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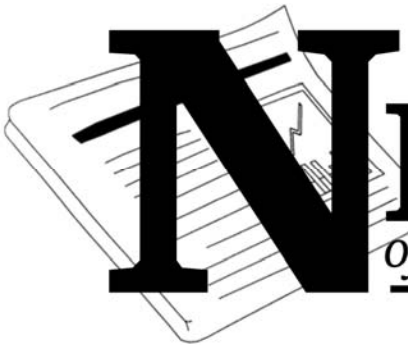

Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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STATE

Consumer Protection—Credit Card Transactions—Obtaining Personal Information

The Song-Beverly Credit Card Act prohibits businesses from requesting cardholders' personal information during credit card transactions and then recording that information. That prohibition does not continue, however, once the credit card transaction is completed, which allows businesses to request such information as soon as the customer receives his or her receipt. That was the holding in *Harrold v. Levi Strauss & Co.*, 236 Cal.App.4th 1259, 187 Cal.Rptr.3d 347 (2015), which reasoned that "the Act is not intended to forbid merchants from obtaining such information voluntarily, if the customer understands that the information need not be disclosed in order to use a credit card."

Corporations—Involuntary Dissolution—Right to Buyout

When a corporate shareholder files for involuntary dissolution, Corporations Code section 2000, subdivision (a) allows holders of 50 percent or more of the voting power to avoid dissolution by purchasing the shares owned by the plaintiff at fair value. But what happens if the plaintiff dismisses the involuntary dissolution action after the defendant has already triggered the buyout procedures? That is what happened in *Kennedy v. Kennedy*, 235 Cal.App.4th 1474, 186 Cal.Rptr.3d 198 (2015). There, defendants argued that despite the dismissal they were entitled to purchase plaintiff's shares

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because the "statutory buyout procedure supplanted the dissolution action." The court disagreed, holding that "[n]othing in section 2000, subdivision (a) provides for a buyout independent of a pending involuntary dissolution suit."

Judgment—Default Judgment—Vacating—Statement of Damages

Many lawyers do not include a specific amount of damages in the complaint, instead alleging that the plaintiff seeks damages according to proof. That can be a mistake if the defendant does not answer and the plaintiff seeks a default judgment. *Rodriguez v. Nam Min Cho*, 236 Cal.App.4th 742, 187 Cal.Rptr.3d 227 (2015) is a recent example. In that case the plaintiff sued for retaliation and wrongful discharge, requesting damages in an amount to be proven at trial. The plaintiff also served a statement of damages, specifying the damages she was seeking. The defendant defaulted and the court entered a default judgment for less than the amount specified in the statement of damages. Two years later, the defendant moved to vacate the judgment as void. The trial court was not impressed, but the court of appeal agreed that the judgment was void and ordered it vacated. The court stated the general rule that a default judgment in excess of the amount demanded in the complaint is void as beyond the court's jurisdiction and may be set aside at any time. But what about the statement of damages that put the defendant on notice as to the amount claimed? The section authorizing a statement of damages, CCP § 425.11, states that it applies in suits "to recover damages for personal injury or wrongful death," and the court of appeal held that plaintiff's action did not meet either of those criteria. The court of appeal said that when a judgment is vacated on this basis, a plaintiff has a choice of having the judgment remitted to the amount demanded in the complaint or amending the complaint to state the amount of damages, in which case the default in failing to answer must be vacated and the case is back to the beginning.

Litigation—Dismissal—Attorneys' Fees

Is a defendant who "obtained dismissal of a case in California pursuant to a Florida forum-selection clause . . . entitled to contractual attorney fees?" In *DisputeSuite.com, LLC v. Scoreinc.com*, 235 Cal.App.4th 1261, 186 Cal.Rptr.3d 75 (2015), the Second District Court of Appeal answered "no," but in doing so it

disagreed with two other published decisions. The Second District reasoned that because the contract claims "were still in dispute and being litigated in Florida, there had been no final resolution of those claims, and therefore no prevailing party on the contract." By contrast, the Fourth District in *Profit Concepts Management, Inc. v. Griffith*, 162 Cal.App.4th 950 (2008) held that where a defendant had successfully quashed service for lack of jurisdiction, the defendant was entitled to attorneys' fees because "[t]he case *in California* has been finally resolved" even though the contract claim had not been resolved on the merits. Id. at 956 (emphasis in original); see also *PNEC Corp. v. Meyer*, 190 Cal.App.4th 66 (2010).

Judgment—Stipulation for Judgment—Power of Trial Court

When parties to an action stipulate to entry of judgment, and seek court of approval, the trial court does not have the authority under CCP § 664.6 to modify the terms of the settlement over the parties' objections. In *Leeman v. Adams Extract & Spice*, 236 Cal.App.4th 1367, 187 Cal.Rptr.3d 220 (2015), the parties settled a Prop. 65 case, which requires court approval under the Health and Safety Code. One provision of the settlement agreement awarded plaintiff's counsel $72,000 in fees. When the court approved the settlement and entered judgment, it inexplicably cut the fee request in half. The court of appeal held that the trial court had no authority to do so. It noted that settlement agreements are interpreted just like any other contract, and while a court may interpret such an agreement, nothing in the statute "authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon."

Litigation—Venue—Motion to Change Venue—Multiple Defendants—Wrong Court

Motions to change venue can be tricky, as illustrated by *Cholakian & Assocs. v. Superior Court*, 236 Cal.App.4th 361, 186 Cal.Rptr.3d 525 (2015). In this case, a former defendant who suffered a huge loss sued his lawyers and insurance carriers on a variety of theories arising from the trial court loss. One of the law firm defendants moved to change venue on the theory that none of the defendants was a resident of the county in which the suit was filed. The plaintiff argued that the suit had been filed in a proper county, but argued that even if not, the court

should retain venue for the convenience of parties and witnesses. This latter argument, however, ran into a technical roadblock. CCP § 396b, the statute authorizing motions to change venue, states that "if an answer is filed, the court may consider opposition to the motion to transfer, if any, and may retain the action in the county where commenced if it appears that the convenience of witnesses or the ends of justice will thereby be promoted." In this case, not all defendants had filed an answer at the time the venue motion was filed. The court of appeal explained that since the convenience of parties and witnesses can only be determined in light of the pleadings, and not all defendants had answered, the trial was limited to determining if the action was filed in a proper or not. If it was not, the court was required to change venue to a proper county and could not consider the convenience of parties and witnesses.

Tort—Wrongful Foreclosure—Damages

In *Miles v. Deutsche Bank National Trust Company*, 236 Cal.App.4th 394, 186 Cal.Rptr.3d 625 (2015), the court considered whether damages are available in a wrongful foreclosure action even if the homeowner had no equity in the foreclosed real estate. The trial court granted summary judgment in favor of the defendant bank "believ[ing] the only permissible damages in a wrongful foreclosure suit is the lost equity in the home, and where there is no equity, no cause of action will lie." The court of appeal reversed, holding that because "[w]rongful foreclosure is a tort," the proper measure of damages "is the familiar measure of tort damages: all proximately caused damages." The court explained that wrongful foreclosure may cause different types of damages, including moving expenses, lost rental income, damage to credit, and emotional distress. The court also recognized that "the rule applied by the trial court . . . would create a significant moral hazard in that lenders could foreclose on underwater homes with impunity, even if the debtor was current on all debt obligations and there was no legal justification for the foreclosure whatsoever. . . . Surely that cannot be the law."