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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

WENDY SEGOVIA et al., Plaintiffs and Respondents, v. CHIPOTLE MEXICAN GRILL, INC., Defendant and Respondent; ENRIQUE LOPEZ-CARRILLO, Objector and Appellant.	B266570 (Los Angeles County Super. Ct. No. BC489851)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Dismissed.

Esner, Chang & Boyer and Stuart B. Esner; The Quisenberry Law Firm and John N. Quisenberry; Bachus & Schanker, and Andrew C. Quisenberry for Objector and Appellant.

Law Offices of Kenneth H. Yoon, Kenneth H. Yoon and Stephanie E. Yasuda; Law Offices of Peter M. Hart and Peter M. Hart for Plaintiffs and Respondents.

Sheppard, Mullin, Richter & Hampton, Richard J. Simmons, Jason W. Kearnaghan, Daniel J. McQueen and Robert Mussig for Defendant and Respondent.

Objector and appellant Enrique Lopez-Carrillo (Lopez-Carrillo) appeals a judgment entered following an order approving the settlement of a wage and hour class action lawsuit brought by plaintiff and respondent Wendy Segovia (Segovia) against defendant and respondent Chipotle Mexican Grill, Inc. (Chipotle).

Before we can reach the merits of Lopez-Carrillo's challenges to the trial court's approval of the settlement, we address as a threshold matter whether Lopez-Carrillo has standing to prosecute this appeal. Only a "party aggrieved may appeal" from a judgment. (Code Civ. Proc., § 902.)[1] Lopez-Carrillo is a class member, but he did not intervene in the action. As a consequence, Lopez-Carrillo lacks party status and is without standing to appeal. Accordingly, the appeal is dismissed.[2]

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

[2] The issue of whether an unnamed class member must intervene in the litigation in order to have standing to appeal is currently pending before the California Supreme Court. (*Hernandez v. Restoration Hardware, Inc.* (2016) 245 Cal.App.4th 651, review granted June 22, 2016, *Hernandez v. Muller*, Case No. S233983.)

FACTUAL AND PROCEDURAL BACKGROUND

Segovia was employed by Chipotle in California in various non-exempt hourly positions, including team member, kitchen manager, service manager and assistant general manager, beginning in June 2010 until February 2012. Segovia commenced this action in August 2012 and filed her fourth amended complaint in October 2013.

Segovia alleged, inter alia, that she and similarly situated employees were not paid all vacation wages that were earned, were not reimbursed for all work-related mileage expenses, were not paid for off-the-clock work, were not permitted to take legally-mandated meal and rest breaks, were not paid all overtime hours at the correct rate, and were not given accurate and itemized wage statements. Segovia sought to represent a class of "all current and former employees classified by [Chipotle] as non-exempt from overtime who worked at [a Chipotle] restaurant in California during the period from August 8, 2008 to the present," including specified subclasses.

The parties engaged in extended settlement negotiations, and in August 2014, two years into the litigation, they executed a long-form Stipulation and Settlement of Class Action Claims (Settlement or Agreement). The Agreement provided for a gross settlement amount of $2 million, with the net proceeds (after deduction of a court-approved attorney fee and cost award not to exceed one-third of the gross settlement fund, a service award to Segovia of up to $15,000, claims administration costs, and the State of California's portion of a payment under the Labor Code Private Attorneys General Act of 2004 [Lab. Code, § 2698 et seq.]) to be distributed to the participating class members who had not opted out of the Settlement. The Settlement provided that the

settlement amount for each class member would be based on each individual's pro rata share of the total amount of wages earned by the settlement class members during the class period.[3] The individual payouts would be distributed by the claims administrator, without requiring class members to submit claim forms or other documentation.

In the Settlement, the parties also stipulated to the filing of a fifth amended complaint, to include claims under the federal Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. § 201 et seq.) that overlap with the claims and issues in the fourth amended complaint, including FLSA claims for off-the-clock work, overtime, improper regular rate calculations and minimum wages.

On August 22, 2014, Segovia filed a motion for preliminary approval of the Settlement.

On December 29, 2014, the trial court entered an order granting preliminary approval of the Settlement. The trial court ruled that "for purposes of the Agreement only, this litigation is CERTIFIED as a class action pursuant to California Code of Civil Procedure § 382." It preliminarily approved the Settlement "as appearing on its face to be fair, reasonable, and adequate and to have been the product of serious, informed, and extensive arm's length negotiations." The trial court indicated it had "considered the nature of the claims, the relative strength of Plaintiff's claims, the amounts and kinds of benefits paid in

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[3] Lopez-Carrillo asserts that with approximately 38,000 class members, each individual would receive, on the average, a net payout of about $34.21. Similarly, according to Segovia, the average payment would be "$28.20 per person (gross of payroll taxes)."

Settlement, the allocation of Settlement proceeds among the class members, and the fact that the Settlement represents a compromise of the Parties' respective positions rather than the result of a finding of liability at trial." The trial court appointed class counsel, approved the claims administrator, approved the Notice of Pendency of Class Action Settlement to be mailed to class members, and scheduled a final approval and fairness hearing.

On April 7, 2015, the claims administrator sent the Settlement notice by first class mail to the 38,344 class members on the class list. According to Chipotle, 96 percent of the class members received the notice.

Four class members, including Lopez-Carrillo, filed objections to the proposed Settlement, and 35 individuals elected to opt out. Lopez-Carrillo contended, inter alia: Segovia had not shown the proposed Settlement was fair, reasonable, and adequate; the notice to class members did not comply with due process; and Segovia did not meet her burden on class certification.[4] Lopez-Carrillo did not opt out of the Settlement, nor did he seek to intervene in the action.

On June 25, 2015, the trial court conducted a final approval and fairness hearing. On July 14, 2015, it entered an order overruling the objections of Lopez-Carrillo and the three other objectors, approved the Settlement as "fair, reasonable, adequate, and in the public interest," and directed entry of a final judgment.

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[4] Lopez-Carrillo is a plaintiff in *Turner, et al. v. Chipotle Mexican Grill, Inc.*, No. 1:14-cv-02612-JLK (D.Colo.), a nationwide FLSA collective action that is being prosecuted in Colorado federal court.

On September 2, 2015, Lopez-Carrillo filed a timely notice of appeal from the judgment.

CONTENTIONS

Lopez-Carrillo contends: the Settlement's FLSA opt-in process does not comport with state or federal law; the trial court abused its discretion in concluding the proposed Settlement was fair, reasonable and adequate; and the trial court erred in granting certification of the Settlement class.

Chipotle and Segovia, in turn, assert the appeal should be dismissed because Lopez-Carrillo lacks standing to appeal.

DISCUSSION

Because "standing to appeal is jurisdictional" (*Life v. County of Los Angeles* (1990) 218 Cal.App.3d 1287, 1292, fn. 3), we must determine as a threshold matter whether Lopez-Carrillo may prosecute this appeal.

1. *General principles*.

Only a "party aggrieved may appeal" from a judgment. (§ 902.) As a general rule, only parties of record may appeal (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736), and the courts have interpreted section 902 to require the appellant both to have been a "party" below and to have been "aggrieved" by the judgment. (See, e.g., *Marsh v. Mountain Zephyr, Inc*. (1996) 43 Cal.App.4th 289, 295 ["to have standing to appeal, a person generally must be both a party of record and sufficiently 'aggrieved' by the judgment or order"].)

As this court explained in *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420 (*Earley*), a class action is one prosecuted by named class representative plaintiffs, who assume a fiduciary responsibility to prosecute the action on behalf of the absent parties. (*Id*. at p. 1434.) The class action structure relieves the

absent class members of the burden of participating in the action, working with class counsel, and being held liable for a successful defendant's attorney fees and costs. (*Id*. at pp. 1431-1434.) Indeed, "[t]he structure of the class action does not allow absent class members to become active parties, since 'to the extent the absent class members are compelled to participate in the trial of the lawsuit, the effectiveness of the class action device is destroyed.' " (*Id*. at p. 1434, fn. omitted.)

Although unnamed class members may be deemed parties for the limited purpose of discovery (*Southern California Edison Co. v. Superior Court* (1972) 7 Cal.3d 832, 840 (*Edison*);[5] *National Solar Equipment Owners' Assn. v. Grumman Corp*. (1991) 235 Cal.App.3d 1273, 1281-1282 (*National*); *Earley*, *supra*, 79 Cal.App.4th at p. 1434, fn. 11), "unnamed class members do not 'stand on the same footing as named parties.' " (*National*, *supra*, at p. 1282.)

2. *The* Eggert *decision: unnamed class members lack appellate standing.*

Eggert v. Pac. States S. & L. Co. (1942) 20 Cal.2d 199 addressed whether unnamed class members could appeal from a postjudgment order entered in a class action. There, the named plaintiff, Eggert, commenced an action against a savings and loan company on behalf of himself and some 1,500 persons who were certificate holders. (*Id*. at p. 199.) The trial court held the suit a proper class action and entered judgment for Eggert and the other certificate holders whom he represented. The judgment

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[5] In *Edison*, the issue was whether unnamed plaintiffs could be compelled to attend depositions on mere written notice to opposing counsel, or whether the unnamed plaintiffs had to be served by subpoena. (*Edison*, *supra*, 7 Cal.3d at pp. 836-837.)

awarded the class more than $1.8 million, to be apportioned pro rata among class members after deduction of expenses and fees. The judgment further reserved jurisdiction to determine the fees to be paid plaintiff's attorneys. (*Id.* at p. 200.) After appointing a receiver to facilitate the collection and payment of the judgment, the court also issued an order, directed to plaintiff and all other persons interested, to show cause why it should not make an order fixing reasonable attorney fees. (*Ibid.*) Two certificate holders appeared and objected to the award of attorney fees to plaintiff's attorneys, and subsequently appealed from the order fixing the amount of attorney fees. (*Ibid.*)

The class representative moved to dismiss the appeal, and our Supreme Court granted the motion, explaining "it is a settled rule of practice in this state that only a party to the record can appeal. [Citations.] Appellants were not named as parties to the action nor did they take any appropriate steps to become parties to the record. The fact that their names and the extent of their interest in the action appeared in an exhibit attached to the complaint and the judgment did not make them parties to the record. [Citations.] Although their attorney appeared at the hearing on the petition for the payment of the money to plaintiff's attorneys and objected to such payment, he did not ask that appellants be made parties, nor did the court order them brought into the action. [Citation.] Appellants had ample opportunity even after the court had made its orders to become parties of record by moving to vacate the orders to which they objected. They could then have appealed from the order denying the

motion." (*Eggert*, *supra*, 20 Cal.2d at p. 201.) Accordingly, the Supreme Court ordered that the appeal be dismissed. (*Ibid.*)[6]

Eggert is controlling here. Like the present action, it involved a class action, an unsuccessful objection by class members who were not parties of record, and thereafter an appeal by the objectors. Guided by our Supreme Court's decision in *Eggert*, we conclude Lopez-Carrillo's appeal must be dismissed. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [decisions of California Supreme Court are binding upon and must be followed by all state courts in California] (*Auto Equity*).)[7]

3. *Appellate decisions in* Trotsky *and its progeny, conferring appellate standing upon mere objectors, are at odds with* Eggert.

Notwithstanding the California Supreme Court's *Eggert* decision, Lopez-Carillo contends he has standing to appeal pursuant to the appellate court's decision in *Trotsky v. Los Angeles Fed. Sav. & Loan Assn*. (1975) 48 Cal.App.3d 134

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[6] We note the federal rule is different. In *Devlin v. Scardelletti* (2002) 536 U.S. 1, 14 [153 L. Ed. 2d 27], the United States Supreme Court held that "nonnamed class members . . . who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening." (See generally, Newberg on Class Actions (5th ed.) § 14:13, relating to appeals by objectors.)

[7] Lopez-Carrillo attempts to distinguish this case from *Eggert* on the grounds that (1) unlike the instant case, which was settled, the judgment in *Eggert* resulted from an adversarial proceeding; and (2) the appeal in *Eggert* was limited to the issue of the trial court's award of attorney fees. Bearing in mind that the issue before this court is one of appellate standing, both of these appear to be distinctions without a difference.

(*Trotsky*). We conclude Lopez-Carillo's reliance on *Trotsky* is misplaced because the *Trotsky* decision overlooked *Eggert*.

In *Trotsky*, appellant Barwig was an unnamed member of the affected class who appeared at a hearing on a proposed settlement of the class action and objected to the settlement. (*Trotsky*, *supra*, 48 Cal.App.3d at p. 139.) *Trotsky*, in discussing Barwig's standing to appeal, stated: "As a member of the affected class who appeared at the hearing in response to the notice, and whose objections to the proposed settlement were overruled, appellant is a party aggrieved, and has standing to appeal. (Code Civ. Proc., § 902.) This is true even though appellant could instead have 'opted out,' i.e., requested exclusion from the judgment. (See Civ. Code, § 1781, subd. (e).) As stated by the court in *Ace Heating & Plumbing Company v. Crane Company* (3d Cir. 1971) 453 F.2d 30, 33, deciding a similar question under rule 23 of the Federal Rules of Civil Procedure, ' . . . It is possible that, within a class, a group of small claimants might be unfavorably treated by the terms of a proposed settlement. For them, the option to join is in reality no option at all. Rule 23 recognizes the fact that many small claimants frequently have no litigable claims unless aggregated. So, without court approval and a subsequent right to ask for review, such claimants would be faced with equally unpalatable alternatives—accept either nothing at all or a possibly unfair settlement. We conclude that appellants have standing to appeal . . . .' (See also *Research Corporation v. Asgrow Seed Company* (7th Cir. 1970) 425 F.2d 1059, 1060; *Cohen v. Young* (6th Cir. 1942) 127 F.2d 721, 724, cert. den., 321 U.S. 778 [88 L.Ed. 1071, 64 S.Ct. 619].) Were the rule otherwise, a class member who objected in the trial court to the terms of the settlement would be unable to secure appellate

review of the court's order approving the settlement." (*Trotsky*, *supra*, 48 Cal.App.3d at pp. 139-140, fn. omitted.)

Thus, *Trotsky* focused primarily on whether an objector to a settlement was "aggrieved " within the meaning of section 902, concluding objectors were aggrieved because " '[i]t is possible that, within a class, a group of small claimants might be unfavorably treated by the terms of a proposed settlement.' " (*Trotsky*, *supra*, 48 Cal.App.3d at p. 139.) However, *Trotsky* did not examine the discrete "party" element of section 902, i.e., "[a]ny *party* aggrieved may appeal." (*Ibid*., italics added.)

Moreover, *Trotsky* did not even mention *Eggert*, let alone attempt to reconcile its expansive approach to standing with *Eggert*'s holding that class members who are merely objectors, rather than parties to the class action, lack standing to appeal. (*Eggert*, *supra*, 20 Cal.2d at p. 201.) Instead of following *Eggert*, the *Trotsky* court based its analysis primarily on federal cases to conclude the appellant had standing to appeal pursuant to section 902. (*Trotsky*, *supra*, 48 Cal.App.3d at pp. 139-140.) For these reasons, we conclude *Trotsky*'s analysis of standing is erroneous.

We reach the same result with regard to decisions that were guided by *Trotsky*. For example, *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117 (*Rebney*) states "there will be review if any aggrieved parties desire it; all they have to do is appear as objectors at the fairness hearing and then take an appeal." (*Id*. at p. 1131.) Like *Trotsky*, the *Rebney* decision does not mention *Eggert* and relies on federal cases. (*Rebney*, *supra*, at pp. 1131-1132.)[8] To similar effect is *Wershba v. Apple*

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[8] In *Rebney*, the court took a piecemeal approach to determining appellate standing of non-intervening parties, and

Computer, Inc. (2001) 91 Cal.App.4th 224 (*Wershba*), which cites *Trotsky* for the proposition that "[c]lass members who appear at a final fairness hearing and object to the proposed settlement have standing to appeal." (*Wershba*, *supra*, at p. 235.) *Wershba* relies solely on *Trotsky* on the issue of standing. (*Wershba*, *supra*, at pp. 235-236.) Thereafter, *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, at pages 395-396, relies on *Rebney*, *Trotsky* and *Wershba* on the issue of standing, without addressing the limitation imposed by *Eggert*.

In sum, *Trotsky* and its progeny are inconsistent with *Eggert* and therefore are unavailing to Lopez-Carrillo. We conclude that his mere appearance as an objector at the trial court level is insufficient to confer appellate standing.

4. *Additional considerations in favor of the* Eggert *rule.*

Under *Auto Equity*, *supra*, 57 Cal.2d at page 455, *Eggert* is binding on this court and must be followed. However, we make the additional observation that the *Eggert* rule is sound and in harmony with class action principles generally.

First, unnamed class members who disagree with a proposed settlement are not deprived of appellate recourse. They may move to formally intervene in the action and, if permitted to intervene, then appeal the judgment entered on the settlement; alternatively, if denied the right to intervene, they may appeal the order denying intervention. (*County of Alameda v. Carleson*,

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found they had standing to appeal some issues, but not others, depending upon whether or not they were aggrieved. (*Rebney*, *supra*, 220 Cal.App.3d at pp. 1132-1134, 1142 [objectors were not aggrieved by expansion of class certification and fairness of settlement issues, but were aggrieved by attorney fee agreement between class counsel].)

supra, 5 Cal.3d at p. 736.) Dissatisfied class members also may elect to opt out of the settlement and pursue their claims in a separate action.

We are also mindful that California " 'has a public policy which encourages the use of the class action device' " (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340), because class actions enable "the claims of many individuals [to] be resolved at the same time." (*Ibid.*) Classes may be quite large: here, for example, the class consists of approximately 38,000 individuals, and much larger classes have also been certified.[9] If every unnamed class member who objects to a proposed settlement could appeal individually, the litigation would become unwieldy and unmanageable and the benefits of the class action device would be undermined.

Further, conferring appellate standing on mere objectors would erode the distinction between parties and absent class members. For example, absent plaintiff class members cannot be held liable for a successful defendant's attorney fees and costs. (*Earley*, *supra*, 79 Cal.App.4th at p. 1431.) As we stated in *Earley*, the United States Supreme Court has "emphasized how differently the absent class plaintiffs are treated from the absent class defendant. 'Besides [a] continuing solicitude for their rights, absent plaintiff class members are not subject to other

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[9] For example, in *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338 [180 L.Ed.2d 374], the district court certified a class of about one and a half million current and former female employees of Wal-Mart, although the certification order subsequently was reversed because the plaintiffs did not provide "convincing proof of a companywide discriminatory pay and promotion policy." (*Id.* at p. 359.)

burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, *or liability for fees or costs*. Absent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff's claims which were litigated.' " (*Earley*, *supra*, 79 Cal.App.4th at p. 1431, quoting *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 810 [86 L.Ed.2d 628], italics added by *Earley*.) Thus, it would be anomalous to confer appellate standing upon a mere objector, while at the same time allowing that individual to retain the protections afforded absent plaintiff class members.

5. *Remaining issues not reached*.

Having determined that Lopez-Carrillo lacks standing to appeal, we do not reach his contentions with respect to the merits of the appeal.

DISPOSITION

The appeal is dismissed. The parties shall bear their own costs on appeal.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.