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

B.E. DEVELOPMENT CORP.,

Plaintiff and Respondent,

v.

GLENN WILLIAMS et al.

Defendants and
Appellants.

B265867 c/w B267392

Los Angeles County
Super. Ct. No. BS155038

APPEALS from orders of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Appeals dismissed as moot.

Farrise Law Firm, Simona A. Farrise and Alina Guzman;
The Arkin Law Firm and Sharon J. Arkin, for Defendants and
Appellants.

Sedgwick, Robert D. Eassa and James L. Mink, for Plaintiff
and Respondent.

INTRODUCTION

In 2011, the surviving members of J.D. Williams' family¹ (Williamsses or family) filed suit in San Francisco Superior Court against B.E. Development Corporation (Builder's Emporium) for, among other claims, J.D.'s wrongful death. The family alleged that J.D. died of lung cancer caused by exposure to asbestos in tiles he purchased from Builder's Emporium. In 2015, while the San Francisco action was still pending, Builder's Emporium filed in Los Angeles Superior Court a petition under Code of Civil Procedure² section 2035.010, et seq., for an order to preserve and inspect the tiles and the box containing them.³ Builder's Emporium sought the order in anticipation of future litigation the Williamsses might bring against the company for any injuries they may suffer from their exposure to asbestos in the tiles.

The Williamsses filed a motion to stay, strike, or dismiss Builder's Emporium's petition on the ground that the San Francisco trial court had exclusive concurrent jurisdiction over discovery concerning the tiles. Phyllis also filed a motion to

¹ The members of the Williams family who brought suit against Builder's Emporium include: J.D.'s wife, Betty, and J.D.'s children, Glenn, Veronica, Jerome, Dierdre, Carmen, Christopher, and Phyllis. Betty Williams died on November 14, 2014, while the family's San Francisco lawsuit was pending.

Because they share the same last name, we sometimes individually refer to the members of the family by their first name.

² All undesignated statutory references are to the Code of Civil Procedure.

³ We hereafter refer to the tiles and the box containing them as "the tiles."

quash the petition, asserting Builder's Emporium did not properly serve her with the petition.

In May 2015, the Los Angeles trial court granted Builder's Emporium's petition and denied Phyllis' motion to quash and the Williamses' motion to stay, strike, or dismiss. Accordingly, the Williamses were ordered to preserve the tiles and allow Builder's Emporium to "inspect and document" them. In September 2015, after the Williamses did not comply with the court's May 2015 order, the court granted Builder's Emporium's request to compel the family to comply with that order, and the Williamses eventually produced the evidence for the company to inspect and document.

The Williamses appeal from the court's May and September 2015 orders. We consolidated the appeals for purposes of oral argument and filing a single opinion. Because the family produced the tiles for Builder's Emporium to inspect and document, we dismiss both appeals as moot.⁴

FACTUAL AND PROCEDURAL BACKGROUND

1. The Williamses' San Francisco lawsuit and the parties' settlement negotiations

J.D. died of lung cancer in July 2010. In January 2011, the Williamses brought survivorship and wrongful death claims against Builder's Emporium in San Francisco Superior Court, alleging that J.D. developed lung cancer after he handled tiles containing asbestos that Builder's Emporium sold to him in the 1970s. Although the Williamses sued Builder's Emporium in

⁴ In light of our ruling, we do not address Builder's Emporium's argument that the May 21, 2015 order is not appealable.

San Francisco, none of the family members lived in that county. J.D. and Betty lived in Los Angeles prior to their deaths; Jerome, Veronica, Glenn, Deirdre, Christopher, and Phyllis also lived (and continue to live) in Los Angeles, and Carmen lived (and continues to live) in San Bernardino.

In June 2014, the trial court in the San Francisco action granted in part Builder's Emporium's motion for summary adjudication and ordered entry of judgment disposing of the family's wrongful death claims against the company.⁵

In January 2015, the parties informed the court that they had reached a preliminary settlement agreement concerning the Williamses' claims against Builder's Emporium in return for \$87,500. As part of the agreement, however, the Williamses reserved the right to sue Builder's Emporium in the future if any member of the family experienced medical complications as a result of exposure to asbestos in the tiles sold to J.D.

Although not part of the parties' preliminary settlement negotiations, Builder's Emporium asked the Williamses' counsel in February 2015 to include in the final settlement agreement a term providing for the preservation of the tiles. Builder's Emporium wanted to preserve the tiles for any future litigation the family might bring against the company. Builder's Emporium offered to preserve, or pay for the costs of having a third party preserve, the tiles if the Williamses did not want to keep them in their possession. The Williamses refused to include

⁵ We grant the Williamses' requests for judicial notice filed in both appeals, requesting that we take judicial notice of the January 14, 2016 judgment of the San Francisco Superior Court and the Williamses' March 11, 2016 notice of appeal from that judgment. (See Evid. Code, §§ 452, subd. (d) & 459.)

in the settlement agreement any term requiring the tiles to be preserved.

2. Builder's Emporium's petition to preserve evidence

On April 9, 2015, Builder's Emporium filed in Los Angeles Superior Court a petition to preserve evidence under section 2035.010, et seq. Builder's Emporium sought an order requiring the Williamses to produce and preserve the tiles for inspection.⁶

Builder's Emporium personally served all of the Williams children, except Phyllis, with the petition. Although the company made several attempts to serve Phyllis, it could not locate her when attempting to serve the petition. Builder's Emporium also served counsel who represented the family in the San Francisco action with a copy of the petition.

The Williamses (with Phyllis specially appearing) filed an opposition to Builder's Emporium's petition as well as a motion to stay, strike, or dismiss the petition (motion to stay). Phyllis also filed a separate motion to quash the petition as to her because Builder's Emporium did not personally serve her.

In their opposition and motion to stay, the Williamses argued that Builder's Emporium improperly sought a discovery order in Los Angeles Superior Court because San Francisco Superior Court had exclusive concurrent jurisdiction over any dispute concerning the parties and the tiles. The Williamses also sought sanctions against Builder's Emporium, claiming the company was abusing the discovery process.

⁶ Specifically, Builder's Emporium requested the court to enter an order "to preserve the Box of Tile, and allowing [Builder's Emporium] to inspect and document (including via photography and/or videography) the Box of Tile pursuant to Code of Civil Procedure section 2035.010, et seq."

Builder's Emporium opposed Phyllis' motion to quash and responded to the Williamses' opposition and motion to stay. The company argued it was proper to file the petition in Los Angeles Superior Court because, under section 2035.030, a petition to preserve evidence must be filed in a county where at least one of the expected adverse parties resides.⁷ Because six of the seven surviving members of the Williams family lived in Los Angeles County, and the seventh lived in San Bernardino County, Builder's Emporium argued Los Angeles Superior Court was an appropriate forum for its petition. In addition, because none of the Williamses lived in San Francisco, the company asserted it was precluded under section 2035.030 from filing the petition in San Francisco Superior Court.

In May 2015, the Los Angeles trial court held a hearing on Builder's Emporium's petition and the Williamses' and Phyllis' motions. On May 21, 2015, it granted Builder's Emporium's petition "as prayed" and denied the Williamses' motion to stay, finding that the doctrine of exclusive concurrent jurisdiction did not preclude it from ruling on the petition. The court also denied the Williamses' request for sanctions against Builder's Emporium. Finally, the court denied Phyllis' motion to quash, finding Builder's Emporium sufficiently complied with the discovery statute's service requirements.

⁷ Section 2035.030, subdivision (a), provides in relevant part: "One who desires to perpetuate testimony or preserve evidence for the purposes set forth in Section 2035.010 shall file a verified petition in the superior court of the county of the residence of at least one expected adverse party"

3. Builder's Emporium's motion to compel compliance with the court's order granting the petition

In June 2015, Builder's Emporium's counsel sent the Williamses' counsel two emails asking whether the family would produce the tiles for the company to inspect. The Williamses' counsel did not respond to the first email. In response to the second email, the Williamses' counsel questioned the legitimacy of the court's order and told Builder's Emporium's counsel that the family did not believe it was required to produce the tiles because such an act went beyond the "spirit" of the court's order.

On July 6, 2015, the Williamses filed in this court a "Petition for Peremptory Writ of Mandate or other Appropriate Relief," requesting that we issue an order directing the trial court to reverse its order granting Builder's Emporium's petition and to stay the proceedings on the petition. The Williamses also requested that we issue an order directing the court to reverse its order denying Phyllis' motion to quash. We denied the Williamses' July 6, 2015 writ petition on August 20, 2015.

As of late July 2015, the Williamses had yet to comply with the court's May 21, 2015 order granting Builder's Emporium's petition. On July 23, 2015, Builder's Emporium filed a motion for an order to show cause regarding sanctions based on the Williamses' failure to comply with that order. Builder's Emporium sought monetary sanctions against the family unless they complied with the court's May 21, 2015 order and produced the tiles for inspection and documentation.

On August 3, 2015, the Williamses appealed the court's May 21, 2015 order granting Builder's Emporium's petition.

On August 19, 2015, the Williamses opposed Builder's Emporium's motion for an order to show cause. The family

argued that requiring them to produce the tiles for inspection and documentation would exceed the scope of the court's May 21, 2015 order. The Williamses again sought sanctions against Builder's Emporium, arguing the company filed the petition only to harass the family, increase the company's attorney's fees, and deter future plaintiffs from suing the company for asbestos-related claims.

On September 1, 2015, the court granted Builder's Emporium's motion and issued an order requiring the family to produce the tiles for inspection and documentation by October 13, 2015.

On September 22, 2015, the Williamses appealed the court's September 1, 2015 order.⁸ Since filing their notices of appeal, the Williamses have complied with the court's orders and produced the tiles for Builder's Emporium to inspect and document.

DISCUSSION

In the opening briefs for both of their appeals, the Williamses admit that they have complied with the court's May 21, 2015 order granting Builder's Emporium's petition to preserve evidence and the September 1, 2015 order compelling the family to comply with the May 21, 2015 order.⁹ Indeed, the

⁸ On September 23, 2015, the Williamses filed another writ petition in this court, this time requesting an immediate stay of the trial court's September 1, 2015 order compelling production of the tiles. On October 8, 2015, we denied the petition.

⁹ "Although briefs are outside the record, we may take the factual assertions in a party's appellate brief as admissions. [Citation.]" (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 454, fn. 4.)

Williamses acknowledge that by complying with those orders, their appeals are “technically” moot. Nevertheless, the Williamses urge us to consider the merits of their appeals, asserting that they raise important public policy issues concerning forum-shopping, oppressive discovery tactics, and deceptive settlement tactics. As we will explain, because the appeals are moot, and the rule of exclusive concurrent jurisdiction is inapplicable, the appeals are dismissed.

“California courts will decide only justiciable controversies.” (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) A justiciable controversy no longer exists after an appeal becomes moot. (*Id.* at p. 1574.) An appeal is moot where, through no fault of the respondent, an event occurs that renders it impossible for the reviewing court to provide the appellant effective relief. (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178-1179.) Where, as here, the relief granted by the trial court is temporal, and that relief expires before the appeal can be heard, an appeal by the adverse party is moot. (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1079.)

As the Williamses acknowledge, their appeals are moot because we no longer can provide them relief from the challenged orders. Specifically, because the family has produced the tiles for Builder’s Emporium to inspect and document, there is no relief that we can provide the family through a favorable decision.

However, as the Williamses point out, special circumstances may exist that warrant an exercise of our discretion to hear a case that is otherwise moot. (See *Malatka v. Helm* (2010) 188 Cal.App.4th 1074, 1088 (*Malatka*)). Those circumstances are: (1) when the case raises an issue of broad

public interest; (2) when the conduct leading to the underlying action is likely to recur; and (3) when a material question remains for the court to decide. (*Ibid.*) The Williamses contend their appeals raise questions of broad public interest and seek to address conduct that is likely to recur because Builder's Emporium's decision to file its petition to preserve evidence in Los Angeles Superior Court was an abuse of the discovery process, gross forum shopping, and an attempt to intimidate the Williamses and future plaintiffs from bringing asbestos-related claims against the company. We disagree. As we briefly explain below, Builder's Emporium was statutorily authorized to seek an order preserving the tiles for future litigation, and the company properly filed its petition in Los Angeles Superior Court. Accordingly, Builder's Emporium did not engage in inappropriate or reprehensible conduct that raises an issue of public interest or that is likely to recur.

The thrust of the Williamses' challenges to the court's orders granting Builder's Emporium's petition and compelling the family to produce the tiles is that the company abused the discovery process by filing its petition in Los Angeles Superior Court. The Williamses assert that, under the doctrine of exclusive concurrent jurisdiction, San Francisco Superior Court was the only proper forum to hear any discovery dispute concerning the parties and the tiles. The Williamses argue that Builder's Emporium engaged in forum shopping and sought to harass the family by filing its petition to preserve evidence in a court that lacked jurisdiction to issue a discovery order concerning the tiles.

“ ‘ “Under the rule of exclusive concurrent jurisdiction, ‘when two [California] superior courts have concurrent

jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved.’ [Citations.] The rule is based upon the public policies of avoiding conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and preventing vexatious litigation and multiplicity of suits.” [Citation.]’ [Citation.]” (*In re B.S.* (2009) 172 Cal.App.4th 183, 190.)

“The rule is established and enforced not ‘so much to protect the rights of parties as to protect the rights of Courts of co-ordinate jurisdiction to avoid conflict of jurisdiction, confusion and delay in the administration of justice.’ [Citation.] The rule of exclusive concurrent jurisdiction may constitute a ground for abatement of the subsequent action. [Citation.] [¶] ‘An order of abatement issues as a matter of right not as a matter of discretion where the conditions for its issuance exist.’ [Citation.] However, abatement is not appropriate where the first action cannot afford the relief sought in the second. [Citations.]” (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 787 (*Plant Insulation*).)

The rule of exclusive concurrent jurisdiction does not apply in this case because San Francisco Superior Court could not afford the relief sought by Builder’s Emporium in the petition filed in Los Angeles Superior Court. Under sections 2035.010 and 2035.030, when someone expects to be a party to litigation in a California state court, whether as a plaintiff or a defendant, that entity or individual may file a petition to “preserv[e] evidence for use in the event an action is subsequently filed.”

(§ 2035.010, subd. (a); see also § 2035.030, subd. (a).)

Section 2035.030 sets forth the procedural requirements for filing a petition to preserve evidence. Under section 2035.030, subdivision (a), a petition to preserve evidence for anticipated litigation *must* be filed in a county where at least one of the expected adverse parties resides, if at least one expected adverse party resides in California. (See § 2035.030, subd. (a).)

Here, all seven of the surviving members of the Williams family live in California; six of the seven surviving members live in Los Angeles County, and the seventh member lives in San Bernardino County. Importantly, no member of the family lives in San Francisco County. Thus, not only was it proper under section 2035.030 for Builder's Emporium to file its petition in Los Angeles Superior Court, but it was also not permissible under that statute for the company to file its petition in San Francisco Superior County, since none of the Williamses live in San Francisco County. In addition, the Williamses have not cited any statute or case law that would have authorized the court in San Francisco to issue a discovery order preserving evidence for a lawsuit that had yet to be filed. Because San Francisco Superior Court could not afford the relief sought by Builder's Emporium in Los Angeles Superior Court, the rule of exclusive concurrent jurisdiction does not apply. (See *Plant Insulation, supra*, 224 Cal.App.3d at p. 787.)

In sum, special circumstances do not exist to warrant consideration of the family's moot appeals.

DISPOSITION

The appeals are dismissed as moot. Builder's Emporium shall recover its costs on appeal.

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LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

GOSWAMI, J.*

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