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Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

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STATE

Appealability—Denial of Stay Pending Arbitration

In *Wells Fargo Bank, N.A. v. The Best Service Co., Inc.*, 232 Cal.App.4th 650, 181 Cal.Rptr.3d 597 (2014), the court of appeal held that a trial court order denying a motion to stay litigation pending arbitration was not appealable where the stay motion was not accompanied by a motion to compel arbitration. There, when plaintiff resisted defendant's demand for arbitration, the defendant moved to stay plaintiff's lawsuit pending arbitration. The trial court denied the motion, and defendant appealed, arguing that court's order was the equivalent of an order refusing to compel arbitration, which is appealable under C.C.P. § 1294(a). The court of appeal disagreed and dismissed the appeal, noting that the defendant never moved to compel arbitration, and the trial court never ruled that plaintiff's claims were not arbitrable.

Arbitration—Demand Requirement

Section 1281.2 of the Code of Civil Procedure requires a party seeking to compel arbitration to prove (i) the existence of an arbitration agreement and (ii) "that a party thereto refuses to arbitrate such controversy." In *Hyundai Amco America v. S3H, Inc.,* 232 Cal.App.4th 572, 181 Cal.Rptr.3d 470 (2014), Hyundai sued S3H after first writing S3H notifying it of an alleged breach of their agreement and demanding a cure. S3H responded by petitioning to compel arbitration. The trial court denied the petition, holding that S3H was first required to demand arbitration. The trial court relied on a 2010 case,

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Mansouri v. Superior Court, 181 Cal.App.4th 633, for the proposition that a party must make a formal demand and have it refused before seeking to compel arbitration. The court of appeal reversed, noting that section 1281.2 does not include any formal demand requirement and that Hyundai's filing suit showed that it refused to arbitrate. The court distinguished *Mansouri* because there the party seeking to compel sought to compel arbitration on different terms than the agreement provided and even on different terms than its own demand letter. Here, S3H merely sought to compel arbitration per the agreement's terms.

Arbitration—Waiver—Standard of Review

Bower v Inter-Con Security Systems, Inc., 232 Cal.App.4th 1035, 181 Cal.Rptr.3d 729 (2014) illustrates when participating in litigation waives a party's right to compel arbitration, but perhaps more important is the court's discussion of the standard of review. Plaintiff signed an arbitration agreement that required him to arbitrate disputes with his employer and precluded class claims. After being fired he sued, asserting class action claims. The employer alleged arbitration as an affirmative defense but only brought a petition to compel arbitration after both parties had engaged in discovery and settlement discussions. The trial court denied the petition based on the employer's participation in the litigation and noting that the delay may have been a tactical choice. On appeal, the employer argued that the order should be reivewed de novo because the underlying facts were undisputed. The court of appeal disagreed, stating that even if the timeline of events was undisputed, independent review obtains only if the facts permit just one inference. Where different inferences may be drawn depending upon the weight afforded certain facts, review is under the "more deferential substantial evidence standard of review." Using that standard, the court of appeal affirmed the order denying arbitration.

Attorneys—Disqualification—Work by Disqualified Lawyer

A court disqualified the City and County of San Francisco's City Attorney office, finding that a conflict involving the office head required that the entire office be disqualified. The City appealed, the Supreme Court eventually affirmed, and the City then retained independent counsel. Five years later, on the eve of trial, the defendant moved to exclude so-called "tainted"

evidence developed by the City Attorney during the three year period the disqualification order was on appeal. The trial court denied the motion as untimely, and the court of appeal affirmed. *City and County of San Francisco v. Cobra Solutions, Inc.,* 232 Cal.App.4th 468, 181 Cal.Rptr.3d 430 (2014). The court of appeal stated that it could not find any California case addressing motions to exclude evidence tainted by involvement of disqualified counsel. Ultimately, the opinion does not offer much guidance on that question, but the lesson is clear. If you know disqualified counsel is working on the matter—and the evidence here showed the defendant knew earlier than the eve of trial—bring your motion then, don't wait.

Collateral Estoppel—Failure to Prosecute

If a plaintiff's state law claims in federal court are dismissed with prejudice for failure to file an amended complaint where leave to amend had been granted, does collateral estoppel preclude plaintiff from filing a state law complaint raising the same causes of action? In *Hardy v. America's Best Home Loans*, 232 Cal.App.4th 795, 181 Cal.Rptr.3d 685 (2014), the court of appeal answered no. There, plaintiff's federal complaint asserted a federal cause of action, which was dismissed with prejudice, and state law claims that were initially dismissed with leave to amend. When plaintiff failed to amend, the district court dismissed the case under F.R.C.P. 41(b), which provides that plaintiff's complaint may be involuntarily dismissed for failure to prosecute or comply with a court order and that such a dismissal is "an adjudication on the merits." Plaintiff then filed a state court complaint reasserting the state causes of action, but the trial court granted judgment on the pleadings based on collateral estoppel. The court of appeal reversed. First, the court explained that under California law, dismissal for failure to prosecute is not a final judgment on the merits for purposes of collateral estoppel. The court then explained that although federal law governs the preclusive effect of a federal judgment, where a court dismisses state law claims in a diversity action, the federal law looks to state law to determine the preclusive effect of the dismissal. The court acknowledged that the federal court's jurisdiction over plaintiff's initial complaint was based on federal question, not diversity, but held that because "the claims asserted in this action involve

only state claims," "the district court's dismissal of the state law claims is similar to a federal court's dismissal in a diversity action." Thus, state law governed the preclusive effect of the federal dismissal, and plaintiff's claims were not barred.

Litigation—Dismissal—Interplay Between Litigation and Arbitration

Under Civil Code section 1717, if a plaintiff voluntarily dismisses an action—which a plaintiff may do without prejudice before the commencement of trial—then there is no prevailing party for purposes of determining contractual attorneys' fees. In *Mesa Shopping Center-East, LLC v. Hill*, 232 Cal.App.4th 890, 181 Cal.Rptr.3d 791 (2014), the court of appeal confronted the novel question of whether a plaintiff may voluntarily dismiss a complaint after the commencement of an arbitration to which the complaint was merely "ancillary." The court answered no. Because the lawsuit "was based on the same causes of action submitted to the arbitrator" and "differed only in the remedies sought," "[o]nce the hearing on the merits of the parties' dispute commenced at the arbitration, it was too late for plaintiffs to dismiss this action without prejudice and thereby avoid an attempt by defendants to recover attorney fees as the prevailing party in this action." This was important because defendant had successfully opposed a motion for preliminary injunction, likely incurring significant fees in the process.

Privilege—Attorney-Client Privilege—Waiver—Public Records Act

Lawyers for municipalities need to pay close attention when producing records pursuant to the Public Record Act. In *Ardon v. City of Los Angeles,* 232 Cal.App.4th 175, 181 Cal.Rptr.3d 324 (2014), the court of appeal held that a city has no remedy to retrieve inadvertently produced privileged documents, and that the production constitutes a waiver of the privilege. The court noted that unlike litigation discovery where the statutory scheme protects against inadvertent disclosure and is subject to judicial supervision, the PRA contains neither of those features as "nothing in the PRA gives the entity producing it either the right to recover it or mechanism to seek its return." The court also held there was no basis to disqualify counsel under Rule 2-100 of the Rules of Professional Conduct for invoking the PRA to seek documents even if the municipality was represented by counsel in the lawsuit for which the documents would be used.