Filed 7/7/11

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RAJAT SAPRA et al.,

Plaintiffs and Appellants,

v.

BENJAMIN TARCHER et al.,

Defendants and Respondents.

A126662

(Alameda County
Super. Ct. No. RG07357589)

Appellants Rajat and Sandhya Sapra (the Sapras) contracted with defendant Syed Z. Bokhari (Syed Z.) to construct an addition to their home in Berkeley. Syed Z. hired respondents Benjamin Tarcher (Tarcher), an architect, and Babek Bakteghan (Bakteghan), a licensed electrical contractor, to perform services as part of the remodel. After construction was underway and the Sapras had paid Syed Z. $80,000, the City of Berkeley (the City) issued a stop work notice because Syed Z. had not obtained the required building permits. The Sapras then learned Syed Z. was not a licensed contractor, and fired him. Following a jury trial, they obtained a judgment against Syed Z. and his family members involved in the remodel. The jury found for Tarcher and Bakteghan on the Sapras' causes of action against them.

The Sapras appeal the judgment in favor of Tarcher and Bakteghan, claiming evidentiary and instructional errors. They also assert the court erred in sustaining Bakteghan's demurrer to their cause of action for conspiracy to violate the Contractors'

State License Law (CSLL).[1] We find no error, and affirm. We do not, however, find the appeal to be "frivolous" under the *Marriage of Flaherty*[2] standard, and deny Tarcher's and Bakteghan's motions for sanctions.

I. PROCEDURAL BACKGROUND

The Sapras filed this action arising out of their home remodeling project against Syed Z.[3] and his father Syed Aqueel Bokhari (Syed A.), brother Saim Bokhari (Saim) and Serlina Bokhari,[4] who were involved in a building company called Irahkob or Irahkob, Inc.[5] Following a jury trial, the Sapras obtained a judgment against the Bokhari defendants, jointly and severally, for $995,963.11. The jury also awarded $135,000 for trespass and $600,000 in punitive damages against both Syed Z. and Syed A., and $30,000 for trespass and punitive damages of $50,000 against Saim.[6] The Bokhari defendants have not appealed from the judgment.[7]

The Sapras also sued Bakteghan and Tarcher, asserting causes of action for negligence, trespass, fraud, conspiracy to defraud, conspiracy to violate the CSLL and, as to Tarcher, conversion of the architectural plans. The court granted Bakteghan's demurrer, without leave to amend, to the third cause of action alleging conspiracy to violate the CSLL. The jury found in favor of Bakteghan and Tarcher on the remaining causes of action against them. The Sapras filed a timely appeal from the judgment in favor of Bakteghan and Tarcher.

---

[1] Business and Professions Code section 7000 et seq. All further statutory references are to this code unless otherwise indicated.

[2] *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.

[3] We refer to certain individuals in this case by their first names for clarity. (See *In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 341, fn. 2.)

[4] Serlina Bokhari was dismissed from the action prior to trial.

[5] Though titled Irahkob, Inc., there is no evidence in the record it was incorporated, and appellants represent it was not. The remaining Bokhari defendants filed an answer to the first amended complaint.

[6] Neither Syed Z. nor Syed A. appeared at trial, and Saim, who was in propria persona, initially appeared but then "stopped coming" to trial.

[7] Writs of execution were returned unsatisfied as of December 2009.

II. FACTUAL BACKGROUND

We set forth only the facts relevant to the issues raised on appeal. In February 2007,[8] the Sapras entered into a written agreement with Syed Z. and Irahkob, Inc. for an addition to their home in Berkeley at a total cost of $85,000. Syed Z. told the Sapras he was a licensed contractor. The Sapras paid $10,000 at the time they signed the agreement, which was designated "for drawing, submittal and approval of the plans." The agreement provided in part: "The contractor shall furnish preliminary and final architectural plans for submittal to city of Berkeley for a second floor addition and a small addition in the rear of the existing property at 834 Page Street, Berkeley, CA. The contractor takes full responsibility for plan approval and plan submittal fees. The contractor will work with an architect of his choice and will work on a design mutually agreed between contractor and owner. . . . The work will be performed as it is approved by the city of Berkeley. The contractor agrees to furnish all materials and labor to finish this project. The contractor will perform all work according to California and Berkeley building code."

Rajat Sapra (Rajat) first learned who the architect was on April 16, when Syed Z. sent him an e-mail stating "Mr. Tarcher, architect, is diligently working on having the blueprints ready for submittal by the end of this month." On May 15, Rajat sent an e-mail to Syed Z. asking if the plans had been submitted to the City. Syed Z. responded by telephone that the plans had been submitted.

Over the next few months, Syed Z. made repeated requests for changes in the payment schedule, telling the Sapras he needed more money in advance. The Sapras agreed to this in order to expedite the construction. The Bokharis began work on the Sapras' home on July 9. By July 12, the Sapras had paid Syed Z. a total of $45,000 and by July 30, they had paid him $10,000 more. The only work completed at their home was some digging and "some flooring was taken out. . . ." Syed Z. complained it took too long for the Sapras' checks to clear, so on August 1, Rajat gave Syed Z. $10,000 in

[8] All dates noted in the opinion are in 2007, unless otherwise indicated.

cash, and on August 27, Rajat paid him $15,000 more in cash, bringing the total payments to $80,000.

On September 7, the City issued a stop work notice because there was no permit for the project. Syed Z. did not inform the Sapras of the stop work notice, nor did he obtain a permit. On October 10, the City issued a second stop work notice, indicating "[d]ouble fees will be assessed." The Sapras first learned about the stop work notice when they received a letter and notice from the City during the second week in October. They confronted Syed Z., who reassured the Sapras he was taking care of the permit issue. Sandhya Sapra (Sandhya) contacted the City and learned there was "not a scrap of paper on file" about their renovation.

Rajat then telephoned architect Tarcher, to whom he had never spoken, and asked for a copy of the plans. Tarcher told him he would drop them off at the house, but he did not. When Rajat called again, Tarcher said Syed Z. told him not to give the Sapras the plans. Rajat testified Tarcher told him Syed Z. was a licensed contractor, though Tarcher testified he advised Rajat to check online to see if he was licensed. Shortly after that, the Sapras learned Syed Z. was unlicensed. The Sapras fired the Bokharis around October 16.

On November 7, the Bokhari defendants showed up at the Sapras' home and told them they would countersue the Sapras if they took legal action rather than continue to work with them. Rajat responded he was now aware they had no contractor's license. The Bokharis persisted in stating they would not submit the plans to the City unless the Sapras agreed not to take legal action against them.

Bakteghan was a licensed electrical contractor and had worked on three other jobs for Syed Z. over a five-year period. Until the Sapras' lawsuit, he did not know Syed Z. was unlicensed. On the two larger jobs[9] for Syed Z., one of which was at 960 Jones Street in Berkeley, Bakteghan obtained electrical permits at Syed Z.'s request. Both jobs passed inspection.

---

[9] The smaller job only involved repairing a light.

When Bakteghan began working on the Sapra project, he asked Syed Z. about the permits "daily." Syed Z. "kept saying don't worry about it. I'm taking care of it," even though Bakteghan offered to get the permits himself. On September 7, 2007, Syed Z. told Bakteghan the project had been "red-tagged" and Bakteghan had to stop working on it. Bakteghan did so, though the electrical work was incomplete.

Bakteghan testified he did not work on the electrical panel at the Sapras' residence. He explained his practice in installing electrical wiring was to prepare a typed legend to be placed on the panel, indicating which switch corresponded to which circuit. He trained his employees to follow this practice, and believed they had done so at 960 Jones Street in Berkeley. He had not placed a legend on the panel at the Sapras' home because he had not completed the electrical wiring. Bakteghan's practice was to leave his electrical work uncovered until it was inspected. At the Sapras' home, some of his electrical work was covered without being inspected because the framers "needed to cover up some of the floor to build the walls. I told the framers to make sure to leave some of the boards unscrewed or unnailed so we can get to them."

Dale Roland Smith (Smith), an electrical contractor, testified as appellants' expert on the standard of care for electrical contractors in the San Francisco Bay Area. On June 10, 2009, almost two years after Bakteghan stopped work, Smith inspected the Sapras' home and took photographs. He testified the electrical power to the bedroom addition was energized and the wiring was hooked up to the circuit breakers, even though this was not supposed to be done until after the final inspection. Smith observed the electrical panel was not clearly labeled as to what each circuit breaker controlled. It was his expert opinion the wiring at the house would not pass inspection and was below the standard of care. Smith also opined no one other than Bakteghan or his crew did this electrical work. He testified each electrician has a "signature," leading him to believe the electrical work at the Sapras' home was all performed by the same person.

Tarcher testified he had never worked for Syed Z. and did not know the Sapras when Syed Z. contacted him about drafting building plans for the Sapras' remodeling project. Tarcher and Syed Z. executed an agreement providing Tarcher would prepare

"Construction Documents required for Permit Submittal only for remodel and addition of 834 Page Street, Berkeley," and would be paid $6,000. The agreement provided "Client understands and agrees that the Architect is not responsible for the means, methods or sequences of construction, job site safety, nor for the contractor's errors." It also provided "All drawings, plans and specifications, are the property of the Owner/Client but shall not be used for any other work without the Architect's written permission. Plans shall be made available to the owner for his use as required." Tarcher testified the word "Owner" in the contract meant "owner of the project and I was working for Mr. Bokhari." The Sapras were not identified in the contract.

Tarcher was angry when he learned Syed Z. had not applied for a permit. Syed Z. asked Tarcher to submit the application, which Tarcher did on October 10. Tarcher testified Rajat contacted him and asked for a copy of the plans. Tarcher refused to give them to Rajat after Syed Z. told him not to.

After the Sapras hired an attorney, the attorney contacted Tarcher to ask for the plans. Tarcher refused, and the attorney filed a complaint with the California Architecture Board. Tarcher then wrote a letter to the Sapras' attorney in which he demanded withdrawal of the complaint and advised the Sapras to continue working with the Bokharis, despite learning Syed Z. was unlicensed. Tarcher also called Rajat and advised him not to take legal action.

III. DISCUSSION

A. Bakteghan's Demurrer to Cause of Action for Conspiracy to Violate the CSLL

Appellants claim the court erred in sustaining Bakteghan's demurrer without leave to amend to their third cause of action for conspiracy to violate the CSLL. That cause of action alleged Bakteghan conspired with the Bokharis to violate section 7028, subdivision (a), which makes it a misdemeanor to act in the capacity of a contractor without a license.

Appellants allege they adequately pled a cause of action for conspiracy to violate the CSLL, not that the court erred in denying them leave to amend, making our standard

of review de novo. "Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal. [Citation.] Under both standards, the plaintiff bears the burden of demonstrating that the trial court erred. [Citation.] Appellate courts first review the complaint de novo to determine whether or not the plaintiff's complaint alleges facts sufficient to state a cause of action under any legal theory, [citation], or in other words, to determine whether or not the trial court erroneously sustained the demurrer as a matter of law." "Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879, fn. omitted; *id.* at pp. 879-880, fns. 9 & 10.)

In sustaining the demurrer, the trial court ruled "After being given several opportunities, Plaintiffs failed to allege a cognizable claim against Defendant. . . . Here, Plaintiffs appear to be alleging a claim of conspiracy to violate various Business & Professions Code sections[10] that do not provide Plaintiff with private causes of action or the facts alleged do not support a private cause of action as to this specific Defendant. The Court further notes that Plaintiffs still have not alleged that this Defendant owed any duty to Plaintiffs and that there can be no cause of action against a participant in the conspiracy if that person is not 'personally bound by the duty violated by the wrongdoing.' "

We thus turn to the necessary allegations for a claim of conspiracy.[11] "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who,

---

[10] Appellants cited the following Business and Professions Code sections in the third cause of action to support their allegation that Bakteghan had a duty not to "aid and abet" the Bokhari defendants in violating the CSLL: sections 5583, 5584, 7028.3, 7031, 7110, 7114, 7115, 7116, 7118, 7160, and 7161. None of those sections impose such a duty on Bakteghan.

[11] Appellants inexplicably claim Bakteghan "should not be permitted to reargue the conspiracy portion of his demurrer" because his demurrer to the fourth cause of action for conspiracy to defraud was overruled.

although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. . . . In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.)

"By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort—that he owes a duty to the plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI* (2002) 100 Cal.App.4th 1102, 1106.) Accordingly, a person who is not an employer cannot be liable for conspiracy to wrongfully discharge an employee (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 54-55), nor can a nonfiduciary be liable for conspiracy to breach a fiduciary duty. (*Everest Investors 8, supra,* at pp. 1107-1108.)

Appellants' claim founders on this duty requirement. Appellants assert "alleging violation of a statute . . . by the defendant" was sufficient to establish "a duty owing by Bakteghan to the Sapras." The statute they alleged was violated was the CSLL, "*specifically* Business and Professions Code [section] 7028 [subdivision] (a) which provides: [¶] It is a misdemeanor for any person to engage in the business or act in the capacity of a contractor within this state without having a license . . . ." (First italics added, second italics omitted.) Appellants did not allege Bakteghan violated this statute, however; they alleged the Bokhari defendants did. Nor could they allege Bakteghan violated the CSLL: he was a licensed electrical contractor since 1997.[12]

---

[12] A complaint may not be amended to allege facts known to be false. "A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint *or by suppressing facts which prove the pleaded facts false.*" (*Cantu v. Resolution Trust Corp., supra,* 4 Cal.App.4th at pp. 877-878, italics added.) At trial, there was no factual dispute that Bakteghan had no knowledge the Bokharis were unlicensed until the lawsuit was filed.

That the CSLL provides for a private cause of action under section 7160 likewise does not aid appellants. Section 7160 provides for a cause of action for fraud. "Any person who is induced to contract for a work of improvement . . . in reliance on false or fraudulent representations or false statements knowingly made, may sue or recover from such contractor or solicitor a penalty of five hundred dollars . . . in addition to any damages sustained by him by reason of such statements or representations . . . ." (§ 7160.)

The difficulty with appellants' argument is they were able to try their conspiracy to defraud claim by way of the fourth cause of action. The court overruled Bakteghan's demurrer to that cause of action, and that claim proceeded to trial where the jury found by special verdict Bakteghan (and Tarcher) did not "join in a conspiracy with Syed Z. Bokhari to defraud Rajat and Sandhya Sapra." The operative allegations of the fourth cause of action for conspiracy to defraud are now barred by collateral estoppel. (See *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797-798.) Appellants cannot resurrect the conspiracy to defraud cause of action they lost at trial by asserting their third cause of action for conspiracy to violate the CSLL was actually for conspiracy to defraud.

In sum, appellants' allegations fail as a matter of law to establish Bakteghan had a duty to the Sapras arising out of the Bokharis' violation of the CSLL. Accordingly, the court properly sustained the demurrer to this cause of action without leave to amend because Bakteghan could not legally conspire to breach a duty owed only by the Bokharis.

B. Claimed Instructional Errors

Appellants maintain the trial court erred in "refusing" to give negligence per se instructions based on their claim Tarcher and Bakteghan violated certain Berkeley Municipal Codes. They also argue the court erred in failing to give certain BAJI instructions regarding duties of an architect and conspiracy, and instead giving CACI No. 3600 regarding conspiracy.

Appellants filed a list of proposed jury instructions on August 7, 2009, which included CACI No. 418, entitled "Presumption of Negligence Per Se," as well as BAJI

Nos. 6.37, 6.37.3, 13.86, 13.87 and 13.89. On August 7, 2009, the parties met with the trial court in an unreported conference regarding the jury instructions. At the conclusion of that conference, the court stated "We've been meeting for about two hours. We met regarding the jury instructions. [¶] And at this time, I will let counsel put anything that they want to put on the record regarding objections to the Court rulings on this. . . . [T]he attorneys have been given direction regarding jury instructions that the Court believes are appropriate at this time." No objections were made on the record to any of the instructions. Appellants then filed an amended list of proposed jury instructions on August 12, 2009, which did not include CACI No. 418, nor did it include BAJI Nos. 6.37, 6.37.3, 13.86, 13.87 or 13.89, and they were not given as part of the final jury instructions.[13] Appellants specifically requested CACI No. 3600 regarding conspiracy, and the court gave that instruction.

Appellants now claim the court "refused" to give CACI No. 418 or the BAJI instructions. The record does not reflect the trial court "refused" those instructions. As previously indicated, there was a two-hour, off-the-record discussion among counsel and the court regarding jury instructions, after which counsel was specifically invited to make any objections to the instructions on the record. Appellants made no objections, and then submitted amended proposed jury instructions, which did not include CACI No. 418 or any negligence per se instructions, or the noted BAJI instructions. " 'An appellate court will ordinarily not consider procedural defects or erroneous rulings . . . where an objection could have been, but was not, presented to the lower court by some appropriate method.' " (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002, quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444.)

At oral argument, appellants' counsel asserted no objection in the trial court was necessary because Code of Civil Procedure section 647 preserved the issue. While the

---

[13] We granted appellants' motions to augment the record with the full text of the August 12, 2009, proposed jury instructions by order dated May 4, 2010, and further augment the record with the full text of the August 7, 2009, proposed jury instructions attached as Exhibit A to the declaration of Clifford Hirsch.

giving or refusing of a jury instruction is "deemed excepted to," (Code Civ. Proc., § 647) the record does not reflect the court "refused" any instructions. There was an off-the-record discussion of jury instructions with counsel, after which appellants submitted an amended request for instructions omitting the ones they now claim were "refused." Their failure to make any record as to the claimed refusal to instruct with CACI No. 418 or any of the BAJI instructions, even after the court specifically invited them to put any objections on the record, did not preserve the claim of error. (See *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200-1201 [" ' "All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent . . . ." ' " "We must therefore presume that what occurred at that [unreported] hearing supports the judgment."]; *Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148, 161.)

Appellants' counsel also claimed at oral argument that appellants' proposed instructions submitted on August 12, 2009, included negligence per se instructions. They did not. The August 7, 2009, proposed instructions included CACI No. 418, regarding negligence per se, but it was omitted from the August 12, 2009, amended proposed instructions. Instead, the August 12, 2009, proposed instructions included certain Berkeley Municipal Code sections regarding building permits and inspections, but without the context of any negligence per se instruction of any kind.

Finally, appellants assert the court erred by instructing the jury with CACI No. 3600 regarding conspiracy, an instruction they requested, claiming the BAJI instructions on conspiracy are more complete. " 'Under the doctrine of "invited error" a party cannot successfully take advantage of error committed by the court at his request . . . therefore, [a party] cannot attack a verdict resulting from an erroneous instruction which it prompted.' " (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 667, quoting *Jentick v. Pacific Gas & Electric Co.* (1941) 18 Cal.2d 117, 121.)

Accordingly, appellants' assertions of instructional error are meritless.

C. Bakteghan's and Tarcher's Receipt of Payment from an Unlicensed Contractor

Appellants assert error in the jury's failure to award them the amounts paid by Syed Z. to Bakteghan and Tarcher. They claim the public policy underlying the CSLL requires even licensed subcontractors and architects to disgorge any payments received from an unlicensed general contractor.

Appellants have failed to show they ever raised this issue in the trial court. They cite to no requested jury instruction in this regard, and no objection. Even had the issue been preserved, appellants concede the CSLL does not specifically provide for disgorgement of payments to a licensed contractor as opposed to an unlicensed contractor, but claim "the public policy is the same."

Section 7031 provides both that an unlicensed contractor may not sue for compensation for work performed, and that a person who utilizes the services of an unlicensed contractor may sue to recover all money paid him or her. The section provides in part: "no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required . . . ." (§ 7031, subd. (a).) It also provides "a person who utilizes the services of an unlicensed contractor may bring an action . . . to recover all compensation paid to the unlicensed contractor for performance of any act or contract." (*Id.*, subd. (b).)

Appellants do not dispute that the statute only provides for recovery of compensation from an unlicensed contractor, not from anyone else that contractor may have paid. And they cite no cases supporting their claim that a licensed subcontractor must disgorge payments if they were "passed through" an unlicensed contractor. Appellants acknowledge both cases they cite, *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988 and *Rushing v. Powell* (1976) 61 Cal.App.3d 597, involve the inapposite situations "where the unlicensed contractor who worked with the licensed contractor is suing to be paid."

Appellants nevertheless argue disgorgement would further the public policy underlying the CSLL. But this is an argument more appropriately made to the Legislature. " 'The determination of public policy of states resides, first, with the people as expressed in their Constitution and, second, with the representatives of the people—the state Legislature.' " (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777, fn. 53, quoting *Jensen v. Traders & General Ins. Co.* (1959) 52 Cal.2d 786, 794.) Accordingly, even if appellants had properly tendered and preserved the issue, we would decline to extend their recovery of payments made to an unlicensed contractor to include amounts paid to and received by licensed contractors not subject to the CSLL.

D. Limitation of Impeachment Testimony

Appellants claim the court erred in disallowing proposed testimony by Rajat they assert would have impeached Bakteghan's testimony that he "did not connect the main electric service panel to the new portion of the Sapras' home." They contend the testimony about whether or not Bakteghan connected the electrical work to the panel was relevant to their conspiracy to defraud cause of action. "Bakteghan testified he did not hook up the panel at the Sapras' home. . . . If he did, it tended to show he was involved in a conspiracy with the Bokharis because a licensed electrical contractor would not prematurely connect the service panel unless he knew there was not going to be an inspection. If Bakteghan knew there was not going to be an inspection it follows that is because he knew Bokhari was not going to obtain a permit and knew Bokhari was unlicensed." From this premise, appellants assert the proposed impeachment testimony that there was no typed legend on the electrical panel at 960 Jones Street was relevant as tending to show Bakteghan actually hooked up the Sapras' electrical panel even though there was no typed legend affixed.

Appellants' counsel asserted at oral argument that Rajat would have testified the markings on the electrical panels at his home and at 960 Jones were identical, thus impeaching Bakteghan's testimony. The record does not reflect, however, what Rajat's testimony would have been in this regard. There was an unreported sidebar conference, but no offer of proof on the record. For this reason alone we cannot conclude the trial

court abused its discretion. (Evid. Code, § 354, subd. (a); *Gutierrez v. Cassiar Mining Corp., supra*, 64 Cal.App.4th at p. 161 ["[Appellant's] failure to make an offer of proof or other proper record of [the proposed] testimony defeats the claim [that witness's testimony was improperly excluded].]")

In any case, after Bakteghan testified he neither connected the electrical panel at the Sapras' home nor made the markings on the panel, Rajat visited the residence at 960 Jones Street in Berkeley, one of the other projects on which Bakteghan performed electrical work for Syed Z., and took a photograph of the electrical box. That photograph is not part of the record. The Sapras' attorney then asked him "Was the way the panel was marked on your house over there consistent with the way the panel [¶] . . . [¶] was marked at 960 Jones Street?" Bakteghan's attorney objected, and the court declined to allow the evidence under Evidence Code section 352. In reviewing an evidentiary ruling made under Evidence Code section 352, the issue is not whether we would have made the same ruling, but whether the trial court abused its discretion. Even speculating as to what Rajat's testimony would have been, we cannot say the court abused its discretion in concluding the probative value of the evidence that Rajat saw an electrical panel without a typed legend at a different home on which Bakteghan worked years ago was simply too tenuous to be relevant, and would have likely led to jury confusion. (See *Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 420-421.)

E. Tarcher's Narrative Testimony

Appellants claim the court erred in allowing Tarcher, who was appearing in pro. per., to testify in narrative form. However, they have waived this issue on appeal by specifically acceding to the narrative testimony in the trial court: "Given the logistical difficulties of having a witness question himself, plaintiffs have no objection to the pro per witnesses presenting their testimony by spoken narrative as long as the testimony otherwise conforms to the rules of evidence." Furthermore, contrary to appellants' claim, the trial court may permit questions calling for a narrative answer if they "will promote the fact-finding function." (Simons, Cal. Evidence Manual (2011) § 3:35, p. 255.)

Accordingly, even if the issue had not been waived, the trial court did not abuse its discretion by allowing Tarcher to testify in narrative form.

F. Refusal to Allow Rebuttal Closing Argument

Appellants claim the court's refusal to allow their counsel to make a rebuttal closing argument was prejudicial error. They assert counsel learned for "the first time" he would not be permitted to rebut Tarcher's and Bakteghan's closing arguments after those arguments were made.

At the conclusion of Tarcher's closing argument, he stated "I rest, and I'm sure [appellants' counsel] will have plenty to say." The court indicated "There won't be time." Then, after the jury was dismissed for the day, appellants' counsel stated "Your honor, I'd like to respectfully object to the Court's ruling that limited me to 45 minutes of my closing argument, and included in that, which I was unaware of but apparently the Court included my rebuttal in that and I expected to be able to have the opportunity to do rebuttal and I was not able to do rebuttal and I think it may materially affect my case and as a result I want to make that objection for the record." The court responded "Okay. It's 10 to five. That's all I want to say."

Appellants assert they "had the right to open and close the argument [citation] and they were denied that right." Code of Civil Procedure section 607 provides in part: "When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs: [¶] . . . [¶] When the evidence is concluded . . . the plaintiff must commence and may conclude the argument." (Code Civ. Proc., § 607(7).) That section "has been interpreted to mean 'that the party upon whom the burden of proof rests has the right to open and close the argument subject to a reasonable discretion on the part of the court to regulate the time and manner of presenting the arguments.' " (*Orient Handel v. United States Fid. & Guar. Co.* (1987) 192 Cal.App.3d 684, 701, quoting *McCullough v. Langer* (1937) 23 Cal.App.2d 510, 524.) "[R]estricting the time for argument by counsel before the jury . . . is a matter resting within the sound discretion of the trial court." (*Bell v. Kelly* (1925) 73 Cal.App. 189, 191-192 [counsel limited to 35 minutes].)

Appellants claim their counsel was "not informed he had only forty-five minutes for closing argument." Counsel's objection in the trial court, however, acknowledged the 45-minute limit set on closing argument, but demonstrated an apparent misunderstanding that this limitation included rebuttal argument. Appellants do not contend the trial court lacked discretion to set a time limit on closing arguments. Nor do they assert the 45-minute time limit was unreasonable. The record demonstrates only that appellants' counsel used all of his allotted time for opening argument and claimed not to have understood the time limit also included any rebuttal.[14] Counsel conceded at oral argument he made no offer of proof in the trial court regarding what he would have said in rebuttal, but asserted the prejudice was "obvious." This is not sufficient to demonstrate either abuse of discretion by the trial court or prejudice to appellants. Having reviewed the record, we also conclude appellants' counsel had an adequate opportunity to argue the case. Accordingly, even if counsel could show any abuse of discretion, we would conclude it was not prejudicial.

G. Respondents' Motion for Sanctions

Tarcher and Bakteghan have filed a motion for sanctions, claiming the issues appellants have raised in their opening brief are frivolous and further complaining they failed to provide adequate citations to the record and supporting arguments in their opening and reply briefs.

"When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (Code Civ. Proc., § 907.) "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.] [¶] However, any definition must be read so as to avoid a serious chilling effect on the assertion of

---

[14] The court's comment that "It's 10 to five" does not, contrary to counsel's suggestion, demonstrate the decision to limit argument was solely because the hour was late rather than because counsel had used his allotted time.

litigants' rights on appeal. . . . An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions." (*In re Marriage of Flaherty, supra,* 31 Cal.3d at p. 650.)

Though we reject appellants' claims on appeal, we find no evidence of an improper motive in prosecuting this appeal. We also cannot say "any reasonable attorney would agree that the appeal is totally and completely without merit" such that it is frivolous and sanctionable. (*In re Marriage of Flaherty, supra,* 31 Cal.3d at p. 650.) Accordingly, we did not request opposition to the requests for sanctions, (see Cal. Rules of Court, rule 8.276) and now deny them.

III. DISPOSITION

The judgment is affirmed. The motions for sanctions are denied.

Banke, J.

We concur:

Marchiano, P. J.

Margulies, J.