Filed 12/12/17 Hahn v. Hanil Development CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HARRY HAHN et al., Plaintiffs and Respondents, v. HANIL DEVELOPMENT, INC. et al., Defendants and Respondents; MYUNG JA KANG et al., Objectors and Appellants.	B268596 Los Angeles County Super. Ct. No. BC468669

APPEAL from a judgment of the Superior Court of Los Angeles County, J. Stephen Czuleger, Judge. Dismissed.

Moon & Dorsett, Dana M. Dorsett and Jeremy Cook for Objectors and Appellants.

Engstrom, Lipscomb & Lack and Steven J. Lipscomb; Law Offices of Henry H. Bahk and Henry H. Bahk; Stalwart Law Group, Paul A. Traina and Ian P. Samson for Plaintiffs and Respondents.

Lee, Hong, Degerman, Kang & Waimey, Douglas Smith, Yvonne Dalton and Matthew J. Soroky for Defendants and Respondents.

INTRODUCTION

Myung Ja Kang and 93 other unnamed class members (objectors), appeal from a judgment[1] approving the settlement of a class action lawsuit and dismissing the action brought by plaintiffs and respondents Harry Hahn and James Hong (representative plaintiffs) against defendants and respondents Hanil Development, Inc. and Aroma Spa & Sports, LLC (defendants).

Before we can reach the merits of the objectors' challenges to the trial court's approval of the settlement, we address as a threshold matter whether the objectors have standing to prosecute this appeal. Only a "party aggrieved may appeal" from a judgment. (Code Civ. Proc., § 902.)[2] The objectors, however, did not intervene in the action. Nor did the objectors take any other steps to become parties of record, ask to be named as class representatives, or demonstrate any willingness to take on the responsibilities and risks of the representative plaintiffs. Because the objectors lack party status and therefore do not have standing to appeal, we dismiss the appeal.[3]

---

[1] We construe the signed order approving the class action settlement and dismissing the action as a final judgment for purposes of this appeal. (See Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1).)

[2] Undesignated section references are to the Code of Civil Procedure.

[3] 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.*

FACTS AND PROCEDURAL BACKGROUND

According to the operative complaint, each of the class members purchased a membership to a spa and fitness center (Aroma) located in the Koreatown neighborhood of Los Angeles. The class members paid initiation fees ranging between $10,000 and $30,000 in exchange for either a 10-year or lifetime membership at Aroma. The complaint asserted the memberships violated the Health Studio Services Act (Civil Code section 1812.80 et seq.) and the Unfair Competition Law (Business and Professions Code section 17200 et seq.).

The representative plaintiffs initiated the class action on August 30, 2011, and filed the operative complaint on May 11, 2012. The court certified a class of "[a]ll individuals and/or families who purchased lifetime memberships and ten year memberships at Aroma Spa Resort during the period of November 2000 to present." The cause was extensively litigated but the parties ultimately negotiated a settlement shortly before the trial was to take place. The court granted the representative plaintiffs' motion for preliminary approval of the settlement on April 10, 2015, and set July 10, 2015 as the deadline for class members to object or reject the terms of the settlement. More than 100 of the 301 class members objected to the settlement.

On July 16, 2015, a group of 10 class members filed a motion asserting that one of the representative plaintiffs promised them a greater recovery than was provided by the settlement. The class members requested that the court retroactively extend the date to opt out of the class action so they could then opt out of the class. The court denied the motion.

Restoration Hardware, Inc. (2016) 245 Cal.App.4th 651, review granted June 22, 2016, *Hernandez v. Muller*, Case No. S233983.)

Meanwhile, the representative plaintiffs filed a motion for final approval of the settlement. The same 10 class members submitted a written opposition to the motion. After hearing argument, the court requested and received supplemental briefing from the 10 class members and the parties. On October 2, 2015, the court granted the motion for final approval of the class action settlement and dismissed the action pursuant to the terms of the settlement agreement. A timely notice of appeal was filed on behalf of 94 objecting class members.

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 the objectors may prosecute this appeal.[4]

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 (*Marsh*) ["[T]o 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

---

[4] The issue of standing was not addressed by the objectors or the respondents. Pursuant to Government Code section 68081, we requested, and received, supplemental briefing on the issue.

responsibility to prosecute the action on behalf of the absent class members. (*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's 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; *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 post-judgment 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 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 to Eggert'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 Eggert and all other persons interested, to show cause why it should not make an order fixing reasonable attorney's fees. (*Ibid.*) Two certificate holders appeared and objected to the award of fees to Eggert's attorneys, and subsequently appealed from the order fixing the amount of the 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. [Citation.]" (*Eggert*, *supra*, 20 Cal.2d at p. 201.) Accordingly, the Supreme Court dismissed the appeal. (*Ibid.*)[5]

---

[5] The federal rule is different. (See *Devlin v. Scardelletti* (2002) 536 U.S. 1, 14 [holding 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"]; and see generally Newberg on Class Actions (5th ed.) § 14:13 [relating to appeals by objectors].)

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.[6] The objectors argue *Eggert* is distinguishable from the present case because "[i]n *Eggert*, the case did not settle; rather, the court issued a judgment, and the appellants then objected to the attorney's fees award." They further urge that "unnamed class members are bound by an approved settlement, and it is this very feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing." We do not find this distinction persuasive. Where unnamed class members do not opt out of class action litigation, they are bound by the result of the litigation irrespective of whether it is a judgment entered after trial or a judgment entered pursuant to a settlement. The fact that unnamed class members have the opportunity to object to a settlement before it is approved and judgment is entered by the court provides a safeguard for the class where no trier of fact determines the outcome of the case. That safeguard is plainly unnecessary in the event a class action cause proceeds to trial. But we see nothing about this procedural distinction which would, in and of itself, confer *standing* to appeal on unnamed class members who choose not to become parties of record—and

---

[6] The objectors urge that, at a minimum, the group of 10 class members who appeared before the trial court by filing objections to the settlement and briefing at the request of the court—as opposed to the other 84 objectors who did not participate in the proceedings below—have standing to appeal. But on that precise issue, *Eggert* held the assertion of an objection in the trial court does not confer party status on unnamed class members. (*Eggert*, *supra*, 20 Cal.2d at p. 201.)

who thereby avoid shouldering the responsibilities of the class representatives.

In sum, guided by our Supreme Court's decision in *Eggert*, we conclude this appeal must be dismissed. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [decisions of the California Supreme Court are binding upon and must be followed by all state courts in California].)

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, the objectors contend they have standing to appeal pursuant to *Trotsky v. Los Angeles Fed. Sav. & Loan Assn*. (1975) 48 Cal.App.3d 134 (*Trotsky*). We conclude the objectors' reliance on *Trotsky* and its progeny 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.) 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, and concluded the 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 Court of Appeal 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.

4. Res judicata does not confer standing on the objectors.

Alternatively, the objectors assert they have standing because principles of res judicata will bar them from challenging or otherwise litigating the issues resolved by the settlement. Citing *Marsh*, the objectors note some courts have held that although generally only a party can appeal, an exception exists where a judgment or order is binding on a nonparty. (*Marsh, supra*, 43 Cal.App.4th at p. 295 ["One exception to the 'party of record' requirement [in section 902] exists in cases where a judgment or order has a res judicata effect on a nonparty. 'A person who would be bound by the doctrine of res judicata, whether or not a party of record, is ... [entitled] to appeal' "].) We agree in principle but observe that the rule cited is displaced in the specific context of a class action lawsuit. After a court certifies a class and a matter proceeds as a class action, members of the class are notified and given the opportunity to opt out of the class. If they do not opt out class members agree to be represented by class counsel and bound by the judgment. Were the rule otherwise, it would allow every class member who is dissatisfied with a settlement or judgment to appeal, thereby eviscerating the efficiencies and benefits of class action litigation.

Here, after the court certified the class, the class members were advised that they may "choose to remain in the class or to opt out of it." Further, they were informed that they would be "bound by the outcome of the lawsuit" unless they requested to be excluded from the class. If they elected to opt out of the class, however, the class members would "not be bound by any judgment" and could file a separate lawsuit against defendants. Having elected to stay in the class, or having failed to opt out in a timely manner, the objectors cannot be heard to complain on appeal that they are bound by the judgment.

5. We do not address the merits of the appeal.

Because we have concluded the objectors lack standing to appeal, we do not reach their contentions with respect to the merits of the appeal.

Further, we reject the objectors' suggestion that we should stay the appeal until the Supreme Court issues a decision in *Hernandez v. Muller, supra*. The appropriate course is for the objectors to file a petition for review with the Supreme Court and allow that court to consider what relief, if any, is appropriate.

DISPOSITION

The appeal is dismissed. In the interests of justice, no costs are awarded on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

STONE, J.*

---

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