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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

Commercial Law—Contracts—
Statute of Limitations—
Contractual Modification

Under the delayed discovery rule, a cause of action accrues when the plaintiff either actually discovers his injury and its cause, or could have discovered the injury and cause through the exercise of reasonable diligence. May parties abrogate this discovery rule by contract and provide for a different accrual date? That was the issue in *Brisbane Lodging, L.P. v. Webcor Builders, Inc.*, 216 Cal.App.4th 1249, 157 Cal.Rptr.3d 467 (2013), which involved an action on a latent construction defect. The parties' contract provided that all causes of action relating to the contract work would accrue from the date of substantial completion of the project. The trial court upheld this provision and granted summary judgment to the defendant on the ground that plaintiff's claim was untimely, although that claim would have been timely had the court applied the discovery rule. Recognizing this as a question of first impression the court of appeal held that "public policy principles applicable to the freedom to contract afford sophisticated contracting parties the right to abrogate the delayed discovery rule by agreement."

Legal Services—Conflict of
Interest

The court of appeal's decision in *Havasu Lakeshore Investments, LLC v. Fleming*, 217 Cal.App.4th 770, 158 Cal.Rptr.3d 311 (2013), holds that in the circumstances present there, a lawyer could ethically represent an LLC and its management against a nonmanaging minority member. There, the minority member sought to

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disqualify counsel on the theory that counsel was in possession of confidential information of the minority member. The trial court, however, disqualified counsel on the theory that joint representation of the company and management violated the duty of loyalty because of a potential conflict of interest between them. The court of appeal reversed that disqualification order on the ground that “no actual conflict of interest existed between the company and the individual who managed the company’s managing member, and there was no reasonable likelihood such a conflict would arise” The court analyzed the claims asserted and concluded that the interests of joint clients “are clearly allied” because the suit sought “to recover the LLC’s property and to restore value to the LLC.” The court distinguished cases in which a member brings a derivative suit, attempts to force dissolution, or alleges mismanagement of the LLC. In those cases, the interests of the company and its members diverge and disqualification of joint counsel may be required. But, absent an actual conflict or a reasonable likelihood of a conflict arising—something more than “a mere *hypothetical* conflict”—joint representation is ethically permitted.

Litigation—Attorneys’ Fees—
Prevailing Party

Maynard v. BTI Group, Inc., 216 Cal.App.4th 984, 157 Cal.Rptr.3d 148, is another opinion on the recurring theme of identifying the prevailing party for attorneys’ fees purposes. The court held that even though the defendant prevailed on the contract, it was liable for plaintiff’s attorneys’ fees because plaintiff had recovered on a negligence theory. The court explained that the language of attorney fee provision was broad enough to encompass both contractual and noncontractual theories and therefore the plaintiff was the prevailing party. The lesson is that if the parties intend to limit a fee provision to contractual remedies, it needs to be written narrowly.

Litigation—Costs —Multiple
Offers to Compromise

Where a plaintiff makes multiple offers of compromise under section 998, does the current offer extinguish the first such that the plaintiff is not entitled to recover costs that are incurred during the period between the two offers, even though the defendant failed to obtain a judgment more favorable than either offer? That was the question the Supreme Court addressed in *Martinez v.*

Brownco Const. Co., Inc., 56 Cal.4th 1014, 157 Cal.Rptr.3d 558 (2013). There, a husband and wife sued Brownco and made two settlement offers under section 998, with the second offer seeking a lower amount for each plaintiff. Ultimately, plaintiffs prevailed at trial; defendant did not do better at trial than either of the wife's offers. When the wife sought expert fees incurred after the first offer, but before the second, defendant argued that under general contract principles, the wife's second offer extinguished her first offer. The Supreme Court rejected this argument, holding that where "the defendant failed to obtain a judgment more favorable than either" of multiple offers, "section 998's policy of encouraging settlements is better served by *not* applying the general contract principle that a subsequent offer entirely extinguished a prior offer." The court reasoned that "parties should not be penalized for making more than one reasonable settlement offer. Nor should parties be rewarded for rejecting multiple offers where each proves more favorable than the result obtained at trial."

Litigation—Cost Bill—Timing—
Extension under CCP 1013

When a party serves notice of entry of judgment—in this case a judgment of dismissal—by mail, the 15-day period to file and serve a cost bill is extended for 5 days under the terms of Code of Civil Procedure section 1013. That was the holding of *Nevis Homes, LLC v. CW Roofing, Inc.*, 216 Cal.App.4th 353, 156 Cal.Rptr.3d 883 (2013), a case of apparent first impression.

Litigation—Experts—
Confidential Information and
Disqualification

In what on the surface seems to be a surprising result, the court of appeal has held that in a second trial arising out of the same dispute, an expert may switch sides and testify for the party who was on the opposite side in the first trial. In *DeLuca v. State Fish Co., Inc.*, 217 Cal.App.4th 671, 158 Cal.Rptr.3d 761 (2013), the parties disputed ownership a building used by a fish processing plant. In the first trial, the expert testified for defendant company concerning the importance of the plant to the company, the expense and disruption of building a new one, and the rental value of the disputed plant. The trial court found that the company owned the building because the other party, DeLuca, violated the corporate opportunity doctrine. The court of appeal reversed, and in the second trial, the rental value was relevant, with

DeLuca now in the role of landlord. DeLuca hired the company's expert to testify as to rental value. The trial court then disqualified DeLuca's attorneys, but the court of appeal reversed. It held that the company had not met its burden of showing that the expert had confidential information pertaining to the dispute. The court explained that "[a]s a general rule, neither the attorney-client privilege nor the work product protection will prevent disclosure of statements to, or reports from, a *testifying* expert." Because a testifying expert's opinions "are no longer subject to the attorney-client privilege or work-product protection—particularly when, as in this case, the expert has already testified—the expert is not in possession of any confidential information and there is therefore no reason that opposing counsel cannot retain the expert." There is no unfairness in such a result because any party can keep confidential information and work product conveyed to a consulting expert protected "by the simple expedient of not designating the expert as a testifying expert."

Litigation—Judgment—
Enforcement Pending Appeal

Often, a judgment creditor will begin to enforce a money judgment before the judgment debtor has an opportunity to stay enforcement by filing a notice of appeal and an appeal bond. Once the judgment debtor files the necessary appeal bond, however, the Code of Civil Procedure provides that any existing liens are extinguished as a matter of law (§ 697.040) and any property held by a levying officer subject to the lien "shall be released" to the judgment debtor (§ 697.050). But what happens if the sheriff erroneously releases the levied funds to the judgment creditor? That was the question addressed in *Adir International, LLC v. Superior Court*, 157 Cal.Rptr.3d 362, 216 Cal.App.4th 996 (2013), which held that the trial court does not have authority to "order a judgment creditor to return to a judgment debtor funds which have already been disbursed to the creditor by the levying officer." The court of appeal recognized that before disbursement "had the debtor sought an order staying further enforcement of the judgment and directing the sheriff to release the levied funds to the debtor, the court would have been required to issue it." The court held, however, that "there is no statutory authority for the proposition that property

disbursed to a creditor after a lien has been extinguished can be ordered to be returned.” Thus, once the property was disbursed, “the court had no authority to order the funds returned to it.” The lesson is that a judgment debtor should seek court intervention and not rely on a sheriff to return property that has been levied based on a judgment that is stayed pending appeal.

Litigation—Deposition Transcripts—Cost

A party who is added late to pending litigation is entitled to obtain copies of previously-taken depositions. But what if the party thinks the court reporter is charging too much? The party’s remedy is to seek relief from the court in the pending action. In *Las Canoas Co. v. Kramer*, 216 Cal.App.4th 96, 156 Cal.Rptr.3d 561 (2013), the court held that a party who did not do so, but instead filed a separate action after the litigation concluded, was not entitled to challenge the fees.

Litigation—Postsettlement Attorneys’ Fees and Costs

The decision in *Khavarian Enterprises, Inc. v. Commline, Inc.*, 216 Cal.App.4th 310, 156 Cal.Rptr.3d 657, (2013), includes two important holdings relating to post-settlement attorney fees and cost awards. First, Civil Code section 1717’s language that where an action has been voluntarily dismissed pursuant to settlement of the case, “there shall be no prevailing party for purposes of this section” does not preclude the court from awarding attorneys’ fees based on noncontract causes of action. Thus, parties settling noncontract claims are “legally permitted to include in their settlement agreement the provision that [one side] could apply to the trial court for an award of attorney fees after voluntarily entering a dismissal of its claims.” Second, Civil Code section 3426.4 provides that in an action for misappropriation, a trial court may award attorney fees and costs if “willful and malicious misappropriation exists.” The court of appeal held that it was proper for settling parties to “ask a trial court to act as fact-finder postsettlement and decide whether defendants engaged in willful and malicious misappropriation of trade secrets.” Where the settlement agreement in a misappropriation case specifically contemplates that the plaintiff will file a motion for attorney fees and costs, the trial court should “receive documentary evidence as well as declarations and/or oral testimony in order to determine whether [the plaintiff] was the prevailing party and, if so, whether the willful

Real Property—Landlord and
Tenant

and malicious misappropriation existed.”

In *Riverisland Cold Storage, Inc. v. Fresno Madera Production Credit Assn.*, 55 Cal.4th 1169 (2013), the Supreme Court overruled longstanding precedent and held that parol evidence contradicting the terms of a written contract is admissible to prove fraud. More recently, the court of appeal in *Julius Castle Restaurant Inc. v. Payne*, 216 Cal.App.4th 1423, 157 Cal.Rptr.3d 839 (2013), considered whether the *Riverisland* decision was limited to contracts of adhesion, or whether it also allowed parol evidence to prove fraud when the written contract was entered into by sophisticated parties after extensive negotiations. The court of appeal held that the *Riverisland* decision “did not limit its holding to contracts of adhesion and we decline to read such a limitation into the decision.” The court also noted that a rule “distinguishing sophisticated business parties who should be barred from introducing parol evidence of fraud from those who should be permitted to introduce such evidence” would be unworkable. The court explained that allowing parol evidence to prove fraud claims involving sophisticated parties “does not create any injustice” because a party claiming fraud must still prove reasonable reliance on the parol evidence.