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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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STEWART TITLE GUARANTY COMPANY,

Plaintiff and Respondent,

v.

MICHAEL BORKOWSKI, Individually and as  
Executor, etc.,

Defendant and Appellant.

C075264

(Super. Ct. No. 34-2010-  
00082287-CU-BC-GDS)

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Estate of ELIZABETH BORKOWSKI, Deceased.

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MICHAEL BORKOWSKI, as Executor, etc.

Petitioner and Appellant,

v.

STEWART TITLE GUARANTY COMPANY,

Objector and Respondent.

C076709

(Super. Ct. No. 34-2008-  
00006368-PR-PW-FRC)

After receiving \$150,000 from a real estate transaction in probate that should have gone to satisfy a lien on the property, defendant Michael Borkowski, who appears individually and as executor of the probate estate, believes he need not satisfy the lien. The trial court found him liable, and we affirm.

This opinion covers appeals in two cases: (1) the probate of the estate of Borkowski's mother (C076709) and (2) a civil case brought by the title insurance company to recover the amount of the lien on real property that Borkowski sold as executor of his mother's estate without satisfying the lien (C075264). In the probate case, the court ordered funds sufficient to satisfy the lien held in a blocked account, and the court later released those funds to plaintiff Stewart Title Guaranty Company after the conclusion of the civil case. In the civil case, the trial court, by way of orders granting summary adjudication of issues, found Borkowski liable to Stewart Title Guaranty Company under unjust enrichment and breach of contract causes of action and entered judgment against Borkowski.

On appeal, Borkowski contends the court in the civil case: (1) erred by overruling his demurrer to the complaint, (2) improperly applied the litigation privilege, and (3) improperly granted summary adjudication of issues with respect to the unjust enrichment and breach of contract causes of action. We conclude that Borkowski fails to establish reversible error.

## BACKGROUND

### A. *Underlying Facts*

In April 2007, Elizabeth Borkowski executed a note for a loan of \$150,000, secured by a deed of trust on real property on Buffwood Way in Sacramento. Eventually, Wells Fargo purchased the note.

In January 2008, Elizabeth Borkowski died. Before she died, she told her son, defendant Michael Borkowski, about the \$150,000 refinance of the Buffwood Way

property. Borkowski was appointed executor of the estate, and filed a petition estimating the encumbrance on the Buffwood Way property as \$150,000.

The probate estate, acting through Borkowski, sold the Buffwood Way property in June 2008, contracting with Stewart Title of Sacramento for services related to the sale, such as the escrow account. Borkowski executed a document entitled “Seller’s Estimated Net Proceeds,” omitting the \$150,000 loan. He also executed escrow instructions, representing that no liens existed on the property.

After the sale, Stewart Title of Sacramento distributed to Borkowski, as executor of the estate, the proceeds of the sale without satisfying Wells Fargo’s lien for the \$150,000 loan. Eventually, Wells Fargo notified Stewart Title Guaranty Company that payments had not been made on the loan and threatened foreclosure, so Stewart Title Guaranty Company paid off the loan to protect the party that bought the Buffwood Way property from the estate.

B. *Probate Case (C076709)*

In May 2008, the probate court appointed Borkowski executor of his mother’s estate.

In 2010, Stewart Title Guaranty Company filed a creditor’s claim to recover the funds not collected through escrow to satisfy the note and deed of trust when the Buffwood Way property was sold. Borkowski, acting as executor of the estate, rejected the claim and filed a petition with the probate court for an order barring the claim. It is unclear from the record on appeal whether the probate court granted Borkowski’s petition for an order barring the claim. The record contains a minute order, stating, “Petition for Hearing (Petition For Order Barring Creditor’s Claim) filed by Michael Borkowski is granted.” Because the language concerning barring of the creditor’s claim is in parentheses, it appears that this is merely on order granting a petition for a hearing. Therefore, the record on appeal does not establish that the probate court filed an order barring Stewart Title Guaranty Company’s claim.

Stewart Title Guaranty Company filed but then withdrew a petition for leave to file a late claim, again for the funds not collected to satisfy the note and deed of trust.

Still in 2010, the probate court ordered that \$158,466.38 to satisfy a future judgment in the then-pending civil case be held in a blocked account. Except for the funds to be held in a blocked account, the probate court granted Borkowski's petition for final distribution of the estate.

In 2014, after final judgment in the civil case, Stewart Title Guaranty Company petitioned the probate court for distribution of funds from the blocked account. The probate court granted the petition, ordering that the funds held in the blocked account be released to Stewart Title Guaranty Company.

Borkowski appeals from the order authorizing distribution of funds from the blocked account. (Prob. Code, § 1300.)

C. *Civil Case (C075264)*

In 2010, Stewart Title Guaranty Company filed a complaint and later an amended complaint alleging six causes of action against Borkowski individually and as executor of the estate: (1) unjust enrichment, (2) conversion, (3) intentional misrepresentation, (4) negligent misrepresentation, (5) fraud and deceit, and (6) breach of contract.

Borkowski demurred to the complaint, but the demurrer was overruled.

Stewart Title Guaranty Company filed a motion for summary adjudication of issues as to the unjust enrichment cause of action. And Borkowski filed a motion for judgment on the pleadings. The trial court (Judge Shelleyanne W. L. Chang, presiding) granted Stewart Title Guaranty Company's motion for summary adjudication of issues as to the unjust enrichment cause of action and denied Borkowski's motion for judgment on the pleadings.

Stewart Title Guaranty Company filed a motion for summary adjudication of issues as to the breach of contract cause of action. And the trial court (Judge Raymond M. Cadei, presiding) granted the motion.

Stewart Title Guaranty Company voluntarily dismissed the causes of action other than unjust enrichment and breach of contract and moved for entry of judgment. The dismissal of those causes of action was done without prejudice.<sup>1</sup>

The trial court entered judgment in favor of Stewart Title Guaranty Company, awarding a total judgment of \$231,881.50, plus attorneys fees and costs according to proof, against Borkowski.

Borkowski appeals the final judgment. (Code Civ. Proc., § 904.1.)

In his opening brief covering both appeals, Borkowski, in his words, “concedes if a timely creditor’s claim had been filed by either the escrow company, Stewart Title of Sacramento, or its insurance company, Respondent Stewart Title Guaranty Company [], in the Estate of Elizabeth Borkowski, the claim would have been paid. [¶] Those aren’t the facts though.”

## DISCUSSION

### I

#### *Forfeited Issues*

In the “Statement of Facts” in his opening brief, Borkowski makes various statements about what he perceives to be errors or irregularities in the trial court proceedings. For example, he states: “The trial court’s Minute Order regarding [Stewart Title Guaranty Company’s] motion [for summary adjudication] reveals findings not supported by the record.” These statements are not included under a separate heading asserting error, nor are they supported by authority. The issues are therefore forfeited.

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<sup>1</sup> Even though the dismissal without prejudice does not finally adjudicate those causes of action, the dismissal of the causes of action without prejudice does not render the subsequent judgment unappealable because there was no stipulation to toll the statute of limitations or otherwise “assure[] the potential for future litigation of the dismissed claims.” (*Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1104-1105.)

“Each point in an appellate brief should appear under a separate heading, and we need not address contentions not properly briefed. [Citations.]” (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1345-1346 & fn. 17; see *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4 [“an argument raised in such perfunctory fashion is [forfeited]”]; Cal. Rules of Court, rule 8.204(a)(1)(B) [appellate brief must “[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority”].)

Consequently, we proceed directly to Borkowski’s assertions of error properly headed in the “Argument” portion of his opening brief.<sup>2</sup>

## II

### *Overruling of Demurrer*

Borkowski contends the trial court erred by overruling his demurrer to Stewart Title Guaranty Company’s complaint in the civil case because the statute of limitations had run on the claims in the complaint. Stewart Title Guaranty Company responds that an order overruling a demurrer is not an appealable order and, based on that assertion, apparently declines to make an argument on the merits. That is unfortunate because, while the overruling of a demurrer is not an appealable order, the order overruling the demurrer may be reviewed when an appeal is taken from a final judgment, as is the case here. (*Boy Scouts of America National Foundation v. Superior Court* (2012) 206

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<sup>2</sup> A contention defendant makes in the “Summary of Argument” is that the judges involved in the law and motion proceedings connected to the civil case did not understand that plaintiff Stewart Title Guaranty Company was the party that paid Borkowski out of the escrow account for the sale of the Buffwood Way property when, in reality, it was Stewart Title of Sacramento that handled the property sale and escrow account. This apparent claim of error appears without a separate heading and without authority supporting an argument that the possible misconception matters. Any claim of error is therefore forfeited.

Cal.App.4th 428, 438.) However, Stewart Title Guaranty Company's failure to address the issue is of no moment because Borkowski has failed to include the order overruling the demurrer in the record on appeal, thus forfeiting review of the order.

Borkowski faults the trial court for overruling his demurrer, yet he does not include the order overruling the demurrer in the record on appeal. Because of this failure in providing a record on appeal, we are not aware of why the court overruled the demurrer. The only order in the record pertaining to the demurrer proceedings is an order denying Borkowski's motion for reconsideration of the order overruling the demurrer. Borkowski included a reporter's transcript of the hearing on the demurrer, but not the order issued by the trial court. It appears from the court's statements that it gave its reasons for overruling the demurrer in its written ruling. At the end of the hearing, the trial court did not give its reasoning orally. Instead, it said, "The tentative ruling is affirmed." Because Borkowski has not provided that tentative ruling, we do not know what it entailed.

"The party seeking to challenge an order on appeal has the burden to provide an adequate record to assess error. [Citation.] Where the party fails to furnish an adequate record of the challenged proceedings, his claim on appeal must be resolved against him. [Citations.]" (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46.) Even though the overruling of a demurrer is reviewed de novo on appeal (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501), it would be unfair to the trial court and unjust to the opposing litigant to find error in the overruling of the demurrer without knowing the trial court's reasoning, which it apparently gave in the tentative ruling. (See *Ernst v. Searle* (1933) 218 Cal. 233, 240-241 [refusal, citing fairness to trial court and opposing litigant, to consider argument in analogous context of attempting to change theory on appeal].)

Borkowski's contention that the trial court erred in overruling his demurrer is forfeited.

### III

#### *Litigation Privilege*

Borkowski contends that his actions as executor of the estate were absolutely privileged under Civil Code section 47, subdivision (b), and, therefore, no liability can be based on those actions. He is wrong.

Civil Code section 47 defines “[a] privileged publication or broadcast,” in part, as one made in a “judicial proceeding.” (Subd. (b).) Borkowski focuses on the allegations of the complaint that: (1) he signed the “Seller’s Estimated Net Proceeds” and “Sale Escrow Instructions” and (2) he represented that there was no lien against the Buffwood Way property. He claims that, because these were privileged communicative acts undertaken in the context of the judicial probate proceedings, he cannot be held liable.

Borkowski raised the issue of the litigation privilege in opposition to each of the motions for summary adjudication, arguing that the privilege barred liability as to (1) the unjust enrichment cause of action and (2) the breach of contract cause of action. Each time, the argument was rejected by the trial court.

As to the unjust enrichment cause of action, the court held:

“With respect to Civil Code § 47(b), that statute is inapplicable here. It concerns a ‘privileged publication or broadcast.’ [Citation.] It has no application in an action for unjust enrichment. [Borkowski] cites no authority holding otherwise. Neither *Silberg v. Anderson* (1990) 50 Cal.3d 205 nor *Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, the only cases [Borkowski] cites, concerned unjust enrichment.”

As to the breach of contract cause of action, the court held:

“[Borkowski] contends that the judicial privilege applies because his actions were both as an attorney for the Estate and also the Executor of the Estate. [Borkowski] contends that his omission of the lien was done in his capacity as executor of the Estate and is absolutely privileged. [¶] [Borkowski’s] reliance on the judicial privilege is misplaced. Civ. Code §47(b) precludes liability for a ‘privileged publication or



broadcast.’ But, the breach of contract action does not appear to be based on any ‘publication or broadcast.’ Instead, the breach is based on [Borkowski’s] failure to repay [Stewart Title Guaranty Company].”

On appeal, Borkowski doubles down on his assertion that his liability in the civil case is based on his signing of the documents in the probate case. To the contrary, as the trial court explained, Borkowski’s liability for unjust enrichment and breach of contract was premised on his failure to satisfy the lien when he sold the Buffwood Way property. Proof of that fact did not rely on proof of any particular publication or broadcast on the part of Borkowski. In fact, the fraud and misrepresentation causes of action, which were predicated on his representations, were dismissed. Therefore, Borkowski’s contention that the litigation privilege precluded a finding that he was liable for his dealings in the probate case is without merit.

Later in his argument, Borkowski broadly asserts: “The actions of the executor fall within the litigation privilege.” He provides no authority to support this broad assertion. And we know of none. (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794 [legal proposition not supported by authority is forfeited].) To the contrary, the litigation privilege applies only to publications and broadcasts, not to all actions. The law allows actions against executors for malfeasance resulting in loss to third parties. (See *Luscomb v. Fintzelberg* (1912) 162 Cal. 433, 443 [personal representative liable for taking property not belonging to estate].) Indeed, immunizing an executor for all conduct in administering the probate estate would invite malfeasance.

#### IV

##### *Summary Adjudication of Breach of Contract and Unjust Enrichment*

Borkowski contends that the trial court erred by granting the motions for summary adjudication. In support of this contention, he presents an assortment of arguments, none of which has merit.

Borkowski claims that the trial court erred by considering hearsay statements. While he calls attention to several statements in Stewart Guaranty Title Company's filings and argues that those statements are hearsay, he provides no authority concerning hearsay and no argument concerning prejudice. Failure to provide authority for a legal proposition results in forfeiture of the contention. (*Amato v. Mercury Casualty Co.*, *supra*, 18 Cal.App.4th at p. 1794.) And failure to explain how the perceived error produced prejudice also forfeits the issue. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.) An appellant may not simply point out an error and obtain reversal without establishing prejudice. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

Borkowski claims that, in granting the motion for summary adjudication of issues with respect to the unjust enrichment cause of action, the court "was operating on a misunderstanding of the facts of the probate action." He lists several alleged misunderstandings: (1) Borkowski knew of the Wells Fargo lien when he sold the Buffwood Way property, (2) Stewart Title Guaranty Company, instead of Stewart Title of Sacramento, handled the escrow, and (3) the entire proceeds of the sale were distributed to Borkowski. Even assuming for the purpose of argument that the trial court misunderstood some of the facts, simply pointing out the misunderstanding is not sufficient to obtain reversal. On appeal after a trial court has granted summary adjudication of issues, the appellant must establish that the ruling was erroneous by presenting legal authority supporting the assertion of error and establishing prejudice. We presume the ruling was correct, regardless of how the trial court arrived at the ruling, and the appellant bears the burden of overcoming the presumption of correctness. (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649-650.) Here, Borkowski does not meet the burden because he merely points out what he perceives to be misunderstandings on the part of the trial court.

Borkowski also claims that the ruling on the motion for summary adjudication with respect to the breach of contract cause of action was defective. He asserts that Stewart Title Guaranty Company's motion "was intentionally misleading" and "omitt[ed] portions of [Borkowski's] declaration." He makes these accusations freely, yet he does not explain their legal significance. Therefore, the accusations are not sufficient to show error and prejudice. (*Boyle v. CertainTeed Corp.*, *supra*, 137 Cal.App.4th at pp. 649-650.) Finally, Borkowski claims that factual disputes remained, but he does not explain how those asserted disputes affect the result. Simply pointing out that alleged facts are in dispute is insufficient to obtain reversal after the trial court grants a motion for summary adjudication. The appellant must establish that the disputed facts were material, meaning they made a difference in the ultimate result. No amount of disputing the facts justifies a court's denial of a motion for summary adjudication if the factual matter does not affect the result. (*Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell* (1977) 70 Cal.App.3d 331, 338.)

#### DISPOSITION

The probate order and civil judgment are affirmed. Stewart Title Guaranty Company is awarded its costs on appeal. (California Rules of Court, rule 8.278(a).)

\_\_\_\_\_NICHOLSON\_\_\_\_\_, J.

We concur:

\_\_\_\_\_BLEASE\_\_\_\_\_, Acting P. J.

\_\_\_\_\_HOCH\_\_\_\_\_, J.