



Litigation Update

Litigation Section News

June 2012

Summary judgment reversed in intellectual property case.

Plaintiff designed and registered with the Copyright Office a floral print fabric and sold 50,000 yards of it between 2002 and 2006. In 2008, plaintiff discovered shirts bearing a very similar design “printed using cruder, lower-quality techniques and machinery.” Plaintiff sued the seller of the design it discovered. The trial court granted summary judgment for defendant. The Ninth Circuit reversed, noting the 50,000 yards were mostly sold in the Los Angeles area, and stating: “A reasonable jury could find that [the copyrighted pattern] was widely disseminated in the Los Angeles-area fabric industry, and hence Defendants had an opportunity to view and copy [the] design.” *L.A. Printex Industries, Inc. v. Aeropostale, Inc.* (Ninth Cir.; April 9, 2012) 676 F.3d 841.

Insurer sits back but pays later.

Two insurance companies were tendered claims by the same insured. One stepped up to the plate and provided a defense; the other declined the tender and merely monitored the suit. After the case was settled, the settling insurer sued the monitoring insurer for equitable contribution. The trial court allocated a 60/40 split between the insurance companies to the advantage of the settling insurer. The appellate court affirmed, noting the settling insurer did “not have to prove actual coverage” under the monitoring insurer’s policy, but “just the potential of coverage.” *Axis Surplus Insurance Company v. Glencoe Insurance Ltd.* (Cal. App. Fourth Dist., Div. 1; April 11, 2012) 204 Cal.App.4th 1214, [139 Cal.Rptr.3d 578].

Employees who work through meal periods not entitled to compensation.

The California Supreme Court addressed the nature of an employer’s duty vis-à-vis meal breaks in

wage and hour cases: “[W]e conclude an employer’s obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done.” *Brinker Restaurant Corp. v. Sup. Ct. (Adam Hohnbaum)* (Cal. Sup. Ct.; April 12, 2012) (Case No. S166350).

Which statute of limitations applies?

Civil Code §2079.4 imposes a two-year statute of limitations on suits brought against a seller’s real estate broker. The standard buyer-broker agreement form issued by the California Association of Realtors form imposes a two-year limitations period for any legal action against a buyer’s broker. This case involves claims brought against a dual listing agent. The Court of Appeal found the two-year period applies to the breach of contract cause of action but that “the discovery rule applies.” As to the other causes of action, the court stated: “With regard to the breach of fiduciary duty, fraud, negligence, and negligent misrepresentation actions, we conclude these claims were based on the common law fiduciary duty and did not arise under the buyer-broker agreement. The applicable statute of limitations govern the timeliness of these claims.” *William L. Lyon & Associates, Inc. v. Sup. Ct. (Ted Henley)* (Cal. App. Third Dist.; April 12, 2012.) (As Mod. May 11, 2012) 204 Cal.App.4th 1294.

Once again, which statute of limitations applies?

In another case, appellants had an option to purchase real property and claimed the three-year statute of limitations under *Civ.Proc.* §338 applied. Both the trial and appellate courts found the two-year statute of limitations under *Civ.Proc.* §339 was the right one because “an option to purchase real property is a contractual right.” *Cyr v. McGovran* (Cal. App. Second Dist., Div. 6; April 17,

2012) 204 Cal.App.4th 1471.

Non-signatories not bound by arbitration agreement.

After a corporation went into bankruptcy, its short-term creditors brought suit against the corporation’s financial advisor alleging fraudulent misrepresentations. The financial advisor filed a petition to compel arbitration. The trial court denied the petition to compel and the appellate court affirmed because “the short-term creditors were not third-party beneficiaries of the contract between the financial advisor and the corporation.” *Epitech, Inc. v. Kann* (Cal. App. Second Dist., Div. 3; April 16, 2012) 204 Cal.App.4th 1365.

Ungrateful client. Lawyer represented client in employment litigation resulting in a \$62,246.74 judgment in the client’s favor after a jury trial. The trial court awarded \$300,000 for attorney fees, whereupon the client substituted the lawyer

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out of her case and represented herself in *propria persona*. The lawyer moved for an order that the attorney fees be made payable to the law firm. The trial court denied the motion and the appellate court granted a petition for extraordinary relief, concluding “an attorney fee award under *Labor Code* sections 1194, subdivision (a) and 226, subdivision (e) should be made payable to the attorney who provided the legal services rather than the client, unless their fee agreement otherwise provides.” *Henry M. Lee Law Corporation v. Sup. Ct. (Ok Song Chang)* (Cal. App. Second Dist., Div. 3; April 16, 2012.) 204 Cal.App.4th 1375.

Arbitration award for employer set aside. An employment agreement containing an arbitration clause stated “this Agreement can be amended, modified, or revoked in writing by the Company at anytime.” The trial court granted the motion to compel arbitration. The plaintiff not only failed to prevail at arbitration, but was ordered to pay the employer over \$40,000 for its attorney fees and expenses. The trial court confirmed the award and the plaintiff appealed. The appellate court agreed with the plaintiff’s contention “that the Agreement is illusory because Neiman Marcus retained the unilateral right to amend, modify, or revoke it on 30 days’ advance written notice, with the change to apply to any unfiled claim. We agree with that contention.” *Peleg v. Neiman Marcus Group, Inc.* (Cal. App. Second Dist., Div. 1; April 17, 2012) 204 Cal. App.4th 1425.

Only natural persons subject to suit. The family of the deceased brought suit against The Palestinian Liberation Organization and The Palestinian Authority under the *Torture Victim Protection Act of 1991* which authorizes a cause of action against an individual for acts of torture and extrajudicial killing committed under authority of color of law of any foreign nation. In this case, Palestinian intelligence officers imprisoned, tortured and killed a naturalized U.S. citizen. The U.S. Supreme Court affirmed dismissal of the action after concluding the word “individual” in the statute referred to a human being, not an organization, and that the act extended liability only to natural persons. *Mohamad v.*

Palestinian Authority (U.S. Sup. Ct.; April 18, 2012) 132 S.Ct. 1702, [182 L.Ed.2d 720].

Punitive damages award upheld. A jury calculated economic damages at \$1.47 million which included medical expenses, lost earnings, lost retirement benefits and the value of household services, and noneconomic damages for pain, suffering, emotional distress and loss of a spouse’s consortium at \$2.5 million. By the time of the separate trial for punitive damages, all but one defendant had settled. That defendant was found to have a 15 percent share of the fault, and to be severally or jointly and severally responsible for \$1.845 million of the award. The jury returned a verdict awarding \$4.5 million in punitive damages against that defendant. The trial court declined to reduce the award. The appellate court affirmed: “This single digit ratio [2.4 times the \$1.845 share of compensatory damages] is well within the range for comparable cases, and is not extraordinarily high.” *Bankhead v. Arvinmeritor, Inc.* (Cal. App. First Dist., Div. 4; April 19, 2012) (As Mod. April 25, 2012) 205 Cal.App.4th 68.

Prejudgment interest between time court vacated arbitration award and reinstatement after appeal. The Court of Appeal concluded prejudgment interest accrued during pendency of an appeal and that the trial court erred in suspending the accrual of interest during the appeal. *Tenzera, Inc. v. Osterman* (Cal. App. Second Dist., Div. 3; April 19, 2012) 205 Cal.App.4th 16.

Lawyers to pay sanctions for frivolous appeal. Plaintiff provided court reporting services to clients of defendants in prior lawsuits. Defendants claimed the charges were too high. When the court reporting service sued the lawyers for breach of contract, the lawyers brought a special motion to strike under the anti-SLAPP statute [*Civ.Proc.* §425.16], which the trial court denied. The appellate court was not impressed with the argument that “protesting that certain court reporting fees in underlying cases were illegal, excessive and unnecessary” was protected activity. Under *Civ.Proc.* §907 and *Cal.Rules of Ct.* §8.276, the defendants and their counsel

were ordered to pay the court reporting firm their attorney fees of \$22,000. *Personal Court Reporters v. Gary Rand* (Cal. App. Second Dist., Div. 4; April 20, 2012) 205 Cal.App.4th 182.

Joint offer under §998 to spouses okay. Plaintiffs contended a *Civ.Proc.* § 998 offer made jointly to a husband and wife is void. The trial court rejected the argument and the Court of Appeal affirmed, stating: “A section 998 offer may be made jointly to spouses because, under the California’s community property law, a cause of action for personal injury damages is community property (*Fam. Code* §780) and under *Family Code* section 1100, subdivision (a), either spouse has the power to accept the offer on behalf of the community.” *Farag v. Arvinmeritor* (Cal. App. Second Dist., Div. 3; April 24, 2012) 205 Cal.App.4th 372.

A deed of trust is not a mortgage. *Civil Code* §2932.5 states: “Where a power to sell real property is given to a mortgagee ...[t]he power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded.” Here a deed of trust was assigned but not recorded, and the homeowner lost in the trial court. Despite rumblings in federal courts about applying 2932.5 to deeds of trust as well as mortgages, a Court of Appeal held

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firm: “We are cognizant that there continues to be a controversy among the various federal courts concerning whether section 2932.5’s limitation to mortgages continues to be viable given the similarities between mortgages and deeds of trusts. The issue is one that the Legislature may wish to consider.” *Haynes v. EMC Mortgage Corporation* (Cal. App. First Dist., Div. 4; April 24, 2012) 205 Cal.App.4th 329.

Use it or lose it. Court of Appeal upheld trial court’s finding employer waived arbitration by delaying arbitration for an unreasonable time period [not expressing desire to arbitrate for four months after action commenced and waiting almost another month before filing its motion to compel arbitration]; engaging in litigation on the merits by taking steps inconsistent with arbitration [multiple demurrers, motions to strike, discovery]; and, prejudicing the employee/plaintiff through the delays and litigation of her claims. *Lewis v. Fletcher Jones Motor Cars* (Cal. App. Fourth Dist., Div. 3; April 25, 2012) (As mod. Apr. 25, 2012) 205 Cal.App.4th 436.

Don’t delay discovery. Two patients were involuntarily held in a county mental institution. The female patient alleges the male patient sexually assaulted her. An investigation revealed the locking mechanism on her door was faulty, enabling the door to simply be pulled open. Plaintiff wanted to reopen discovery after defendants produced evidence the doctors and nurses had no knowledge of the latch-

ing mechanism problem on the door in a motion for summary judgment. The trial court denied the request, and the appellate court agreed, saying “[p]laintiff had years to conduct discovery and failed to act diligently.” The appellate court also declined to find the trial court abused its discretion when it denied a continuance of the summary judgment motion. Summary judgment was entered in favor of the county and affirmed on appeal. *Johnson v. Alameda County Medical Center* (Cal. App. First Dist., Div. 4; April 25, 2012) 205 Cal.App.4th 521.

Class action claims stricken. Arbitration agreement provided for arbitration of disputes arising out of plaintiff’s employment. It was silent regarding class actions. The trial court granted defendant’s petition to compel arbitrations and denied its motion to dismiss class allegations. Noting the plaintiff produced no evidence to the trial court regarding the four factors required under *Gentry v. Sup. Ct.* (2007) 42 Cal.4th 443, [165 P.3d 556; 64 Cal. Rptr.3d 773] [assuming *Gentry* survives after *AT&T v. Concepcion* (2011) 131 S.Ct. 1740, [179 L.Ed.2d 742]], the appellate court affirmed the order granting the petition to arbitrate, but reversed the denial of the motion to strike the class allegations, noting “The parties arbitration agreement did not authorize class arbitration.” *Kinecta Alternative Financial Solutions, Inc. v. Sup. Ct. (Kim Malone)* (Cal. App. Second Dist., Div. 3; April 25, 2012) (As Mod. May 1, 2012) 205 Cal.App.4th 506.

Question of fact whether dangerous condition of public property existed. Traffic exiting baseball park was induced onto a public street where plaintiff was standing behind her car when she was hit by a drunk driver. The trial court granted summary judgment. The appellate court reversed, holding numerous questions of fact existed relating to the issue of dangerous condition of public property. *Cole v. Town of Los Gatos* (Cal. App. Sixth Dist.; April 27, 2012) 205 Cal. App.4th 749.

No attorney fees. Employer settled case with employees who contended they were not given rest breaks required by *Labor Code* §227.7. The California Supreme Court decided “the most plausible inference to be drawn ... is that the Legislature intended section 226.7 claims to be governed by the default American rule that each side must cover its own attorney fees.” *Kirby v. Immoos Fire Protection, Inc.* (Cal. Sup. Ct.; April 30, 2012) 53 Cal.4th 1244.

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