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NEWcases

of BUSINESS LITIGATION INTEREST

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S T A T E

Appeal—Appealability— Attorney Fee Order Following Remand—Collateral Order Doctrine

Apex LLC v. Korusfood.com, 222 Cal.App.4th 1010, 166 Cal.Rptr.3d 370 (2014) is a strange case. There, the court of appeal reversed a judgment and remanded for a new trial on limited issues. Apparently before any new trial occurred, the party who won the appeal moved for its appellate attorneys' fees, which the trial court granted. The losing party appealed. The court said that the order did not "appear" to be appealable under CCP § 904.1(a)(2) as order following an appealable judgment, since the order was made after the judgment the court of appeal reversed. The court of appeal did not decide that issue, however, but held that the fee order was appealable under the collateral order doctrine: the fee order (i) was a final determination (ii) of a collateral matter (iii) which directed the payment of money or performance of an act. The case is strange, however, because it did not discuss whether the party seeking fees was a "prevailing" party. The normal rule is that one must await the final determination of the case to find out who a prevailing party is; an interim victory does not qualify. See, e.g., *Lindenstadt v. Staff Builders, Inc.*, 55 Cal.App.4th 882, 894 n.9; *Presley of Southern California v. Whelan*, 146 Cal.App.3d 959. Here, since the first opinion remanded for further proceedings which do not appear to have concluded, one must wonder if there was a prevailing party at the time of the fee award.

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Appeal—Appealability—Request for Dismissal After Summary Adjudication

The mere filing of a request for dismissal of all claims remaining after an adverse summary adjudication order may create an appealable judgment. That was the holding in *Dattani v. Geen Hone Lee*, 222 Cal.App.4th 411, 165 Cal.Rptr.3d 882 (2013), and it was devastating to the appellants, whose appeals were dismissed as untimely. There, to facilitate an appeal from a trial court order granting summary adjudication on one cause of action, plaintiffs filed a request for dismissal without prejudice of all remaining claims. The request was filed on a Judicial Council form, but the court clerk never completed the section of the form indicating whether or not dismissal was entered. A little more than seven months later, the court entered a “Judgment,” from which plaintiffs appealed. The court of appeal dismissed the appeal on the ground that it was filed more than 180 days after plaintiffs’ request for dismissal. “[W]e hold that the mere filing of the request for dismissal, without further action by the clerk, dismissed the remaining claims from the suit and created an appealable judgment from which [plaintiffs] could have contested the summary adjudication ruling.”

Appeal—Waiver of Right to Appeal

An agreement to accept a ruling to be made by the trial court does not by itself constitute a waiver of a parties’ right to appeal that ruling. *Ruiz v. California State Auto. Ass’n Inter-Insurance Bureau*, 222 Cal.App.4th 596, 165 Cal.Rptr.3d 896 (2014). Here, settling a consumer class action, class counsel agreed to accept as attorneys’ fees either the maximum specified in the agreement or an amount awarded by the trial court, whichever was less. After the trial court awarded fees in an amount that was considerably less than requested, class counsel appealed. Respondents argued that class counsel had waived the right to appeal by agreeing to accept the anticipated ruling of the trial court on the fee issue, but the court of appeal disagreed. The court held that “if the parties to a contract want their agreement to encompass a waiver of the right to appeal from an anticipated judicial ruling, they must say so explicitly and unambiguously; they cannot leave their intent to be inferred from the language of the agreement.”

Arbitration—Waiver by Litigation Conduct

It is well established that a party may, by its litigation conduct, waive its contractual right to arbitration. But who should decide whether a party's conduct is sufficient to constitute waiver, the court or the arbitrator? In *Hong v. CJ CGV America Holdings, Inc.*, 222 Cal.App.4th 240, 166 Cal.Rptr.3d 100 (2013), the court held that the trial court correctly decided the waiver issue in ruling on a motion to compel. The court of appeal noted that "California statutory and decisional authority recognizes the issue of waiver by litigation conduct is ordinarily resolved by the trial court, not an arbitrator," but because the parties' arbitration agreement was governed by the Federal Arbitration Act, the court had to look to federal law. The court relied on four federal decisions holding that courts, not arbitrators, should decide issues related to waiver by litigation conduct. The court of appeal found a contrary decision by the Eighth Circuit to be limited to the "unique facts" of that case, which involved litigation activity during an arbitration proceeding that "had been lingering for a year."

Litigation—Dismissal for Failure to Prosecute—Abuse of Discretion Discussion

Under Code of Civil Procedure section 583.310 *et seq.*, an action that is not brought to trial within five years after it is commenced "shall be dismissed." The decision in *Gaines v. Fidelity National Title Insurance Company*, 222 Cal.App.4th 25, 165 Cal.Rptr.3d 544 (2013), is notable in several respects relating to this dismissal statute. First, the statute excludes from the five-year period any time when "prosecution or trial of the action was stayed or enjoined." In *Gaines*, the court held that this exclusion applies only to an order that "stays *all* prosecution of the action," and not to an order that stayed existing trial and hearing dates, but required the parties to respond to previous discovery requests. Second, the court held that the trial court properly dismissed the entire action, even though several defendants did not move for dismissal because the trial court had "express authority" under the statute to dismiss on its own motion. Finally, Justice Rubin's concurring and dissenting opinion is must reading concerning the abuse of discretion standard of review. Describing that standard as "the most misused and most misunderstood" standard, he found the "various distasteful formulations" of that standard not "particularly helpful to the appellate courts." He went on

to describe the abuse of discretion standard as a “deference continuum” where the greatest deference is owed (i) when “factual determinations are involved,” and (ii) “when the judge’s position in the courtroom gives him or her a superior opportunity to get the feel of the case.”

Litigation—Statement of Decision—Failure to Provide—Prejudicial Error Analysis

In 1985 the court of appeal held that a trial court’s failure to provide a statement of decision following a court trial when one was timely requested was reversible per se. *Miramar Hotel Corp. v. Frank B. Hall & Co.*, 163 Cal.App.3d 1126, 1129 (1985). *Miramar* is no longer the solid authority it once was as the Third District court of appeal has now squarely disagreed with it. *F.P. v. Monier*, 222 Cal.App.4th 1087, 166 Cal.Rptr.3d 551 (2014). The court of appeal said that since the defendant timely requested a statement of decision, but the trial court did not issue one, “[c]learly this was error.” But the court of appeal refused to apply *Miramar*’s per se reversal rule, instead using a prejudicial error analysis. The court went on to hold that defendant waived its key argument by not raising it at trial and therefore, the trial court’s failure to issue a statement of decision “did not, and could not, result in a miscarriage of justice.”

Litigation—Trial—Special Verdict Form—Defect—Prejudicial Error Analysis

In *Taylor v. Nabors Drilling USA, LP*, 222 Cal.App.4th 1228 (2014), the court applied a prejudicial error analysis to a special verdict form. The court acknowledged that when a special verdict form is involved “the reviewing court does not imply findings in favor of the prevailing party.” Here, the special verdict form contained some mistakes and erroneously directed the jury to skip certain questions. The court of appeal first agreed with the trial court that the appellant waived these defects because they were obvious on the face of the form and appellant had not raised the issue before the jury was discharged. But then the court went on to say that “[i]rrespective of whether appellant forfeited its claim that the special verdict is defective, reversal is not required because the defect constitutes harmless error.” The court went on to say that it “is an issue of first impression whether or not a defective verdict can be ‘saved’ by the harmless error rule. We hold that a defective special verdict form is subject to harmless error analysis.”