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Newcases

of BUSINESS LITIGATION INTEREST

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S T A T E

Alter Ego—Adding Party to Judgment—Evidence—Attorney Mistake

Hollywood provides fertile ground for litigation. In *Toho-Towa Co., Ltd. v. Morgan Creek Productions*, 217 Cal.App.4th 1096, 159 Cal.Rptr.3d 469 (2013), the court of appeal discussed when it is proper to add an alter ego to a judgment, evidence that may be considered, and whether the judgment could be set aside because of attorney mistake. In a nutshell, plaintiff obtained Japanese distribution rights to a motion picture. It anticipated entering into the deal with a company called Morgan Creek Productions (MCP), but agreed instead to contract with an MCP-related entity formed in the Netherlands whose obligations would be guaranteed by yet a second MCP-related entity. You guessed it. Plaintiff obtained a judgment against the two contracting entities who didn't pay and then sought to add MCP as a party to the judgment under CCP § 187. In support of its motion plaintiff submitted evidence of relationship of the three companies. MCP submitted no evidence in opposition. After some skirmishing in the trial court, and after a tentative decision and further briefing, MCP got new counsel who filed an ex parte application complete with contrary evidence, which the trial court refused to consider. The court added MCP to the judgment and the court of appeal affirmed. The court of appeal first rejected MCP's argument that the court of appeal could consider the late contrary evidence because the declaration was in the appellate record. The court said

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“When a trial court rules that a party may not present certain evidence, the party may, of course, cite the evidence to challenge that ruling. In the absence of a challenge to the ruling, however, it should go without saying that the excluded evidence, though part of the ‘record on appeal’ may not be used by this court to reverse the order of the trial court.” The court of appeal then found plaintiff’s evidence sufficient to support the trial court’s alter ego finding. Finally, the court of the appeal refused to set aside the judgment based on MCP’s first lawyer’s failure to present evidence because he allegedly made a mistake of law in believing MCP was not required to present evidence given that plaintiff had the burden of proof on the alter ego issue. The court of appeal said that MCP did not have to present evidence *if* plaintiff’s prima facie case did not carry its burden. The court added: “This was not a winning argument, given the fact that [MCP’s first lawyer] had been practicing law for 28 years, had experience representing entertainment clients, including MCP in litigation, had conducted over 50 jury trials, and had obtained several multi-million dollar verdicts and settlements.” Reading between the lines, it also appears that MCP structured its related entities in a way that would prevent plaintiff from ever satisfying its judgment against them, and that likely played a role in the alter ego decision.

**Arbitration—Motion to Compel—
Attorneys’ Fees**

After a court rules on a petition to compel arbitration, is the prevailing party entitled to contractual attorneys’ fees before the underlying claims are resolved by arbitration? According to the Second District’s decision in *Roberts v. Packard, Packard & Johnson*, 217 Cal.App.4th 822, 159 Cal.Rptr.3d 180 (2013), it depends on whether the petition was filed as an independent action or in an already-pending lawsuit. Plaintiffs filed an action against their former attorneys, who successfully petitioned to compel arbitration. Before the arbitration concluded, the trial court awarded attorneys’ fees to defendants as the prevailing party on the petition to compel, but the court of appeal reversed. The court recognized that when a petition to compel arbitration is filed as an independent proceeding, the trial court’s decision on that petition may be the basis for an award of attorneys’ fees because it terminates the proceeding in favor of one of the parties.

When the petition is filed in an existing lawsuit, however, the decision on that petition does not end the proceeding. Thus, there can be no prevailing party until the underlying claims have been resolved in arbitration. In so holding, the court expressly disagreed with the First District's decision in *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40, which held that a party who prevailed on a petition to compel arbitration in an existing lawsuit was entitled to fees even though the arbitration remained pending.

Arbitration—Petition to Vacate
Arbitration Award—Service—
Relief from Default

In *Abers v. Rohrs*, 217 Cal.App.4th 1199, 159 Cal.Rptr.3d 414 (2013), the court of appeal held that CCP § 473 does not confer authority on a trial court to grant relief from dismissal or default based on a failure to properly serve a petition to vacate an arbitration award within 100 days as required by section 1288.2. In so holding, the court disagreed with several other courts of appeal that have recognized the availability of section 473 relief in such circumstances. A little background: The arbitration statutes allow a petition to vacate to be served by mail on a party's attorney if that petition is filed in an existing proceeding in which the parties have already appeared. By contrast, if the petition is brought as a new proceeding, then service must be made in the manner of a summons. In *Abers*, after the parties were compelled to arbitrate a dispute over contractual rent increases, petitioners sought to vacate the award. Rather than filing the petition to vacate in the existing proceeding, however, petitioners filed it as a new action. The problem is that petitioners' counsel did not personally serve the petition, but only served it by mail on the opposing parties' attorneys and one of the parties. The trial court quashed service, refused to grant relief under section 473, and dismissed the petition. The court of appeal affirmed. The court reasoned that section 473 cannot be used to grant relief from a jurisdictional deadline, and rejected petitioners' argument that the failure to properly serve the petition did not amount to a jurisdictional deficiency because the trial court had jurisdiction in the existing proceeding in which the court had compelled arbitration. The court of appeal recognized that at least three other cases have stated that section 473 relief was available for failure to comply with the 100-day time

period in the arbitration statutes, but the court found “none of those cases persuasive”

**Expert Fees—Dismissals—
Voluntary Dismissal by Plaintiff
as Triggering Defendant’s
Entitlement to Expert Fees
under CCP § 998**

When a party dismisses an action without prejudice, it retains the option of filing a new action based on the same set of facts. Even though there remains at least the theoretical possibility of a new action, however, the voluntary dismissal is sufficient to trigger the defendant’s right to expert fees under CCP § 998. *Mon Chong Loong Trading Corp. v. Superior Court*, 218 Cal.App.4th 87, 159 Cal.Rptr.3d 575 (2013). The court of appeal explained that “the trial court erred to the extent it required the defendant, who had made a valid section 998 offer, to first obtain a judgment in the case before the trial court would consider its claim for recovery of expert witness fees.” The court explained that the time to assess expert fees is at the conclusion of the action and “cannot be predicated or dependent upon the possible future result of related (or even identical) separate litigation that may itself never progress to a judgment or award.”

**Litigation—Motions in Limine—
Evidence**

Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc., 218 Cal.App.4th 272, 159 Cal.Rptr.3d 869 (2013), points up the danger of trying to resolve substantive issues by way of motion in limine. In this case, a dispute between merchants over the payment of invoices controlled by the Commercial Code, the plaintiff sought an in limine ruling to preclude evidence that would vary the terms of the plaintiff’s invoices, which provided for interest if payments were late. The trial court issued a confusing ruling. It denied the motion, but found that the invoices were intended by the parties as the final expression of their agreement. The trial court nevertheless said that it would allow evidence at trial to show waiver. Ultimately, the jury awarded nearly \$200,000 in interest, but the court of appeal reversed. The court held that under section 2207 of the Commercial Code a whole host of factors must be taken into account in determining what terms make up a contract between merchants, including the parties’ course of conduct over the term of their relationship. The hitch, the court of appeal said, was that at the time the trial court ruled on the motion in limine there was “very little evidence” and nothing “explaining how the parties conducted business, how the invoices were used, or any other pertinent evidence that would

allow the court to properly apply section 2207.” The court of appeal therefore found that the trial court erred in ruling as a matter of law at the motion in limine stage that the interest provision was part of the parties’ contracts as a matter of law.

Litigation—Motion for
Reconsideration—Change in
Law—Depublication of Opinion
Relied on by Trial Court

Does the Supreme Court’s depublication of a court of appeal opinion that was heavily relied upon by the trial court in issuing an order constitute a “change of law” that would permit the trial court to reconsider that order on its own motion under Code of Civil Procedure section 1008? In *Farmers Insurance Exchange v. Superior Court*, 218 Cal.App.4th 96, 159 Cal.Rptr.3d 580 (2013), the court held “that it can, and that, in the unusual circumstances presented by this case, it necessarily did.” There, the trial court relied on a single court of appeal decision to grant class certification of wage and hour claims. Shortly thereafter, the Supreme Court depublished the court of appeal decision on which the trial court had relied. The defendant urged the trial court to reconsider its certification decision on its own motion, but the trial court concluded there had not been the requisite “change of law” that would justify reconsideration under section 1008. The court of appeal issued a writ of mandate ordering the trial court to reconsider its order. The court recognized that “Supreme Court depublication does not necessarily constitute disapproval,” but it does deprive the depublished opinion of any “precedential value” and ensures that the opinion “is no longer part of the law” and “ceases to exist.” Thus, “[w]hen a court decision is made on the basis of an opinion that is subsequently depublished, the law justifying that decision has necessarily changed.”

Torts—Extortion—Prelitigation
Demand Letters

The decision in *Malin v. Singer*, 217 Cal.App.4th 1283, 159 Cal.Rptr.3d 292 (2013), is the latest decision to clarify the line between a legitimate prelitigation demand letter and illegal extortion. There, attorney Singer sent a demand letter to Malin alleging, among other things, that Malin had “misused company resources to arrange sexual liaisons with older men.” The demand letter included a draft complaint with spaces left blank for the details (e.g., names) of the alleged sexual liaisons, but promised that “[w]hen the Complaint is filed with the Los Angeles Superior Court, there will be no blanks in the pleading.”

Malin promptly sued Singer for extortion, and Singer filed an anti-SLAPP motion. The trial court denied the motion to strike the extortion cause of action, finding that the letter did not constitute protected activity. The court of appeal reversed. The court recognized that a demand letter may be so extreme as to constitute criminal extortion as a matter of law, but found this letter did not qualify because it did not “expressly threaten to disclose Malin’s alleged wrongdoings to a prosecuting agency or the public at large.” The court also found that the letter’s reference to sexual misconduct “was inextricably tied to” the complaint’s allegation of misuse of company funds. The court reasoned that “[t]here is no doubt that the demand letter could have appropriately noted that the filing of the complaint would disclose Malin had spent stolen monies on a car or a villa, if that had been the case. The fact that the funds were used for a more provocative purpose does not make the threatened disclosure of that purpose during litigation extortion.”