May 2018

Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

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STATE

Litigation—Anti-SLAPP Motions—60-day Deadline

Under CCP § 425.16(f), an anti-SLAPP motion must be filed "within 60 days of the service of the complaint . . . ." But what if the plaintiff files an amended complaint that contains some causes of action asserted in the original complaint? May the defendant file an anti-SLAPP motion within 60 days of the amended complaint? In *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 4 Cal.5th 637, 230 Cal.Rptr.3d 408 (2018), the Supreme Court held that an anti-SLAPP motion filed after an amended complaint is timely only as to those causes of action that were not included in the original complaint. The court reasoned that the anti-SLAPP statute "is intended to resolve quickly and relatively inexpensively meritless lawsuits that threaten free speech on matters of public interest." But the statute is also designed "not to permit the abuse that delayed motions to strike might entail . . . ." Thus, "a defendant must move to strike a cause of action within 60 days of service of the earliest complaint that contains that cause of action."

Litigation—Anti-SLAPP Motions—Protected Activity

A defendant bringing an anti-SLAPP motion must show that the challenged claim arises from protected activity. But where the complaint alleges protected activity, must the defendant admit to engaging in that activity in order to bring the anti-SLAPP motion? The court in *Bel Air*

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Internet, LLC v. Morales, 20 Cal.App.5th 924, 230 Cal.Rptr.3d 71 (2018) answers "no," holding that defendant may rely solely on the complaint to show the claim arises from protected conduct. No additional evidence is needed, and the defendant can deny engaging in protected activity. This avoids the "perverse effect of making anti-SLAPP relief unavailable when a plaintiff alleges a baseless claim, which is precisely the kind of claim that section 425.16 was intended to address."

Litigation—Sanctions—Improper Purpose Not Enough

The line between zealous and improper advocacy is not always well-defined. Under CCP § 128.7(b), a person who signs a pleading certifies, among other things, that the pleading is not being presented for an improper purpose *and* contains positions that are not frivolous. Section 128.7(c) authorizes the trial court to impose sanctions on attorneys or parties who violate the certification. In a somewhat surprising decision, the court of appeal in *Ponce v. Wells Fargo Bank*, 21 Cal.App.5th 253, 230 Cal.Rptr.3d 236, 238 (2018) held that a nonfrivolous complaint cannot be presented for an improper purpose. In other words, "the nonfrivolous nature of the claims . . . necessarily establishes [the plaintiffs'] good faith." Thus, sanctions are not proper against a party whose pleading is not frivolous.

Litigation—Venue—Timing for Change of Venue Motion

CCP sections 396b and 397 both allow a trial court to change venue. Only section 396b, however, requires the motion to change venue be filed within the time allowed to respond to the complaint. In *Walt Disney Parks and Resorts U.S., Inc. v. Superior Court*, 21 Cal.App.5th 872, 230 Cal.Rptr.3d 811 (2018), the court of appeal held that a defendant's failure to comply with the timing requirement in section 396b does not waive the right to change venue under section 397. There, the defendant answered the complaint and removed the case to federal court, which remanded back to state court. The defendant then filed a motion to change venue under section 396b and 397. The trial court denied the motion, holding that failure to file within the time required by 396b waived the right to change venue. The court of appeal reversed, holding that where the Legislature chose to include the timing requirement in one provision and omit it from a second, the court must presume the

Legislature did not intend the timing requirement be read into the second provision.

FEDERAL

Appeal—Notice of Appeal—Timeliness—Separate Judgment Requirement

Orr v. Plumb, 884 F.3d 923, (9th Cir. 2018) points up the appellate pitfalls when a district court does not promptly enter a separate judgment when one is required. Here, the jury returned a special verdict, which the clerk entered into the docket along with a minute order to the effect that the verdict had been returned in favor of plaintiff. Defendant timely filed a motion for judgment as a matter of law, which the court denied by minute order, and the defendant appealed from that order. No separate judgment had yet been entered on the verdict. More than 180 days from entry of the verdict on the docket, defendant finally appealed from the verdict, stating that the appeal was "from Judgment based on special verdict"—even though no separate document had yet been entered. Was the notice of appeal timely? No. Under FRCivP 58, if a separate document is required, but not entered, the judgment is deemed entered 150 days after the ruling is entered on the docket, with the notice of appeal due within 30 days thereafter. The court of appeal found that entry occurred when the clerk entered the verdict on the docket because the verdict ended the litigation on the merits and left nothing to be done. Since the notice of appeal was filed more than 180 days later, it was not timely. The 150 day period did not run from denial of the JMOL motion because rule 58(a)(1) is explicit that no separate document is required for a ruling on a JMOL motion. Circuit Judge Rawlinson dissented, explaining that the "untimely" appeal resulted from "a procedural morass not of [defendant's] making and should not result in the loss of his right to appeal."

Jurisdiction—Amount in Controversy

In a removed diversity case, amount in controversy is determined as of "the time of removal." In this employment case, plaintiff argued that only her lost wages from the time of her termination until the case's removal to federal court could be counted in determining the amount in controversy, even though if she prevailed at trial, her damages would not be so limited. The Ninth Circuit sensibly rejected this argument, explaining that

"when we say that the amount in controversy is assessed at the time of removal, we mean that we consider damages that are claimed at the time the case is removed . . . [i.e.,] all relief claimed at the time of removal to which the plaintiff would be entitled if she prevails." *Chavez v. JPMorgan Chase*, 888 F.3d 413 (9th Cir. 2018).

Jurisdiction—Diversity
Jurisdiction—Holding Company

For diversity purposes, a corporation is a citizen of its state of incorporation and where it maintains its principal place of business, typically its "nerve center." Here, the court was charged with determining the principal place of business of a holding company formed in Missouri 25 days before an LLC in which it held an interest sued a California lawyer in California for malpractice arising out California real estate litigation. Diversity jurisdiction hinged on whether the holding company was a citizen of California or Missouri. Before the suit was filed, the holding company's only act was to incorporate. Aligning itself with other circuits to have addressed similar issues and also analogizing to dissolved companies that have no place of business, the court found the principal place of business to be the state of incorporation. But the court remanded to have the district court consider whether the holding company was formed to manipulate jurisdiction and whether alter ego principles should come into play in assessing diversity. *3123 SMB v. Horn*, 880 F.3d 461 (9th Cir. 2018). Dissenting, Circuit Judge Hurwitz noted that all shareholders, directors, and assets of the entity in which the holding company had an interest were in California and the "nerve center" could not be in Missouri "where the corporate EEG is flat."

Litigation—Discovery Sanctions

Rule 45 is not the sole mechanism for compelling a nonparty to appear at a deposition and obtaining sanctions for noncompliance. Here, the court ordered plaintiffs to produce their expert witness on a date certain for deposition. Neither plaintiffs, their counsel, nor the expert appeared and plaintiffs made no showing of a good faith effort to have the expert attend. Affirming the district court, the court of appeals held that the district court had authority to order payment of attorneys' fees to defendant and to uphold contempt against plaintiff's *counsel* when they didn't pay. *Sali v. Corona Reg. Med. Ctr.*, 884 F.3d 1218 (9th Cir. 2018).