Filed 9/19/19

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MUHAMMAD R. JUNAID, Plaintiff and Appellant, v. RADY CHILDREN'S HOSPITAL et al., Defendants and Respondents.	D072767 (Super. Ct. No. 37-2015-00040796-CU-WT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Randa Trapp, Judge. Affirmed.

Muhammad R. Junaid, in pro. per., for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Marilyn R. Moriarty, Lann G. McIntyre, Rita Kanno and Brittany Bartold Sutton, for Defendants and Respondents.

Plaintiff Muhammad R. Junaid sued his former employer Rady Children's Hospital (Rady) and his supervisor, Jennifer Cortez (Rady and Cortez are sometimes collectively referred to as defendants), asserting (no less than) 16 causes of action in his third amended complaint (TAC). Plaintiff's TAC included claims: (i) arising under Government Code

section 12940 et seq. for discrimination (age, race, and National origin/disability), harassment, retaliation, and failure to prevent discrimination and to provide a reasonable accommodation; and (ii) for violation of the Health and Safety and Labor Codes, wrongful termination, breach of contract, negligence, unlawful business practices (Bus. & Prof. Code, § 17200 et seq.), and declaratory and injunctive relief.

In addition to the instant lawsuit, plaintiff through his union filed a grievance against Rady, which he pursued through hearing with a neutral arbitrator. After taking evidence, the arbitrator in a 16-page decision ruled that Rady was justified in terminating plaintiff for insubordination. Defendants in the instant case thereafter moved for summary judgment (or in the alternative, summary adjudication). The court granted summary judgment.

On appeal, plaintiff—who is self-represented—bore the burden of providing an adequate appellate record "even if he did not bear the burden in the trial court. [Citation.]" (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230). This burden at a minimum required him to provide a full and complete appellate record, citations to the record evidence, and legal authority and analysis in light of such evidence to demonstrate the court erred in granting summary judgment. Unfortunately, because plaintiff did not adhere to any of these basic requirements, we are unable to provide meaningful review of his appeal and thus are constrained to dismiss it.

A. *Failure to Provide a Complete Appellate Record*

Plaintiff prepared and filed a seven-volume appellant's appendix (AA), which included "Volume 1A of 6" and "Volume 1 of 6." By way of example,[1] Volume 1 of the AA, which includes plaintiff's original complaint and the second amended complaint (SAC), ends at page 0088. Volume 1A starts at page 0090, meaning there is no page 0089. The chronological table of contents of the AA provided by plaintiff states the TAC is located at page 0087 of the AA, when in fact it appears at page 0092 in volume 1A and continues through 0138. However, page 0139 of the AA confusingly is page 29 of plaintiff's SAC, which continues through page 0151 of the AA. Starting on page 0152 of the AA is another copy of the TAC but includes only the first 11 pages.

By way of further example, volume 2 of the AA begins at page 0135. However, volume 1A was paginated through page 0162, and volume 1 through page 0088, as noted. Thus, there were multiple duplicate pages in the appendices in violation of the California Rules of Court, rule 8.144(b)(2)(D),[2] which requires a record transcript to "be consecutively numbered . . . ." Volume 2 of the AA includes defendants' summary judgment motion, and declarations and exhibits A through Y in support thereof. Volume 3 of the AA begins with a portion of the deposition transcript of Cortez taken on April 28, 2017.

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1 We mean no disrespect to plaintiff in pointing out the deficiencies in connection with his preparation of the record and his briefing to this court.

2 All further rule references are to the California Rules of Court.

We note the April 28 Cortez deposition is *not* one of the exhibits defendants included in their moving papers. Thus, we can only surmise the Cortez deposition is a portion of the evidence lodged by plaintiff in opposition to defendants' motion. We say "surmise" because plaintiff failed to include in the AA a full and complete copy of his opposition to defendants' summary judgment. In fact, absent from the AA is his points and authorities in support of his opposition, which we can only assumed he filed in the trial court; and any declarations—including exhibits—in support of his opposition, which he ostensibly used in an attempt to create one or more triable issues of material fact. Thus, the purpose of including the Cortez deposition in the AA is far from clear.

In any event, volume 3 of the AA includes about 43 pages of Cortez's deposition transcript. Following this transcript is a five-page, barely legible, document on Rady letterhead, which appears to be a job application submitted by plaintiff. After the five-page document are more pages of the April 28 Cortez deposition transcript. Following Cortez's deposition transcript are a series of documents that appear to be from plaintiff's employment file, and other evidence he may have lodged in opposition to defendants' motion. Again, it is not clear from the record what issue or issues this "evidence" pertains to.

Volume 4 of the AA is another copy of portions of the April 28 Cortez deposition transcript, once again interrupted by the five-page document on Rady letterhead, followed (once again) by more of Cortez's deposition testimony and then what appears to be the same miscellaneous evidence that appeared in volume 3. Volume 4 of the AA thus for the most part appears to be duplicative of volume 3 of the AA.

Volume 5 of the AA contains volumes 3 of 4 and 4 of 4—but *not* volumes 1 of 4 or 2 of 4—of plaintiff's exhibits identified in the declaration of Maria Bourn in support of plaintiff's opposition to summary judgment. The Bourn declaration, however, was not included in the AA. In addition to portions of other deposition transcripts including witness James Woods taken on April 29, 2017, volume 5 of the AA includes more of the April 28 deposition testimony of Cortez. We note from the table of contents of plaintiff's exhibits that the Cortez deposition transcript was lodged in volume 2, and not volume 3, of plaintiff's exhibits. After about 10 pages of the April 28 Cortez deposition, volume 5 continues with a partial transcript of the April 29 Woods deposition.

Volume 5 also includes a *portion* of plaintiff's response to defendants' separate statement of undisputed material facts. Specifically, plaintiff included only pages 31 through 120 of this document. This volume also includes defendants' reply brief in support of their motion and their reply to plaintiff's response to their separate statement.

Volume 6 of the AA includes the court's minute order granting summary judgment, the judgment entered thereon, and plaintiff's notice of appeal.

It is axiomatic that an appellate court presumes that the trial court's judgment and orders are correct and supported by the facts of the case, and any error must be affirmatively demonstrated. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 (*Ketchum*); *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) As a corollary to this rule of appellate review, an appellant is obligated to furnish us with a complete and adequate record: "The appellant must affirmatively demonstrate error by an adequate record. In the absence of a contrary showing in the record, all presumptions in favor of the trial court's

action will be made by the appellate court. 'If any matters could have been presented to the court below which would have authorized the order [or judgment] complained of, it will be presumed that such matters were presented.' " (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.)

When, as here, the record is inadequate to assess the errors raised, the claims are deemed to have been forfeited and must be rejected. (*Ketchum*, *supra*, 24 Cal.4th at pp. 1140–1141; see *Rancho Santa Fe Assn. v. Dolan–King* (2004) 115 Cal.App.4th 28, 46 [noting a party seeking to challenge an order or judgment on appeal has the burden of providing an adequate record to assess error, and further noting when that "party fails to furnish an adequate record of the challenged proceedings, his [or her] claim on appeal must be resolved against him [or her]," citing *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 and *Ketchum*, at pp. 1140–1141.)

Turning to the instant case, the record provided by plaintiff is missing many key documents, including (as noted) most, if not nearly all, of his motion in opposition to summary judgment. Because of these critical deficiencies, we are unable to consider plaintiff's challenge on appeal that the court erred in granting summary judgment because among other reasons there were triable issues of material fact on one or more issues.

We recognize plaintiff is self-represented. Nonetheless, his propria persona status does not exempt him from the rules of appellate procedure or relieve him of his burden on appeal. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984; see also *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247 (*Nwosu*) [noting that self-represented litigants "must

follow correct rules of procedure" and that their failure to do so forfeits any challenge on appeal].)

B. *Failure to Include All Material Evidence and the Lack of Citations to the Record Evidence*

Plaintiff's opening brief includes a lengthy "factual background." Unfortunately, this factual background, and his brief in general, fails in two key areas: first, plaintiff did not set forth in his brief *all* the material evidence, as opposed to " '*merely* [*his*] *own evidence*.' " (See *Nwosu*, *supra*, 122 Cal.App.4th at p. 1246, quoting *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Fallon*); see also rule 8.204(a)(2)(C) [requiring an appellant to "[p]rovide a summary of the *significant* facts" (italics added)].) Plaintiff's failure to include all the material facts relevant to his case forfeits on appeal any challenge of error with respect to such facts. (See *Nwosu*, at p. 1246; *Fallon*, at p. 881.)

Second, plaintiff's opening brief includes myriad "string cites" to his separate statement, despite the fact he failed to include in the record a full and complete copy of his response to defendants' separate statement. In any event, the separate statement is *not* evidence "of anything" (see *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1022, disapproved on another ground as stated in *Regents of Univ. of Cal. v. Superior Ct.* (2018) 4 Cal.5th 607, 634, fn. 7), but rather a "mere assertion." (*Stockinger*, at p. 1022.) Plaintiff therefore was required to cite to those pages in the record where the evidence could be found, in addition to the corresponding separate statement of disputed facts. (See *id.*; see also rule 8.204(a)(1)(C) [requiring "any reference to a matter in the record" to be supported by a citation to its location].) As

pointed out by defendants, plaintiff's opening brief did not include one cite to the evidence in the record.

Plaintiff's failure to do so constitutes a forfeiture of his claim that the court erred in finding there were no triable issues of material fact. This is because our obligation to conduct a "de novo review [of the grant of summary judgment] does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." (See *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116, questioned on another ground as recognized in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 41–42; see also *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 [recognizing the principle that an "appellate court is not required to search the record on its own seeking error"]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1111, 1115 [rejecting appellant's challenge to the grant of summary judgment because, although appellant alleged a " 'plethora of admissible evidence' indicate[d] a triable issue of fact exist[ed]" on many of his claims, appellant's failure to "identify this evidence and where it can be found in the record" constituted a waiver of any such error on appeal].)

C. *The Lack of a Complete Appellate Record and any (and Not Just Specific) Citations to the Record Evidence Preclude Appellate Review of the Merits of Plaintiff's Appeal*

Finally, the importance of requiring a complete appellate record and cites to the record evidence therein become clear when reviewing the merits of plaintiff's opening brief.

For example, plaintiff in his opening brief argues he presented a "plethora of direct evidence demonstrating the motive for Rady's termination was related to his disability—PTSD." Plaintiff then cites to *his* separate statement, issue numbers 1–12, 22–25, and 58–136. As noted however, he did not include *his* separate statement in the AA. Moreover, as also noted there are no cites to the record evidence supporting this argument. In addition, citing to more than *90* issues in which plaintiff allegedly offered evidence in response to defendants' undisputed material facts to support this *one* argument makes appellate review of this argument untenable.

It is precisely for this reason that the California Rules of Court require an appellant like plaintiff herein to provide *specific* record cites in support of *each* argument raised on appeal. (See *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 [noting a party must support its arguments with appropriate and *page-specific* references to the record, and further noting the failure to do so effectively forfeits the argument]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 [noting the failure to support arguments with citations to *specific* evidence in the record, and failure to apply cited legal principles to the facts, forfeits those arguments on appeal].)

As another example, plaintiff in his opening brief argues that defendants failed to meet their burden of production to make a prima facie showing of the nonexistence of any genuine issue of material fact. Plaintiff supports this argument as follows: "Rady fails to meet its burden because their sparse Separate Statement simply omits and fails to address material facts in dispute that exist in this lawsuit. Indeed, as to some causes of action, Defendants fail to present any evidence, failing to meet their burden of showing the nonexistence of any triable issue of material fact. Defendants cannot obtain summary judgment by simply pretending disputed facts go to the elements of the prima facie case do not exist, and their motion must be denied on this basis alone." Plaintiff, however, neither provided meaningful analysis nor specific record cites to support this overly broad argument.[3]

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3 In any event, plaintiff misconstrues defendants' burden in moving for summary judgment, as he argues it was their burden to include *his* discovery responses in their separate statement of undisputed facts because those responses—which are not part of the appellate record—allegedly showed the facts (on some issue) were disputed. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [noting the "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if [that party] carries [t]his burden of production, [the moving party] *causes a shift, and the opposing party* [*i.e., plaintiff herein*] *is then subjected to a burden of production of his* [*or her*] *own to make a prima facie showing of the existence of a triable issue of material fact*"] (italics added).)

Finally, we note in several of his arguments plaintiff relies on evidence that is not in the appellate record. For example, in arguing that he exhausted his administrative remedy with respect to his 12th and 13th causes of action for failure to provide a reasonable accommodation and disability discrimination, respectively, he cites to the declaration of Larry Schapiro and to "Ex. A" allegedly attached thereto. Relying on such "evidence," plaintiff argues his complaint to the Department of Fair Employment and Housing in 2015 for discrimination based on "family care or medical leave" included disability discrimination. As noted however, plaintiff failed to include any declarations in his AA, including Schapiro's, and it is not known where "Ex. A" is located (if at all) in the record.[4]

For all the foregoing reasons, we are constrained to dismiss plaintiff's appeal.[5]

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4 There are many other instances where plaintiff relied on declarations and other evidence that are not in the record, including in connection with his argument that the statutes of limitation were tolled while he pursued administrative relief. Plaintiff supported this argument with numerous times to the "Bourn Decl." which, as noted, is not in the record.

5 We considered, but now decline to begin the process on our own motion of, imposing sanctions against plaintiff for filing a potentially frivolous appeal. (Rule 8.276(a) ["On motion of a party or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs under rule 8.278, on a party or an attorney for: [¶] (1) Taking a frivolous appeal or appealing solely to cause delay"].)

DISPOSITION

The judgment is affirmed. Defendants to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

09/19/2019

KEVIN J. LANE, CLERK

By _____ Deputy Clerk