Cal.App.4th 949, 955.) Rather, we will infer substantial evidence supports the court's findings. (*Ibid.*)

In addition, parties must provide citations to the appellate record directing the court to the supporting evidence for each factual assertion contained in that party's briefs. When an opening brief fails to make appropriate references to the record to support points urged on appeal, we may treat those points as waived or forfeited. (See, e.g., *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 779–801 [several contentions on appeal "forfeited" because appellant failed to provide a single record citation demonstrating it raised those contentions at trial].) Further, "an appellant must present argument and authorities on each point to which error is asserted or else the issue is waived." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.) Matters not properly raised or that lack adequate legal discussion will be deemed forfeited. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656.)

An appellant has the burden not only to show error but prejudice from that error. (Cal. Const., art. VI, § 13.) If an appellant fails to satisfy that burden, his argument will be rejected on appeal. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.) "[W]e cannot presume prejudice and will not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice. [Citations.] Nor will this court act as counsel for appellant by furnishing a legal argument as to how the trial court's ruling was prejudicial. [Citations.]" (*Ibid.*) In short, an appellant must demonstrate

prejudicial or reversible error based on sufficient legal argument supported by citation to an adequate record. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556–557.) And it is well established that " '[w]hen a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys [citations].' [Citations.]" (*Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1056.)

Although plaintiff is not an attorney, he should be familiar with these legal principles by now. Indeed, we have articulated and applied these well-settled appellate standards in two prior appeals by plaintiff in related cases. (*MacDonald v. Arazm et al.* (Jan. 4, 2018, B265659) [nonpub. opn.] and *MacDonald v. Singer et al., supra*, B261024.) In those prior appeals, plaintiff's briefing largely failed to comply with the standards just summarized but we were nevertheless able to identify some cognizable legal arguments and address them on the merits. Here, however, plaintiff's brief is so lacking that we are unable to find even a single comprehensible argument.

To illustrate the inadequacy of plaintiff's brief, we provide a few examples. First, plaintiff does not consistently cite to the appellate record in his brief. Instead, toward the beginning of the brief, plaintiff includes a small section entitled "Timeline and Citation to Record," in which plaintiff lists the titles of various documents included in the clerk's transcript, their page ranges, and the date the documents were filed in the trial court. Evidently, plaintiff considers that list of documents (and similar lists provided at the beginning of his two argument sections) sufficient, as the text of the brief is otherwise devoid of record citations. Given that the clerk's transcript in this case consists of

20 volumes separated into four separate sets (one set for each of the four consolidated appeals) and exceeds 4,000 pages, plaintiff's approach plainly fails to satisfy the appellant's duty " ' "to support the arguments in its briefs by appropriate reference to the record, which includes providing *exact page citations.* ..." ' A party's inaccurate or missing record citations 'frustrates this court's ability to evaluate *which facts* a party believes support his position.' " (*Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 276–277, internal citations omitted.)

The record is also incomplete. Although it is not entirely clear from his brief, it appears that plaintiff intended to challenge the court's order granting the Singer defendants' anti-SLAPP motion in this appeal. He failed, however, to include a copy of his opposition to the Singer defendants' anti-SLAPP motion in the clerk's transcript—a point he concedes in his opening brief. In light of the applicable standard of review, it would be essential for us to review the evidence plaintiff submitted in opposition to the Singer defendants' anti-SLAPP motion in order to determine whether the court erred.[1] And in the absence of that evidence, we cannot address the issue. (*Haywood v. Superior Court, supra*, 77 Cal.App.4th at p. 955.)

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[1] We review de novo an order granting a special motion to strike under section 425.16. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) In considering the pleadings and supporting and opposing declarations, we do not make credibility determinations or compare the weight of the evidence. Instead, we accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of law. (*Ibid.*)

But plaintiff's brief suffers from another pervasive failing. His arguments are simply incomprehensible. For brevity's sake, we do not provide an excerpt from plaintiff's brief here. It is sufficient to say that, like his briefing in the two prior appeals we have considered, plaintiff's 55-page brief is rife with unsupported allegations of misconduct, conspiracy theories, and disjointed extra-record references of no apparent relevance to the issues we might consider.

Since late 2014, plaintiff has initiated 10 appeals or original proceedings in this court in relation to the same constellation of parties and alleged misdeeds, and many of those appeals involved challenges to multiple rulings of the trial court. Certainly, plaintiff has the right to his day in court and the right to judicial review of trial court proceedings. But we lack the resources to create arguments on his behalf from whole cloth. As another court put it recently, " 'We are not obliged to make other arguments for [appellant] [citation], nor are we obliged to speculate about which issues counsel intend to raise.' (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1831, fn. 4; see *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ['We are not bound to develop appellants' arguments for them.'].) We may and do 'disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt.' (*City of Santa Maria v. Adam* [(2012) 211 Cal.App.4th 266,] 287.)" (*Hernandez v. First Student, Inc., supra*, 37 Cal.App.5th at p. 277.) The time spent on appeals such as the present one, which utterly lack merit, is precious. As the court said in *Haynes v. Gwynn* (1967) 248 Cal.App.2d 149, 151, "If and when we are required to perform tasks which are

properly those of appellants' counsel, we necessarily relegate farther into the background appeals waiting their turn to be decided. It is unfair to litigants thus affected that we do this."

DISPOSITION

The orders are affirmed. Respondents shall recover their costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.

APPENDIX B

Appellate Courts Case Information

Supreme Court

Change court

Court data last updated: 10/13/2020 03:36 PM

Disposition

MacDONALD v. KEMPINSKY
Division SF
Case Number S261035

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation:
none

Date	Description
05/13/2020	Petition for review denied

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