NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of BRYAN D. and BONNIE SUE BLAIR.	B227626
BRYAN D. BLAIR, Appellant, v. BONNIE SUE BLAIR, Respondent.	(Los Angeles County Super. Ct. No. PD039087)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patricia Ito, Judge. Affirmed.

Law Office of Anthony Roach and Anthony A. Roach for Appellant.

Walzer & Melcher, Christopher C. Melcher and Jennifer L. Musika for Respondent.

Bryan Blair contends on appeal that the trial court erred when it issued evidentiary sanctions for his attorney's negligent failure to file a witness list and exhibit list according to the local rule then in effect, The Superior Court of Los Angeles, Local Rules, former rule 14.14 (former rule 14.14).[1] Because Bryan[2] has failed to show prejudicial error, we affirm the judgment.

FACTS

Bryan filed a petition for dissolution of marriage from Bonnie Blair on June 3, 2005. On April 26, 2006, Bryan and Bonnie stipulated to a division of most of their assets, but sought trial on the issue of support. Until the issue was resolved, they agreed that Bryan would pay Bonnie $3,100 per month beginning July 15, 2005. Bryan also agreed to pay $3,000 towards Bonnie's attorney fees. They retained a forensic accountant to value their community property business, Valley Tile, Inc., to determine its cash flow for purposes of calculating support payments to Bonnie.

Trial was initially set for August 17, 2006, with the mandatory settlement conference to be held July 3, 2006. On July 3, 2006, however, the court continued the mandatory settlement conference to October 16, 2006 and took the trial date off calendar pursuant to a stipulation of the parties. The mandatory settlement conference was continued seven more times over the course of the next year with no trial date set. Former rule 14.14 requires the parties to exchange witness lists and exhibits as well as other items seven days before the mandatory settlement conference to ensure the parties have sufficient information to prepare for the conference. Former rule 14.14, subdivision (a)(1) also provides: "Failure, without good cause, to identify any such witness shall preclude calling that witness at time of trial. Failure, without good cause, timely to provide a witness list shall be sanctioned; such sanction(s) may include, but not

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1 Former rule 14.14 has been renumbered to rule 5.14 and amended effective July 1, 2011.

2 As is common in family law proceedings, we use the parties' first names for purposes of clarity. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

necessarily be limited to, precluding the noncomplying party from calling any non-party, non-impeachment witness." A similar sanction precluding the admission of exhibits is also specified for a failure to timely identify and exchange exhibits. (*Ibid.*) It is undisputed that Bryan did not submit a witness list or exhibits to Bonnie at any time prior to each of the nine scheduled mandatory settlement conferences.

On January 8, 2008, the trial court set the trial date for April 23, 2008, with the "Mandatory Settlement Conference for March 17, 2008." The court further ordered, "[m]andatory settlement documents are to be exchanged on or before 3/4/08. Discovery cut off including any motions is 3/4/08." No witness or exhibit lists were submitted by Bryan's attorney prior to this latest mandatory settlement conference. On March 17, 2008, Bryan's attorney failed to appear at the mandatory settlement conference, though Bryan himself was present. The court ordered the trial dates to remain as set. Although Bonnie's counsel urged the trial court to preclude testimony from Bryan's witnesses and preclude admission of his exhibits under former rule 14.14, the trial court declined to do so, giving Bryan or his counsel until the end of the day to file those documents. In a written order dated that same day, the trial court again warned Bryan and his counsel that, "[f]ailure to list witnesses on the witness list shall result in the exclusion of non listed witnesses. Failure to list exhibits on the exhibit list shall result in the exclusion of non listed exhibits."

No witness or exhibit lists were submitted pursuant to the trial court's order, but Bryan's counsel, Steve Lambert, filed an ex-parte application on March 25, 2008, seeking an extension of time to do so. The trial court denied the application without prejudice subject to the attachment of the witness and exhibit lists and a declaration by Lambert to support his motion. Lambert filed his second ex-parte application with the requisite supporting documents on or about April 2, 2008. That was denied with prejudice. At oral argument, Lambert blamed a medical condition for his failure to timely file the pretrial documents. The trial court responded, "You've had over a year to get these documents done. I would think that since last March there would have been some days when this would have been possible."

On the first day of trial, the court ruled, "[t]he failure of Petitioner to file a previously ordered Witness List and/or Exhibit List hereby results in Petitioner being precluded from presenting any witnesses at time of trial and from presenting any exhibit at time of trial." Nonetheless, Bryan was permitted to testify on his own behalf at trial. Bonnie also testified and her exhibits were admitted into evidence. The trial court issued a statement of decision on June 17, 2008, citing to both Bonnie's and Bryan's testimony to support its decision as well as relying on their tax returns to determine income. Among other things, Bryan was ordered to pay $1,500 per month as spousal support to Bonnie from May 1, 2008, to May 16, 2010, unless one party died or Bonnie remarried. Bryan was also ordered to pay spousal support arrears in the amount of $66,924.15.

Faced with Bryan's failure to file the requisite documents and an impending trial date, Bonnie meanwhile sought sanctions and attorney fees from Bryan and Lambert pursuant to Family Code section 271 on April 2, 2008. After trial on the issue of support, a trial was held on Bonnie's motion and the court granted the request for sanctions on July 14, 2008. The trial court ordered Bryan and Lambert to each pay Bonnie $1,000 at the rate of $25 per month until paid in full.

Although the trial court denied Bonnie's request for attorney fees, it noted that "[t]he amount of attorney fees incurred by respondent was exacerbated greatly by Mr. Lambert's repeated failure to prepare for mandatory settlement conferences, necessitating continuances, ex parte applications not supported by the requisite documents as well as numerous instances of tardiness to Court . . . . [¶] . . . Having chosen to hire and to continue to retain Mr. Lambert, petitioner must share in the responsibility for the increased attorney fees incurred by respondent as a result of Mr. Lambert's representation of petitioner." The trial court further found that it "made clear that petitioner was required to prepare certain trial documents, including exhibit and witness lists. Although the Court accepted Mr. Lambert's statement that he failed to appear for the last mandatory settlement conference due to a medical condition after medical evidence was eventually presented, Mr. Lambert could not satisfactorily explain why the documents had not been prepared timely notwithstanding his failure to appear. . . . Most of the

documents eventually and tardily submitted did not comply with requirements. For example, Mr. Lambert submitted an exhibit list which did not identify specific exhibits but only general categories of exhibits."

Bryan, with the aid of new counsel, filed his notice of appeal on September 24, 2010, after an unsuccessful motion for new trial.[3]

DISCUSSION

Bryan's sole contention on appeal is that the trial court erred when it issued the evidentiary sanctions under former rule 14.14 because it in effect punished him for his attorney's negligence. We find no prejudice resulted from the trial court's order.[4]

Section 575.1 of the Code of Civil Procedure[5] grants superior courts with the power to adopt local rules "designed to expedite and facilitate the business of the court," so long as such local rules are not inconsistent with state statutes or the California Rules of Court. Section 575.2, subdivision (a), in turn provides that such local rules may establish penalties and sanctions for noncompliance with any of the requirements thereof, including striking of all or part of a pleading, dismissal of an action or proceeding, or entry of judgment by default. However, subdivision (b) of that section specifically states that "[it] is the intent of the Legislature that if a failure to comply with these [local] rules is the responsibility of counsel and not of the party, any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense thereto."

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[3] For reasons not reflected in the record, a judgment was not filed in this matter until July 27, 2010, two years after the trial court issued its statement of decision and only after the trial court issued an order to show cause regarding sanctions for both parties' failure to submit a judgment.

[4] Although the trial court's orders make no mention of a violation of former rule 14.14 as a basis for the exclusion of evidence, the trial court indicated that it would have granted Bryan's motion for new trial "pursuant to Code of Civil Procedure sections 659 et seq. and 575.2(b)." Accordingly, we assume that the trial court improperly imposed sanctions based on a violation of former rule 14.14.

[5] All further section references are to the Code of Civil Procedure unless otherwise specified.

Courts have interpreted section 575.2, subdivision (b) as "sharply limit[ing] penalties in instances of *attorney* negligence." (*State of California ex rel. Public Works Bd. v. Bragg* (1986) 183 Cal.App.3d 1018, 1025 (*Bragg*).) In particular, section 575.2, subdivision (b) creates "an exception to the general rule that the negligence of an attorney is imputed to the client [citations], with the client's only recourse a malpractice action against the negligent attorney." (*Bragg*, at p. 1026; *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, 502; *Cooks v. Superior Court* (1990) 224 Cal.App.3d 723, 727.) The case law holds that a trial court must invoke section 575.2 subdivision (b) on its own motion when necessary to protect an innocent party. (*Cooks*, at p. 727; *Moyal*, at p. 502; *Bragg, supra*, at pp. 1028-1029; see also *In re Marriage of Colombo* (1987) 197 Cal.App.3d 572, 579-580 (*Colombo*).) Because Lambert, Bryan's attorney below, was at fault for the failure to file the witness and exhibit lists, Bryan contends that subdivision (b) of section 575.2 prohibited the trial court from imposing evidentiary sanctions against him.

We do not agree that Bryan is entitled to relief in this case because he has failed to show prejudice resulting from the trial court's ruling. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.) "When the trial court commits error in ruling on matters relating to pleadings, procedures, or other preliminary matters, reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, *at trial*. Article VI, section 13 [of the California Constitution] admonishes us that error may lead to reversal only if we are persuaded 'upon an examination of the entire cause' that there has been a miscarriage of justice. In other words, we are not to look to the particular ruling complained of in isolation, but rather must consider the full record in deciding whether a judgment should be set aside." (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.)

Bryan does not direct us to anything in the record to support a finding of prejudice. He instead argues that "the order excluding apellant's witnesses and exhibits was prejudicial in and of itself." He contends, "[t]here is no requirement that the appellant show that but for the excluded evidence, he would have had a better result at trial."

We disagree. The statute and case law support our conclusion. Section 575.2 prohibits the penalty or sanction from "adversely affecting" the innocent client. Nothing in the statute precludes this court from applying the harmless error standard in its review of the trial court's order. By its plain language, section 575.2 requires some showing of prejudice. Therefore, we reverse the judgment only if we conclude "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*In re Marriage of Jones* (1998) 60 Cal.App.4th 685, 694.)

Moreover, "[t]he burden is on the appellant in every case to show that the claimed error is prejudicial; i.e., that it has resulted in a miscarriage of justice." (*Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 82.) Prejudice is not presumed and must appear affirmatively upon an examination of the entire record. "But our duty to examine the entire cause arises when and only when the appellant has fulfilled his duty to tender a proper prejudice argument. Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice. [Citations.]" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) "Where any error is relied on for a reversal it is not sufficient for appellant to point to the error and rest there." (*Santina v. General Petroleum Corp.* (1940) 41 Cal.App.2d 74, 77.)

The cases on which Bryan relies provide ample support for our conclusion that an appellant must demonstrate prejudice before reversal is warranted. In *Colombo, supra,* 197 Cal.App.3d 572, the trial court precluded the wife from presenting evidence on community ownership of stock claimed by the husband as his separate property. (*Id.* at pp. 579-580.) The wife had filed a deficient responsive pleading which failed to put the issue into dispute. The Court of Appeal reversed, finding the wife was not at fault for the deficient pleadings because she was in the process of changing attorneys. (*Ibid.*) In *Bragg, supra,* 183 Cal.App.3d 1018, the trial court granted a motion in limine filed by the property owner to exclude the state's appraisal report and expert valuation testimony in a condemnation case. (*Bragg,* at p. 1022.) As a result, the only evidence of the value of

the property admitted at trial was evidence from the property owner. (*Ibid.*) On appeal, the court found "[t]hat the [state] was adversely affected is certain. . . ." (*Id.* at p. 1028.) Contrary to Bryan's assertion, neither *Colombo* nor *Bragg* hold that prejudice need not be shown. To the contrary, prejudice is apparent in each of those cases.

Notwithstanding his position that the error itself requires reversal, Bryan also claims that he was "clearly" prejudiced by the exclusion of testimony from the parties' joint forensic accountant, Jack Zuckerman, who was appointed to determine the cash flow generated from Valley Tile for purposes of support. Bryan, however, does not explain what Zuckerman would have testified to that would have changed the result of the trial. The trial court derived Valley Tile's income from its 2007 corporate tax return, which is presumed to be correct. (*In re Marriage of Loh* (2001) 93 Cal.App.4th 325.) Bryan does not contend that Zuckerman's testimony would have rebutted this presumption. We conclude that Bryan has failed to show prejudice and the error complained of is harmless.

DISPOSITION

The judgment is affirmed. Each party to bear their own costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.