S232582

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEVE RYAN
Plaintiff & Appellant,

vs.

MITCHELL ROSENFELD, et al.,
Defendants & Respondents.

AFTER AN ORDER OF INVOLUNTARY DISMISSAL BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FOUR, APPEAL NO. A145465
ON APPEAL FROM ORDER/ JUDGMENT OF SAN FRANCISCO SUPERIOR COURT
CASE NO. CGC-10-504983, HONORABLE CYNTHIA M. LEE, TRIAL JUDGE

OPPOSITION TO MOTION TO DISMISS REVIEW

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INTRODUCTION

Although respondent Mitchell Rosenfeld and his co-defendants (collectively "Rosenfeld") never filed an answer to the petition for review, Rosenfeld waited three and a half months after review was granted to file the motion to dismiss review. Rosenfeld finally did so on the day the opening brief was served.

While he seeks to evade appellate review of the trial court's dismissal of appellant Steve Ryan's lawsuit under the diligent-prosecution statutes, Rosenfeld's motion to dismiss should be summarily denied. "When this court granted review, by a unanimous vote of its seven justices, we necessarily determined that the issues [Ryan] raised have sufficient statewide importance to warrant an opinion from this court, and that this case presents those issues." (*People v. Braxton* (2004) 34 Cal.4th 798, 809.) In addition, because the arguments raised in Rosenfeld's motion are brand new and go to the merits of the appeal (rather than the sole appealability issue that was specified by this Court in limiting the scope of review), the motion to dismiss is dead on arrival.

Rosenfeld's motion is also disturbing because when Rosenfeld moved to dismiss the appeal in the Court of Appeal, he based his argument solely on the timeliness of Ryan's appeal from the judgment. (Exhibit 1, pp. 5-6.) Ryan has already conceded that his appeal from the judgment was untimely. (OBOM 13.) On the other hand, in dismissing Ryan's additional appeal from the post-judgment order denying his motion to vacate the judgment under Code of Civil Procedure section 663, the Court of Appeal practically confirmed the existence of a conflict as to whether the denial of such a motion is appealable in the first place. (Exhibit 2, p. 2.) This well-percolated conflict requires resolution. (OBOM 19-21.)

LEGAL DISCUSSION

A. The Motion to Dismiss Mischaracterizes the Record and the Procedural History.

Rosenfeld initially argues that this Court's opinion in this case will be "advisory" because Code of Civil Procedure section 663 was "never actually at issue" in this case. (Motion, 2.) This is an odd argument, given that Ryan's notice of motion and the motion itself invoked section 663 multiple times. (CT 161:23; 162:18-19; 165:8-13.) Apparently realizing the inaccuracy of his assertion, Rosenfeld later states that while Ryan specifically invoked section 663 "in the caption of his moving papers" (Motion, 2), that was not enough, erroneously assuming or suggesting that the legal arguments in that motion did not address section 663.

Rosenfeld then changes his theory again, claiming that although Ryan "quoted from Section 663" in his motion (Motion, 3), Ryan "did not brief that provision." (Motion, 3 [citing CT 165].) A cursory look at the argument section of that motion confirms that Ryan briefed this issue by devoting an entire section to seek relief under section 663. (CT 162:8-19.) Specifically, after challenging the dismissal of the case under the diligent-prosecution statutes, Ryan concluded his argument by contending that "[u]nder CCP 663, the order dismissing plaintiff's action should be vacated, and a new trial date set." (CT 162:18-19 [citing *Farrar v. McCormick* (1972) 25 Cal.App.3d 701].) Ironically, the *Farrar* case cited by Ryan in support of his section 663 argument addressed the appealability of orders denying motions to vacate. (*Id.* at p. 706.) [1]

[1] *Farrar* cited motions to vacate under section 473 as an example of a post-dismissal motion to vacate where the case is dismissed under the diligent-prosecution statute. (*Ibid.*) The court addressed the silent-record exception

Although it is technically true that the section of the motion labeled as "points and authorities" did not include the section 663 analysis (CT 165), Ryan presented his section 663 argument under an omnibus heading: "Legal Argument/Facts, Declaration of Plaintiff Steve Ryan." (CT 162.) Rosenfeld cannot seriously argue that such a cosmetic point precluded him from attacking Ryan's arguments under section 663 so as to result in some sort of waiver by Ryan. In fact, while Rosenfeld did not see fit to attach his opposition to Ryan's motion to vacate to his pending motion to dismiss (Exhibit 3), Rosenfeld did not advance his current position that section 663 "was never actually at issue in the trial court." (Motion, 2.) Therefore, the motion to dismiss should be denied. [2]

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to the non-appealability view discussed in our brief. (OBOM 15-18.) The court ultimately affirmed "the judgment of dismissal and the subsequent order denying reconsideration." (*Farrar*, at p. 707.)

[2] Finally, to support his factually-erroneous argument that Ryan did not seek relief under section 663, Rosenfeld selectively quotes out of context Ryan's statement that his "request to vacate the current order of dismissal is based upon the law as stated in CRC 3.1342.(a), not CCP 663." (Motion, 3; quoting CT 178:18-19.) This CRC provision simply articulates the timing, service and filing requirements for seeking dismissal under the diligent-prosecution statute. Section 663, on the other hand, provides the procedural *vehicle* for challenging an underlying ruling. Because section 663 does not define the requirements for dismissal under the diligent-prosecution statute, Rosenfeld misinterprets Ryan's quote to mean that Ryan was not invoking section 663. Furthermore, the fact that Ryan was also seeking relief under section 473 (CT 178:19) does not eliminate his request for relief under section 663. In fact, Rosenfeld's own proposed order (which was signed by the court) reflects the denial of relief under section 663 as untimely, in addition to denying relief under section 473 on the merits. (CT 186.) In sum, Rosenfeld's factual assertions are inaccurate.

B. The Recurring Appellate Jurisdictional Issues Presented Here Require This Court's Resolution, Given the Well-Established Conflict Practically Acknowledged in the Court of Appeal's Dismissal Order.

This Court granted review to decide whether "the denial of a motion to vacate the judgment under Code of Civil Procedure section 663 [is] separately appealable." (Order, April 27, 2016.) Given the conflicting views on this jurisdictional issue (OBOM 19-20) and the conflicting messages sent by this Court on this issue (*id.* at 19), "the greatest evil" under such circumstances is "the uncertainty ... created under the present state of the law." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 61 [internal quotation marks and citation omitted].) Because "the question whether an order is appealable goes to the jurisdiction of an appellate court, which is not a matter of shades of grey but rather of black or white" (*Farwell v. Sunset Mesa Property Owners Ass'n, Inc.* (2008) 163 Cal.App.4th 1545, 1550), resolving this conflict is critical. Otherwise, the existing confusion will continue to grow in this area where "bright lines are essential." (*In re Baycol Cases,* (2011) 51 Cal.4th 751, 761.) By deciding the recurring jurisdictional issue presented here, this Court can finally eliminate the "jungle of doubt" that litigants face in guessing the appealability of motions to vacate. (*Dickinson v. Petroleum Corp.* (1950) 338 U.S. 507, 517 (dis. opn. of Black, J.).)

Deep discord on a recurring issue of appellate procedure undermines the judicial process and litigants' faith in just results. The uncertainty occasioned by the conflicting views implicitly acknowledged by the Court of Appeal in its dismissal order is intolerable, given this Court's responsibility to oversee the even-handed and consistent functioning of the state judiciary. Different appellate districts have weighed in with discordant

results. Some have intramural inconsistencies. The only possible source of clarity is this Court.

C. Rosenfeld's Brand New Argument Regarding Ryan's Likelihood of Success Under Section 663 Must Be Decided in the First Instance by the Court of Appeal After This Court Decides the Procedural Appealability Issue.

Seeking to argue the merits of Ryan's motion to vacate at this time, Rosenfeld also argues that Ryan's motion under section 663 was properly denied because Ryan sought a new trial rather than the entry of a different judgment. Improperly mixing the procedural appealability issue with the substantive issues on the merits, Rosenfeld argues that "Ryan was never entitled to a different judgment" in his favor. (Motion, 4 [internal quotation marks omitted].)

In granting review, however, this Court limited the scope of review to the narrow, threshold issue of appealability. Rosenfeld's motion to dismiss review is a disguised attempt to augment or modify the scope of review, by asking this Court to evaluate the likelihood of Ryan's ultimate success on appeal at this time, before Rosenfeld has even filed an answer brief. Because Rosenfeld never made this argument until now, the Court of Appeal will have to decide in the first instance whether Rosenfeld has waived this argument and, if not, whether this argument is substantively valid (after this Court resolves the narrow appealability issue that was granted review).

Furthermore, Rosenfeld's self-serving suggestion that deciding this case will result in an advisory opinion is totally inaccurate. Here's why. If this Court adopts Ryan's appealability view, the Court of Appeal will be necessarily required to review the merits of Ryan's appeal. While Rosenfeld can try to convince the Court of Appeal that Ryan is not entitled

to any relief under section 663, that determination must be made by the Court of Appeal (after this Court's post-briefing decision). [3]

Finally, while we vigorously dispute the suggestion that deciding this case will yield an advisory opinion, this Court has not hesitated to decide cases yielding such an opinion. (See, e.g., *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1202, fn. 8 [deciding the appeal, despite the practice against issuing advisory opinions, because "the present case provides this court with an opportunity to reconcile disparate lines of judicial authority and thereby clarify the law"].) Likewise, this Court has denied motions to dismiss review, even where *both* sides requested such relief, in other cases "due to the public interest in having the important and continuing legal issues decided." (*Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 60.) The Court has adopted the same approach in other contexts.[4] It should do the same here, given the pernicious effect of having conflicting decisions on appellate jurisdictional issues.

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[3] Rosenfeld simply assumes that Ryan cannot obtain a reversal here because Ryan proceeded under section 663. This assumption is false. (See *Finnie v. District No. 1 - Pacific Coast Dist.* (1992) 9 Cal.App.4th 1311, 1316, 1320 [upholding the trial court's decision to grant relief under section 663 when trial court vacated its prior dismissal order that was issued under the diligent-prosecution statute; assuming without deciding that section 663 motion was improper as argued by Rosenfeld].)

[4] (See *Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1086 [in custody case involving mother's proposed move to Ohio, court denied mother's motion to dismiss review even though she no longer intended to move]; *Burch v. George* (1994) 7 Cal.4th 246, 253, fn. 4 ["We have inherent power to retain a matter, even though it has been settled and is technically moot, where the issues are important and of continuing interest"]; *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1001 [same]; *Maynard v. Brandon* (2005) 36 Cal.4th 364, 371, fn. 2 [same]; *Rosales v. Depuy Ace Med. Co.* (2000) 22 Cal.4th 279, 282 [same].)

CONCLUSION

The motion to dismiss is factually, procedurally and legally flawed. Denial of the motion would also discourage other respondents from adopting Rosenfeld's wait-and-see approach by using the motion to dismiss as a disguised answer to the petition for review, after this Court has devoted its resources at the petition stage in evaluating whether to grant review. There is no reason to encourage the gamesmanship employed here, as evidenced by the timing of the motion to dismiss review filed in this case.

Respectfully submitted,

DATED: September 6, 2016

WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

By _____
Robert Cooper
Attorney for Plaintiff & Appellant
STEVE RYAN

DECLARATION

I, Robert Cooper, declare:

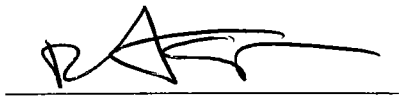
1. I am an attorney at law duly licensed to practice before the courts of the State of California. I represent appellant Steve Ryan. We served the opening brief on the merits on the same day that Rosenfeld filed his motion to dismiss review.

2. A copy of Rosenfeld's Motion to Dismiss the Appeal is attached as Exhibit 1.

3. A copy of the Court of Appeal's order dismissing the appeal is attached as Exhibit 2.

4. A copy of Rosenfeld's opposition to Ryan's motion to vacate under section 663, filed in the trial court, is attached as Exhibit 3.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 6, 2016 at Los Angeles, California.



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Pro Se

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

APPEALS DIVISION

STEVE RYAN, *Plaintiff and Appellant* v. MITCHELL S. ROSENFELD *Defendant and Respondent*	Appeal No. A145465 Div. 4 Superior Court Case No. CGC 10-504983 **DEFENDANT'S MOTION TO DISMISS APPEAL**

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I. INTRODUCTION

This appeal is untimely because the plaintiff failed to appeal within 60 days of service of the trial court's signed, written order dismissing this action. Further, he failed to appeal within 180 days of entry of the order. The trial court involuntarily dismissed Plaintiff's action on October 24, 2014. Under settled law, the dismissal was immediately appealable. After being served with a copy of the Order of Dismissal on the same day the order was entered, plaintiff waited more than seven months to file the notice of appeal. Under California Rule of Court, Rule 8.104(a)(1)(C), the notice of appeal is considered late if it is filed five months after the deadline. Since the notice of appeal was filed late, the Court lacks jurisdiction over this appeal. The appeal must be dismissed.

I. STATEMENT OF FACTS

On October 29, 2010, the plaintiff and appellant, Steve Ryan ("Ryan"), filed this action on various breach of contract-related claims. (CT 001.) During the course of the litigation, Ryan made multiple attempts to continue the trial date. On October 3, 2014, Ryan filed a motion to continue the trial. On October 16, 2014, the Court denied this motion. On October 17, 2014, Ryan submitted a Petition for Writ of Mandamus or Prohibition to the Court of Appeal. The Court denied the petition. (CT 014-15; CT 085; CT 151.)

On October 20, 2014, the day of trial, Hon. Cynthia Lee dismissed Ryan's action pursuant to CCP §§ 583.410 and 583.420(a)(2)(A). (CT 086-089.) On October 24, 2015, the Court granted the motion and entered the order. (CT 086-87.) On the same day, as acknowledged by Ryan, he was served with a copy of the Order of Dismissal. (CT 093.) On November 4, 2014, Ryan filed a Motion for Reconsideration. (CT 009.) On December 18, 2014, the Court denied the motion and the resulting order was entered on May 22, 2015. (CT 183-184.)

After his unsuccessful attempt at reconsideration, Ryan filed a Motion to Vacate the Order of Dismissal on December 22, 2014. (CT 009.) On May 11, 2015, the Court denied the motion. On May 22, 2015, the Court entered the order. (CT 183-184.)

On June 12, 2015, Ryan filed a Notice of Appeal directed to two orders: "Order Denying Motion to Vacate Order Dismissing Plaintiff's Action, and *Order of Dismissal*" (emphasis added). (CT 190-192.) Ryan's Appeal was filed over seven months after the entry of the Order of Dismissal and service thereof on October 24, 2014. (CT 093.)

In connection with this appeal, on July 24, 2015, Ryan filed Appellant's Civil Case Information Statement. Ryan made material misrepresentations in the statement in responding to two of the questions.

First, Ryan answered question § I.B.1 by stating that the date of entry of judgment or appealed from was May 22, 2015. The Order of Dismissal was actually entered on October 24, 2015. (CT 086.) This misrepresentation is significant because Ryan filed the Notice of Appeal within 60 days of May 22, 2015, but not within 60 days of entry and service of the Order of Dismissal on October 24, 2015. He also did not file the Notice of Appeal within 180 days of entry of the Order of Dismissal. Ryan made this misrepresentation despite having clearly filed the Notice of Appeal based upon the Order of Dismissal. He also made this misrepresentation despite stating in §-I.A.1 that the appeal stemmed from a Judgment of Dismissal.

Second, in § I.D, Ryan stated that there has not been any appeal, writ, or other proceeding related to this case in any California appellate court. However, Ryan failed to inform this Court that he filed a Petition for Writ of Mandamus or Prohibition Writ of Mandamus or Prohibition on October 17, 2014 (Appeal No. A143294). (CT 085; CT 151.)

II. ARGUMENT

In order for the notice of appeal to invoke the jurisdiction of the appellate court, the notice must be timely and valid. *Bourhis v. Lord* (2013) 56 Cal.4th 320, 330; *Delmonico v. Laidlaw Waste Systems, Inc.* (1992) 5 Cal.App.4th 81, 83; *In re Marriage of Adams* (1987) 188 Cal.App.3d 683, 689. See also *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56 (appellate court has no jurisdiction to entertain an untimely appeal).

It is mandatory and jurisdictional that a party comply with the deadline for filing a notice of appeal. *Imuta v. Nakano* (1991) 233 Cal. App. 3d 1570, 1579, fn. 11; *Vibert v. Berger* (1966) 64 Cal.2d 65, 67; *Chong v. Fremont Indemnity Co.* (1988) 202 Cal. App.3d 1097, 1102-1103. If a notice of appeal is not timely, the appellate court must dismiss the appeal. *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 582. It is well accepted that an order of dismissal under CCP § 583.410 *et seq.* is an appealable order. CCP § 581d; *In re Sheila B.* (1993) 19 Cal.App.4th 187, 197. An order of dismissal for failure to prosecute is an appealable order. *San Francisco Lathing, Inc. v. Superior Court* (1969) 271 Cal. App. 2d 78, 82.

In the instant case, the trial court entered an order on October 24, 2014 to dismiss Ryan's action. (CT 086-87.) A copy of the Order of Dismissal was served on Ryan on October 24, 2014 and Ryan acknowledged that he was served on this day. (CT 093.) The time to appeal runs from 60 days after the party filing the notice of appeal serves or is served with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service. Cal. Rules of Court, rule 8.104(a)(1)(A-B). Here, a copy of the order of dismissal was served October 24, 2014. The Notice of Appeal was not filed until more than seven months later. Even absent such service, the Notice of Appeal is untimely. It was filed more than 180 days after entry of the order of dismissal. Cal. Rules of Court, rule 8.104(a)(1)(C).

The deadline for timely filing an appeal may be extended by the filing of a valid motion to reconsider or vacate. Cal. Rules of Court, rule 8.108(c) and (e). Ryan filed both a motion to reconsider and a motion to vacate. Neither act makes his appeal of the Order of Dismissal timely. Ryan filed the appeal more than 60 days after each motion was noticed and more than 180 days after entry of the order of dismissal. Since Ryan did not timely file the Notice of Appeal, this Court does not have jurisdiction over the appeal with respect to the order of dismissal.

III. CONCLUSION

Defendant respectfully requests that the Court dismiss the appeal.

Dated: December 4, 2015

Respectfully submitted,

//Mitchell S. Rosenfeld//

Mitchell S. Rosenfeld, Esq.
Pro Se

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

STEVE RYAN,

Plaintiff and Appellant,

v.

MITCHELL S. ROSENFELD,

Defendant and Respondent.

A145465

(San Francisco County
Super. Ct. No. CGC 10-504983)

BY THE COURT:

On December 4, 2015, respondent Mitchell S. Rosenfeld filed a motion to dismiss this appeal on the ground that the appeal was untimely. An opposition has been filed by appellant. For good cause appearing, this court rules as follows:

"The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Under California Rules of Court, rule 8.104, (a)(1), plaintiff was required to file the notice of appeal within 60 days of service of the notice of entry of judgment or 180 days after entry of judgment. Even if plaintiff was not served with the notice of entry of judgment within 60 days, he did not file his notice of appeal within 180 days of the order dismissing the action.

The 180-day period is the outside limit for filing a notice of appeal. "The latest possible time within which a notice of appeal must be filed is 180 days after entry of judgment or entry of an appealable order . . . ." (*Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1454. Moreover, the 180-day rule is not "triggered" only upon the filing a valid proof of service, but it applies even where the record does not contain a document showing when notice of entry of order was mailed by the court clerk or served by the respondent on the appellant. (*Ibid.*) Finally, the 180-day period is not extended by

Cal. Rules of Court, rule 8.108, when the appellant has filed a post-trial motion for reconsideration or to vacate the judgment. (*Carpiaux v. Peralta Community College Dist.* (1989) 215 Cal.App.3d 1220, 1223 [180-day period is an outside limit and is not extended by rule 2 (predecessor rule to rule 8.108]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) [¶] 3.18, p. 3-9].)

On October 24, 2014 the trial court entered an order dismissing the action. Inasmuch as plaintiff's notice of appeal was filed on June 12, 2015, more than 180 days after the order or dismissal was filed, the appeal must be dismissed as untimely.

Plaintiff also argues that application of the 180-day rule in his case would be inequitable since the court did not warn him that its delay in ruling on his reconsideration motions would impact his appeal rights. ~(Opposition, pp. 4-5)~ This argument lacks merit. Plaintiff's status as a proper litigant does not excuse him from the duty to comply with the rules. An appellant in propria persona is held to the same standard of conduct as that of an attorney on appeal. (*Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 628.)

Plaintiff further argues that his appeal of the court's May 22, 2015 order denying his motion to vacate the judgment is timely. ~(Opposition, p. 6.)~ The order denying the motion to vacate the order dismissing the action, however, is not appealable. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 197, pp. 273-274.) To permit an appeal from an order denying a motion to vacate would effectively authorize two appeals from the same decision. (*Ibid.*, *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 822 [denial of a statutory motion to vacate the judgment is not separately appealable [criticizing *Howard v. Lufkin* (1988) 206 Cal.App.3d 297, cited by plaintiff in his opposition at p. 6].)

Therefore, good cause appearing, respondents' motion to dismiss the appeal is granted. Each party to bear their respective costs on appeal.

(Ruvolo, P.J., Reardon, J. and Rivera, J. concurred in this decision.)

Date: JAN 13 2016

Ruvolo, P.J.

P.J.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

STEVE RYAN,

Plaintiff,

v.

MITCHELL ROSENFELD; SACHIKO ROSENFELD; MICHAEL SORANTINO; MOEJOSE PROPERTIES, LLC, A Limited Liability Company, Does 1-10, inclusive

Case No.: CGC 10-504983

DEFENDANT'S AND CROSS-COMPLAINANT'S OPPOSITION TO PLAINTIFF'S MOTION TO VACATE ORDER OF DISMISSAL

MITCHELL ROSENFELD; MICHAEL SORANTINO, MICHAEL SORANTINO;

Cross-Complainants,

v.

STEVE RYAN aka STEPHEN M. RYAN, and ROES 1-10

Cross-Defendants.

Date: February 17, 2015
Dept: 302
Time: 9:30 AM
Res. No. 122214-01

Complaint Filed: October 29, 2010
Trial Date: N/A

OBJECTION TO MOTION FOR RECONSIDERATION

A. Plaintiff's Motion Should be Stricken for Failure to Comply with Local Rule 8.1(B)(4)

According to San Francisco Superior Court Local Rule 8.1(B)(4) (*emphasis added*):

Motions to tax costs, for new trial, and ***to set aside and vacate judgments*** *and enter a different judgment* ***must be heard by the judge who presided at the trial or proceedings*** *unless that judge is not available.*

The Order of Dismissal which is the subject of the present motion was issued by Department 206. [Plaintiff's Motion to Vacate Judgment, Exh. A (Order of Dismissal).] Thus, pursuant to Local Rule 8.1(B)(4), the present motion should have been noticed for Department 206 rather than Department 302. The fact of the improper notice was brought to the attention Plaintiff by way of letter on January 2, 2015. Plaintiff failed to respond and did not withdraw the motion despite ample opportunity to do so. [Rosenfeld Decl. ¶1, Exh. A (Letter to Ryan).]

Accordingly, the present motion should be denied without consideration of the merits.

OPPOSITION TO MOTION FOR RECONSIDERATION

Plaintiff filed the present action in October of 2010. After four years and several delays due to Plaintiff's multiple motions to continue the trial, the trial date was set for October 20, 2015. Shortly before the trial, Plaintiff made additional but ultimately unsuccessful attempts to continue the trial yet again, including an attempt in Department 302 heard on September 30, 2014 in conjunction with a motion by Plaintiff's counsel to withdraw. [Rosenfeld Decl. ¶2.]

After failing to have Department 302 continue the trial, Plaintiff immediately moved in Department 206 to continue the trial, but this time claiming a continuance was justified based upon medical reasons. [Rosenfeld Decl. ¶3.] That motion was denied on October 16, 2014. The next day, October 17, 2014, Plaintiff filed a petition for a writ of mandamus or prohibition to overturn the order. That petition was denied. On the day of trial, Plaintiff informed the Court that neither he nor his counsel were ready for trial and again moved to continue the trial. The motion to continue was denied and based upon Plaintiff's abandonment of the case and

failure to comply with the Court's Order to litigate the case on October 20, 2014, the Court dismissed Plaintiff's action and issued the written Order of Dismissal on October 24, 2014. [Plaintiff's Motion to Vacate Judgment, Exh. A (Order of Dismissal).]

Plaintiff then moved in Department 206 for reconsideration of the Order of Dismissal. The motion for reconsideration was heard and denied on December 18, 2014. Four days (two court days) later, Plaintiff filed the present motion seeking to vacate the Order of Dismissal which had just been reconsidered. [Rosenfeld Decl. ¶4.] The present motion is based upon the same fundamental factual allegations as the failed motion for reconsideration – (1) the illness of the Plaintiff[1], and (2) abandonment by his attorney.

For example, Plaintiff made the following statements in both the present motion and the reply in support of the motion for reconsideration:

- "It was then that my already prevalent medical problems and symptoms got much worse …"
- "I admit that I was an emotional and physical wreck at that time …"
- "I could not attend trial because I was in the hospital at the time; that is the only reason; not because I did not want to go to trial." (*identical except for a grammatical error*)
- "I was abandoned by my Attorney, who knew a month before trial that he had just that time remaining to prepare, and did nothing to do so."
- "I am tired of being thrown under the bus by my past attorney to artfully cover his malpractice and abandonment."

These examples as well as others can be found by a comparing pages 3 to 5 of the present motion to pages 1 to 4 of Plaintiff's reply brief from the motion for reconsideration. [Rosenfeld Decl. ¶6, Exh. C (Plaintiff's Reply in Support of Motion for Reconsideration).] Moreover, the only documentary evidence submitted in support of the present motion, two

[1] Plaintiff first claimed that the trial should be continued based upon issues with his counsel. When that argument failed, he then claimed he could not attend trial due to the illness of his wife. After that failed, he turned to the present argument combining a new allegation, his illness, with an old one, malpractice by his attorney.

documents purportedly from Hospital Guzman Tijuana (Plaintiff's Motion to Vacate, Exh. B), was previously submitted in support of the motion for reconsideration. [Rosenfeld Decl. ¶5, Exh. B (Plaintiff's Motion for Reconsideration, Exhs. D & E).]

Given that the present motion is a blatant attempt to re-litigate the same issues which were already decided in Department 206, the present motion is untimely, without merit, and an abuse of process.

A. Plaintiff's Motion is Untimely Under CCP §663

According to CCP §663a (a) (*emphasis added*):

A party intending to make a motion to set aside and vacate a judgment, as described in Section 663, shall file ..., either:

(1) After the decision is rendered and before the entry of judgment.

*(2) **Within 15 days of the date of mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him or her by any party of written notice of entry of judgment**, or within 180 days after the entry of judgment, **whichever is earliest.***

The Order of Dismissal was entered and served upon Plaintiff on October 24, 2014. [Rosenfeld Decl. ¶5, Exh. B at 4:25-26 (Plaintiff's Motion for Reconsideration).] Thus, in order to timely file a motion under CCP §663, the motion should have been filed on or before November 8, 2014. However, Plaintiff waited close to two months before filing the present motion.

B. Presiding Judge Lee's Order of Dismissal was Proper Under CCP §583.410

Plaintiff's argument regarding notice under CCP §583.410 was raised by Plaintiff at the hearing on the motion for reconsideration and found to be unpersuasive. [Rosenfeld Decl. ¶7.] Moreover, the legal authority cited Plaintiff, Farrar v. McCormick, (1972) 25 CA3d 701, 705, demonstrates that the notice and timeliness of the dismissal under CCP §583.410 was proper –

(a) it was within the discretion of the Court to hear the motion with less than 45 day notice, and (b) any defect in timeliness was waived by Plaintiff.

The facts of the present motion are a mirror image of those in Farrar. Id. As in the present action, in Farrar, after the case had been pending for well over three years, the trial court granted a motion to dismiss under CCP §583 based upon a motion made with less than 45 day notice pursuant to Rule 203.5 of the California Rules of Court thus shortening time for the hearing. Id. In affirming both the order of dismissal and the subsequent order denying reconsideration, the Court found "no objection was made by the plaintiff to the trial court's hearing of the motion. To the contrary, the record indicates plaintiff appeared to oppose the motion. Any defect in its timeliness thus was waived by the appearance; the purpose of giving notice accordingly was satisfied." Id. The present situation is identical. As stated in the Order of Dismissal Plaintiff's counsel, Ian Kelley, appeared at the hearing. Moreover, no objection was made to the hearing of the motion. As in Farrar, any defect in timeliness was waived. Both the Order of Dismissal and subsequent denial of reconsideration were proper.

C. The Order of Dismissal Was Based Upon Affirmative Actions of Plaintiff Rather Than Mistake, Inadvertence, Surprise or Excusable Neglect

Under CCP §473(b), Plaintiff must show that the Order of Dismissal was "taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." As explained by the Court in the Order of Dismissal, the action was dismissed because of the Plaintiff's failure to be ready for trial in direct contravention of the Court's order to do so. Plaintiff's counsel filed numerous declarations, was present and heard by the Court at the hearing dismissing the case. As already determined by Presiding Judge Lee at the hearing dismissing the case and again upon reconsideration the same alleged facts relied upon in the present motion, the intent of Plaintiff was made clear by his actions – Plaintiff refused to litigate as ordered and abandoned the case.

Moreover, the facts and circumstances of the present action are very different than those in Fleming v. Gallegos, (1994) 23 CA4th 68, which is relied upon by Plaintiff. Fleming involved a case of extreme neglect by Plaintiff's counsel. Such is not the case here. Indeed, Plaintiff's

former counsel made many attempts to have the court continue trial based upon the many excuses offered by Plaintiff in his supporting declarations. Presiding Judge Lee even commented during the hearing on the motion to reconsider that Plaintiff's counsel went above and beyond the call of duty.[2] [Rosenfeld Decl. ¶8.]

Plaintiff's claims of illness of himself and his wife motion have already been presented to Presiding Judge Lee three times (hearings on October 16, October 20 and December 22) and the Court of Appeal once. Each and every time, Plaintiff failed to persuade the Court that he was entitled to relief. The facts have not change and neither should the result. Indeed, the very same alleged facts relied upon in the present motion, including the claims of abandonment by his attorney, were found unpersuasive by Presiding Judge Lee in denying reconsideration.

Thus, there was nothing inadvertent or excusable about Plaintiff's decision to disregard the Court's order to be ready for trial and abandon the case.

PLAINTIFF SHOULD BE SANTIONED

Plaintiff was notified shortly after filing the present motion that the motion was noticed for the incorrect department in violation of Local Rule 8.1(B)(4). Despite the notice, Plaintiff willfully refused to re-notice the motion in the proper department. Thus, sanctions are warranted pursuant to CCP 128.7(b).

CONCLUSION

The Motion to Vacate is procedurally flawed as it was filed in the wrong department under Local Rule 8.1(B)(4) and untimely under CCP §663a(a). Moreover, the merits have already been fully addressed by Presiding Judge Lee in denying Plaintiff's motion for reconsideration. Mr. Ryan's action is and should remain dismissed.

Dated: February 2, 2015 By: _____
Mitchell Rosenfeld, Pro Se

[2] The arguments Plaintiff raises contradicting Presiding Judge Lee who issued the Order of Dismissal and denied reconsideration demonstrates the importance of Local Rule 8.1(B)(4).

Steve Ryan v. Mitchell Rosenfeld, et al.

Case No. CGC-10-504983

I, Yvonne Jansky, am over the age of 18, not a party to this cause. I am a resident of or employed in the County of San Francisco where the mailing took place. My business address is 3 Embarcadero Center, Suite 460, San Francisco, CA 94111.

On February 2, 2015, I served a copy of the following documents:

1. **DEFENDANT'S AND CROSS-COMPLAINANT'S OPPOSITION TO PLAINTIFF'S MOTION TO VACATE ORDER OF DISMISSAL**
2. **DECLARATION OF MITCHELL ROSENFELD IN SUPPORT OF DEFENDANT'S AND CROSS-COMPLAINANT'S OPPOSITION TO PLAINTIFF'S MOTION TO VACATE ORDER OF DISMISSAL**

on Steve Ryan, Plaintiff via US Express Mail to 1728 Bryant Street, San Francisco, CA 94110. I placed the above identified documents in an envelope with sufficient postage and addressed to the persons above. I placed the envelope for collection in a US postal office Express Mail drop.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Yvonne Jansky

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18. I am not a party to this action. My business address is 555 S. Flower Street, Suite 2900, Los Angeles, CA 90071.

On **September 6, 2016**, the foregoing document described as **OPPOSITION TO MOTION TO DISMISS REVIEW** is being served on the interested parties in this action by true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

[X] **(BY OVERNIGHT DELIVERY)** The attached document is being filed and served by delivery to a common carrier promising overnight delivery as shown on the carrier's receipt pursuant to CRC 8.25.

[X] **BY MAIL** - As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on **September 6, 2016** at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Noemi Santiago

SERVICE LIST

Steve Ryan v Mitchell Rosenfeld, et al
Supreme Court of California, Case No. S232582
Wilson Elser File No. 99990.01421

Daniel L. Alexander COLEMAN FROST LLP 201 Nevada Street El Segundo, California 90245 Tel: 424.277.1650 Fax: 310.648.8739 daniel@colemanfrost.com *One copy* Sent by US Mail	Attorneys for Defendants and Respondents, MITCHELL ROSENFELD, SACHIKO ROSENFELD, MICHAEL SORANTINO and MOEJOE PROPERTIES, LLC
Office of the Clerk CALIFORNIA SUPREME COURT 350 McAllister Street San Francisco, CA 94102-4797 Telephone: 415-865-7000 *Original and eight copies* Sent by Fed Ex	S232582