Not Reported in Cal.Rptr.3d, 2007 WL 1733227 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1733227 (Cal.App. 2 Dist.))

Court of Appeal, Second District, California.
Estate of Mark E. Johansen, Deceased.
Adam Grey LECUYER, Plaintiff and Appellant,
v.
Steven JOHANSEN et al., Defendants and Respondents.

No. B189895.
(Los Angeles County Super. Ct. No. BP 081777).
June 18, 2007.

APPEAL from a Judgment and Order of the Superior Court of Los Angeles County. Mitchell L. Beckloff, Commissioner. Affirmed.
Dunn **Koes** and Pamela E. Dunn, Daniel J. **Koes**, and Mayo L. Makarczyk for Plaintiff and Appellant Adam Grey LeCuyer.

Law Offices of David Glubok and David Glubok for Defendant and Respondent Steven Johansen, Special Administrator of the Estate of Mark E. Johansen.

ZELON, J.

***1** Plaintiff Adam Grey LeCuyer (LeCuyer) appeals from a judgment enforcing a settlement agreement relating to the purchase of real property from the Estate of Mark Johansen (Estate) and the trial court's denial of his motion for new trial. LeCuyer contends that the trial court erred (1) in enforcing the settlement agreement based upon parol evidence and in finding his cashing of the settlement check constituted acceptance of the terms of the settlement agreement; (2) in awarding attorneys' fees to defendant; and (3) in failing to admit critical evidence in support of his new trial motion. Steven Johansen, the Special Administrator of the Estate, contends the appeal is frivolous and seeks sanctions and attorneys' fees on appeal. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. The Probate Proceedings.

On August 8, 2003, LeCuyer offered to purchase Mark Johansen's house located at 7242 Fountain Avenue in West Hollywood for $436,000. On August 21, 2003, the realtor informed LeCuyer that Mark Johansen had died intestate, and the house sale would need to be probated, which meant the sale could take in excess of a year. LeCuyer entered into an escrow to purchase a condominium in Los Angeles.

On August 28, 2003, Steven Johansen (Johansen), Mark Johansen's brother, called to inform LeCuyer that he was willing to sell the Fountain Avenue house to LeCuyer for $436,000, and told him to back out of the condominium escrow. Several days later, Johansen told LeCuyer he would be acting as the administrator of Mark Johansen's estate.

During September 2003, the parties entered into an agreement for the purchase and sale of the house. Johansen agreed to permit LeCuyer to occupy the premises prior to the close of escrow commencing October 1, 2003, and agreed to permit LeCuyer to store personal property at the house. Johansen also agreed if he could not deliver possession of the property by October 1, 2003, he would provide transport and safe storage for LeCuyer's possessions until such time as the property was rendered vacant and inhabitable. LeCuyer withdrew from the condominium sale.

At the time, some squatters were residing at the Fountain Avenue property. In October 2003, LeCuyer was unable to move into the house because the squatters refused to vacate. He sent Johansen copies of his storage bills, but Johansen re-

fused to pay them. In early December 2003, the squatters vacated the house, but not before they had taken all of the fixtures and a fountain.

In January 2004, LeCuyer's inspection of the house disclosed extensive termite damage and electrical and structural problems with the house. LeCuyer and Johansen agreed that LeCuyer would have his contractor prepare an estimate of the cost to repair the house. After Johansen received a copy of the inspection, he refused to acknowledge any problems existed with the house. Throughout February 2004 Johansen urged LeCuyer to complete the sale; however, in late February 2004, the Estate's attorney advised LeCuyer that the property had been appraised at $480,000, the probate court would not confirm a sale of the property for less than $432,000, and such sale would still be subject to overbid at the court hearing to confirm the sale. The Estate's attorney further told LeCuyer he had until March 8, 2004 to respond in writing.

***2** On February 24, 2004, LeCuyer commenced this action for specific performance and breach of contract. He also filed a lis pendens against the property.

On March 24, 2004, Johansen sent LeCuyer a "Notice to Buyer to Perform." On March 29, 2004, the Estate attorney advised LeCuyer that any contract for the sale of the property was considered cancelled because of LeCuyer's failure to abide by the contract; furthermore, the Estate intended to use the deposit to pay Johansen's attorneys' fees and other damages. Subsequently, Johansen sold the property at the court confirmation hearing to a third party for $581,000. Johansen told LeCuyer that he would "think about" returning LeCuyer's deposit.

In September 2004, the Estate's attorney advised LeCuyer that Johansen would be retaining the $40,000 deposit to compensate for mortgage payments, utilities, repairs, and attorneys' fees. Johansen took the position that LeCuyer had breached the parties' agreements regarding the sale by failing to waive the contingencies as set forth in the Notice to Perform dated March 25, 2004.

2. The Settlement and Proceedings to Enforce the Settlement.

Commencing in August 2004, the parties attempted to settle their dispute through their attorneys. The main discussion points of the settlement were the amount of settlement monies to be paid to LeCuyer and the scope of the release; LeCuyer would only agree to release his claims against the Estate, but would not release his claims against Johansen personally.

On February 22, 2005, LeCuyer personally sent Johansen an email containing a draft settlement agreement. The record does not contain a copy of the attachment, although it contains the email.

On February 25, 2005, LeCuyer's attorney wrote to Johansen's attorney and advised him that LeCuyer was "adamant" that any settlement was only with the Estate and the "release is written with that view in mind and is all he will agree to." Furthermore, because of increased attorneys' fees, LeCuyer was raising his settlement demand from $68,000 to $75,000.

On March 1, 2005, Johansen's counsel responded that "[a]s you well know, a full and complete release is an essential part of any settlement agreement. It was in this spirit and intent that Mr. Johansen agreed to settle this matter.... With this in mind, be advised that unless the settlement agreement contains a true release, that is full and complete release of ALL parties to this matter, including their representatives and attorneys, Mr. Johansen will not agree to sign it. Attached hereto is a settlement agreement that contains such a release."

The parties took over the negotiations and began to deal directly with each other. Johansen contends that on March 3, 2005, after speaking directly with LeCuyer, Johansen faxed him a settlement agreement, which LeCuyer signed and faxed back to Johansen. This typewritten agreement, later attached to Johansen's motion to enforce the settle-

ment, applied only to the Estate, although it contained several interlineated, handwritten terms initialed "SJ" that it applied to Steve Johansen individually as well as the Estate. Johansen, individually and on behalf of the Estate, and LeCuyer signed the settlement agreement. The agreement provided that LeCuyer would accept $68,000 in settlement of his claims against Johansen and the Estate; in exchange, LeCuyer would dismiss his complaint against the Estate and Steve Johansen with prejudice.

***3** LeCuyer negotiated the check, which bore the notation "settlement agreement and Release Case # BC 31293," after crossing out this notation, but refused to dismiss his complaint. LeCuyer denied signing the settlement agreement, and denied that he agreed to the interlineated changes.

On July 13, 2005, Johansen filed a motion to enforce the settlement agreement pursuant to Code of Civil Procedure section 664 .6. Johansen contended LeCuyer refused to dismiss his action, which had prevented the Estate from closing.

LeCuyer opposed the motion, contended that he did not sign the settlement agreement, nor did he consent to the handwritten changes to the settlement agreement. LeCuyer's attorney's declaration stated that during the period August 2005 through February 2005 the parties' attorneys exchanged draft agreements. Ultimately, the parties entered into a settlement agreement, but LeCuyer's counsel had no knowledge of the contents of the written agreement. On April 4, 2005, LeCuyer's counsel sent a letter to Johansen's counsel that he was no longer representing LeCuyer. At the time, LeCuyer's counsel believed there had been no meeting of the minds concerning the parties' agreement.

In a supplemental reply, Johansen argued that under Civil Code section 1526 and Commercial Code section 3311, LeCuyer's negotiation of the check constituted an accord and satisfaction. LeCuyer responded that because the check did not state "full payment," it did not create an accord and satisfaction; and in any event, under Civil Code section 1526, he could cash the check without binding himself to the settlement agreement. LeCuyer's supplemental declaration stated that he never entered into any settlement agreement, the check did not constitute such an agreement, and that he intended to amend his complaint to add a claim for fraud.

The court took the matter under submission after the November 1, 2005 hearing, [FN1] and issued a minute order in which it ruled that there was binding settlement between the parties because it found there was a meeting of the minds. The court found Exhibit 1 (which the court described as an email) established LeCuyer agreed to the terms expressed in the writing. Furthermore, the court found Johansen's testimony more credible, and that LeCuyer cashed the $68,000 in settlement of the claim because Johansen called LeCuyer when he sent the check and LeCuyer told him, "great, [I am] glad it is over and we will part friends." However, after the check was cashed LeCuyer called and told Johansen, "now we will talk about punitive damages. I am going to bury you."

> FN1. The parties waived a court reporter at the hearing. LeCuyer filed a motion in the trial court to proceed with a settled statement. After we ascertained no reporter had been present at the hearing, we denied LeCuyer's request to proceed with a settled statement, and LeCuyer took his motion pending in the trial court off calendar.

The court further found that there was an accord and satisfaction because the check was tendered in good faith and the payment was made in consideration of LeCuyer's acceptance of the settlement agreement, but that LeCuyer fraudulently struck the settlement language from the check. The court awarded Johansen's attorneys' fees. On December 7, 2005, judgment was entered in Johansen's favor.

3. LeCuyer's New Trial Motion.

Not Reported in Cal.Rptr.3d, 2007 WL 1733227 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1733227 (Cal.App. 2 Dist.))

*4 On December 19, 2005, LeCuyer moved for a new trial pursuant to Code of Civil Procedure section 657. He argued the trial court erred in failing to admit tape recordings of Johansen's voice mail messages; the court's factual findings and evidentiary rulings were erroneous; the court improperly ordered him to dismiss the action; newly discovered evidence concerning Johansen's insurance claim reflecting negatively on Johansen's credibility required a new evidentiary hearing; the award of attorneys' fees was excessively large; and insufficient evidence supported the court's factual findings because Johansen's testimony was not credible. LeCuyer's declaration attached his counsel's letter of February 25, 2005, advising Johansen that due to his increased attorneys' fees, LeCuyer was not willing to execute the latest version of the settlement agreement. LeCuyer denied executing the settlement agreement, and attached a declaration from a handwriting expert stating that LeCuyer's signature on the settlement agreement was not genuine. Further, LeCuyer crossed out the notation on the check stating it was in settlement of his claims.

LeCuyer requested a hearing on his new trial motion on February 3, 2006. On February 24, 2006, the trial court issued its ruling in which it stated that the new trial was denied by operation of law as it was untimely having been filed more than 60 days after entry of the Notice of Judgment filed December 7, 2005.

DISCUSSION

I. STANDARD OF REVIEW.

This record contains no reporter's transcript of the trial court's evidentiary hearing on the motion to enforce the settlement agreement. Although an abbreviated record is presumed to contain all matters material to deciding the issues raised on appeal, this presumption does not apply where there is no reporter's transcript. (Cal. Rules of Court, rule 8.163; *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154.) Thus, absent error appearing on the face of the record, we presume the unreported oral proceedings would establish the absence of error. (*Ehrler v. Ehrler, supra,* 126 Cal.App.3d at p. 154.) "The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) However, if the error is manifest from the clerk's transcript alone, we will not presume the error was cured by the proceedings not included in the record on appeal. (*Stauffacher v. Stauffacher* (1964) 227 Cal.App.2d 735, 737.)

II. NO ERROR APPEARS ON THE FACE OF THE RECORD.

Code of Civil Procedure, section 664.6 creates a summary procedure for enforcing settlements by converting them into judgments.[FN2] The agreement must have been made orally before the court, or in a writing signed by the parties. (Code Civ. Proc., § 664.6; [FN3] *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810.) Furthermore, there must actually be a meeting of the minds such that the parties have formed a contract capable of enforcement, and if the agreement is not made in court, there must also be a writing signed by the parties that contains the material terms of the agreement. (*Weddington Productions, Inc. v. Flick, supra,* 60 Cal.App.4th at pp. 810-811.) In ruling on a section 664.6 motion, the trial court sits as fact finder and may take evidence and adjudicate disputed facts. (*Fiore v. Alvord* (1985) 182 Cal.App.3d 561, 566; *Corkland v. Boscoe* (1984) 156 Cal.App.3d 989, 994.)

FN2. Code of Civil Procedure section 664.6 provides, "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."

FN3. All statutory references herein are to the Code of Civil Procedure unless otherwise noted.

*5 Ordinary principles of contract formation govern whether an enforceable settlement exists. There must be mutual consent. "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." (Civ.Code, § 1580.) We ascertain whether there has been mutual assent through objective criteria, "the test being what the outward manifestations of consent would lead a reasonable person to believe." (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942-943.) Where the existence of a contract is at issue and the evidence is conflicting, it is for the trier of fact to determine whether a contract existed. (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.)

Here, LeCuyer makes several arguments to support his contention the parties did not enter into the signed agreement. First, he contends that substantial evidence does not support the trial court's finding he consented to the interlineated terms of the settlement agreement because there were no facts before the court that LeCuyer ever received the pages with the interlineations; further, his negotiation of the check did not constitute a separate agreement to the interlineated terms because Johansen gave him no additional consideration for his individual release. Second, he contends the court violated the parol evidence rule by admitting the alleged oral agreement to release Steven Johansen individually because the agreement was integrated and this term directly contradicted the written agreement. Finally, he contends that his negotiation of the check did not constitute an accord and satisfaction under Commercial Code section 3311.

1. The Record Supports the Trial Court's Finding that LeCuyer Agreed to the Interlineated Terms in the Settlement Agreement.

LeCuyer points to three implied factual findings he contends are inconsistent with the trial court's conclusions: (1) Exhibit 1 did not establish he agreed to its terms; [FN4] (2) LeCuyer did not manifest his assent to the interlineated terms because they were not initialed by him, nor transmitted to him; and (3) the fax transmissions bear no evidence that LeCuyer sent the settlement agreement by fax to Johansen on March 3, 2005.

FN4. The trial exhibits were not lodged on appeal, and LeCuyer filed a motion to require Johansen to lodge Exhibit 1 with this court. We granted that motion, and Johansen lodged a copy of the settlement agreement he contends is Exhibit 1. Counsel's declaration accompanying the document states Exhibit 1 was first transmitted as an attachment to an email, printed out, and then signed by the parties; the original was sent to LeCuyer but not produced by him at the hearing to enforce the settlement. After the hearing, the clerk did not return Exhibit 1 to Johansen's counsel, although it is the clerk's custom and practice that counsel for moving party would take possession of the exhibits after the hearing. After Johansen lodged the exhibit with this court, LeCuyer moved to strike it and requested sanctions for Johansen's failure to maintain the exhibit, and also argued that the true Exhibit 1 is the February 22, 2005 email he sent to Johansen, not the signed settlement agreement lodged with this court as Exhibit 1. Johansen's opposition stated that counsel customarily makes copies of exhibits submitted to the court at evidentiary hearings, and counsel attached what he avers is a copy of LeCuyer's February 22, 2005 email and an unsigned settlement agreement. LeCuyer's reply states that Johansen's attachment not a part of the record on appeal, and is different from the February 22, 2005 email LeCuyer relied on at trial. We deny LeCuyer's motions to strike and for sanctions. On the record before us, we cannot determine what was actually presented to the trial court; furthermore, it is not this court's function to make a determination when appellant has failed to meet his burden to provide a sufficient basis to rule.

Here, the record discloses no error. The trial court specifically relied on its assessment that Johansen's testimony at the hearing the parties entered into the agreement (presented to this court as Exhibit 1) was credible evidence that LeCuyer had agreed to the interlineated terms; LeCuyer's negotiation of the settlement check was additional evidence upon which the court relied to reach this conclusion. The fact this evidence may support contradictory inferences does not require reversal because the trial court, sitting as factfinder, could credit or disregard evidence as it saw fit.

Furthermore, the parties' dispute that the Exhibit 1 lodged with this court is in fact the exhibit relied upon by the trial court in reaching its conclusions does not change our conclusion, because the burden is on the appellant to demonstrate error. Without a settled statement, which would have included a description of the exhibit and enabled us to ascertain whether the trial court relied upon a different settlement agreement in making its factual findings, we cannot ascertain if LeCuyer's contentions in that regard are correct, and even if so, whether they would compel reversal of the judgment.

2. The Trial Court Properly Admitted Parol Evidence to Establish Whether the Writing Was in Fact the Settlement Agreement of the Parties.

***6** The parol evidence rule prohibits the introduction of extrinsic evidence to vary or contradict the terms of an integrated writing. (Civ.Code, § 1856.) The rule is based upon the rationale that the written instrument embodies the agreement of the parties. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 22-23.) However, the rule does not preclude the admission of extrinsic evidence offered to prove the written instrument is invalid or unenforceable. (Code Civ. Proc., § 1856, subd. (f) ["Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue"]; see also *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 42.)

We find the trial court properly admitted extrinsic evidence of the parties' conduct to determine whether the settlement agreement was a valid contract. Therefore, such evidence was not, as LeCuyer argues, admitted to vary or contradict the terms of the writing. Given that the signed written settlement agreement was regular on its face and bore no indication that it was not the agreement of the parties, or was invalid or otherwise unenforceable, parol evidence was essential to *LeCuyer's* attempt to establish he did not sign the agreement or agree to the additional release terms.

3. There Was an Accord and Satisfaction Under Commercial Code Section 3311.

We find there was an accord and satisfaction and LeCuyer's attempt to avoid it by striking the settlement language from the check is ineffective. Commercial Code section 3311 provides that good faith tender of an instrument in full satisfaction of an unliquidated claim operates to discharge the obligation if the instrument contains a conspicuous statement to the effect that the instrument is tendered in full satisfaction of the claim. (Comm.Code, § 3311, subds.(a), (b).) On the other hand, Civil Code section 1526 provides that the creditor may opt out of the accord and satisfaction by striking out the settlement language. However, we find persuasive the analysis of two courts that the later-enacted Commercial Code provisions that do not permit such opt-out supersede the conflicting provisions of Civil Code section 1526. (*Woolridge v. J.F.L. Electric* (2002) 96 Cal.App.4th Supp. 52, 60; see also *Directors Guild of America v. Harmony Pictures, Inc.* (C.D.Cal.1998) 32 F.Supp.2d 1184, 1192.) As noted in *Woolridge, supra,* 96 Cal.App.4th Supp. at p. 60, "[t]he weight of the commentary reaches the same conclusion as the court in *Directors Guild,* namely, that the two statutes cannot be harmonized, and therefore, California Uniform Commercial Code section 3311, having been enacted most recently, controls." [FN5]

FN5. Because we uphold the trial court's conclusion the settlement agreement was a valid contract between the parties, we ne-

Not Reported in Cal.Rptr.3d, 2007 WL 1733227 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1733227 (Cal.App. 2 Dist.))

cessarily reject LeCuyer's argument, based upon his contention no agreement existed, that the award of attorneys' fees was incorrect.

III. THE TRIAL COURT DID NOT ERR IN DENYING LECUYER'S NEW TRIAL MOTION.

LeCuyer contends the trial court erred by denying his unopposed motion for new trial. He contends the trial court's erroneous evidentiary rulings and his newly-discovered evidence require reversal. (§ 657, subds.(1), (4)).) [FN6] Further, he contends the court erred in failing to hold a hearing on his motion.

FN6. LeCuyer also cites to Code of Civil Procedure section 657, subdivisions (6) [decision against law] and (7) [error in law], but makes no specific argument in support of new trial on those grounds.

*7 Because the trial court failed to rule on the new trial motion within 60 days, it was denied by operation of law. (§ 660.) The denial of a new trial motion by operation of law is reviewable on appeal from the judgment, and we review the denial as if the trial court had expressly denied the motion. (*Evarts v. Jones* (1959) 170 Cal.App.2d 197, 207; *In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 152.) Where the court has denied the motion, we examine the entire record and make an independent assessment of whether there were grounds for granting the motion. (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)

1. LeCuyer Has Not Established the "Newly Discovered Evidence" Could Not be Produced Earlier Through the Exercise of Reasonable Diligence.

Code of Civil Procedure section 657, subdivision (4) authorizes a grant of a new trial where the party has newly discovered evidence, material for the party making the application, that could not, with reasonable diligence, have been discovered and produced at the trial. (§ 657, subd. (4); *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161.) The party must show that the evidence is newly-discovered, and if so, that the evidence is material and reasonable diligence was exercised in its procurement. (*Ibid.*) In establishing diligence, "a general averment of diligence is insufficient. The moving party must state the particular acts or circumstances which establish diligence." (*In re Marriage of Liu, supra,* 197 Cal.App.3d at p. 154.)

Here, LeCuyer submitted a declaration of a handwriting expert to establish that his signature on the settlement agreement was not genuine. However, he fails to show diligence or why the evidence could not have been produced earlier. Other than his contention that because he was in pro per, it did not occur to him to hire an expert, LeCuyer offers no explanation why this declaration, which relates to the hotly-contested issue of whether he consented to the written agreement before the court, was not presented at the time of the hearing on the motion to enforce the settlement agreement. Therefore, grant of new trial on this ground would have been properly denied.

2. The Trial Court's Evidentiary Rulings Do Not Require Reversal.

LeCuyer contends the trial court's admission of Exhibit 1 was in error. He contends the exhibit was irrelevant because prior to the purported execution of the settlement agreement on March 3, 2005, LeCuyer informed Johansen that he was revoking his acceptance of the settlement offer. LeCuyer also contends the court's refusal to admit tape-recordings of Johansen's phone messages to establish Johansen was not a credible witness was error.

Code of Civil Procedure section 657, subdivision (1) provides for a grant of new trial where the party shows "any order of the court or abuse of discretion by which either party was prevented from having a fair trial." However, the movant must establish prejudice from the purportedly erroneous evidentiary ruling. (*Townsend v. Gonzalez* (1957) 150 Cal.App.2d 241, 249-250.)

Not Reported in Cal.Rptr.3d, 2007 WL 1733227 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1733227 (Cal.App. 2 Dist.))

*8 Here, LeCuyer contends the settlement agreement was irrelevant to the question of whether he agreed to the terms of the draft settlement agreement, and the exclusion of the phone messages was prejudicial because they were necessary to establish Johansen's lack of credibility. Aside from the fact we have no record upon which to review whether LeCuyer made appropriate objections in the trial court. we find these contentions without merit. (Evid.Code, § 353.) The document presented to this court as Exhibit 1, if in fact it is the Exhibit 1 relied upon by the trial court, was relevant to the issue of whether the parties entered into a settlement agreement, and the terms of any purported agreement. [FN7] (Evid.Code, § 351.) LeCuyer's declaration in support of the new trial motion states the trial court excluded the tape recordings on the grounds they were illegally obtained. We do not know the basis of the trial court's ruling, but we do not presume error. Further, the record demonstrates there was no prejudice in their exclusion, as LeCuyer had an opportunity to testify at trial to rebut Johansen's testimony concerning the parties' discussions and negotiations surrounding the execution of the settlement agreement. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

FN7. As discussed supra, due to the deficiency in the record resulting from the lack of a reporter's transcript, we cannot determine what was actually admitted as Exhibit 1.

IV. RESPONDENT'S REQUESTS FOR SANCTIONS AND ATTORNEYS' FEES ARE DENIED.

In his respondent's brief, Johansen requests sanctions, contending LeCuyer's appeal is frivolous. Johansen argues any reasonable attorney would agree LeCuyer's arguments are completely without merit, and the lack of an appellate record for meaningful review supports a finding the appeal is frivolous or undertaken for the purpose of delay. Further, Johansen requests attorneys' fees on ap- peal.

We deny these requests. A request for sanctions in the appellate court must be made by separate, formal motion. (Cal. Rules of Court, rule 8.54; *Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402.) Furthermore, because Johansen advances no argument or analysis in support of his request for attorneys' fees on appeal, we deny his request. (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 458.)

DISPOSITION

The judgment and order of the superior court are affirmed. Respondent is to recover his costs on appeal.

We concur: JOHNSON, Acting P.J., and WOODS, J.

Cal.App. 2 Dist.,2007.
Lecuyer v. Johansen
Not Reported in Cal.Rptr.3d, 2007 WL 1733227 (Cal.App. 2 Dist.)

END OF DOCUMENT