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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KATHLEEN COLEMAN, Plaintiff and Appellant, v. ANEETA SAGAR, Defendant and Respondent.	B283005 (Los Angeles County Super. Ct. No. BC592047)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly J. Fujie, Judge. Reversed.

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

Slack & Associates and Chad M. Slack for Defendant and Respondent.

I. INTRODUCTION

Plaintiff Kathleen Coleman appeals from a judgment following an order granting a motion to enforce a settlement agreement. Plaintiff sued defendant Aneeta Sagar for negligence following an automobile accident. Plaintiff offered to compromise pursuant to Code of Civil Procedure[1] section 998. Defendant faxed a notice of acceptance that purported to contain defense counsel's signature. Plaintiff then attempted to withdraw the section 998 offer.

Defendant moved to enforce the settlement agreement under sections 664.6 and 998. Plaintiff opposed, arguing defendant's counsel had failed to sign the acceptance, which contained the notation: "Dictated but not read." Plaintiff also argued acceptance was equivocal because the notice of acceptance suggested additional terms. The trial court ruled that defense counsel had electronically signed the acceptance, pursuant to the Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.) (UETA) , and the acceptance was unequivocal.

Plaintiff moved for new trial, arguing the parties never agreed to use electronic signatures under the UETA, thus rendering any purported electronic signature ineffective. The trial court denied the motion.

We reverse. Section 664.6 is not applicable to this action because the record on appeal demonstrates the parties did not sign the purported settlement. Defendant therefore was not entitled to move for enforcement of a settlement under section 664.6. Additionally, interpretation of the UETA and the notice of

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[1] Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

acceptance was necessary to determine whether the acceptance was signed and unequivocal, and a trial court may not resolve such disputes when entering judgment under section 998.

II. BACKGROUND

A. *Section 998 Offer to Compromise*

On August 20, 2015, plaintiff and non-appealing party John Hutton filed a complaint against defendant for negligence involving a motor vehicle. The plaintiffs filed their amended complaint, the operative pleading, against defendant and non-responding party Kinder Clinic, Inc. on October 2, 2015. Plaintiff sought both compensatory and punitive damages. On October 19, 2016, plaintiff offered to compromise with defendant pursuant to section 998 by allowing judgment to be entered against defendant in the amount of $100,000. The offer was signed by plaintiff's counsel Peter diDonato.

On November 18, 2016, at 12:19 p.m., defendant's counsel David Hillier sent by facsimile to diDonato a document with the subject "NOTICE OF ACCEPTANCE OF PLAINTIFF, KATHLEEN COLEMAN'S C.C.P. §[]998" (notice of acceptance), which provides: [¶] "Please be advised we are accepting Plaintiff, Kathleen Coleman's C.C.P. §[]998. We would prefer to do it by way of Release and Dismissal if possible (see enclosed). Please advise how you wish to proceed." (Emphasis removed.) Hillier's name appears typed in an italicized font at the bottom of the notice of acceptance. The document also contains the notation: "Dictated but not read." On November 18, 2016, at 12:26 p.m., diDonato sent via facsimile to Hillier a withdrawal of

plaintiff's offer to compromise. Hillier received the withdrawal notice at 12:29 p.m. that day.

B. *Motion to Enforce Settlement*

On December 27, 2016, defendant moved to enforce the settlement under sections 664.6 and 998. Defendant asserted that the notice of acceptance was signed by Hillier and constituted an unequivocal acceptance of plaintiff's offer to compromise. Defendant also asserted that the acceptance of the section 998 offer occurred prior to plaintiff's withdrawal of the offer.

Plaintiff argued that defendant failed to accept the offer to compromise as required under section 998, subdivision (b), which provides: "Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party . . . ." Plaintiff argued: the notice of acceptance was not signed by counsel; the phrase "[d]ictated but not read" indicated defense counsel never looked at it; all conduct associated with purportedly accepting the offer had been performed by defense counsel's secretary, who was not authorized to accept section 998 offers; and acceptance under section 998 did not allow defendant to suggest additional terms. Plaintiff's counsel submitted a declaration averring that settlement would be unjust because plaintiff had accrued approximately $170,000 in medical bills as a result of the accident.

In reply, defendant contended the acceptance was unequivocal because the suggestions contained in the notice of acceptance constituted post-acceptance communications.

Defendant further contended that the notice contained an electronic signature and the phrase "[d]ictated but not read" did not invalidate the signature. Defendant proffered that defense counsel dictated the letter to his secretary, the secretary transcribed the letter, and defense counsel then authorized his electronic signature to confirm his dictation.

On February 2, 2017, the trial court granted defendant's motion. As to the signature, the trial court cited Civil Code section 1633.7, part of the UETA, which provides that a signature may not be denied legal effect solely because it is in electronic form. The trial court noted, ""Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.'" (Civ. Code, § 1633.2) The court concluded, "[d]efendant's November 18, 2016 correspondence contains an italicized electronic signature stamp of [Hillier]. Mr. Hillier avers that he sent this Notice of Acceptance via facsimile. The Court finds that the signature stamp constitutes an electronic signature within the meaning of Civil Code section 1633.2. It is attached to the November 18, 2016 electronic record with the clear intent by Mr. Hillier to sign the correspondence." The trial court also concluded that defense counsel's statement regarding a preference to proceed by way of release and dismissal, and request for plaintiff to advise how she wished to proceed, did not render the acceptance equivocal. Rather, the court concluded that the notice "reflects [d]efendant's absolute and unqualified intention to accept the [o]ffer even if [plaintiff] refused to proceed with the Release and Dismissal." On March 23, 2017, the court entered judgment in favor of plaintiff against defendant for $100,000 pursuant to section 998.

C. *Motion for New Trial*

On April 16, 2017, plaintiff noticed her intent to move for a new trial under section 657, subdivisions 1, 6, and 7. Plaintiff repeated her earlier arguments. Defendant argued Hillier's signature on the notice of acceptance was a valid electronic signature, again citing Civil Code section 1633.7. Hillier submitted a declaration in support.

On May 18, 2017, the trial court denied plaintiff's motion for new trial. Citing Hillier's declaration, the trial court determined that Hillier intended to sign the notice of acceptance with an electronic signature, and did so. The trial court also determined it was irrelevant that Hillier did not place the electronic signature on the notice of acceptance himself.

III. DISCUSSION

A. *Appealability*

A judgment entered enforcing a settlement agreement pursuant to section 664.6 is appealable. (*Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1250-1251.) A judgment that resolves all issues between one plaintiff and the defendant is immediately appealable even if the action is still pending between another plaintiff and the defendant. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 567-568, disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171.) An order denying a motion for new trial is not directly appealable, but subject to review on appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.)

B. *Defendant Was not Entitled to Move to Enforce Settlement Under Section 664.6*

We requested the parties brief the issue of whether defendant could move to enforce the purported settlement under section 664.6. Having reviewed the supplemental briefing, we conclude defendant could not.

Section 664.6 provides, "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court . . . for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." The term "parties" as used in section 664.6 means the litigants, not their attorneys of record. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 585-586.) The record indicates neither party on appeal signed the purported settlement agreement. An agreement to settle cannot be enforced under section 664.6 unless it is signed by all litigating parties. (*Levy v. Superior Court, supra,* 10 Cal.4th 578 at p. 586; *J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 985; *Critzer v. Enos, supra*, 187 Cal.App.4th at p. 1258.) "Because of its summary nature, strict compliance with the requirements of section 664.6 is prerequisite to invoking the power of the court to impose a settlement agreement." (*Sully-Miller Contracting Co. v. Gledson/Cashman Construction, Inc.* (2002) 103 Cal.App.4th 30, 37.)

Defendant contends that our Supreme Court in *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266 (*Poster*) approved of the enforcement of a section 998 offer to compromise pursuant to section 664.6. That case is unavailing as it fails to discuss section 664.6 at all. (See *Ginns v. Savage* (1964) 61

Cal.2d 520, 524, fn. 2 ["an opinion is not authority for a proposition not therein considered"].)

Defendant next contends that the interpretation of "parties" in section 664.6 by our Supreme Court in *Levy v. Superior Court* does not apply in the context of an insurance carrier defending a case on behalf of its insured, and cites *Fiege v. Cooke* (2004) 125 Cal.App.4th 1350 (*Fiege*) in support. Here, the letterhead of the notice of acceptance identifies defense counsel as employees of the corporate law department of the insurer.

Fiege, supra, 125 Cal.App.4th 1330, is not persuasive. In *Fiege*, the plaintiff had orally agreed to the settlement before the trial court. (*Id.* at p. 1353.) Here, as defendant admits, plaintiff did not orally agree before the trial court; nor did she sign the section 998 agreement. (See *Critzer v. Enos, supra*, 187 Cal.App.4th at p. 1260 [distinguishing *Fiege* on grounds that, inter alia, two defendants did not personally consent to oral settlement].) Accordingly, section 664.6 does not support the trial court's entry of judgment.[2]

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[2] Section 664.6 is not the only means to enforce a settlement. "Alternative procedures are a motion for summary judgment, a separate suit in equity, or an amendment to the pleadings in this action." (*Levy v. Superior Court, supra*, 10 Cal.4th at p. 586, fn. 5; *Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110, 1122.) The record indicates defendant did not pursue these other methods to enforce the purported settlement. Section 998 provides that "Any judgment . . . entered pursuant to this section shall be deemed to be a compromise settlement." (§ 998, subd. (f).) As discussed below, on these facts, defendant could not enforce the purported settlement under section 998.

C. *Section 998 Authorizes Entry of Judgment as Ministerial Act Only; Courts May Not Resolve Disputes Over Whether Offer Was Accepted*

We now discuss whether section 998 permitted the trial court to adjudicate the parties' dispute regarding defendant's purported acceptance of plaintiff's section 998 offer, and conclude it did not.

"Section 998 clearly reflects this state's policy of encouraging settlements. [Citations.] In order to encourage parties to accept reasonable settlement offers made pursuant to the section, subdivisions (c) and (d) of section 998 afford the offeror a remedy against a party who has failed to accept a statutory settlement offer that proves to be reasonable. Subdivision (c) provides that if an offer made by a defendant is not accepted and if the plaintiff fails to obtain a more favorable judgment, the plaintiff will be denied recovery of costs, shall pay defendant's costs from the time of the offer, and may be compelled to pay all of defendant's costs, including expert witness costs. Subdivision (d) provides that if an offer made by a plaintiff is not accepted and the defendant fails to secure a more favorable judgment, the defendant may be required to pay expert witness costs [. . . in addition to plaintiff's costs.]" (*Poster, supra*, 52 Cal.3d at p. 270.) If, however, the "offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly." (§ 998, subd. (b)(1).)

"Although the procedure established by section 998 is clearly intended to encourage settlements, the statutory language is silent on a number of issues relevant to the application of the provision, including what conduct constitutes an acceptance, whether a statutory offer may be revoked by the offeror prior to

the expiration of the statutorily designated period, and the effect of counteroffers on the viability of outstanding statutory settlement offers." (*Poster, supra*, 52 Cal.3d at pp. 270-271.) Indeed, section 998 does not address whether the clerk or judge may enter judgment when the parties dispute the validity of the settlement agreement. The Courts of Appeal decisions to consider this issue suggest that section 998 does not grant trial courts such authority.

We find the court's reasoning in *Saba v. Crater* (1998) 62 Cal.App.4th 150 persuasive. In that case, during a deposition, defendant's lawyer made an oral offer to compromise, which was transcribed. (*Id.* at 151.) Plaintiff accepted the offer, in writing, and made a motion to have judgment entered pursuant to section 998. (*Id.* at pp. 151-152.) The parties disputed whether the offer included attorney's fees and costs. (*Id.* at p. 152.) The court first considered whether a transcript of an oral offer constituted a written offer within the meaning of section 998, and concluded it did not. (*Id.* at p. 153.) In addition, the court noted: "The judgment suffers from another defect. The parties disagreed on the terms of the settlement, specifically whether the offer included attorney fees. The trial court purported to adjudicate this dispute, heard evidence as to the intent of the parties and found the offer did not include such fees. Section 998 does not grant the court the authority to adjudicate such a dispute. The entry of judgment pursuant to section 998 is merely a ministerial act which may be performed by the clerk of the court. This is another reason a formal written offer and acceptance are required; the clerk could hardly resolve the kind of dispute which confronted the court here." (*Id.* at p. 153.) The court reversed the trial court's entry of judgment. (*Id.* at p. 154.)

The facts of *Bias v. Wright* (2002) 103 Cal.App.4th 811 (*Bias*), are even more analogous to the ones here. The plaintiff served a section 998 offer on the defendant. (*Id.* at p. 814.) The parties disputed whether the defendant had accepted the offer because the notice of acceptance included the term "'each party to bear their own respective costs,'" which was not a term in the offer. (*Id.* at p. 815.) The defendant moved for an order enforcing the alleged settlement and requested that judgment be entered. (*Id.* at p. 816.) The plaintiff opposed the motion, arguing that there was no unqualified acceptance. (*Ibid.*) Both parties submitted declarations in support. (*Ibid.*) After oral argument, the trial court found defense counsel's secretary's declaration to be proof of acceptance and granted the motion. (*Ibid.*) The plaintiff appealed, and the Court of Appeal reversed. (*Id.* at p. 814.)

The court determined that the trial court had erred by resolving contradictory evidence regarding the acceptance. (*Bias, supra*, 103 Cal.App.4th at p. 822.) "[T]he trial court should have declined to enter judgment under section 998 because a trial court cannot adjudicate disputed facts concerning the parties' intent in reaching a section 998 compromise and enter judgment." (*Ibid.*) (See also *Berg v. Darden* (2004) 120 Cal.App.4th 721, 727 ["Neither the clerk nor the court is authorized to adjudicate a dispute over the terms of section 998 agreements before entering judgment"]; *Roden v. Bergen Brunswig Corp.* (2003) 107 Cal.App.4th 620, 630, fn. 3 ["§ 998 does not permit courts to resolve disputes concerning terms of settlement"]; cf. *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 667 ["At no time during the entire process

leading to entry of a section 998 judgment does a judge or jury ever consider the validity of the agreement"].)

Because the notice of acceptance here required interpretation of statutes and the document itself to determine whether it was a valid acceptance for purposes of section 998, a trial court or clerk could not enter judgment. As evidenced by the trial court issuing a written ruling in which it interpreted counsel's italicized name as an electronic signature and defendant's acceptance as unequivocal, the court was required to apply the UETA to the notice of acceptance and construe the language in the notice, in order to determine whether defendant had accepted plaintiff's 998 offer. These adjudications were beyond the scope of a ministerial act. (*Bias, supra*, 103 Cal.App.4th at p. 822; *Saba, supra*, 62 Cal.App.4th at p. 153.) Thus, the trial court was not authorized under either section 664.6 or section 998 to make findings as to whether the section 998 offer had been accepted, and erred by doing so.

IV. DISPOSITION

The March 23, 2017 judgment is reversed. Plaintiff Kathleen Coleman is entitled to recover her costs on appeal.

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KIM, J.

We concur:

BAKER, Acting P.J.

MOOR, J.