Filed 9/25/18 Forrest v. George Town Plaza CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LAUREL FORREST, Plaintiff and Appellant, v. GEORGE TOWN PLAZA LLC et al., Defendants and Respondents.	B285013 (Los Angeles County Super. Ct. No. SC119404)

APPEAL from the judgment of the Superior Court of Los Angeles County. Michelle Williams Court and William G. Willett, Judges. Dismissed in part; affirmed in part.

Didonato Law Center and Peter R. Didonato for Plaintiff and Appellant.

Wood, Smith, Henning & Berman, Paul J. Nolan, Christine J. Loni; Kirk, Zuawaski & Myers and Dordaneh Ghaemi for Defendants and Respondents.

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Plaintiff and appellant Laurel Forrest filed this slip and fall action against defendants and respondents George Town Plaza LLC and Cal Select Properties, Inc. (collectively defendants), seeking damages for injuries that occurred on defendants' property.

Plaintiff filed a pretrial motion to disqualify defense counsel, or alternatively for discovery sanctions, based on defense counsel's alleged abuse of the discovery process. The motion was denied and the case proceeded to a bifurcated jury trial on the issue of liability only. The jury found in favor of defendants. After plaintiff's posttrial motions attacking the judgment were denied, plaintiff filed a notice of appeal challenging the judgment and the denial of her motion to disqualify.

We conclude the notice of appeal is untimely as to the motion to disqualify and dismiss the appeal in part on that basis. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2012, plaintiff filed this action against defendant George Town Plaza for negligence and premises liability related to a slip and fall in which she broke her leg. Defendant Cal Select Properties was subsequently added as a doe defendant.

During the course of pretrial discovery, a dispute arose between the parties over the release of plaintiff's mental health records to defendants. Plaintiff told defendants she was not seeking damages for mental health injuries, beyond ordinary pain and suffering. An outside copy service retained by defendants obtained the mental health records without notice to plaintiff. Plaintiff filed a motion to disqualify defense counsel, or alternatively for evidence, issue or monetary sanctions.

Defendants opposed the motion, explaining they did not know the copy service had failed to give notice to plaintiff, they had since provided the records to plaintiff, and they would not use them for any purpose in the litigation.

Plaintiff's motion to disqualify was heard by the Honorable Michelle Williams Court. At the hearing on the motion, defense counsel reiterated that he had not purposefully or surreptitiously sought to obtain the records, the records had been turned over to plaintiff, copies were not provided to any defense experts, they had not been used in other discovery, and they would not be used or referenced in any way at trial.

On May 11, 2017, the court, by written order, denied plaintiff's motion, reasoning in part that defense counsel had not engaged in wrongful conduct and had agreed not to use the records for any purpose. The court noted in its order that its denial should not be construed as condoning the use of the confidential records for any purpose. Plaintiff filed and served notice of the order by mail on May 23, 2017.

The case proceeded to a jury trial before the Honorable William G. Willett on June 7, 2017. Trial was bifurcated, with the issue of liability being tried first. No evidence or argument was presented to the jury related to or based on the mental health records. The jury found in favor of defendants. Judgment was entered on June 14, 2017.

Plaintiff moved for a new trial, for an order vacating the judgment and/or for judgment notwithstanding the verdict. The motions were based exclusively on the evidence received at trial concerning the condition of the parking lot where the accident occurred, and other issues related solely to defendants' liability. No mention was made of plaintiff's mental health records having

been obtained by the defense, or of the denial of the motion to disqualify defense counsel. After briefing and argument, the court denied all of plaintiff's posttrial motions. The clerk served notice of the orders by mail on August 9, 2017.

Plaintiff filed a notice of appeal on September 6, 2017, contesting the judgment after jury trial as well as the court's pretrial order denying plaintiff's motion to disqualify defense counsel.

DISCUSSION

1. The Motion to Disqualify

Plaintiff contends the trial court erred in denying her pretrial motion to disqualify defense counsel. Defendants argue the notice of appeal was not timely filed as to the order denying the motion, and that plaintiff has failed to show any abuse of discretion by the trial court. Plaintiff did not file a reply brief and therefore did not provide any argument supporting the timeliness of her appeal. As we explain, we find the notice of appeal was not timely filed as to the May 11, 2017 order.

"Compliance with the time for filing a notice of appeal is mandatory and jurisdictional." (*Laraway v. Pasadena Unified Sch. Dist*. (2002) 98 Cal.App.4th 579, 582.) The question of timeliness here turns on whether the order denying the motion to disqualify is separately appealable or properly challenged on direct appeal from the judgment.

In *Meehan v. Hopps* (1955) 45 Cal.2d 213 (*Meehan*), our Supreme Court "held that an order denying a disqualification motion was appealable." (*URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 879 (*URS Corp*.); accord, *Brand v. 20th Century Ins. Co./21st Century Ins. Co*. (2004) 124 Cal.App.4th 594, 601.) The Supreme Court in *Meehan* "stated

two grounds for this holding: (1) Such an order is a final order on a collateral matter. 'The matter of disqualification of counsel is unquestionably collateral to the merits of the case. . . .' [And] (2) Such an order is, in effect, an order refusing to grant an injunction to restrain counsel from participating in the case." (*Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 452-453, citation omitted; see also Code Civ. Proc., § 904.1, subd. (a)(6) [appeal may be taken from an order "refusing to grant . . . an injunction"].)

A handful of lower courts have questioned *Meehan*. (See, e.g., *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1052, fn. 1.) Nevertheless, *Meehan* remains the law and we adhere to the Supreme Court's holding in that case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, we find the pretrial order denying plaintiff's motion to disqualify was appealable as a final order.

Notice of entry of the denial order was served May 23, 2017. Under California Rules of Court, rule 8.104(a)(1)(B), plaintiff had 60 days within which to file an appeal. Alternatively, plaintiff could have filed a writ petition. (*URS Corp.*, *supra*, 15 Cal.App.5th at p. 879 ["California courts have expressed a preference for resolving attorney disqualification issues in writ proceedings, which 'are determined more speedily than appeals.' "].) However, plaintiff did neither. Instead, she chose to proceed with trial. After the defense verdict, plaintiff filed posttrial motions attacking the judgment and then filed a notice of appeal from the judgment.

Plaintiff's notice of appeal was not filed until September 6, 2017, *more than 100 days after* notice of entry of the order denying the motion to disqualify. California Rules of Court,

rule 8.108 provides an extension of time within which to appeal a final judgment where, as here, certain posttrial motions challenging the judgment are filed. Plaintiff's notice of appeal was therefore timely as to the entry of judgment. However, it was *not* timely as to the court's *pretrial* ruling on her motion to disqualify defense counsel.

Notwithstanding the one final judgment doctrine, it is well established that where an order is separately appealable "it is not also reviewable on appeal from the final judgment: Any other conclusion would allow two appeals raising the same question." (*Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 884; see also Code Civ. Proc., § 906 ["The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken."].)

Defendants point out that in *In re Sophia B.* (1988) 203 Cal.App.3d 1436 (*Sophia B.*), the court considered the merits of a challenge to a pretrial motion to disqualify on appeal from the final judgment. However, *Sophia B.* contains no discussion of *Meehan* or the timeliness of the appeal which appears to have been presumed. " 'It is axiomatic that cases are not authority for propositions not considered.' " (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.) In any event, *Sophia B.* did acknowledge that it was "unaware of any case . . . in which a trial court's ruling on a motion to disqualify counsel was considered on appeal following a final judgment." (*Sophia B.,* at p. 1439.) Given the binding precedence of *Meehan*, we follow its dictates.

Even assuming, solely for the sake of argument, that *Sophia B.* was authority for the timeliness of plaintiff's appeal, it would be of no assistance to plaintiff. The court there held that "on appeal from a final judgment, an issue of attorney

disqualification may not be raised *unless it is accompanied by a showing that the erroneous granting or denying of a motion to disqualify affected the outcome of the proceeding to the prejudice of the complaining party*." (*Sophia B.*, *supra*, 203 Cal.App.3d at p. 1439, italics added.)

Plaintiff did not argue in her posttrial motions below, nor has she argued in this court, that the denial of her motion to disqualify defense counsel prejudicially impacted the trial. She did not mention the motion to disqualify at all in her posttrial challenges to the judgment. Plaintiff has not made any argument in this court demonstrating that any alleged error in the court's ruling on the motion to disqualify affected the outcome at trial. (Cal. Const., art. VI, § 13 ["No judgment shall be set aside, or new trial granted, in any cause . . . unless . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."].) Therefore, even if we deemed her appeal timely, she would fail on the merits.

Because plaintiff did not timely appeal from the denial of her pretrial motion to disqualify, we dismiss the appeal with respect to plaintiff's challenge to the court's May 11, 2017 order of denial.

2. The Judgment and Postjudgment Motions

As explained above, plaintiff's notice of appeal was timely as to the entry of judgment. (Cal. Rules of Court, rule 8.108.) However, plaintiff's sole argument on appeal is that the trial court abused its discretion in finding that defense counsel's conduct with respect to seeking and obtaining her mental health records did not warrant disqualification. Plaintiff does not raise any arguments demonstrating any errors or irregularities at trial. Moreover, plaintiff did not make any arguments that

anything related to the motion to disqualify or defendants' efforts to obtain her mental health records was in any way relevant to, or was placed in issue at, the bifurcated trial on liability. Because plaintiff has not presented any colorable argument challenging the judgment in favor of defendants, we affirm the judgment.

DISPOSITION

The notice of appeal is dismissed as to plaintiff's challenge to the trial court's May 11, 2017 order denying the motion to disqualify defense counsel.

The judgment entered June 14, 2017, in favor of defendants and respondents George Town Plaza LLC and Cal Select Properties, Inc., is affirmed.

Defendants and respondents shall recover costs of appeal.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

DUNNING, J.*

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