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Court of Appeal, First District, Division 3, California.

Loyola R. **SCHULER**, Defendant and Appellant,
v.

Myrtle Z. **SCHULER**, Plaintiff and Respondent.
WMC Mortgage Corporation, Intervenor and Appellant,
v.

Myrtle Z. **Schuler** et al., Intervention Defendants.
Nos. A119125, A119472.

(Alameda County Super. Ct. No. C524350).

Nov. 24, 2008.

Timothy F. O'Leary, O'Leary & O'Leary, San Francisco, CA, for Plaintiff and Respondent.

Fred Sture Hjelmset, Law OfcStephen Benda, Menlo Park, CA, for Defendant and Appellant.

McGUINNESS, P.J.

*1 This appeal arises from a lawsuit respondent Myrtle Z. Schuler (Myrtle) filed in 1979 against her daughter, appellant Loyola R. Schuler (Loyola),^{FN1} regarding their rights and obligations to a house located in Oakland, California (the house). After a two-day court trial in 1982, the trial judge issued a Memorandum Decision, finding in favor of Myrtle and finding true her allegation that Loyola held title to the house in trust for Myrtle's benefit. The Memorandum Decision, among other things, ordered Myrtle to pay the mortgage and ordered Loyola not to further encumber the house and to transfer title to Myrtle once the mortgage was paid off.

FN1. Because Myrtle and Loyola Schuler share the same last name, we refer to them by their first names for ease of reference.

For many years, Loyola did not encumber the house and Myrtle made the mortgage payments. When Myrtle paid off the mortgage in 1995, Loyola did not transfer title to Myrtle, and in 2005, Loyola borrowed money from WMC Mortgage Corporation (WMC), using the house as security. Myrtle stated she had not given permission to Loyola to encumber the house, and filed a motion requesting that the trial court sign a judgment nunc pro tunc pursuant to the Memorandum Decision of the trial judge who, by then, was deceased. The trial court granted the motion.

Loyola and WMC appeal from the judgment nunc pro tunc. They contend the trial court had no authority to sign a judgment based on a Memorandum Decision that reflected the trial judge's tentative decision, and that the court abused its discretion in entering judgment nunc pro tunc. In addition, Loyola contends the trial court violated her due process rights, and WMC seeks modification of the judgment to permit adjudication of its claims against Loyola and others. We reject the contentions, deny WMC's request for modification, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In her first amended complaint, which was the operative complaint (the complaint), Myrtle alleged she was involved in her first real estate transaction in 1974, when she purchased a house with the assistance of a real estate agent. She alleged she gave the agent a total of \$2,263 to purchase the house. Myrtle intended that Loyola assist by lending her credit and Loyola assured Myrtle that the house was being "purchased for and on behalf of [Myrtle]." A deed of trust in the amount of

\$21,700, which was secured by the house, was executed between Loyola as trustor and Security National Bank as beneficiary. Myrtle moved into the house on January 3, 1975, and began making monthly payments consisting of the mortgage and property taxes directly to Security National Bank.

In March 1975, Myrtle discovered that documents related to the deed of trust and title to the house were in Loyola's name. Myrtle did not understand the legal effect of the documents but discussed the matter with Loyola, who reassured her that Myrtle was the "true owner," and that she (Loyola) was going to "transfer the necessary papers at a later time." In April 1979, Loyola threatened to sell the house without Myrtle's consent. Myrtle asked Loyola not to sell the house and to transfer title to her in accordance with the prior understanding. Loyola did not sell the house but did not transfer title to Myrtle. Myrtle filed a complaint against Loyola, seeking declaratory judgment, a resulting or constructive trust, and an order conveying the house to her. A notice of lis pendens was recorded in the Alameda County Recorder's Office, providing that Myrtle had commenced an action against Loyola that affected title to the house.

*2 Loyola denied the allegations. She claimed she contributed \$200 toward the down payment and, unlike other family members, had qualified for financing under a federal loan program. She explained that Myrtle was making the monthly payments on the house because there was a "verbal agreement" between them that Loyola would "allow [Myrtle] to reside on the subject property as a tenant for a monthly rental equal to the amount of the monthly payments, plus an additional amount for maintenance." She stated that Myrtle and other family members contributed to the down payment in exchange for Loyola's promise that she would allow Myrtle to live in the house as long as Myrtle made the monthly payments.

A two-day bench trial took place on January 18 and 19, 1982. Both parties were represented by counsel. On February 11, 1982, the trial court issued a docu-

ment entitled Memorandum Decision, which provided: "In the above entitled action, the court finds that the allegations in plaintiff's First Amended Complaint are true and that defendant holds title to the real property in issue here in trust for the benefit of plaintiff, and defendant is enjoined from further encumbering said real property and from transferring the same to any person other than plaintiff. [¶] If, as and when the real property is free of any encumbrance, or with the written consent of any existing lienholders wherein defendant is released of any and all liability to such lienholder, defendant is ordered to convey said property to plaintiff. Pending any such conveyance by defendant, plaintiff is ordered to pay all existing loans secured by said property and all taxes levied thereon; maintain adequate fire and liability insurance; keep the property in good repair; and hold defendant harmless from any loss or harm that may be suffered by her as a result of her record title interest in said property. All rights of possession of, and to the profits from said property shall be in plaintiff or her successors and assigns. [¶] Let judgment be entered accordingly." The document further stated that counsel for the parties had been notified of the Memorandum Decision "by a copy of this minute order mailed to [them]."

Myrtle continued to make all house payments and paid off the mortgage in March 1995.^{FN2} In March 2005, Loyola encumbered the house by borrowing \$215,000, using the house as security.^{FN3} On September 28, 2005, Myrtle filed a "declaration ... in support of judgment pursuant to Memorandum Decision," requesting that the trial court sign a judgment pursuant to the Memorandum Decision. The trial court denied Myrtle's request without prejudice "for failure to show that [Myrtle] fully performed all actions required by the Court's February 11, 1982 memorandum decision in order to get Defendant Loyola Schuler to transfer the property." The court directed Myrtle "to provide admissible documentary evidence to the Court in support of her position by November 30, 2005."

FN2. The letter indicating the mortgage was paid off is addressed to Loyola. It is not clear from the record whether Myrtle learned at this time that the mortgage had been paid off.

FN3. According to Myrtle, she first learned about this loan in late 2005.

*3 On November 30, 2005, Myrtle filed a declaration stating in part: "I have fully complied with and performed all actions required by the Court's February 11, 1982 Memorandum Decision in that I paid off all existing loans secured by said property and all taxes levied thereon; I have maintained adequate fire and liability insurance (which was included in the mortgage payments); kept the property in good repair; and I have and continue to hold defendant harmless from any loss or harm that may be suffered by her as a result of her record title interest in said property. [¶] Defendant has on many occasions, threatened to sell said property and there is reason to believe that defendant intends to take advantage of the situation by encumbering said property for her own personal and financial gain."

On December 5, 2005, Loyola filed a declaration stating she did not believe her mother understood the content of her November 30, 2005, declaration because "[s]he is a 93 year[] old woman with a third grade education, who is slightly senile...." Loyola stated that Myrtle gave her "oral consent" when Loyola asked Myrtle if she could encumber the house again.

In a declaration filed December 13, 2005, Myrtle stated she did not give Loyola permission to take out additional loans. She stated that a search with the Alameda County Recorder's Office revealed that Loyola had borrowed \$215,000 on March 24, 2005, and that the loan increased to \$293,000 in November 2005. WMC was the lender of the \$293,000 loan, and the beneficiary of a deed of trust that had been recorded against the house.

According to WMC, Loyola took out a third loan

from WMC in March 2006, increasing the total loan amount to \$432,000. On April 14, 2006, Myrtle sought an order finding Loyola in contempt of the Memorandum Decision. Loyola responded that although she knew she had "lost the case" in 1982, she had not seen the Memorandum Decision until August 2005, when her mother or sister mailed her a copy of it. She explained that she got into an argument with her attorney after the trial and that her attorney did not give her a copy of the Memorandum Decision. During the contempt hearing, Myrtle's attorney essentially withdrew her contempt request by stating, "I will concede that if judgment is entered nunc pro tunc that [Loyola] cannot be held in contempt of that when [the judgment] hasn't existed in reality for the last 22 years. So I would concede that point." The trial court discharged the contempt.

On April 20, 2006, WMC filed a motion for leave to file a complaint in intervention and for declaratory relief, equitable indemnity and equitable subrogation. It requested intervention on the ground that Myrtle and Loyola's "claims arise out of the same transaction, and determination of both in one proceeding is necessary and appropriate in order to avoid the circuitry and multiplicity of actions that would result if WMC is forced to bring a separate action against intervention defendants for equitable subrogation and equitable indemnity." WMC further requested "a judicial determination of the respective rights and duties of WMC and intervention defendants [Myrtle and Loyola] with respect to the WMC Deed of Trust." The trial court granted WMC's motion to intervene in the action, and WMC's complaint against Loyola, Myrtle and others was filed on May 31, 2006.

*4 On June 13, 2007, Myrtle filed a motion for judgment nunc pro tunc. She stated that she believed the "dispute had been resolved in 1982 and that ... the case was over," and that she did not understand the difference between a Memorandum Decision and a Judgment. At the hearing on the motion, the trial court, Judge Frank Roesch (Judge

Roesch) stated: “Judge Barber issued at least a tentative decision saying that I’ve heard the evidence and the evidence results in this. It’s not just a one-liner. It explains with some detail what he thinks the judgment should be, and then he says let judgment be entered accordingly. A period of time passed; nobody objected to that. In fact, nobody did anything. [¶] Life went on and the parties seemingly until 1995 actually followed the judgment... And it wasn’t until 1995 when it appears that most likely the property was paid off and that the plaintiff had actually paid the property taxes or whatever the plaintiff was required to do. And that’s when conflict started to arise and didn’t get resolved ... until now somebody made that motion to have that judgment entered.”The court stated: “[W]hat I perceive that I’m doing is I am completing the job’s task that was required of the Court in 1982. And I have no doubt at all in reading Judge Barber’s memorandum decision that in the face of no objection to his tentative ruling that this is the judgment that would have been entered. I just have no doubt in my mind at all.”The trial court issued a proposed judgment nunc pro tunc on July 18, 2007, stating in part: “The Court, having held a trial in this action, Judge Barber having issued a Memorandum Decision dated February 11, 1982, there being no request for a statement of decision, and Judge Barber now being unavailable, ... judgment is entered as of February 26, 1982....”

WMC objected to the proposed judgment on the ground the judgment should include the following language: “Nothing herein shall be deemed an adjudication of the parties’ claims or defenses relating to Intervenor WMC Mortgage Corporation’s complaint in intervention filed on May 31, 2006.”Loyola objected to the proposed judgment on the ground that she was not afforded a fair trial in 1982. She stated that family members and “their supporters” physically threatened her and her attorney and on one occasion “attacked and maliciously beat[] and robbed” her, such that she became “fearful for [her] life and safety” and was unable to testify fully and freely or present all of her evidence

at trial.

The trial court overruled the objections to the proposed judgment. It denied WMC’s request to include additional language and, as to Loyola’s objection, found her declaration was “not credible because of 1) the incredible nature of the assertions and, 2) the extremely long period of time between the trial and the date the assertions are first raised.”The court ordered that “[t]he proposed judgment shall be the Judgment of the Court and Plaintiff shall prepare a form of a final judgment and present it to the court for signature.”Final judgment nunc pro tunc was entered on August 23, 2007.

DISCUSSION

1. The trial court had authority to enter judgment based on the Memorandum Decision.

*5 California Rules of Court, rule 3.1590(a)^{FN4} provides that at the end of a court trial, the trial judge shall “announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk.”In a court trial lasting more than one day, a party may challenge the tentative decision by requesting a statement of decision within ten days of the announcement of the tentative decision. (Code Civ. Proc., § 632.)^{FN5}“The statement of decision provides the trial court’s reasoning on disputed issues and is [the appellate court’s] touchstone to determine whether or not the trial court’s decision is supported by the facts and the law. [Citation.]” (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718.) A party waives its right to a statement of decision unless it timely requests one (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647;§ 632), and “[i]n the absence of a statement of decision, the appellate court will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record. [Citation.]” (*Slavin v. Borinstein, supra*, 25

Cal.App.4th at p. 718).

FN4. All further rule references are to the California Rules of Court. Rule 3.1590 was known as rule 232 at the time of the 1982 trial, but the procedures to which we refer in this opinion that are set forth in rule 3.1590 are substantively the same as those that were contained in rule 232 in 1982.

FN5. All further statutory references are to the Code of Civil Procedure unless otherwise stated.

If there is no timely request for a statement of decision, the court must prepare and mail a proposed judgment to the parties within ten days of the expiration of the time to request a statement of decision. (Rule 3.1590(g).) The parties are given additional time to serve and file objections to the proposed judgment, and if there are no objections, the court is required to sign and file a judgment. (Rule 3.1590(g), (h).) Section 635, on which the trial court apparently relied in entering judgment, allows a presiding judge to sign a judgment based on a trial judge's decision where the trial judge has become unavailable before completing the process set forth in rule 3.1590. The section provides in full: "In all cases where the decision of the court has been entered in its minutes, and when the judge who heard or tried the case is unavailable, the formal judgment or order conforming to the minutes may be signed by the presiding judge of the court or by a judge designated by the presiding judge."

Loyola and WMC contend the trial court had no authority to sign a judgment under section 635 because the Memorandum Decision was a tentative decision, and a trial court is not authorized to sign a judgment based on an unavailable trial judge's tentative decision. They rely principally on *Raville v. Singh* (1994) 25 Cal.App.4th 1127 (*Raville*), *Armstrong v. Picquelle* (1984) 157 Cal.App.3d 122 (*Armstrong*), *Swift v. Daniels* (1980) 103 Cal.App.3d 263, 265 (*Swift*), and *Mace v. O'Reilly* (1886) 70 Cal. 231, 233-234 (*Mace*). Assuming,

without deciding, that Judge Barber's Memorandum Decision reflected his tentative decision, we conclude the above cases do not support Loyola and WMC's position because they involve the very different situation of a trial judge who became unavailable before issuing a statement of decision *that had been timely requested*. In fact, the cases stand for the proposition that a presiding judge *has* the authority to sign a judgment based on a tentative decision where no statement of decision is requested.

*6 In *Armstrong*, for example, the trial court announced its "tentative findings," which were entered in the minutes. (157 Cal. App.3d at p. 125.) The defendant *timely requested a statement of decision*, and the trial judge directed the plaintiff to prepare a proposed statement of decision. (*Id.* at p. 126.) Thereafter, the trial judge retired, and the plaintiff submitted his proposed statement of decision to the presiding judge, who signed the proposed statement of decision, then signed a judgment based on that statement of decision. (*Ibid.*) *Armstrong* concluded a new trial was necessary because the defendant had timely requested a statement of decision, and the presiding judge's act of signing his own statement of decision deprived the parties of their right to a statement of decision from the trial judge who had heard the evidence. (*Id.* at pp. 127-128.)

Armstrong held: "To allow entry of a judgment by a presiding judge on the basis of a tentative ruling by a nonavailable trial judge would wrest from the parties the right to have 'the judge who hears the evidence ... decide the case' [citation], depriving them of their right to a full and fair trial." (157 Cal.App.3d at pp. 127-128, citing *Swift, supra*, 103 Cal.App.3d at p. 265.) Thus, it held: "[Section 635] does not ... authorize the presiding judge to enter a formal judgment whenever the judge who has heard the evidence has orally entered a tentative decision...." (*Swift, supra*, 157 Cal.App.3d at p. 127.) "The ... section authorizes the signing of a formal judgment by the presiding judge only where (1) *no*

statement of decision has been requested or (2) the judge who has heard the evidence has already provided the parties with a *statement of decision* upon their request for it.”(*Ibid.*, first italics added.)

Similarly, in *Raville*, *supra*, 25 Cal.App.4th at p. 1132, *Swift*, *supra*, 103 Cal.App.3d at p. 265, and *Mace*, *supra*, 70 Cal. at p. 264, the presiding judge had no authority to sign a judgment for an unavailable judge based on that judge's tentative decision, *where a statement of decision had been timely requested*. *Raville* followed *Armstrong* in noting that “[i]f a statement of decision is not requested, the presiding judge does have authority to sign the judgment.”(25 Cal.App.4th at p. 1131, fn. 3, see also p. 1133.)

Here, there is nothing in the record indicating a statement of decision was requested, and neither Myrtle nor Loyola asserts she requested one. Thus, the parties waived their rights to a statement of decision, and Judge Barber was not required to prepare one. (See *In re Marriage of Ditto*, *supra*, 206 Cal.App.3d at p. 647;§ 632.) Loyola asserts her due process rights were violated because she was deprived of her right to have Judge Barber, who heard the evidence, decide her case. However, because Loyola did not request a statement of decision, the only thing left for Judge Barber to do was to issue a proposed judgment and judgment based on the Memorandum Decision, to which there had been no objection. Thus, Judge Barber's unavailability and the signing of a judgment by another judge did not “wrest from the parties the right to have ‘the judge who hears the evidence ... decide the case.’ “ (See *Armstrong*, *supra*, 157 Cal.App.3d at pp. 127-128.)

*7 Further, although *Armstrong* stated that allowing a presiding judge to sign a judgment on the basis of a tentative decision “would strip the parties of their section 632 right to a statement of decision,” (157 Cal.App.3d at p. 127, italics omitted), there was no such concern here because the parties had waived their right to a statement of decision. It was not Judge Roesch's signing of a judgment based on the tentative decision that “strip[ped] the parties of

their ... right to a statement of decision,” but rather the parties' failure to make a timely request for one. The trial court was authorized to enter judgment based on the Memorandum Decision after Judge Barber became unavailable. (See, e.g., *Armstrong*, *supra*, 157 Cal.App.3d at p. 127 [section 635 authorizes the signing of a formal judgment by the presiding judge where no statement of decision has been requested]; *Raville*, *supra*, 25 Cal.App.4th at p. 1131, fn. 3, 1133 [same].)

Loyola notes in a footnote that Judge Roesch, who signed the judgment in this case, was not the presiding judge, and that “there is no indication that he was designated by the presiding judge...” As noted, section 635 authorizes the entry of judgment by “the presiding judge ... or by a judge designated by the presiding judge.”Loyola never objected to the signing of the judgment on the ground that Judge Roesch was not the presiding judge or a judge designated by the presiding judge. Thus, she is precluded from raising this argument for the first time on appeal. (See *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1249 [points not raised below nor considered and ruled upon by the trial court are deemed waived and will not be considered for the first time on appeal].)

We recognize, as Loyola and WMC point out, that a “tentative decision does not constitute a judgment and is not binding on the court.”(See rule 3.1590(b).) We also recognize that a court has the power to modify its tentative decision, perhaps even to the point of changing the result. (See rule 3.1590(b); see also *Phillips v. Phillips* (1953) 41 Cal.2d 869, 874 [a judge who has heard the evidence may at any time before entry of judgment amend or change his or her findings of fact].) However, we are presented here with a situation in which there is no indication that modification was contemplated or even considered. Judge Barber's Memorandum Decision unequivocally found in favor of Myrtle and issued specific orders to the parties. The document did not suggest in any way that Judge Barber was uncertain or undecided about

any issue in the case. In fact, its language—that the court “finds” Myrtle’s allegations to be true, “order[s]” the parties to do certain things, and directs judgment to “be entered accordingly”—shows Judge Barber intended the Memorandum Decision to become final unless one of the parties requested a statement of decision or otherwise raised objections to it.^{FN6} Implicit in the language of the Memorandum Decision was that unless a timely objection was made or a statement of decision requested, the Memorandum Decision would become final. We conclude the Memorandum Decision became the “decision of the court” by virtue of the parties’ failure to object to it. In light of the fact that no objection or request for a statement of decision was made, we, as the trial court did, have “no doubt” that judgment would have been entered according to the Memorandum Decision.^{FN7}

FN6. Although we need not decide this issue, we believe the Memorandum Decision, which stated the factual and legal basis for the decision, would have qualified as a statement of decision. (See e.g., *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 524-525 [a statement of decision is sufficient if it discusses and disposes of all material issues raised at trial], overruled on another ground in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184.)

FN7. In so concluding, we reject Loyola’s argument that the term “decision of the court” as used in section 635 should be given the same meaning that is given to the same term as used in section 664. Section 664 provides that after a court trial, the clerk must enter judgment “in conformity to the decision of the court, immediately upon the filing of such decision.” The section contemplates that *the trial judge has already signed and filed the judgment*, and that all that remains is the clerk’s entry of

judgment. (See Rule 3 .1590(h) [the signed and filed judgment “constitutes the decision on which judgment is to be entered under ... section 664”]). In contrast, section 635, which authorizes the presiding judge to sign a judgment formalizing the prior decision of an unavailable judge, *presumes the judgment has not yet been signed or filed*. Although both statutes use the term “decision of the court,” they do so in different contexts, and thus, the terms do not hold the same meaning.

2. The trial court did not abuse its discretion in entering judgment nunc pro tunc.

*8 We also conclude the trial court did not abuse its discretion in entering judgment nunc pro tunc. “The general rule is that ‘courts have inherent power to enter judgments nunc pro tunc so as to relate back to the time when they should have been entered, but will do so only to avoid injustice.’ [Citation.] [Citation.] ‘A court will always exercise this authority when it is apparent that the delay in rendering the judgment, or a failure to enter it after its rendition, is the result of some act or delay of the court, and is not owing to any fault of the party making the application....’ [W]here the delay in rendering a judgment or a decree arises from the act of the court ... the judgment or the decree may be entered retrospectively as of a time when it should or might have been entered up.” [Citation.]” (*Williamson v. Plant Insulation Co.* (1994) 23 Cal.App.4th 1406, 1415, italics omitted.) In *Scalice v. Performance Cleaning Systems* (1996) 50 Cal.App.4th 221, 239, the court stated: “The only appropriate reason for the exercise of this power is to preserve the rights of a party that would otherwise be lost. Entry of judgment nunc pro tunc is intended to ‘express the true intention of the court as of the earlier date and thus conform to verity.’” [Citation.]” The court’s exercise of the power is reviewed for abuse of discretion. (*Ibid.*; *T.R.E.E.S v. Department of Forestry & Fire Protection* (1991) 233 Cal.App.3d 1175, 1179, fn. 1.)

Here, the judgment nunc pro tunc was properly entered in order to “avoid injustice.” (See *Williamson v. Plant Insulation Co.*, *supra*, 23 Cal.App.4th at p. 1415.) Both parties were present during the two-day court trial and the court provided their attorneys with notice of the Memorandum Decision, which found in favor of Myrtle and provided that judgment would be “entered accordingly.” Neither party objected to the Memorandum Decision. Myrtle, who believed the Memorandum Decision represented Judge Barber's final decision, complied with and performed all acts required by it, including paying off the entire mortgage over the course of the following 13 years, paying all property taxes, and maintaining adequate insurance. Loyola, who claims she did not receive a copy of the Memorandum Decision until August 2005, admits she knew in 1982 that she had “lost the case.” Nevertheless, she took out a \$215,000 loan in March 2005, using the house as security.

Loyola explains that she encumbered the house believing no final order had been issued in the case. However, as noted, she admitted she knew in 1982 that she had “lost the case.” Loyola's rush to take out additional loans in November 2005 and March 2006, after she became aware of her mother's efforts to enforce the Memorandum Decision in September 2005, and before the trial court issued its judgment nunc pro tunc, casts doubts on her claim of innocence. (See *Reed v. Williamson* (1960) 185 Cal.App.2d 244, 248 [the law “looks with disfavor” on a party who attempts to take advantage of a mistake].) An order denying the motion for a nunc pro tunc judgment under these circumstances would have provided Loyola with a windfall of \$432,000, and would have been contrary to what Judge Barber intended, and the parties knew, to be the outcome of the trial. Under these circumstances, it was reasonable for the trial court to conclude that justice would be better served by entering judgment nunc pro tunc.

*9 Moreover, we cannot conclude that the delay in the entry of judgment was Myrtle's “fault.” (See

Williamson v. Plant Insulation Co., *supra*, 23 Cal.App.4th at p. 1415.) As noted, rule 3.1590 requires the court to prepare and mail a proposed judgment and to sign and file a judgment if there is no timely request for a statement of decision. (Rule 3.1590(g), (h).) The rules specify the time within which the court must prepare and sign these documents, and also provides the court with the option of ordering one of the parties to prepare the proposed judgment or judgment. (*Ibid.*) Here, Judge Barber neither prepared a proposed judgment or judgment, nor ordered one of the parties to do so. Instead, he stated in his Memorandum Decision, “Let judgment be entered accordingly,” which indicated to the parties that the Memorandum Decision reflected the judge's final determination of the merits of the case, unless either party requested a statement of decision or otherwise raised an objection to the decision. Thereafter, when no objection was made and no statement of decision was requested, it was the duty of the court to prepare a proposed judgment and judgment, which Judge Barber failed to do. Thus, although, as WMC points out, the plaintiff is generally responsible for prosecuting the case (see *Cohn v. Rosenberg* (1943) 62 Cal.App.2d 140, 142 [case dismissed after the plaintiff did nothing on the case for more than seven years and the delay prejudiced the defendant]), it was reasonable for the trial court to determine that the mistake in this case was not attributable to Myrtle.

3. The trial court did not violate Loyola's due process rights.

Loyola contends the trial court violated her due process rights by entering judgment nunc pro tunc because “she was deprived of a full and fair trial by the intimidation and threats at trial which prevented her from producing all of her evidence.” Her contention is without merit.

Loyola did not object to the Memorandum Decision in a timely manner and did not raise the issue of intimidation to Judge Barber at any time. Thus, she

waived her right to object to the Memorandum Decision, and in the absence of a statement of decision, the trial court is presumed to have made all necessary factual findings. (See § 632; *In re Marriage of Ditto*, *supra*, 206 Cal.App.3d at p. 647; *Slavin v. Borinstein*, *supra*, 25 Cal.App.4th at p. 718.) In any event, even assuming Loyola was intimidated at trial, we conclude her contention fails because she has failed to show she was prejudiced.

“No judgment ... shall be reversed or affected by reason of any error ... unless it shall appear from the record that such error ... was prejudicial, and also that by reason of such error, ... the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error ... had not occurred or existed.” (§ 475.) Loyola has not shown that the alleged intimidation caused her substantial injury, or that a “different result would have been probable,” but for the intimidation. She states merely that she was “deprived” of her “right to produce evidence,” but does not state *what evidence* she would have been able to produce, and how that evidence would have changed the outcome of the case. “Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred.” (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.) Loyola has not met that burden.

4. WMC is not entitled to a modification of the judgment nunc pro tunc.

*10 WMC argues the judgment nunc pro tunc should be modified to include language clarifying that the court has not yet adjudicated WMC's complaint in intervention. Modification is unnecessary, however, because the record is clear that the judgment, which was a near verbatim recitation of Judge Barber's Memorandum Decision, resolved only the dispute between Myrtle and Loyola regarding the house, and made no findings as to WMC's claims against Myrtle and Loyola.

“ [A]n intervener becomes an actual party to the suit by virtue of the order authorizing him to intervene.” [Citation.]” (*Deutschmann v. Sears, Roebuck & Co.* (1982) 132 Cal.App.3d 912, 916, quoting *Hospital Council of Northern Cal. v. Superior Court* (1973) 30 Cal.App.3d 331, 336.) However, it is well settled that an intervenor is entitled to have the issues raised between himself and the other parties tried and determined. (*Poehlmann v. Kennedy* (1874) 48 Cal. 201, 207-208.) “This right [cannot] be [a]ffected by the dismissal of the plaintiff's action.” (*Id.* at p. 208.) “To hold otherwise could seriously interfere with the purpose of ... section 387, which authorizes intervention to avoid multiplicity of suits.” (*Deutschmann v. Sears, Roebuck & Co.*, *supra*, 132 Cal.App. at p. 917.) If the dismissal of a plaintiff's case “could deprive an intervener of his cause of action, interveners would be well advised to bring independent actions to pursue their [own] rights.” (See *ibid.*) “The legislative purpose of ... section 387, to reduce the burden on our already overcrowded dockets, would be undermined” if courts were to disallow intervenors from pursuing their own claims after the dismissal of a plaintiff's case. (*Ibid.*) Because the judgment nunc pro tunc resolved only issues between Myrtle and Loyola, WMC retains the right to pursue its claims against Loyola, Myrtle and others.

DISPOSITION

The judgment is affirmed. Respondent Myrtle Schuler shall recover her costs on appeal.

We concur: SIGGINS and JENKINS, JJ.

Cal.App. 1 Dist., 2008.

Schuler v. Schuler

Not Reported in Cal.Rptr.3d, 2008 WL 4968003
(Cal.App. 1 Dist.)

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