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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RANDHIR S. TULI,

Plaintiff and Appellant,

v.

SPECIALTY SURGICAL CENTER
OF THOUSAND OAKS LLC et al.,

Defendants and Respondents.

B275847

(Los Angeles County
Super. Ct. No. BC542350)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gail Feuer, Judge. Dismissed.

Law Office of Bruce Adelstein and Bruce Adelstein for
Plaintiff and Appellant.

Waller Lansden Dortch & Davis and Jennifer L. Weaver,
for Defendants and Respondents.

Following the trial court's ruling granting summary judgment against plaintiff and appellant Randhir S. Tuli, he entered into a stipulation with cross-complainants and respondents Specialty Surgical Center of Thousand Oaks LLC (SSCTO) and SymbionARC Management Services, Inc. (SymbionARC) (collectively Cross-Complainants) to dismiss their cross-complaint against him without prejudice subject to a tolling agreement. The trial court entered judgment in favor of all the defendants, and Tuli filed an appeal.

In *Kurwa v. Kislinger* (2017) 4 Cal.5th 109 (*Kurwa II*), which was decided after this case was fully briefed, the California Supreme Court held that when parties enter into an agreement which “effectively preserve[s] their remaining claims for future litigation,” the judgment is not final and appealable, and an appellate court must dismiss the appeal and remand the matter to the trial court with directions to vacate the “defective judgment and the [parties’] underlying stipulation.” (*Id.* at pp. 111, 118.) Given this ruling, we asked the parties for supplemental briefing addressing whether this appeal should be dismissed under the authority of *Kurwa II*.

Cross-Complainants argued the judgment in this case was not final and appealable under the “one final judgment rule” as articulated in *Kurwa II* and, thus, this appeal should be dismissed. Tuli disagreed, contending we should consider the appeal on the merits because the judgment was final and appealable as to nine respondents who were not parties to the cross-complaint. Alternatively, Tuli asks that his appeal as to the Cross-Complainants be treated as a writ petition because they were involved in virtually all of the causes of actions.

Although we agree that where a judgment resolves all claims as to one party, that judgment is final and appealable, that principle is not applicable to this situation: a case involving multiple parties where the interest of the Cross-Complainants are not distinct and separable from the general subject of the litigation. Under these circumstances, based on the reasoning in *Kurwa II*, and due to the interrelatedness of the issues in both the complaint and cross-complaint, we conclude this appeal must be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND¹

Tuli filed a complaint, which was later amended on December 11, 2015,² against SSCTO and members of its governing board alleging they conspired together in bad faith to “squeeze out” his interest in the company by voting to expel him as a member and to redeem his units for the price of zero. He also sued SymbionARC and others alleging they improperly terminated his consulting agreement, whereby he, his business partner, and their company had been retained to provide consulting and oversight services related to the operation of SSCTO. SSCTO and SymbionARC filed a cross-complaint against Tuli, alleging that it was his actions that led to his expulsion from SSCTO and the termination of his consulting agreement with SymbionARC.

¹ Because of our disposition, we devote only limited attention to the factual background of this case.

² Tuli amended his complaint after the trial court denied his motion for summary adjudication.

The defendants filed a motion for summary judgment, which the trial court granted. Thereafter, Tuli entered into a stipulation with the Cross-Complainants to dismiss their cross-complaint against him without prejudice subject to a tolling agreement. On April 7, 2016, Cross-Complainants filed a request for dismissal of their cross-complaint without prejudice.

The trial court entered judgment against Tuli and in favor of the defendants. The text of the judgment explicitly mentioned that the cross-complaint had been “dismissed without prejudice subject to the tolling agreement executed by the parties thereto.”

On June 23, 2016, Tuli filed a timely notice of appeal.

DISCUSSION

In *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097 (*Kurwa I*), the California Supreme Court considered the issue of “whether an appeal may be taken when the judgment disposes of fewer than all the pled causes of action by dismissal with prejudice, and the parties agree to dismiss the remaining counts without prejudice and waive operation of the statute of limitations on those remaining causes of action.” (*Id.* at p. 1100.) It held that such a judgment is not appealable. (*Ibid.*)

In that case, the plaintiff sued the defendant for breach of fiduciary duty and defamation, among other claims; while the defendant cross-complained for defamation. (*Kurwa I, supra*, 57 Cal.4th at p. 1100.) The trial court ordered the plaintiff’s action dismissed with prejudice with the exception of the defamation claim. In order to “test the issue” on the fiduciary duty claim and “get a ruling” from the appellate court before disposing of the defamation claims, the parties agreed to dismiss their respective defamation claims without prejudice and to waive the applicable statute of limitations. (*Id.* at p. 1101.)

In dismissing the appeal, our Supreme Court disapproved of the parties' agreement to hold "some causes of action in abeyance for possible future litigation," and held in such a situation the judgment was not final, and that the appeal was precluded under the one final judgment rule. (*Id.* at p. 1100.)³

Following *Kurwa I*, the plaintiff attempted to secure a final and appealable judgment to no avail. (*Kurwa II, supra*, 4 Cal.5th at p. 111.) As our Supreme Court explained in *Kurwa II*, "First, the trial court disclaimed any power to revisit the parties' agreement. Then, when plaintiff attempted to finalize the judgment by dismissing his own outstanding claims *with* prejudice, the Court of Appeal dismissed the appeal, concluding that no appeal will lie unless defendant, too, disposes of his outstanding cross-claim." (*Id.* at p. 111.) Because the defendant refused to dismiss his defamation claim, plaintiff "wound up in a legal cul-de-sac." (*Ibid.*)

In *Kurwa II*, our Supreme Court provided further guidance on the proper recourse we must take when parties improperly "attempt to secure appellate review of a trial court's nonfinal judgment" by entering into an "agreement holding some causes of action in abeyance for possible future litigation after an appeal from the trial court's judgment on others." (*Kurwa II, supra*, 4 Cal.5th at pp. 113, 118.) It explained that because the judgment in such a situation was not final and appealable, the trial court retained the power to vacate both "the defective

³ Under the "one final judgment" rule, a judgment that fails to dispose of all the causes of action pending between the parties is generally not appealable." (*Kurwa I, supra*, 57 Cal.4th at p. 1100.)

judgment and the [parties'] underlying stipulation.” (*Id.* at p. 118.) It held we must dismiss the appeal to allow the parties and the court to dispose of the remaining claims, either by dismissing them with prejudice or pursuing them to judgment. It further held it is only then that the trial court can issue a final judgment from which the plaintiff can appeal. (*Ibid.*)

Under the authority of *Kurwa II*, the parties here disagree whether we should dismiss this appeal. Cross-Complainants, of course, take the position that this appeal is “near identical” to the “procedural posture” in *Kurwa II* and we should follow the “clear instructions” of our Supreme Court and dismiss this appeal because the judgment is not final and appealable as a result of the stipulation, and so the trial court can dispose of the remaining claims in the cross-complaint.

Although Tuli acknowledges that under *Kurwa II*, the judgment as to the Cross-Complainants is not final and appealable, he contends we should decide the merits of this appeal because the judgment as to the nine respondents who are not parties to the cross-complaint is final and should be heard and resolved as to them. Alternatively, Tuli asks us to exercise our discretion and treat his purported appeal as to the Cross-Complainants as a writ petition and decide it along with the appeal as to the nine respondents.⁴ We disagree with Tuli and

⁴ At the time Tuli filed his supplemental brief, the online docket of *Kurwa II* showed that on January 3, 2018, a request for modification of the opinion was filed, and on January 4, 2018, the Supreme Court issued an order stating, “[t]he finality of the opinion in the above-entitled case is hereby extended to and including February 16, 2018.” On January 31, 2018, the Supreme Court modified the opinion; however, the modification does not affect our decision here.

decline the invitation to reach the merits on a nonfinal judgment or to treat his appeal as a writ.

His first argument ignores the fact that the issues raised in the complaint and cross-complaint are so intertwined that severance of this appeal is likely impracticable.⁵ Thus, Tuli's reliance on the Supreme Court cases that support the principle "where a judgment resolves all claims to one party, the judgment is final and appealable as to that party" is misplaced. We acknowledge "a practical exception [to the final judgment rule] is recognized where there are multiple parties and the order granting summary judgment disposes of all issues involving the appealing party, [however] the interests of the parties must be distinct and severable from the general subject of the litigation to justify separate judgments." (*American Nat. Bank v. Stanfill* (1988) 205 Cal.App.3d 1089, 1095.) This is not the situation here. In the cases relied on by Tuli, the claims resolved by the "final and appealable" judgment were distinct and separable from the remaining claims. (See *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 993, fn. 3 [order sustaining demurrer without leave to amend appealable in case involving

⁵ We note that in support of his contention for writ relief, Tuli acknowledges that the issues involving the nine respondents "are the same, or at least similar and related to," the issues involving the Cross-Complainants, and argues it would "promote judicial economy and avoid piecemeal litigation if all claims were evaluated in one appellate proceeding." As discussed in this opinion, we agree with Tuli that the issues in both the complaint and cross-complaint are related, but defer to the reasoning in *Kurwa II* and conclude the "one appellate proceeding" will occur *only after the parties and the court dispose of the cross-complaint.* (*Kurwa II*, *supra*, 4 Cal.5th at p. 118.)

multiple parties where remaining claim involved separate cause of action against separate defendant]; *Justus v. Atchison* (1977) 19 Cal.3d 564, 567-568, disapproved on another ground in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171) [demurrer sustained as to husbands, but not to wives, appealable in wrongful death action where injuries experienced by husbands different than wives].)

This appeal is clearly distinguishable on its facts. As noted above, the principal contentions in both the complaint and cross-complaint are whether the operating agreement of SSCTO and the consulting agreement with SymbionARC were breached. As Tuli concedes, the Cross-Complainants “are involved in virtually all of the causes of action and the issues in these claims are interrelated with those involving the [nine respondents].” Because the issues in the complaint and cross-complaint are not distinct and severable, we find the judgment is not a “final” appealable judgment as to the nine respondents. (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [“When appellate jurisdiction depends on a court-made policy rule and not on statute, appellate discretion supplies a firmer conceptual base than procedural fictions”].)

Next, Tuli urges that, even if we agree with the analysis of *Kurwa II*, we should exercise our discretion to treat his appeal as to the Cross-Complainants as a petition for a writ of mandate and, thus, reach the merits of the appeal. An appellate court may use its discretion to construe an appeal as a petition for writ of mandate “(1) under unusual circumstances, and (2) where doing so would serve the interests of justice and judicial economy.” (*Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87, 92.) These unusual circumstances exist “where

requiring the parties to wait for a final judgment might lead to unnecessary trial proceedings, the briefs and record include[] in substance the necessary elements for a proceeding for a writ of mandate, there [i]s no indication the trial court would appear as a party in a writ proceeding, the appealability of the order [i]s not clear, and all the parties urge[] the court to decide the issue rather than dismiss the appeal.” (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1367, citing *Olson v. Cory* (1983) 35 Cal.3d 390, 400–401.)

We find the case before us is not an unusual circumstance that justifies treating the appeal as to the Cross-Complainants as a writ petition. To do so would allow an end run around the Supreme Court’s ruling in *Kurwa II*, which made clear that when parties enter into stipulations “effectively preserv[ing] their remaining claims for future litigation,” as in this case, we must dismiss the appeal, which is what we will do in this case. (*Kurwa II, supra*, 4 Cal.5th at pp. 111, 118.) In addition, Cross-Complainants object to deciding the issue on the merits, precluding a finding that all the parties encourage appellate resolution by means of writ review in this case.

As set forth in *Kurwa II*, we dismiss this appeal and remand this case with directions to the trial court to exercise its authority to vacate “the defective judgment and the underlying stipulation” so the parties and the court may dispose of the cross-complaint. (*Kurwa II, supra*, 4 Cal.5th at p. 118.)

DISPOSITION

The appeal is dismissed. Respondents shall recover their costs on appeal.

BIGELOW, P.J.

We Concur:

GRIMES, J.

HALL, J. *

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.