



Litigation Update

Litigation Section News

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Attorneys fail in argument they played only a passive role. Plaintiff, who was the defendant in an underlying action, brought a malicious prosecution action. The trial court dismissed the malicious prosecution action against some of the attorney defendants pursuant to an anti-SLAPP motion to strike [CCP §425.16] and granted attorney fees to them, after they argued they played only a passive role in the underlying litigation, although their names appeared on the pleadings and papers. Plaintiff appealed. The Court of Appeal reversed, finding the plaintiff showed “the requisite likelihood that he will prevail on his malicious prosecution claims against all defendants,” including the attorneys who claimed they played only a passive role. *Cole v. Patricia A. Meyer & Assoc.* (Cal. App. Second Dist., Div. 4; June 8, 2012) 206 Cal.App.4th 1095.

Summary judgment reversed [Feds had wrong address for search warrant, by the way]. DEA agents forced their way into a home under the mistaken belief it was occupied by a drug dealer. Using “#*%#” words, they ordered the parents to the floor. With their guns drawn, they also ordered the sleeping children to the floor. The 14-year-old girl complied, but the 11-year-old girl was frozen in fear. The agents then pulled the 11-year-old down, handcuffed her and pointed guns at her head. The district court granted summary judgment in favor of the United States, holding the DEA agents used reasonable force when they executed the search warrant. Applying California tort law, the Ninth Circuit affirmed as to the parents, but reversed as to the children, stating: “A jury could find that the agents pointed their guns at the head of an 11-year-old girl, ‘like they were going to shoot [her],’ while she lay on the floor in handcuffs, and that it was excessive for them to do so. Similarly a jury could find

that the agents’ decision to force the two girls to lie face down on the floor with their hands cuffed behind their backs was unreasonable.” *Avina v. United States of America* (Ninth Cir.; June 12, 2012) 681 F.3d 1127.

A borrower is not a victim. A woman failed to make her car payments. The car was repossessed and sold, and the bank hired a debt collector to collect the remainder of what was owed. The debt collector’s letter included the following language: “Please be advised that if you notify my office in writing within 30 days that all or a part of your obligation or judgment . . . is disputed, then I will mail to you written verification of the obligation. . . . If I do not hear from you within 30 days, I will assume that your debt. . . is valid.” The woman filed a motion to dismiss the action brought on behalf of the lender to collect the debt, arguing collection violations. The debt action was dismissed. Later, the woman sued in federal court for unfair debt collection practices which required her to dispute her debt in writing. The *Fair Debt Collection Practices Act* [FDCPA; 15 U.S.C. §1692 *et seq.*] and its California equivalent the *Rosenthal Act* [Civil Code §1788] prohibit a debt collector from requiring written disputes. In this case, the district court dismissed the woman’s action, and the Ninth Circuit affirmed, finding the debt collector must “expressly require a consumer to dispute her debt in writing” and here it was merely implied. *Riggs v. Prober & Raphael* (Ninth Cir.; June 8, 2012) 681 F.3d 1097.

General contractor successful on summary judgment. Masonry subcontractor worker at construction project stepped onto the rung of a plaster scaffold to gain access so he could lay masonry underneath it. The scaffold was wet. His shoes were muddy. He slipped and was injured. He sued the general contractor alleging his injuries “were caused by [the gen-

eral contractor’s] negligence in sequencing and coordinating construction work at the site, and failing to call a ‘rain day’ to protect workers from dangerous conditions caused by slippery surfaces. The trial court granted the general contractor’s motion for summary judgment, and the appellate court affirmed under the *Privette-Toland* doctrine (*See, Privette v. Sup. Ct. (Contreras)* (1993) 5 Cal.4th 689, [854 P.2d 721; 21 Cal.Rptr.2d 72]; *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, [955 P.2d 504; 74 Cal.Rptr.2d 878], and because there are no triable issues of material fact. *Brannan v. Lathrop Construction Associates, Inc.* (Cal. App. First Dist. Div. 1; June 12, 2012) 206 Cal.App.4th 1170.

Prisoner’s First Amendment rights violated. Prisoner at Pelican Bay State Prison attempted to mail a letter to a newspaper through the prison mail system. It argued that certain California prisoners, including him, should be recognized as political prisoners. In the letter, he referred to himself as a “New Afrikan Nationalist Revolutionary Man.” Prison officials confiscated the letter after concluding it threatened prison security and because it could contain hidden messages promoting gang activity. The Court of Appeal granted the prisoner’s writ of habeas corpus and ordered that his letter be sent to the addressee. *In re James Crawford* (Cal. App. First Dist., Div. 2; June 4, 2012) (As Mod. June 13, 2012) 206 Cal.App.4th 1259.

Petition to compel arbitration denied. Sales agent for an insurance company, who was part of a collective bargaining agreement which required arbitration, sued the company to receive minimum wage, reimbursement for work-related expenses and prompt payment of earned wages due upon termination, all claims based on various *Labor Code* statutes. The underlying issue was whether the agent

was an employee or independent contractor. The appellate court affirmed the trial court's denial of the petition, stating that even if the company did not waive arbitration by failing to move to compel it for over a year: "If [agent] was an employee with viable statutory labor claims, her claims are not subject to arbitration. If [agent] was an independent contractor she cannot assert statutory labor claims as an employee and therefore the question of arbitration seems irrelevant." *Hoover v. American Income Life Insurance Co.* (Cal. App. Fourth Dist., Div. 2; June 13, 2012) 206 Cal.App.4th 1193.

Appeal from order of good faith settlement dismissed.

The trial court approved a condominium developer defendant's motion for a determination of a good faith settlement, and another defendant filed an appeal from the trial court's order. The Court of Appeal dismissed, holding the appeal was from a non-appealable interlocutory order. The court noted *Civil Code* §877.6 permits review by writ of mandate within 20 days, and that 20 days had expired when the appeal was filed [leaving open, of course, the question of whether or not the appellate court might have treated the appeal as a petition for extraordinary relief had it been filed within 20 days.]. *Oak Springs Villas Homeowners Association v. Advanced Truss Systems, Inc.* (Cal. App. Second Dist., Div 8; June 14, 2012) 206 Cal.App.4th 1304.

Jury verdict after good faith settlement reduced to zero.

Prior to trial, plaintiff settled her case involving the loss of anticipated survivorship interests with some of the defendants, and the court found the settlement was made in good faith pursuant to *Civil Code* §877. A jury awarded her \$200,000 against the remaining defendants who are lawyers. The court granted an offset as to the entire \$200,000, stating: "This court does not need to determine the exact amount of the settlement. It is clear that its value exceeds the \$200,000 judgment." Part of plaintiff's argument on appeal was that an attorney cannot be a joint tortfeasor with a non-attorney under §877. The appellate court rejected the argument, which would have resulted in a double recovery if successful, stating: "Although both attorneys and non-

attorneys are codefendants in this matter, they can still be 'tortfeasors claimed to be liable for the same tort'" within the meaning of §877. *Oliveira v. Kiesler* (Cal. App. Fourth Dist., Div. 3; June 15, 2012) 206 Cal.App.4th 1349.

No §17200 claim against homeowners association.

Plaintiff homeowner sued his homeowner's association under *Business and Professions Code* §17200, the *Unfair Competition Law*. Both the trial court and the appellate court found the homeowner's association was not a business under this statute. *That v. Alders Maintenance Assoc.* (Cal. App. Fourth Dist., Div. 3; June 15, 2012) 206 Cal.App.4th 1419.

Right to arbitrate deemed waived for nonpayment of fees.

Plaintiff brought suit for securities fraud. One of the defendants moved to compel arbitration pursuant to a term in the private placement memorandum. The court granted the petition, but only two of the six defendants paid the arbitrators' fees. The panel of arbitrators from the American Arbitration Association terminated the matter for nonpayment of fees. A paying defendant moved to have the trial court confirm the arbitrators' termination ruling and dismiss the complaint; the court refused. Thereafter, he requested the court to send the matter back to arbitration, which the court agreed to do if he paid the non-paying defendants' fees as well as his own. He refused and appealed the court's denial of his request to send the case back to arbitration. The appellate court affirmed, finding "defendants have waived their right to arbitrate by refusing to reach a resolution with [plaintiff] on the fee dispute." *Cinel v. Barna* (Cal. App. Second Dist., Div. 1; June 15, 2012) 206 Cal.App.4th 1383.

Real estate broker not liable to third parties under B&P statute.

Business and Professions Code §10159.2 makes a licensed individual real estate broker who is the designated officer of a corporate broker "responsible for the supervision and control" of the corporate broker's employees. Lender alleged misrepresentations by a real estate salesman. The trial court sustained defendant's demurrer, and the Court of Appeal affirmed, stating:

"The designated officer's duty to supervise codified in section 10159.3 is owed to the corporation, not to third parties." *Sandler v. Sanchez* (Cal. App. Second Dist., Div. 7; June 18, 2012) 206 Cal.App.4th 1431.

Counsel's online filing satisfied FEHA's jurisdictional requirement.

Plaintiff sued his employer for violating the *Fair Employment and Housing Act* [FEHA, *Gov. Code* §12900 *et seq.*]. The trial court grant the employer's summary judgment motion on the sole ground the employee did not file a verified complaint with the department. The Court of Appeal reversed, concluding the employee's counsel's complaint filed through the department's online automated system was sufficient. *Rickards v. United Parcel Service, Inc.* (Cal. App. Second Dist., Div. 4; June 19, 2012) 206 Cal.App.4th 1523.

Equitable Relief Permitted Under ERISA.

An employee was seriously injured in a car accident involving a drunk driver. Her past and future medical expenses, wages and pain and suffering totaled \$1,757,943.08. She recovered \$376,906.84 from the tortfeasor. The employer's benefit plan gave the employer a right to full reimbursement for medical expenses paid by a third party tortfeasor, regardless of whether the injured person was made whole by the recovery. Even though she had only been partially compensated by the tortfeasor for her losses, the employer demanded full reimbursement for the medical expenses it paid. The employee and her counsel declined to reimburse, placing the entire disputed amount in a trust. The employer sued both its employee and her lawyer. The district court granted summary judgment in favor of the lawyer, finding the plan's reimbursement provision could not be enforced against the lawyer, but granted summary judgment in favor of the employer and against the employee for the full amount of medical expenses it paid. The Ninth Circuit affirmed the grant of summary judgment in favor of counsel, but reversed summary judgment in favor of the employer, and remanded the matter back to the trial court to "apply traditional equitable principles including consideration of traditional equitable defenses. The amount to which [the employer] is entitled to re-

cover under [ERISA, 29 U.S.C. §1001] §502(a)(3) and the proportional amount of attorneys' fees and costs for which [the employer] is responsible under §502 (a)(3) must be consistent with principles of equity and not merely contract." *CGI Technologies and Solutions Inc. v. Rose* (Ninth Cir.; June 20, 2012.) (Case No. 11-35127).

National Bank Act preempts Civil Code §1748.9. *Civil Code* §1748.9 requires certain disclosures on pre-printed convenience checks issued by banks to credit card users. The *National Bank Act of 1864* [13 Stat. 99] ("NBA") contains no such requirement. The California Supreme Court concluded "the NBA preempts *Civil Code* §1748.9 because the state law stands as an obstacle to the broad grant of power given by the NBA to national banks to conduct the business of banking." *Parks v. MBNA America Bank* (Cal. Sup. Ct.; June 21, 2012) 54 Cal.4th 376.

No dangerous condition; no duty to provide more lighting; severe injuries. Father and his three children were walking across the street in the evening in a marked crosswalk that had no signal lights and no overhead lighting. A car stopped and they entered the crosswalk in front of the stopped car. A pickup truck coming from the opposite direction hit one of the children who was thrown 80 feet and landed on his head. The driver who hit the four-year-old boy said he didn't even have time to put on his brakes, and "the last thing I saw was someone's head-

lights." The family sued the State of California for maintaining a dangerous condition and Pacific Gas & Electric Company for inadequate lighting. They argued the conditions gave them the false impression they were visible to drivers on the roadway. The trial court granted summary judgment in favor of both defendants. The appellate court affirmed, finding the intersection was not in a dangerous condition, and that a public utility has no duty to provide lighting [citing a case that held "a public entity is under no duty to light its streets."]. *Mixon v. State of California* (June 22, 2012) 207 Cal.App.4th 124.

California Supreme Court explains protections for attorneys' work product. Two items were claimed to be work product: recordings of witness interviews conducted by investigators employed by counsel and information concerning the identity of witnesses from whom counsel obtained statements. Regarding the recorded statements, the Supreme Court stated: "we hold that witness statements procured by an attorney are not automatically entitled as a matter of law to absolute work product protection . . . Upon an adequate showing, the trial court should then determine, by making an in camera inspection if necessary, whether absolute work product protection applies . . . witness statements procured by an attorney are entitled as a matter of law to at least qualified work product protection . . ." Regarding the identity of witnesses from whom counsel obtained statements, the Supreme Court said they are

not automatically entitled as a matter of law to absolute or qualified work product privilege. Upon a proper showing, the trial court should make an in camera inspection. *Coito v. Sup. Ct. (State of California)* (Cal. Sup. Ct.; June 25, 2012) 54 Cal.4th 480.

As the pizza turns. Sixteen-year-old employee of a Domino's pizza franchise filed a FEHA [Fair Employment and Housing Act, Gov. Code §12940] alleging she was sexually harassed at her job by her manager. The franchise filed for bankruptcy relief and Domino's Pizza, Inc. filed a motion for summary judgment with evidence that "Domino's was not [the alleged harasser's] employer and was not involved in the training, supervision or hiring of any employees" of the franchise, and the franchise is responsible for "supervising and paying the persons who work at the store." In opposition, the plaintiff attached the deposition of the manager of the franchise which said that Domino's "area leader" twice ordered him to fire employees of the franchise. The trial court granted the MSJ. The appellate court reversed, stating "a franchisor's actions speak louder than words in the franchise agreement." *Patterson v. Domino's Pizza, LLC* (Cal. App. Second Dist., Div. 6; June 27, 2012) (Case No. B235099).

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