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NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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S T A T E

Appeal—Premature Appeal— Dismissal

Good v. Miller, 214 Cal.App.4th 472, 153 Cal.Rptr.3d 848 (2013), shows that there is a limit to the court of appeal's patience when parties fail to follow the rules and the code. In this case, the trial court granted a motion for terminating sanctions, a nonappealable order. The plaintiff appealed from this nonappealable order and later, a judgment was entered. Plaintiff never appealed from the judgment even after defendant's appellate mediation statement (filed within the time plaintiff could still have appealed) pointed out that plaintiff appealed from a nonappealable order. It gets worse. Once the case got to the briefing stage, defendant's opening argument in its respondent's brief was that plaintiff's appeal should be dismissed as having been taken from a nonappealable order. Plaintiff failed to respond in the reply brief. The court of appeal dismissed the appeal. First, the court explained that this premature appeal fell within that part of rule 8.104 that gives the court of appeal discretion to save a premature appeal—but does not require it to do so—because the mandatory subdivision applies only the appeal is filed after a judgment is rendered, but before it is entered. Here, no judgment had been rendered when plaintiff filed its notice of appeal. The court declined to exercise its discretion to save the appeal for three reasons: (i) plaintiff never asked the court to do so; (ii) plaintiff ignored the appealability issue even after defendant raised it; and (iii) plaintiff misstated the facts

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in the “appealability” section of his brief.

**Business Organizations—
Dissolution and Survival**

In *Greb v. Diamond Intern. Corp.*, 56 Cal.4th 243, 153 Cal.Rptr.3d 198, (2013), the California Supreme Court held that California’s corporate survival statute does not apply to corporations formed in states other than California. The case arose out of the plaintiffs’ personal injury suit—alleging exposure to asbestos—against Diamond International Corporation, a Delaware corporation. Although Diamond had been dissolved for many years, plaintiffs sought recovery from Diamond’s unexhausted liability insurance coverage. Delaware, however, has a three-year survival statute, which precludes suit against a dissolved corporation after three years. By contrast, California’s survival statute “sets no time limitation for suing a dissolved corporation for injuries arising from its predissolution conduct; the sole temporal limitation to such a suit is found in the applicable statute of limitations relating to each cause of action.” Analyzing the legislative history, as well as the statutory structure, the Supreme Court concluded that “the history and language of the statutes simply do not support the proposition that [California’s survival statute], at its inception or today, governed or governs foreign in addition to domestic corporations.” The court, therefore, held that the trial court had properly sustained Diamond’s demurrer to plaintiff’s complaint.

**Business Organizations—
Suspension—Retroactive
Revival**

A notice of appeal filed while a corporation’s powers are suspended for not paying taxes may be deemed valid if the corporation revives its powers before the appeal is concluded, even if the revival occurs after the time to file a notice of appeal has expired. In other words, the revival retroactively validates the notice of appeal. *Bouris v. Lord*, 56 Cal.4th 320, 153 Cal.Rptr.3d 510 (2013).

**Judges—Peremptory
Challenges—Master Calendar
Rule—Timeliness**

Under the “master calendar” rule, when a judge is supervising a master calendar and assigns a case out for trial, any party wishing to exercise a peremptory challenge must do so then and there for the challenge to be timely. In *Entente Design, Inc. v. Superior Court*, 214 Cal.App.4th 385, __ Cal.Rptr.3d __ (2013), the parties were assigned to an independent calendar judge. When the case came on for trial the judge informed the parties he was tied up on other matters and sent them to

a different department for trial that ultimately was to start two days later. Upon arrival in the department, the defense filed a peremptory challenge to the newly-assigned judge. Invoking the master calendar rule, the judge ruled that the challenge was too late. The court of appeal vacated that ruling. It explained that (i) the parties had no advance notice that the first judge was acting as a master calendar judge—assuming he was; and (ii) since the second judge could not have started the trial immediately, but had postponed the start for two days, the justification for the master calendar rule did not apply.

Litigation—Expert Testimony—
Trial Court’s Role as
“Gatekeeper”

In *Sargon Enterprises, Inc. v. University of Southern California*, 149 Cal.Rptr.3d 614, 55 Cal.4th 747 (2012), the California Supreme Court recently held that the trial court must “act[] as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative.” The Second District’s decision in *Garrett v. Howmedica Osteonics Corporation*, 214 Cal.App.4th 173, 153 Cal.Rptr.3d 693 (2013), is one of the first court of appeal decisions to apply the *Sargon* decision and shows some possible limits to its principles. *Garrett* involved a plaintiff’s product liability claim alleging a defect in a prosthetic device. When the defendants moved for summary judgment, plaintiff filed a declaration by a metallurgist expert, stating that he had determined through destructive testing that the metal portion of the prosthesis that fractured was softer than the minimum standards and that that anomaly, among others, caused the prosthesis to fail. The trial court excluded that testimony, granted defendants summary judgment, and plaintiff appealed. On appeal, the defendants argued that, under *Sargon*, “a trial court is required to scrutinize the reasons for an expert’s opinion and must determine whether the analytical gap between the data and the opinion is too great.” Defendants further argued that the plaintiff’s expert’s testimony could not meet that standard because it was lacking sufficient information to perform the required analysis, including information about the specific tests performed and the particular results of those tests. The court of appeal

disagreed, holding that “a reasoned explanation required in an expert declaration filed in opposition to a summary judgment motion need not be as detailed or extensive as that required in expert testimony presented in support of a summary judgment motion or at trial.” The court concluded that “[w]hatever shortcomings that cross-examination may or may not reveal in [the expert’s] testing methods and opinion, we believe that the absence of more specific information as to the testing methods used and the results obtained would not provide any grounds for the trial court to conclude that there was no reasonable basis for [the expert’s] opinion.”

Litigation—Interest on Postjudgment Cost Awards

Generally, when a judgment provides that one party is entitled to prejudgment costs or attorneys’ fees, the amount of those costs is added to the judgment and interest on those costs begins to accrue from entry of the judgment, even if the amount was determined at a later time. But does the same rule apply to an award for costs and fees incurred *postjudgment*? In *Lucky United Properties Investments, Inc. v. Lee*, 213 Cal.App.4th 635, 152 Cal.Rptr.3d 641 (2013), the court of appeal held that “interest on awards of fees and costs incurred postjudgment starts to accrue on the date of entry of the awards themselves.” The court based its holding on the rationale that interest begins to accrue at the time a party’s liability becomes certain. “This principle—that interest starts to accrue on the date that the amount owed has been fixed or can be determined with certainty—is consistent with a rule that allows interest to accrue on a cost or fee award when the award is entered, rather than from entry of the original judgment, when the amount of the awards was not merely unknown, but the postjudgment costs and fees had not even been incurred.” This is true even though such costs may be incorporated into the underlying judgment for enforcement purposes.