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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

XOCHILT CASIANO, Plaintiff and Respondent, v. WET SEAL RETAIL, INC., Defendant and Respondent; SALLY CHAABAN, Objector and Appellant.	B230532 (Los Angeles County Super. Ct. No. BC355626)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Kronstadt, Judge. Dismissed.

Law Offices of Sima Fard and Sima Fard for Objector and Appellant.

Mitchell Silberberg & Knupp, Adam Levin, Emma Luevano and Julianne M. Scott for Defendant and Respondent.

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

Xochilt Casiano (Casiano) filed a wage and labor class action against Wet Seal Retail, Inc. (Wet Seal) in Los Angeles County (*Casiano* action). A settlement was agreed upon and preliminarily approved by the trial court. Meanwhile, appellant Sally Chaaban (Chaaban) filed a second class action against Wet Seal in Orange County (*Chaaban* action). Chaaban unsuccessfully objected to the settlement in the *Casiano* action. The settlement was approved and judgment was entered in favor of Wet Seal. Chaaban appealed. We reversed the judgment in *Xochilt Casiano v. Wet Seal Retail, Inc.* (May 6, 2009, B207672) [nonpub. opn.] (*Casiano I*) and directed the trial court to conduct a new fairness hearing for final approval of the settlement and independently evaluate the strengths and weaknesses of the *Casiano* action pursuant to *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116. After remand, Chaaban opted out of the class and the trial court again approved the settlement. Chaaban appealed. Because Chaaban opted out of the class, she is not an aggrieved party and therefore lacks standing. Accordingly, Chaaban's appeal is dismissed.

Wet Seal and Casiano request sanctions against Chaaban and her attorney, Sima Fard (Fard). That request is denied.

FACTS

Following remand after *Casiano I*, the trial court conducted a second fairness hearing over the course of many months.

Kenneth H. Yoon (Yoon), counsel for Casiano, prepared a proposed order granting approval of the settlement. Paragraph 19 stated: "[Casiano] and [Wet Seal] have agreed that Objector [Chaaban] may opt out of this settlement within seven (7) days of the September 27, 2010[,] hearing. Objector [Chaaban] need only file with the [trial court] a document stating, 'Ms. Sally Chaaban has elected to opt-out of the settlement of the [Casiano action][.]"

The proposed order was approved as to form by Yoon and counsel for Wet Seal, Emma Luevano (Luevano). Fard refused to sign.

The parties convened on September 27, 2010. After the trial court indicated its tentative decision to approve the settlement, it asked counsel for both sides, "Anything else?"

The colloquy progressed as follows.

"Mr. Yoon: We have one comment, your Honor, at this point. The parties discussed perhaps a late opt-out by Ms. Chaaban[,] . . . which will allow her the opportunity to continue on with her individual claims.

"The Court: All right. Any objection?

"Ms. Fard: I'm sorry, I have no idea what Mr. Yoon just said. Ms. Chaaban opted out a long time ago.

"Ms. Luevano: No, your Honor. If she had opted out, she would have no standing to be here. She did not opt out. That's why she objected to the settlement. The parties will agree to a late opt out for Ms. Chaaban so that she could then pursue her own lawsuit.

"The Court: Wait a second. [¶] To the extent—To the extent that Ms. Chaaban has not opted out, do you wish to have additional time in which to have her make that decision?

"Ms. Fard: To the extent she hasn't, which she has, yes, your Honor. But she has signed an opt-out.

"The Court: I'm not making a determination on that. [¶] . . .

"Mr. Yoon: I think for that, we would be fine since there's already a seven-day provision in the court's tentative or the court's intended ruling, within seven days, if, for whatever reason, Ms. Chaaban would like to make sure her opt-out, if she wants to clarify that, she can just file something. If Ms. Chaaban wishes to opt-out of this case, that would be fine for opting out. [¶] . . .

"The Court: Does that work for you, Ms. Fard?"

"Ms. Fard: Sure. But, yeah.

"The Court: "So ordered."

On October 4, 2010, Chaaban filed a document entitled "Notice of Filing of Objector's Opt Out Form Previously Submitted on August 24, 2007." The notice stated: "PLEASE TAKE NOTICE that Objector Sally Chaaban hereby resubmits her Opt Out . . . dated August 8, 2007[,] previously submitted on August 24, 2007[,] along with her objection to settlement of class action."

Attached as exhibit 1 to the notice was an October 1, 2010, dated letter to the "Case Administrator" for the class action that stated: "For your attention, we are again enclosing the following five requests for exclusion of Sally Chaaban" and four others. The one attachment was a form. It stated: "I[,] Sally Chaaban, hereby request to be excluded from the settlement in this action" The form was dated August 9, 2007, and signed.

In its December 3, 2010, order approving the settlement, the trial court stated in part: "Plaintiff [Casiano] and Defendant [Wet Seal] have agreed that Objector [Chaaban] may opt out of this Settlement within seven (7) days of the September 27, 2010[,] hearing. Objector [Chaaban] need only file with the [trial court] a document stating 'Ms. Sally Chaaban has elected to opt-out of the settlement of the [Casiano action].' (Objector did so on October 4, 2010.)"

This appeal followed.

On appeal, Chaaban argues that the trial court did not comply with the law of the case and our directions in *Casiano I* and therefore abused its discretion when it approved the settlement.

STANDING

Only an aggrieved party of record may appeal from an order approving a class action settlement. (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1131.) If a class member opts out of the settlement, she is no longer a party to the action. (*Id.* at p. 1134.) As a consequence, she is not aggrieved by the settlement and cannot challenge it on appeal. (*Ibid.*)

The question is whether Chaaban opted out when she filed her October 4, 2010, notice. According to Chaaban, "the alleged notice of opt out in October 2010 is invalid.

First, it is undisputed that opt-outs were due back in August 24, 2007, making any later opt-out invalid. Although the trial court and [Casiano and Wet Seal] agreed there could be a late opt-out . . . [,] they cite no law allowing for such a late opt-out, especially when Chaaban did not request it. Second, the terms of the late opt-out instigated by [Casiano and Wet Seal] were very specific: paragraph 19 of the court's order provided that Chaaban may opt out of the settlement within seven days of September 27, 2010, and that she 'need only file with the Court a document stating 'Ms. Sally Chaaban has elected to opt-out of the settlement of the [Casiano action].' [¶] However, what was filed on October 4, [2010,] was entitled 'Notice of Filing of Objector's Opt Out Form Previously Submitted on August 24, 2007' and . . . stated: 'Please take notice that objector Sally Chaaban hereby resubmits her opt out dated August 8, 2007[,] previously submitted on [August] 24, 2007[,] along with her objection to settlement of class action.' [Citation.] Thus, this opt-out does not match what the trial court requested, and in fact was not, by its own terms, a new opt-out. Instead, it was simply a reference to an earlier misstated opt-out that in fact never actually occurred (because as it turns out and [is] undisputed now by the parties, [Fard] never submitted the August 9, 2007[,] opt-out Chaaban signed to the claims administrator or the [trial] court)." (Emphasis omitted.)

These contentions lack merit. We are aware of no statutory or decisional law preventing a trial court from accepting a late opt-out form. In the absence of a legal proscription, we perceive no impediment. Our conclusion flows from the recognition that a trial court has "statutory and inherent authority over judicial proceedings [citations]." (*Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1022; Code Civ. Proc., § 128, subd. (a)(5).) In the same vein, it cannot be ignored that "trial courts generally have broad discretion to manage and order class affairs." (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1083.)

Even if the trial court lacked the statutory or decisional authority to accept a late opt-out form, Chaaban cannot complain. A "'party who seeks or consents to action beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction.' [Citation.]" (*People v.*

National Automobile & Casualty Ins. Co. (2000) 82 Cal.App.4th 120, 125–126.) Here, Fard consented to the seven-day window for the late opt-out.

The suggestion that Chaaban did not opt out because the notice she filed on October 4, 2010, did not track the language in the proposed order filed by Yoon lacks merit. At the September 27, 2010, hearing, the trial court did not require Chaaban to use specific language. Rather, the trial court simply said it is "so ordered" following a colloquy about Chaaban "fil[ing] something" in order to clarify that she had opted out or that she wanted to opt out. In her notice, Chaaban indicated that she was resubmitting her opt-out form. This notice cannot reasonably be construed as anything other than acceptance of the invitation by the trial court to opt-out within seven days of the September 27, 2010, hearing. As indicated in the order approving the settlement, the trial court recognized the notice as an opt-out.

In the alternative, Chaaban contends that Casiano and Wet Seal are barred from challenging her standing based on waiver. The problem is that "standing to appeal is jurisdictional and therefore cannot be waived. [Citation.]" (*Life v. County of Los Angeles* (1990) 218 Cal.App.3d 1287, 1292, fn. 3.)

In her final effort to establish standing, Chaaban states: "[A]ny error that may have been caused by the confusion over the validity of [Chaaban's] opt out is [Casiano and Wet Seal's] fault under the doctrine of invited error. [Citation.] Under this theory, [Casiano and Wet Seal] are estopped from claiming [Chaaban] lacks standing or that they have been prejudiced in anyway because they invited such error and stood by for years. In fact, the contrary is true in that Chaaban and her counsel have been prejudiced for having to go through two appeals and four years of litigation, incurring over one hundred thousand dollars in fees."

The doctrine of invited error provides that when a party induces the commission of an error, "'he is estopped from asserting it as grounds for reversal. [Citations.] Similarly an appellant may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal.'" (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685–1686.) This rule has no application. Casiano and Wet

Seal have not appealed the order approving the settlement, and they are not seeking a reversal or even suggesting the trial court erred.

If the opt-out is valid, Chaaban requests an opportunity to withdraw it. She contends that it was submitted in error. In the declaration submitted in support of the opposition to the motion for sanctions, Fard declares that she filed the notice in October 2010 because she forgot that the plan was for Chaaban to object to the settlement and withhold her objection. Further, Fard states: "I filed the notice of the October 2010 opt-out in response to the arguments of opposing counsel and the [trial court's] order under the mistaken believe that if I did not do so, Chaaban would somehow lose her ability to prosecute her own separate action that she had been prosecuting for four years. I read the trial court's words '**So Ordered'** on [September 27, 2010,] as an order. I never intended to give up Chaaban's right to object to the Casiano settlement and her right to appeal."

We accept that Fard made a mistake. But the fact remains that she filed an opt-out on Chaaban's behalf. To withdraw her opt-out, Chaaban should have filed a request or motion with the trial court. She failed to do so. We are aware of no law permitting an appellate court to allow a party to belatedly withdraw an opt-out when the party did not first raise the issue with the trial court.

Based on the record before us, we conclude that Chaaban opted out and lacks standing to appeal. This appeal must be dismissed.

SANCTIONS

Casiano and Wet Seal request sanctions pursuant to Code of Civil Procedure section 907 and California Rules of Court, rule 8.276(a). They argue that Chaaban's appeal is frivolous.

An appeal is frivolous when any reasonable attorney would agree that the appeal is totally without merit, or when it is prosecuted for an improper purpose such as harassing the respondent or causing delay. (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516.) Whether an appeal was prosecuted for an improper purpose is a subjective inquiry. A court must focus "on the good faith of appellant and counsel." (*Ibid.*)

"[A]ny definition [of a frivolous appeal] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals. . . . In reviewing the dangers inherent in any attempt to define frivolous appeals, . . . courts cannot be 'blind to the obvious: the borderline between a frivolous appeal and one which simply has no merit is vague indeed . . . . The difficulty of drawing the line simply points up an essential corollary to the power to dismiss frivolous appeals: that in all but the clearest cases it should not be used.' [Citation.] The same may be said about the power to punish attorneys for prosecuting frivolous appeals: the punishment should be used most sparingly to deter only the most egregious conduct." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650–651.)

While Chaaban's appeal lacks merit, we do not find evidence of sufficiently egregious conduct to warrant sanctions.

DISPOSITION

The appeal is dismissed.

Casiano and Wet Seal are entitled to their costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD