



Litigation Update

Litigation Section News

November 2012

No Fourth Amendment Violation For Seizing Truck.

Plaintiff was stopped by the police while driving his truck to a job site. He was arrested for driving without a license in an unregistered vehicle, and the police contacted a towing company to tow the truck away. Plaintiff sued the towing company for wrongfully withholding his 1998 Dodge light truck for 38 days until he paid \$1,385 for its release. The trial court sustained the towing company's demurrer, and the Court of Appeal affirmed, concluding that the sheriff's department impounding the truck did not violate plaintiff's Fourth Amendment rights, his right to travel, was not an unreasonable seizure and was not otherwise in violation of law. *Halajian v. DeB Towing* (Cal. App. Fifth Dist.; September 4, 2012) 209 Cal.App.4th 1.

"Boundary By Agreement" Doctrine Does Not Apply.

The parties own contiguous pieces of property with a common boundary of approximately 1,300 feet. Plaintiff's fence does not run all the way to the boundary line, and defendant's almond orchard encroaches on a portion of plaintiff's property. Defendant contended the fence established the boundary under the doctrine of "boundary by agreement." The trial court quieted title in plaintiff's favor, and the appellate court affirmed, noting that "missing from defendants' case, among other things, is an essential element—an agreement." *Martin v. Van Bergen* (Cal. App. Second Dist., Div. 6; September 6, 2012) 209 Cal.App.4th 84.

Restaurant Obviously Didn't Like The A.D.A. Suit.

A disabled man filed a complaint for damages and permanent injunctive relief against a restaurant because of alleged violations of the *Americans with Disabilities Act* [42 USC §12182(b)(2)]. The restaurant filed a general denial and a cross-complaint alleging the disabled man and his attorney were li-

able under *Government Code* §12651(a)(7) of the *California False Claims Act* for knowingly filing false statements in fee waiver applications to avoid paying court fees, when the disabled man received funds of at least \$65,000 from settlements in lawsuits the previous year. The attorney contends he is not liable as he did not have an independent obligation to pay court filing fees. The trial court granted summary judgment to the disabled man and his attorney, but the appellate court reversed and remanded the matter for further proceedings. *Mao's Kitchen, Inc. v. Thomas Mundy and Morse Mehrban* (Cal. App. Second Dist., Div. 4; September 10, 2012) 209 Cal.App.4th 132.

Usual Legal Rate Of Interest Not Used In Criminal Forfeiture Proceeding.

A criminal defendant was convicted of various drug charges. The police confiscated a lot of drugs and \$10,153.38 in cash from his hotel room. The man claimed he earned the cash by selling candy, cigarettes and sodas from his room. In forfeiture proceedings, he was awarded \$12,601.33, which represents the money seized plus the interest actually earned while on deposit in an interest bearing account. On appeal, the man claims the trial court erred in failing to award him interest at the legal rate of seven percent per annum as specified in the California Constitution. The appellate court affirmed, applying *Health and Safety Code* §11469(i) which requires a seizing agency to preserve the value of seized property. *The People v. Twelve Thousand Six Hundred One Dollars and Thirty-Three Cents* (Cal. App. Second Dist., Div. 3; September 10, 2012) 209 Cal.App.4th 121.

Summary Judgment Reversed In Foreclosure Case.

Plaintiff alleges she realized something was wrong with the loan on her home when she saw her signature was forged on a few

of the loan documents. She hired a handwriting expert who confirmed some of the documents were not signed by her. She immediately brought the issue to the attention of the lender savings & loan. Plaintiff says she relied on a misrepresentation by a man named John at the savings & loan who told her not to make the April 2008 loan payment because "the worst thing that's going to happen is you are going to have a late fee, and we will get this done for you." Immediately after the April 2008 payment was not paid, foreclosure proceedings were instituted, and her tenders of late payments were rejected. Her home was sold at a foreclosure sale. The trial court granted summary judgment to the defendant on the ground plaintiff suffered no damages because she was not able to reinstate the loan by tendering the back payments and fees. The appeals court, after liberally construing plaintiff's evidence, said a reasonable inference was that she tried to make her monthly payments but the savings & loan rejected them, that she had been able to make the monthly payments at the time of the foreclosure sale, but that she had not been able to pay the additional late fees tacked on by savings & loan. The Court of Appeal reversed the grant of summary judgment on causes of action for negligent misrepresentation, fraud, violation of Civil Code §2924g(d), and intentional infliction of emotional distress. *Ragland v. U.S. Bank National Association* (Cal. App. Second Dist., Div. 3; September 11, 2012) 209 Cal.App.4th 182. [The FDIC took control of Downey Savings in November 2008 and later assigned its assets, including plaintiff's loan, to U.S. Bank.]

City Enjoined From Outsourcing.

The plaintiff, a union representing city employees, brought an action against the City for injunctive relief based upon a proposed outsourcing plan and layoff notices sent to over 100 employees. The trial

court granted a preliminary injunction enjoining the City from contracting with a private entity for any of the services that are performed by union members, or laying off union members as a result of such contracting. The appeal concerned only the grant of the preliminary injunction. The appellate court noted the collective bargaining agreement/MOU states: “should a decision be made to contract out for a specific service which is at the time being performed by employees covered by the MOU, the employees affected will be given sufficient time (a minimum of six months) in which to evaluate their own situation and plan for their future.” The appellate court ruled the trial court did not abuse its discretion in granting the preliminary injunction. *Costa Mesa City Employees’ Association v. City of Costa Mesa* (Cal. App. Fourth Dist., Div. 3; September 13, 2012) (As Mod.; October 10, 2012) 209 Cal.App.4th 298.

Arbitration As An “Inferior Forum.” In a retail sales contract, the plaintiff signed a stack of papers and never saw the arbitration clause. Plaintiff individually and as a class representative, brought an action against the automobile dealership for violating the *Consumer Legal Remedies Act* [CLRA; *Civil Code* §1750 *et seq.*], the *Automobile Sales Finance Act* [*Civil Code* §2981 *et seq.*] and for *Unfair Business Practices* [*Bus. & Prof. Code* §17200 *et seq.*] The trial court denied the motion to compel arbitration. The appellate court affirmed, stating the dealership “designed its arbitration clause to impose arbitration not simply as an alternative to litigation, but as an inferior forum that would give it an advantage over its buyers. Accordingly, the trial court acted within its discretion by implicitly concluding the arbitration clause was so permeated by “unconscionability that the interests of justice would not be furthered by severing the unconscionable elements from that clause and enforcing the remainder.” *Goodridge v. KDF Automotive Group* (Cal. App. Fourth Dist., Div. 1; September 13, 2012) 209 Cal.App.4th 325.

Defamation, Invasion Of Privacy, Unfair Business Practices Causes Of Action Service § 425.16 Motion. A genetics company publicly admitted that research

was mishandled vis-à-vis previously reported results of studies for a diagnostic test for fetal Down Syndrome. Plaintiff alleges he resigned after he was made an offer “that if he resigned as chief financial officer, he would not be associated with the mishandling and would be separated from others involved in the test data mishandling.” The company then issued a press release which stated in part: “The company has terminated the employment of its president and chief executive officer . . . and its senior vice president of research and development The company has obtained the resignation of its chief financial officer, [the plaintiff’s name], and one other officer. While each of these officers and employees has denied wrongdoing, the special committee’s investigation has raised serious concerns, resulting in a loss of confidence by the independent members of the company’s board of directors in the personnel involved.” Plaintiff brought suit for various torts, and the trial court partially granted the company’s motion to strike pursuant to CCP §425.16 [the anti-SLAPP statute.] but left standing the causes of action for defamation, invasion of privacy and unfair business practices. The Court of Appeal affirmed, stating plaintiff met the burden to show the falsity of the statements, and the company did not establish that as a matter of law it had a complete defense. *Hawran v. Hixson* (Cal. App. Fourth Dist., Div. 1; September 13, 2012) 209 Cal.App.4th 256.

No Mandatory Duty To Capture And Take Pit Bulls Into Custody. One afternoon, three boys were walking home from school when two pit bulls attacked and seriously injured one of them. A lawsuit was brought against the dogs’ owner, the landlord and the County of Los Angeles. Among other allegations, the complaint alleged the county had received nine complaints the pit bulls had jumped the fence and were running around loose chasing people, yet the county failed to capture and take the pit bulls into custody. Most complainers did not identify themselves, but one did, and she reported two pit bulls jumped a fence and killed two goats. According to the complaint, after the instant attack, the county seized the dogs and they were euthanized. The county brought a motion for summary judgment

arguing they had no mandatory duty to capture the pit bulls prior to the attack, noting they were never sure which specific animals were involved with the complaints. The trial court denied the County’s summary judgment motion, finding there were undisputed facts the dogs constituted a hazard and a menace to the health, peace and safety of the community and concluding the county had a mandatory duty to take custody of the dogs before the attack. The Court of Appeal granted the county’s petition for extraordinary relief, directing the trial court to grant the county’s motion for summary judgment. *County of Los Angeles v. Sup. Ct. (Kameron Faten, a Minor)* (Cal. App. Second Dist., Div. 8; September 20, 2012) 209 Cal.App.4th 543.

Discrimination In Housing. Defendants, who owned rental dwellings, were sued by the U.S. Justice Department for violation of the *Fair Housing Act* [42 U.S.C. §3604(a)-(d)] for refusing to rent to non-Korean tenants, refusing to rent to African Americans, refusing to rent to families with children and advertising with a preference for Korean tenants. They tendered the defense of the action to three insurance companies. The Court of Appeal affirmed the trial court’s determination that only the insurance company that provided coverage for discrimination had a duty to defend. *Federal Insurance Company v. Steadfast Insurance Company* (Cal. App. Second Dist., Div. 5; September 24, 2012) 209 Cal.App.4th 668.

Hospital Records Of Its Institutional Review Board Exempt From Discovery. Trial court ordered hospital to answer interrogatories and provide documents concerning information held only by its Institutional Review Board [IRB]. Court of Appeal granted a writ for extraordinary relief, holding IRB records to be exempt from discovery under *Evidence Code* §1157 because, even though the committee includes community members who are not physicians, it is a medical staff committee under the statute. *Pomona Valley Hospital Medical Center v. Sup. Ct. (April Christine Cabana)* (Cal. App. Second Dist., Div. 5; September 24, 2012) 209 Cal. App.4th 687.

Wrongful Termination Claim Against Hospital Dismissed.

Plaintiff sued a hospital for wrongful termination in violation of public policy because it allegedly violated *Labor Code* §132a, which generally prohibits discharging an employee for filing a workers' compensation claim, and for defamation because the hospital told others why she was fired. The trial court dismissed her claims pursuant to different motions brought by the hospital. The Court of Appeal affirmed, stating: "Whether malice exists to preclude the privilege [under *Civil Code* §47(c)] may be decided by a trial court upon undisputed facts on a motion for summary judgment;" and "We conclude a violation of section 132a cannot be the basis of a tort action for wrongful termination." *Dutra v. Mercy Medical Center Mt. Shasta* (Cal. App. Third Dist.; September 26, 2012) 209 Cal.App.4th 750.

County Enjoys Absolute Immunity. County asked for extraordinary relief after the trial court denied its motion for summary judgment. The action alleges a violation of a duty to warn of the violent tendencies of a person placed in a care facility. The conservatee injured one person and killed another. The County argued it was absolutely immune under *Welfare and Institutions Code* §5358.1. The appellate court agreed and issued the writ. *County of Sacramento v. Sup. Ct. (Tumbur Purba)* (Cal. App. Third Dist.; September 26, 2012) 209 Cal.App.4th 776.

Change In Law Permitted Court To Revisit Order Denying Arbitration.

In a class action alleging misrepresentation of cellular phone rates, the trial court denied defendants' motion to compel arbitration in 2006, prior to the United States Supreme Court's decision in *AT&T Mobility LLC v. Conception* (2011) 131 S.Ct. 1740, [179 L.Ed.2d 742]. Defendants renewed their motion to compel arbitration and the trial court granted it the second time around. The Court of Appeal, after noting an order compelling arbitration is not appealable and treating the appeal as a petition for a writ of mandate, issued the writ, stating: "An intervening change of law permitted the trial court to revisit its order denying arbitration and to issue a new order compelling arbitration." *Phillips v. Sprint PCS* (Cal. App. First Dist., Div. 3; September 26, 2012) 209 Cal.App.4th 758.

No Interlocutory Review Of Anti-Slapp Motion In Limited Civil Cases.

The appellate division of the superior court does not have jurisdiction to review an order denying a pre-judgment anti-SLAPP motion in a limited civil case. The legislative vehicle for appeals to the appellate division, *CCP* § 904.2, does not specify that such orders are reviewable on direct appeal. *Citibank, N.A. v. Tabalon* (App. Div. Sup. Ct. L.A.; September 26, 2012) 209 Cal.App.4th Supp. 16.

No Separate Statement Results In Summary Judgment Granted.

In a wrongful termination case, the em-

ployer brought a motion for summary judgment containing evidence it had a legitimate business reason for terminating plaintiff's employment. The evidence was that the employer discovered plaintiff, whose job "involved responding promptly to union members and diligently representing them," had resigned from the state bar with charges pending after he "had been disciplined prior to his resignation from the bar and his wrongdoing involved failing to respond to client inquiries and failing to perform legal services competently." In opposing the motion, plaintiff did not file a separate statement of additional material facts in an attempt to show that a triable issue of fact existed regarding the reasons for his termination, although his memorandum of points and authorities included facts and citations to supporting evidence. The trial court denied plaintiff's request for a continuance. The trial court determined plaintiff's opposition failed to include a separate statement of disputed and undisputed facts that conformed to the requirements of *CCP* §437c (b)(3) and *CRC* Rule 3.1350 and granted defendant's motion. The Court of Appeal affirmed. *Batarse v. Service Employees Internat. Union, Local 1000* (Cal. App. Fifth Dist.; September 27, 2012) 209 Cal.App.4th 820.

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