Filed 11/20/12 Kleiman v. Cluff CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MELODIE KLEIMAN, Plaintiff and Appellant, v. DONALD W. CLUFF, as Trustees, etc., et al. Defendants and Respondents.	2d Civil No. B230932 (Super. Ct. No. 56-2009-00364743-CU-PO-VTA) (Ventura County)

Melodie Kleiman appeals from an order granting costs to Donald W. Cluff and Sheila T. Cluff, individually and as Trustees of the Cluff Family Trust dated February 5, 1985, (respondents) pursuant to Code of Civil Procedure section 1032, subdivision (b),[1] after appellant dismissed her action against them, without prejudice. Appellant's action sought damages alleging negligence and other theories for injuries that she claims resulted from a dangerous condition on respondents' property. She contends that the trial court erred in awarding respondents costs as prevailing parties because her dismissal was without prejudice and not final, and "the action was in fact re-filed." We affirm.

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

On December 29, 2009, appellant filed a complaint alleging causes of action for negligence, premises liability, and intentional infliction of emotional distress, for injuries she suffered after she tripped and fell on January 7, 2009, at respondents' Ojai residence ("the first action"). On March 25, 2010, she filed a first amended complaint alleging causes of action for negligence, premises liability, and negligence per se. She claimed that injuries from her January 7, 2009 fall included leg injuries and two ruptured discs in her lower spine. She further claimed that those disc injuries caused her to fall down the stairs in her home in September 2009, and suffer nerve damage and other injuries.

On September 3, 2010, the trial court set the matter for a December 13, 2010 jury trial. On December 8, 2010, respondents took the deposition of appellant's retained expert, Brad Avrit. On December 10, 2010, appellant took the deposition of respondents' liability expert, Ned Wolfe. Respondents had noticed the deposition of Larry Khoo, M.D., appellant's orthopedic surgeon, but his emergency calls twice required the cancellation of his deposition.

On December 10, 2010, appellant filed a request for dismissal of the first action, without prejudice. She did so unilaterally without seeking the agreement of respondents or their counsel.

On December 23, 2010, respondents filed a memorandum of costs. They requested costs of $12,547, which included jury fees, deposition costs, witness fees, and other items.

On January 6, 2011, appellant filed another action against respondents (the second action). The second action arises out of the same set of facts as the first action.[2]

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[2] Because the record contains no documents from the second action, we have taken judicial notice of the superior court file in the case entitled *Kleiman v. Cluff* (Super. Ct. Ventura County, 2011, No.56-2011-00389047-CU-PO-VTA). (Evid. Code § 452, subd. (d).)

On January 11, 2011, appellant filed a motion to strike or tax costs. She then claimed that she dismissed the first action "to facilitate the taking of Dr. Khoo's deposition" which he had to cancel, and that respondents declined her request to stipulate to continue the trial. She asserted that respondents' denial of her request to continue the trial left her with "no choice but to dismiss the action without prejudice and then refile it." She did not seek a continuance in the trial court.

On January 31, 2011, the trial court heard appellant's motion to strike or tax costs, and took the matter under submission. Later that day, it issued a minute order awarding respondents $12,263.20 in costs, and striking $150 in jury fees and $133.80 in travel expenses. On February 16, 2011, the court entered judgment for respondents and awarded them costs in the amount of $12, 263.20.

DISCUSSION

Appellant contends that the trial court erred in awarding respondents costs as prevailing parties because the dismissal was without prejudice, and not final, and "the action was in fact re-filed." We disagree.

As a general rule, the prevailing party in civil cases is entitled as a matter of right to recover its litigation costs. (§ 1032, subd. (b); *Scott Co. v. Blount, Inc*. (1999) 20 Cal.4th 1103, 1108.) As relevant here, section 1032, subdivision (a)(4) defines a "prevailing party" to include "a defendant in whose favor a dismissal is entered . . . ." Where, as here, the determination of whether the criteria for an award of costs have been met is a question of law reviewed de novo. (*Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 669.)

Unlike a dismissal with prejudice which bars further litigation of the matters involved and thus constitutes an "end" to the litigation between the parties (*Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1095), a dismissal without prejudice does not. (*Tokerud v. CapitolBank Sacramento* (1995) 38 Cal.App.4th 775, 778). However, the Legislature's definition of a prevailing party in section 1032, subdivision (a)(4) does not distinguish between a dismissal with prejudice and a dismissal without prejudice. The plain language of that statute encompasses dismissals with or

without prejudice, and provides that a defendant is entitled to receive costs if "a dismissal" is entered in that defendant's favor. (See *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 190 [costs are allowed to a defendant when plaintiff's action is dismissed whether it is a voluntary dismissal with prejudice or without prejudice].) The trial court correctly concluded that respondents were prevailing parties, and entitled to costs under section 1032, subdivisions (a) and (b).

Appellant makes several arguments challenging the trial court's award of costs to respondents. None are persuasive. She argues, as she did below, that the unavailability of her expert forced her to dismiss the first action without prejudice. In this court, she further argues that doing so "was the only way it could continue to allow for healing of the traumatic brain injury that was part of the continuum of damages resulting for the initial fall and thereby allow [her] to continue." Both arguments ignore or overlook her failure to seek a continuance, the obvious alterative to a dismissal without prejudice under each circumstance she describes.

Rule 3.1332(c), of the California Rules of Court provides that a court may grant a continuance upon a showing of good cause, including "(1) The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances; [or] (2) The unavailability of a party because of death, illness, or other excusable circumstances."

Appellant also contends that the trial court deprived her of due process by awarding costs to respondents "because it could keep [appellant] out of the judicial process through the intimidation of the assessment of that fine." We reject this contention for two reasons. First, appellant opted to dismiss the first action without prejudice instead of seeking a continuance. Secondly, she cites no relevant authority to support her claim.

In attacking the court's award of costs to respondents, appellant cites cases concerning attorneys' fees. Attorneys' fees are authorized by Civil Code section 1717. Section 1032, subdivision (b) governs costs. The cases interpreting Civil Code section 1717 are inapposite.

We also reject appellant's claim that the trial court's award of costs in the first action could result in a duplicate award of the same costs in the second action. If respondents prevail in the second action, and seek duplicative costs, appellant may challenge their request in the trial court. Respondents' brief states that if they "are the prevailing party in the second lawsuit," they will not seek costs that they incurred in the first lawsuit. Appellant also argues that the award of costs to respondents in the first action may operate as a denial of her costs if she is the prevailing party in the second action. Assuming appellant prevails in the second action, she can seek the costs she incurred in pursuing that action, in the trial court.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

HOFFSTADT, J.*

* Assigned by the Chairperson of the Judicial Council.

Kent M. Kellegrew, Judge

Superior Court County of Ventura

Melodie Kleiman, in pro. per., Plaintiff and Appellant.

Wisotsky, Procter & Shyer, James N. Procter II and Karen M. Harmeling for Defendants and Respondents.