No. S182629

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JOSEPH L. SHALANT

Plaintiff and Appellant

vs.

THOMAS V. GIRARDI, et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal,
Second Appellate District, Division One
Court of Appeal No. B211932 (c/w B214302)
Los Angeles Superior Court No. BC 363843 (c/w BC 366214)
Hon. Teresa Sanchez-Gordon

ANSWER BRIEF

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INTRODUCTION

This brief relies heavily on the wise and thoughtful Court of Appeal's Opinion from which defendants/respondents are appealing, and which should be affirmed. Their "Opening Brief on the Merits" displays sophistry that needlessly confuses Title 3A, distorts its words, "legislates" a new meaning and poses "problems" that both do not exist and require no remedial expansion of Title 3A.

Furthermore, the only parties who attempted to obstruct justice, obfuscate the facts and delay by using frivolous, irrelevant and manufactured facts and arguments to oppose Shalant's lawsuit (reinstated by the Court of Appeals) are these same parties. Girardi's arguments below, in opposition to Shalant's very timely actions to obtain the presiding judge's approval for his already heavily litigated lawsuit, and which were largely parroted by National Union, were incorporated into jury questions 1-28 and decided on February 4, 2009 by the jury in the consolidated case (LASC #BC 363843, c/w BC 366214), which included Girardi's cross-complaint. Each of the 28 questions was decided unanimously against Girardi, thereby exposing his fraud on the court with his untruthful contentions. It is indeed ironic that it is in this same party, along with National Union, who is now appealing and attempting to prevent Shalant from receiving a trial on the merits. Shalant has already basically established the contentions in his lawsuit by defeating each of Girardi's alleged defenses below. The defenses were also presented by Girardi as the basis for seeking affirmative relief against Shalant in his cross-complaint. This Supreme Court's En Banc ruling of July 21,

2010, (#S182629) denying Castro's petition for review must, at least inferentially, have considered the underlying record that included the aforesaid jury findings.

Given the foregoing, plaintiff/appellant Shalant presents the following additional exposition addressing the other sides' arguments.

ARGUMENT

Both the statutory language of Title 3A, Vexatious Litigants, CCP §391-391.7, and its intended purpose are clear and instructive in its application as to the issues discussed by the Court of Appeals. However, as to other related issues in Shalant's briefs to that court, there is a lack of clarity. Should this court unlikely disagree with the underlying Court of Appeal, it is respectfully urged that those other issues upon which Shalant relied, but which became unnecessary for the Court of Appeal to decide, be heard either by this court or by the Court of Appeal on remand.

Title 3A is, otherwise, a concise, straight-forward remedial set of statutes that effectively deal with the problems of vexatious litigants – bolstered by, as the Appellate Court made clear on P. 13 of its Opinion, CCP §128.7 (pursuing frivolous litigation) and §2023.010-2023.040 (discovery abuses) – and requires "no need to resort to extrinsic interpretive aids such as public policy considerations" P.10 of its Opinion. One interesting and instructive anomaly, however, not relevant to this instant case, is the odd situation involving a pending lawsuit filed by a vexatious litigant in pro-per who did not obtain the required pre-

filing order. This illustration otherwise defines the efficient workings of the statute as written and as relevant to this case, except in the following situation.

Hypothetically, suppose plaintiff filed his complaint in pro per and failed to obtain pre-filing permission from the presiding judge. The case then went through various stages of litigation before it is discovered that the clerk had mistakenly filed the litigation without the requisite order. At that point, the defendant files and serves a notice under CCP §391.7(c) and thereby automatically stays the litigation until at least the plaintiff "obtains an order from the presiding judge permitting the filing ...." Suppose at the same time, the defendant "move(s) the court, upon notice and hearing, for an order requiring the plaintiff to furnish security" – based on the premise "that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation...." CCP §391.1.

In this context, Title 3A paradoxically operates in an inefficient and wasteful manner. Although the standards confronting the vexatious litigant appear to be comparable, the implementing procedures diverge. CCP §391.7 requires the plaintiff to convince the presiding judge "that the litigation has merit and has not been filed for the purposes of harassment or delay." §391.1 requires the opposing party to make "a showing (to the trial judge) that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant."

In this unique situation not present here, suppose also, as was true in both Forrest v. Department of Corporations (2007) 150 Cal. App. 4th 183 and in this instant case, the respective litigations had gone through various stages including, for example, demurrers, motions to strike, motions for summary judgment, case management conferences, etc. and were approaching trial. Under §391.1, the trial judge is obviously very well informed about the case and is in an excellent position to decide whether to order the plaintiff to post security and in what amount. Peculiarly, however, and only to waste judicial resources, cause needless delay and risk getting a far less knowledgeable and inconsistent ruling, the trial judge would decide the sanctions motion, but the uninformed presiding judge would have to preside over whether the litigation has merit and has not been filed to harass and delay.

In this setting the legislation clearly needs clarification or revision so as to operate intelligently, efficiently and justly. As will now be shown, Title 3A otherwise makes perfect sense as relevant to the instant case and is readily implemented so as to accomplish its intended purposes. Among other things, §391(a) and (b) define a vexatious litigant as someone who within the past seven years has "commenced, prosecuted, or maintained in propria persona at least five litigations ... finally determined adversely...." "in any state or federal court. §391(b)(2) adds more related factors involving relitigating, etc. §391(b)(3) adds repeatedly filing unmeritorious motions, abusing discovery, etc. while in propria persona and "that are frivolous or solely intended to cause unnecessary delay."

"Security" is defined quite broadly so as to make it quite unlikely that a vexatious litigant will proceed with a foolish lawsuit if he has to post security for the other party's attorney's fees and all (not limited to taxable) costs incurred "in or in connection" with such litigation. Such costs could include the pre-litigation and post-litigation attorney's fee and other various costs – a dreadful burden for anyone pursuing a vexatious litigation.

CCP §391.6 also enables the motion for security to be renewed "at any time thereafter," i.e. after an earlier motion or motions were made so as to update the security requirements and consider new evidence perhaps requiring a still larger security posting.

The litigation is stayed until the ordered security is posted and dismissed if it is not posted, CCP §391.4. These aforementioned remedies are more than adequate to prevent abuse by vexatious litigants, and protect the other party. All the remedies provided by the foregoing sections, not including CCP §391.7, are handled by the trial judge.

CCP §391.7 stands separate and apart from the preceding portions of Title 3A, as explained by the Appellate Court. It "governs only the initiation of a lawsuit" P.6 of the Opinion. Note, too, the dissent in Forrest which concluded, as reiterated by this Appellate Court, P.9, "a prefiling order governs only the initiation of a lawsuit, not what occurs during the prosecution of the litigation." CCP §391.7 does not, as relevant herein, require any judicial rewriting or expansion to afford the protections intended by the legislature.

CCP §391.7 clearly identifies and concerns the "prefiling order," "new litigation" and the need to obtain prefiling leave of the presiding judge of the court "where the litigation is proposed to be filed". It discusses "permit(ting) the filing" and "condition(ing) the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3." All this is to be ordered and decided by the presiding judge, and demonstrates how CCP §391.7 operates differently from the preceding sections and should be read for exactly what it states.

That CCP §391.7 only pertains to a prefiling order to be granted not by the trial judge, but only by the presiding judge, and does not concern litigation properly filed, is further established by subdivision (c) which prevents the clerk from filing the litigation in the first place. Should the clerk err by mistakenly filing the litigation without the presiding judge's order, the remedy is for the opposing party(ies) to file, etc. the described notice (of the vexatious litigant's status) and an automatic stay will result with subsequent dismissal unless the presiding judge permits the filing using the same standards as if the litigation had not yet been filed.

Also noteworthy and perhaps odd is that CCP § 391.7(d) includes "any petition," even a petition for dissolution of a marriage whether or not there is anything to contest or at issue besides status. Yet the proceedings under the Family Code are mentioned as evidencing only the inclusive nature of new

litigation not yet filed. There presumptively would not be much of a hurdle for a vexatious litigant to meet if all he wanted to do was to dissolve his marriage.

Nothing is said in Title 3A about the trial judge deciding anything under the pre-filing section, CCP §391.7, and nothing is even mentioned under the sections preceding §391.7 about the presiding judge or his/her having to become involved with litigation properly filed. Prefiling permission is a distinct and separate issue from the matters dealt with under CCP §391-391.6 and those portions of Title 3a are mutually exclusive and stand independent of each other. Taken together as they are written and in their severable applications, however, they protect the courts and individuals against abuse by vexatious litigants. They also provide for their implementation thoughtfully, logically and efficiently, except for the anomalous situation described, and except for the related topics discussed by Shalant in his briefs to the Appellate Court. For Judge Sanchez-Gordon to have, in essence, ordered this already substantially litigated matter (that was imminently scheduled for trial, with Shalant having the day before dismissal filed several in limine motions for the trial) to go to the uninformed presiding judge for §391.7 approval was illogical, and only wasteful of court resources.

It is important here to note that Shalant's plaintiff case had been filed and pursued by counsel for about 11 continuous months, and that Shalant was represented for another three months thereafter (after a two month hiatus of being in pro per). He then again found himself in pro per (for reasons which, in truth, had nothing to do with the merits of his case). P.4 of Opinion. Shalant's

prefiling order, issued years earlier, only pertained to "filing new litigation" (P.3 of Opinion) and he, of course, filed no such new litigation in this underlying case.

It is also highly relevant that Shalant had done all that he could possibly do to properly and very timely obtain the presiding judge's approval after the trail court made its aforesaid CCP §391.7 referral order. This is extensively discussed in Shalant's opening brief to the Appellate Court. Nonetheless, and while Shalant was awaiting the scheduled October 2, 2009 hearing before the presiding judge, the trial court erroneously dismissed the subject litigation on September 18, 2009 in Shalant's absence. His not attending was caused by confusion created by the court's scheduling and continuing various matters. See footnote 3 and pages 5 and 6 of the appellate Opinion.

Interestingly and worthy of guidance by the Supreme Court, as discussed in Shalant's briefs to the Appellate Court, is that defendants Girardi and National Union had attempted to convert the scheduled Oct. 2 hearing before the presiding judge into a contested mini-trial. Their "defense" in opposition to granting the misconceived prefiling order involved the same false, purjurious allegations they presented in their answers to Shalant's complaint and which formed the basis for the cross-complaint filed by Girardi for himself and the "copy-cat" complaint Girardi filed as counsel for Castro. Those allegations were, again, emphatically rejected by the jury which decided Girardi's said cross-complaint and Castro's complaint. P.6 of Opinion.

As Shalant argued to the Court of Appeal in his opening brief, the trial proceedings should also have been stayed while a properly and timely filed motion under CCP §391.7 was pending before the presiding judge and awaiting hearing. That Shalant was denied due process by the trial court's unwarranted dismissal on Sept. 18, 2009, when his motion to proceed in pro per was to be heard two weeks later, is clear.

CONCLUSION

It is respectfully requested that this Supreme Court affirm the Appellate Court's Opinion and overrule Forrest.

Respectfully submitted,

Dated: 10/8/10

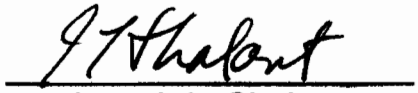
J Shalant

Joseph L. Shalant

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I certify that the foregoing Opening Brief on the Merits was produced on a computer in 13-point type. The word count as calculated by the word processing program used to generate the brief is 2,383 words.

Dated: Oct. 8, 2010



Joseph L. Shalant
in propria persona

CERTIFICATE OF SERVICE

I, Wendy Kronick, am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is: 14924 Camarosa Dr., Pacific Palisades, California 90272. I served the foregoing **REPLY BRIEF** by mailing a copy by first class mail in separate envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Oct. 8, 2010, at Los Angeles, California.

Wendy Kronick