Appellate Reports and cases in brief

Cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Alter ego; inequitable results; waiver of alter-ego allegations: *Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2014) __ Cal.App.4th __ (2d Dist., Div. 6.)

Relentless sued Airborne in a contract dispute involving the sale of an airplane, winning a judgment and attorney's fees. Relentless was unable to collect on its judgment. It moved in the trial court to add Airborne's principals (the Fultons) and two other companies they owned as judgment debtors. The trial court found that the Fultons and their companies were, in fact, alter egos, but it declined to add them to the judgment, finding that Relentless had not shown that treating Airborne as a separate entity from the Fultons and their other companies would produce an inequitable result. Reversed.

Relentless was not required to establish that the Fultons acted with wrongful intent when they took money out of Airborne to pay their own bills or to fund other businesses. All that is necessary is proof that treating Airborne separately would produce an inequitable result. Since Relentless was unable to collect on its judgment as a result of the Fultons' conduct, that failure is an inequitable result as a matter of law. Relentless was not required to pursue alter-ego discovery before trial, or to sue Airborne's suspected alter egos as parties. There are valid public-policy advantages to not having every dispute involve discovery into the ownership of the parties involved and their financial dealings. Relentless had therefore not waived its right to file a post-judgment motion to add Fulton and their companies to the judgment on an alter-ego theory.

Arbitration; Federal Arbitration Act; appellate review: *In re: Wal-Mart Wage and Hour Employment Practices Litigation* (9th Circ. 2013) __ F.3d __

Burton and Bonsignore were appointed by the district court as class counsel in a wage-and-hour action against Wal Mart.

The case settled for $85 million in 2006. The parties agreed that any fee disputes among plaintiffs' counsel would be arbitrated. The district court made a fee award of $28 million. Burton and Bonsignore could not agree to an allocation of the fee award, and the dispute was submitted to "binding, non-appealable arbitration." The arbitrator awarded $6 million to Burton and $11 million to Bonsignore. Bonsignore moved to confirm the award, while Burton moved to vacate it. The district court confirmed the award and Burton appealed. Affirmed.

The court rejected Bonsignore's argument that the non-appealability language in the arbitration agreement deprived the court of jurisdiction over Burton's appeal. The provision is ambiguous and can be interpreted to either deprive only the district court of the right to review the arbitrator's decision, or to deprive both the district court *and* the Court of Appeals of jurisdiction; the latter view does not comport with the Federal Arbitration Act ("FAA"). Judicial review of arbitration awards under the FAA is limited to the grounds provided in the FAA and may not be supplemented by contract. Similarly, the grounds for vacating arbitration awards specified in the FAA cannot be waived or eliminated by contract. [*Editor's note* – by contrast, arbitration under the California Arbitration Act allows parties, by contract, to make the arbitration reviewable or not reviewable on appeal.]

Waiver of the right to appeal: *Ruiz v. Cal. State Auto Ass'n Interinsurance Exchange* (2013) __ Cal.App.4th __ (1st Dist., Div.4.)

Ruiz filed a class action against CSAA alleging that premiums were being disguised as finance charges. The case settled for payments by CSAA of up to $6.5 million, depending on the number of claims filed, plus certain non-monetary relief estimated to be worth $3 million. CSAA agreed not to oppose a fee award that sought less than $2.3 million, or an incentive provision giving Ruiz up to $10,000 – but the agreement stated that Ruiz and class counsel would accept the lesser of these amounts or what the court actually awarded. The trial court awarded fees of $350,000 and an incentive award to Ruiz of $1,250. Ruiz and class counsel appealed. Reversed.

The published portion of the opinion deals with the court's rejection of CSAA's argument that by agreeing to accept the lesser of the specified figures or what the trial court awarded, counsel and Ruiz impliedly waived their right to appeal the trial court's award. While a party can waive the right to appeal, such a waiver must be clear and express, and any doubts will be resolved against finding a waiver of the right to appeal. Here, the language the parties used did not contain an unambiguous waiver of the right to appeal. The agreement could be construed to mean that the parties would "accept" the award made by the trial court, but did not agree that they would not appeal it.

Attorney's fees; FEHA; disparity between size of fee award and underlying damage award; supporting declarations: *Muniz v. UPS* (9th Cir. 2013) __ F.3d __

Muniz sued her employer, UPS, under the FEHA. UPS removed to federal

court, where the case was tried. The jury awarded her $27,820 in damages. The district court awarded fees in excess of $700,000. The award included fees for time spent by a paralegal. Muniz's attorney submitted a declaration stating the number of hours that the paralegal had worked on the case. Affirmed in part; reversed in part.

The Ninth Circuit rejected UPS's argument that it was an abuse of discretion for the district court to award fees in excess of $700,000 when the award to Muniz was only $28,820. "A trial court does not, under California law, abuse its discretion by simply awarding fees in an amount higher, even very much higher, than the damage awarded, where successful litigation caused conduct that the FEHA was enacted to deter to be exposed and corrected." The court held that the attorney's declaration stating the hours worked by his paralegal was hearsay, and remanded for recalculation based on a showing of admissible evidence.

Anti-SLAPP statute; television anchors; free speech; discrimination; protected conduct: *Hunter v. CBS Broadcasting, Inc.* (2013) _ Cal.App.4th __ (2d District, Div.7.)

Kyle Hunter filed an employment-discrimination lawsuit against CBS, which alleged that two local CBS stations had "repeatedly shunned him for numerous on-air broadcasting positions due to his gender and his age." He alleged that KCBS chose not to renew his contract of its then weather anchor Johnny Mountain as "part of a plan to turn prime-time weather broadcasting over to attractive females." CBS filed an anti-SLAPP motion, which was denied. The trial court found that Hunter's claims arose from its discriminatory conduct, not the exercise of any constitutionally protected rights. In light of this ruling, it did not address the issue of whether Hunter could establish a reasonable probability of prevailing at trial. Reversed.

An act is in furtherance of the right of free speech if it helps advance that right or assists in the exercise of that right. California courts have previously recognized that reporting the news and creating television shows qualify as the exercise of free speech. When assessing whether acts constitute a protected activity, courts must distinguish between the acts that underlie the plaintiff's claim and the claimed illegitimacy of those acts. Hunter's gender and age-discrimination claims arise from CBS's decisions concerning a choice of a weather anchor, which were rights in furtherance of its first-amendment rights. Whether CBS had a gender or aged-based discriminatory motive in not selecting Hunter as a weather anchor is an entirely separate inquiry from whether Hunter's discrimination claims are based on CBS's employment decisions.

Code Civ. Proc. § 998 offers to compromise; form; sufficiency of acceptance: *Rouland v. Pacific Specialty Ins. Co.* (2013) 220 Cal.App.4th 280 (4th Dist. Div.3.)

Rouland and his wife sued PSIC for breach of contract and bad faith arising out of its denial of their claim for damage to their home, which was damaged in a landslide. Two months before trial, PSIC served separate offers to settle under section 998, offering to pay each of its insureds a specified amount in exchange for general releases and dismissals with prejudice. Both offers stated, "If you accept this offer, please file an Offer and Notice of Acceptance in the above-entitled action prior to trial or within thirty (30) days after the offer is made." The Roulands did not accept either offer. After a five-week trial, a jury returned a verdict in favor of PSIC. PSIC filed a cost bill that included expert fees of $331,000, based on the rejected 998 offers. The trial court granted the Roulands' motion to tax, finding that PSIC's 998 offers did not comply with the requirements of section 998. Reversed.

The Legislature amended section 998 in 2006 to specify the requirements for a valid offer and acceptance. The offer must be in writing and "include a statement of the offer, containing the terms and conditions of the judgment or award, and *a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted.*" (§ 998, subd. (b), italics added.) "Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party." (§ 998, subd. (b).) The purpose of these provisions is to eliminate uncertainty by removing the possibility that an oral acceptance might be valid.

Recent decisions agree that failing to comply with the acceptance provision requirement invalidates the offer, but they do not provide clear guidance on how to satisfy that requirement. Here, Pacific Specialty included each offer and acceptance provision in a single document. The acceptance provision stated, "If you accept this offer, please file an Offer and Notice of Acceptance in the above-entitled action prior to trial or within thirty (30) days after the offer is made." The Roulands claim that this is insufficient for two reasons: (1) it had no line for them to accept the offers by signing them "as included in Judicial Council form CIV-090"; and (2) it "had no language ... which stated that [the Roulands] *shall* accept the offer[s] *by signing* a statement that the offer[s are] accepted." The court rejected both reasons.

The judicial council acceptance form is optional; not mandatory. Nothing in the statute's language requires an offer to include either a line for the party to sign acknowledging its acceptance or any specific language stating the party shall accept the offer by signing an acceptance statement. Indeed, no "magic language" or specific format is required for either an offer or acceptance under section 998.

Pacific Specialty's offers satisfied section 998's acceptance provision requirement because they informed the Roulands how to accept the offers (file an "Offer and Notice of Acceptance" with

the trial court) and the identified means of acceptance satisfied the statute's requirements for a valid acceptance (a writing signed by the Roulands' counsel). The court remanded the matter to the trial court to determine whether PSIC should recover its attorney's fees.

Code Civ. Proc. § 473, subd. (b); excuse of defaults; mandatory relief; summary judgment; bad lawyering: *Las Vegas Land and Development Company, LLC v. Wilkie Way, LLC* (2013) 219 Cal.App.4th 1086 (2d Dist., Div. 3.)

Purchaser of commercial real estate brought an action against the seller for breach of contract and fraud. The seller moved for summary judgment, which the plaintiff did not oppose. The trial court granted the motion and judgment was entered against the purchaser. Approximately six months later, the purchaser filed a motion for relief from default under § 473, subd. (b), explaining that it had not filed an opposition to the motion because of "bad lawyering." It explained that it could not obtain an attorney affidavit of fault because one attorney was being prosecuted for stealing money from the plaintiff, and the other had cut off all contact. The motion asked for leave to file an opposition to the summary judgment motion and argued that relief was mandatory.

The "motion for relief" was denied on the following grounds: (1) Plaintiff did not file a copy of the proposed opposition with the motion for relief; (2) no affidavit of fault was submitted; and (3) the failure of Plaintiff's counsel to "perform effectively" did not "constitute a sufficient ground for setting aside a motion for summary judgment ruling." Plaintiff appealed. Affirmed.

The provision in section 473, subd. (b) for mandatory relief does not apply to summary judgments, which are not a "default," or a "default judgment or dismissal." There is a split of authority on this issue, but the more recent cases hold that summary judgments are not included within the statute. And there is no exception to the requirement in the mandatory-relief section that the moving party file an attorney affidavit of fault. Moreover, the record does not show that the Plaintiff was abandoned by its attorneys. Rather, it shows that when its lawyers informed Plaintiff of the need to file an opposition to the motion, the Plaintiff told them that it had hired other lawyers to do the work.

Even if the attorneys had abandoned the plaintiff, the proper remedy is discretionary relief under section 473, which is not limited to defaults, default judgments, or dismissals.


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