Filed 12/21/12 Memorial Hospital of Gardena v. Superior Court CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MEMORIAL HOSPITAL OF GARDENA, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; ELVIN DANIEL HERNANDEZ RUIZ, a Minor, etc., Real Party in Interest.	B243575 (Super Ct. No. YC066998)
FARSHID MOOSSAZADEH, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;	B244306 (Super Ct. No. YC066998)

ELVIN DANIEL HERNANDEZ RUIZ, a Minor, etc.,

Real Party in Interest.

ORIGINAL PROCEEDINGS; applications for a writ of mandate. Dudley W. Gray II, Judge. Writs granted.

Emmet Thornton & Associates, Inc., T. Emmet Thornton, and James A. Doerning for Petitioner Memorial Hospital of Gardena.

Schmid & Voiles, Susan H. Schmid, and Kathleen D. McColgan for Petitioner Farshid Moossazadeh.

No appearance for Respondent.

Solomon, Saltsman & Jamieson, Stephen Allen Jamieson, Fagel & Associates, and Bruce Fagel for Real Party in Interest.

Real party in interest Elvin Daniel Hernandez Ruiz, a minor, by and through his guardian ad litem Alfredo Casillas, sued petitioners Memorial Hospital of Gardena and Farshid Moossazadeh, M.D., for medical malpractice. Petitioners brought motions to dismiss the complaint on the basis that it was barred by *res judicata* because Ruiz had previously dismissed with prejudice an essentially identical complaint two years earlier. Ruiz opposed the motions on the basis that the trial court in the prior action had not approved the minor's compromise and settlement of the action. Therefore the ensuing dismissal of that action was void and thus not a bar to the current action. The respondent

court denied the motions to dismiss the current action and petitioners filed petitions for writ of mandate.[1]

This court issued alternative writs of mandate directing respondent court to vacate its ruling denying petitioners' motions to dismiss and enter a new order granting the motions to dismiss, or show cause why a peremptory writ should not issue. Respondent court declined to comply with the alternative writ. Because we conclude that the dismissal of the prior action was voidable, rather than void, and Ruiz failed to bring a timely motion to vacate that dismissal, the order of dismissal became final and bars Ruiz's maintenance of the current action. We therefore grant the relief prayed for in the petitions.

FACTUAL BACKGROUND

1. The Prior Action (L.A. Super. Ct. No. YC061343)

In December 2009, Ruiz (by his father, Jose Hernandez, as guardian ad litem), and Hernandez, in his individual capacity, sued petitioners for the wrongful death of their mother/wife and for medical malpractice. The wrongful death claim alleged that defendants' failure "to adequately identify, diagnose and treat the Amniotic Fluid Embolism . . . resulted in the progression of the disease" and led to the death of their mother/wife in December 2008. The negligence claim alleged the same failure resulted in Ruiz developing cerebral palsy. On August 19, 2010, plaintiffs (through their attorney, Barry I. Goldman of Rose, Klein & Marias) filed a request for dismissal of the "[e]ntire action of all parties and all causes of action" with prejudice. Dismissal was entered as requested on that same date.

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[1] Because both petitions for writ of mandate involve the same issues arising out of the same events, we ordered the matters consolidated on our own motion. (See, e.g., *Lee v. Superior Court* (2009) 177 Cal.App.4th 1108, 1122.)

2. The Present Action (L.A. Super. Ct. No. YC066998)

In April 2012, Ruiz only (by Casillas as guardian ad litem), represented by new counsel (Bruce G. Fagel in association with Stephen A. Jamieson of Solomon, Saltsman & Jamieson), sued petitioners for medical malpractice/negligence, alleging as before that defendants "failed to adequately identify, diagnose, and treat the Amniotic Fluid Embolism, which resulted in the progression of the disease resulting in [Ruiz] developing cerebral palsy."

3. The Legal Malpractice Action (L.A. Super. Ct. No. BC467737)

Also in April 2012, Jamieson filed a notice of related action showing that in August 2011, Ruiz sued his original attorney, Goldman, and Rose, Klein & Marias for legal malpractice and negligence.

4. The Motion to Dismiss the Present Action

In May 2012, petitioners filed motions to dismiss the complaint in this action with prejudice. They pointed out that dismissal of the prior action was with prejudice and in exchange for a waiver of costs. This action does not seek compensation for the death of Ruiz's mother, but otherwise the plaintiff, defendants, cause of action for negligence, and underlying circumstances are identical to those alleged in the prior action. Petitioners argued that dismissal of the prior action with prejudice is a final judgment on the merits and the complaint in this case is barred by res judicata.

Ruiz opposed the motion, accusing petitioners of having attempted to "sidestep" the trial court's power to protect a minor plaintiff by failing to obtain court approval of the minor's compromise and settlement, and of the ensuing dismissal, which was merely entered by a clerk of the superior court. Because no court order was obtained from a judge approving the purported settlement by minor's compromise, Ruiz contended that dismissal of the earlier action was voidable. Further, he argued that by filing the present action, he disaffirmed the earlier judgment of dismissal, thereby rendering it void.

Accordingly, because there was no dismissal and no final judgment, there was no bar to the current action.

In reply, petitioners argued that Ruiz was improperly making a collateral attack on a two-year-old valid, final judgment. Ruiz cannot simply "disaffirm" a judgment as he might disaffirm a contract. Assuming the trial court acted in excess of its jurisdiction by entering a judgment without an order approving a minor's compromise, the judgment was "voidable," not void. A voidable judgment is valid unless and until it is set aside. Ruiz was required to act to set aside the judgment by filing a motion to vacate the judgment pursuant to Code of Civil Procedure section 473.[2] Petitioners argued that Ruiz could not skip that step, file another lawsuit, and simply claim to be disaffirming the earlier judgment. The six-month time limit within which Ruiz was required to file a section 473 motion had long since lapsed, with the result that the judgment of dismissal in the prior action was final and no longer voidable. Therefore, petitioners contended the present suit was barred by *res judicata* and that Ruiz's sole remedy was to pursue a legal malpractice action against his original attorney.

5. The Respondent Court's Ruling

On August 15, 2012, the trial court heard the motions to dismiss and denied them without comment.

These writ proceedings followed.

DISCUSSION

I. Court Approval of the Minor's Compromise

We will assume without deciding for purposes of these writ proceedings that trial court approval of the minor's compromise and settlement in the prior action was required. As relevant here, section 372, subdivision (a) provides: "When a minor . . . is a party,

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

that person shall appear . . . by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case. . . . The . . . guardian ad litem so appearing for any minor . . . shall have power, *with the approval of the court in which the action or proceeding is pending*, to compromise the same, to agree to the order or judgment to be entered therein for or against the ward or conservatee, and to satisfy any judgment or order in favor of the ward or conservatee or release or discharge any claim of the ward or conservatee pursuant to that compromise." (Italics added.) Pursuant to that statutory requirement, "[o]nce a guardian ad litem is appointed, the action may not thereafter be compromised, settled or dismissed without court approval, thus insuring the interests of the child have been fully and fairly considered." (*County of Shasta v. Caruthers* (1995) 31 Cal.App.4th 1838, 1847.)

In *Scruton v. Korean Air Lines Co.* (1995) 39 Cal.App.4th 1596 (*Scruton*), the guardian ad litem for two children brought an action for personal injury and wrongful death against an airline arising out of the death of the children's mother. The parties reached a settlement, but before the court approved the settlement, the guardian ad litem withdrew her consent to settle. The airline brought a successful motion to enforce the settlement agreement and obtained the trial court's approval of the settlement. The appellate court reversed, holding that until court approval was obtained for a minor's compromise, the guardian ad litem could withdraw her consent. The court stated: "The guardian ad litem serves merely as the representative of the minor and an officer of the court. [Citation.] As an agent with limited powers, the guardian's purpose is to protect the rights of the minor [citation]; but it is the duty of the court to see that such rights are protected. [Citation.] A guardian has no authority to enter into an agreement compromising the claims of his charge without the sanction of the court that appointed the guardian. [Citations.] The court's order approving the compromise confers on the guardian ad litem the legal power to enforce that agreement. [Citation.] This is so because the court effectively exercises 'supervision over the rights of the minor or the acts of the guardian ad litem.' [Citation.] Therefore, without trial court approval of the proposed compromise of the ward's claim, the settlement cannot be valid. [Citation.] [¶]

Nor is the settlement binding until it is endorsed by the trial court. Subject to exceptions not applicable here, contracts are voidable by minors in California. (Fam. Code, §§ 6710, 6701; 1 Witkin, Summary of Cal. Law (9th ed., 1994 pocket supp.) Contracts, § 356C, pp. 71-72.) Therefore, a proposed compromise is always voidable at the election of the minor through his guardian ad litem unless and until 'the court's imprimatur has been placed on it.' [Citation.]" (*Scruton, supra*, at pp. 1605-1606.)

It is unwarranted for Ruiz to cast aspersion on petitioners for failing to obtain approval to dismiss the claim. Ruiz's father, as guardian ad litem, and their attorney had that responsibility. (§ 372 [the "guardian ad litem . . . appearing for any minor . . . shall have power, with the approval of the court in which the action or proceeding is pending, to compromise the same"].) Section 372 does not provide authority for a defendant to bring a motion to enforce the compromise. Instead, "[t]hat provision delineates the powers of the *guardian*, not those of parties opposing the minor. The rules of the Superior Court of Los Angeles County provide only for the guardian ad litem's petition for approval of the compromise of the ward's claims. (Super. Ct. L.A. County, Probate Policy Manual, rule 21:1.00 et seq.)" (*Scruton, supra*, 39 Cal.App.4th at p. 1607. See Super. Ct. L.A. County, Probate Division Rules, rule 4.115. See also Prob. Code, § 2506 ["Where approval of the court in which the guardianship . . . proceeding is pending is required under this article, *the guardian . . . shall file a petition* with the court showing the advantage of the compromise [or] settlement, . . . to the ward . . . and the estate." (Italics added.)].)

Accordingly, trial court approval of the settlement—by which Ruiz and Hernandez agreed to dismiss their action with prejudice, apparently in exchange for a waiver of costs—was required.[3] Because "'the court's imprimatur ha[d] [not] been placed on it,'" the proposed compromise remained voidable at the election of the minor through his guardian ad litem. (*Scruton, supra*, 39 Cal.App.4th at p. 1606.) The question then becomes whether the judgment of dismissal was *void*, and therefore Ruiz could elect to

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3 In its motion to dismiss, Memorial Hospital of Gardena stated that the dismissal was in exchange for a waiver of costs.

withdraw from the compromise at any time, or merely *voidable*, such that Ruiz through his guardian ad litem was required to take action in a timely manner to prevent the judgment from becoming final. As we next explain, we conclude the judgment of dismissal was merely voidable, and because Ruiz allowed the judgment to become final by failing to move to vacate the judgment in a timely manner, it became binding.

II. The Judgment of Dismissal Was Voidable, Not Void

Petitioners contend that Ruiz's filing of the complaint in the current action amounted to a collateral attack on the judgment of dismissal in the prior action, which had become a valid and final judgment, even if the trial court had acted in excess of its jurisdiction by entering a judgment without also issuing an order approving a minor's compromise. Petitioners argue the judgment was "voidable," not void, and a voidable judgment is valid unless and until it is set aside by way of a timely motion to vacate the judgment pursuant to section 473.

In *Lee v. An* (2008) 168 Cal.App.4th 558, this court discussed the difference between void and voidable judgments and the significance of the distinction between the two for purposes of obtaining relief under section 473. We stated: "Relief under Code of Civil Procedure section 473, subdivision (b), based on mistake, inadvertence, surprise or excusable neglect must be sought 'within a reasonable time, in no case exceeding six months, . . .' after the judgment, dismissal or order was made. . . . [¶] . . . [¶] Subdivision (d) of section 473 allows a court to set aside a void judgment without any mention of a time limit. (See *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 862.) 'A trial court has no statutory power under section 473, subdivision (d) to set aside a judgment that is not void . . . .' (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495-496.) As we explain, [where, as is the case here,] the judgment . . . was not void, but voidable, [the judgment is] not subject to being set aside beyond the six-month time limit of section 473.

"The distinction between void and voidable orders is frequently framed in terms of the court's jurisdiction. 'Essentially, jurisdictional errors are of two types. "Lack of

jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." ([*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.]) When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and "thus vulnerable to direct or collateral attack *at any time*." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 119[, italics added].)' (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660.) For example, if a defendant is not validly served with a summons and complaint, the court lacks personal jurisdiction and a default judgment in such action is subject to being set aside as void. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441.)[4]

"But when a statute authorizes a prescribed procedure and the court acts contrary to the authority conferred, the court exceeds its jurisdiction. (*People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at p. 661.) 'Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal . . . ,' and generally are not subject to collateral attack once the judgment is final in the absence of unusual circumstances which prevented an earlier, more appropriate attack. (*Ibid*.)" (*Lee v. An*, *supra*, 168 Cal.App.4th at pp. 563-564, fns. omitted.)

"'A court can lack fundamental authority over the subject matter, question presented, or party, making its judgment void, or it can merely act in excess of its jurisdiction or defined power, rendering the judgment voidable.' (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) . . . 'The difference between a void judgment and a voidable one is that a party seeking to set aside a voidable judgment or order must act to set aside the order or judgment before the matter becomes final.' (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 780.)" (*Lee v. An*, *supra*, 168 Cal.App.4th at pp. 565-566.)

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[4] Real party's reliance on *County of Shasta v. Caruthers* (1995) 31 Cal.App.4th 1838 and *Everett v. Everett* (1976) 57 Cal.App.3d 65 is misplaced. Neither case discussed the distinction between a void and voidable judgment.

"An error is jurisdictional '"only where the clear purpose of the statute is to restrict or limit the power of the court to act and where the effective enforcement of such restrictions requires the use of extraordinary writs of certiorari or prohibition."' (*County of Santa Clara* [*v. Superior Court* (1971)] 4 Cal.3d [545,] 549.)" (*In re Marriage of Goddard, supra,* 33 Cal.4th at p. 57.) In *Redlands etc. Sch. Dist. v. Superior Court* (1942) 20 Cal.2d 348, 360, the Supreme Court noted that: "[N]ot every violation of a statute constitutes excess of jurisdiction on the part of a court. The doctrine relied upon by petitioners applies only where the clear purpose of the statute is to restrict or limit the power of the court to act and where the effective enforcement of such restrictions requires the use of the extraordinary writs of *certiorari* or prohibition. Where, as here, the statute does not restrict the power of the court but merely sets up a condition precedent to the establishment of the plaintiff's cause of action, we think the violation of the statutory provision constitutes an error of law rather than excess of jurisdiction." (See also *County of Santa Clara v. Superior Court, supra,* 4 Cal.3d at p. 549; *Abelleira v. District Court of Appeal, supra,* 17 Cal.2d 280 [pronouncing the rule that prohibition may be invoked only to restrain an act in excess of jurisdiction].)

In the case of section 372, the clear purpose of the statute is to restrict the powers of the guardian ad litem, not to limit the jurisdiction of the court. Moreover, effective enforcement of section 372 does not require use of extraordinary writs because the onus is on the guardian ad litem to seek approval of the minor's compromise, whereas extraordinary writs are directed at the trial court, not at a party. Here, the trial court in the prior action entered dismissal, arguably in excess of its jurisdiction, because the guardian ad litem had not sought approval of the minor's compromise. Section 372 is not a statute that gives rise to jurisdictional error by a court's failure to abide by it. "Where, as here, the court has jurisdiction over the party and the questions presented, but acts in excess of its defined power, the judgment is voidable, not void. (*In re Marriage of Goddard, supra*, 33 Cal.4th [at p.] 56.)" (*Lee v. An, supra,* 168 Cal.App.4th at p. 566.)

Thus, entry of dismissal without court approval of the minor's compromise made the judgment voidable, not void. The trial court merely entered judgment upon Ruiz's

request pursuant to statute. (§ 581, subd. (b)(1).) If Ruiz's guardian ad litem was required to first obtain court approval of minor's compromise and failed to do so, the court could be said to have entered dismissal in excess of its jurisdiction and upon the mistaken or inadvertent request of the minor and his attorney. Therefore, Ruiz had six months to move to vacate under section 473.[5] (See *Roybal v. University Ford* (1989) 207 Cal.App.3d 1080, 1085 (*Roybal*) ["[e]rror by [plaintiff's] counsel in filing a request for dismissal with prejudice may well have constituted grounds for relief under . . . section 473[, subdivision (b)] upon timely application" to the court where it was filed].)

The dismissal in the prior action was filed on August 19, 2010, and is long since final. (Cal. Rules of Court, rule 8.104.) No motion to vacate the judgment pursuant to section 473 was ever filed. The dismissal is not subject to attack in a subsequent action. (See *Roybal*, *supra*, 207 Cal.App.3d at p. 1085.)

Finally, "[w]e note that a trial court retains discretion to vacate a default on equitable grounds, even if statutory relief is unavailable. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) 'One ground for equitable relief is extrinsic mistake—a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits.' (*Ibid*.) But for a party to qualify for such equitable relief on this basis, courts have developed a three-part test: first, the defaulted party must demonstrate it has a meritorious case; second, it must articulate a satisfactory excuse for not presenting a defense to the original action; and third, the moving party must demonstrate diligence in seeking to set aside the default once it was discovered. (*Cruz v. Fagor America, Inc.*, *supra*, 146 Cal.App.4th at p. 503.)" (*Lee v. An*, *supra*, 168 Cal.App.4th at p. 566.)

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[5] Section 473, subdivision (b) states as relevant that the "court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

As was the case in *Lee v. An*, even if Ruiz could satisfy the first two elements, he cannot meet the third. (168 Cal.App.4th at p. 566.) The order of dismissal in the prior action was filed on August 19, 2010, and is long since final. (Cal. Rules of Court, rule 8.104.) No motion to vacate the order pursuant to section 473 was *ever* filed. Twenty months had elapsed after the order dismissing the prior case was entered before the present action was filed, and in any event, the order of dismissal was not subject to attack in a subsequent action. Plainly, "[t]his does not reflect the diligence necessary for equitable relief." (*Lee v. An*, *supra*, at p. 566.)

Accordingly, the order of dismissal stands.

III. Res Judicata Bars the Present Action

Petitioners are correct that the current action is subject to dismissal on *res judicata* grounds pursuant to the authorities which state that a plaintiff's voluntary dismissal with prejudice constitutes a determination on the merits in favor of defendants and is *res judicata*. A dismissal with prejudice "is a retraxit constituting a decision on the merits invoking the principles of res judicata." (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 822.)

In *Roybal*, *supra*, 207 Cal.App.3d 1080, 1085, the court held that a plaintiff's voluntary dismissal with prejudice constituted a determination on the merits and was res judicata. Quoting *Gagnon Co., Inc. v. Nevada Desert Inn* (1955) 45 Cal.2d 448, 455, the *Roybal* court noted that "'[a] dismissal with prejudice by plaintiff of its action is a bar to a subsequent action on the same cause; otherwise there would be no meaning to the "with prejudice" feature. ". . . It is a final judgment in favor of defendants . . . ." [Citation.]'" (*Roybal*, *supra*, at pp. 1085-1086.)

The present action involves the same parties and the same causes of action as the prior complaint that was voluntarily dismissed, the only differences being the elimination of the wrongful death cause of action and the substitution of a different guardian ad litem. Thus, the voluntary dismissal with prejudice of the prior action constituted a final determination on the merits in favor of petitioners, albeit a voidable one. But once the

time elapsed to bring a motion to vacate the order of dismissal, the order became final and binding, and operates as res judicata to bar the present action.

DISPOSITION

Let a peremptory writ of mandate issue directing respondent superior court to vacate its order denying petitioners' motions to dismiss the current action and enter a new order granting the motions to dismiss. Costs are awarded to petitioners.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.