Filed 4/20/12 Kartiganer v. CKE Restaurants CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ADAM KARTIGANER, Plaintiff and Appellant, v. CKE RESTAURANTS, INC., Defendant and Respondent.	B232830 (Los Angeles County Super. Ct. No. BC427840)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Appeal dismissed.

Adam Kartiganer, in pro. per.

Robinson Di Lando, Michael Di Lando and Mark Kane for Defendant and Respondent.

On appeal after final judgment, Adam Kartiganer challenges an order denying his peremptory challenge to the trial judge under Code of Civil Procedure section 170.6.[1] The order is not reviewable on appeal, but only by petition for writ of mandate. Accordingly, we dismiss the appeal.

BACKGROUND

On December 10, 2009, Kartiganer filed this personal injury action against CKE Restaurants, Inc. (CKE) and Citigroup Center.[2] The case was assigned to Judge David L. Minning, as indicated on the file-stamped copy of the complaint in the appellate record.

On February 11, 2010, Judge Minning issued a signed notice informing the parties that the case management conference was scheduled for June 23, 2010. On that date, Kartiganer and CKE appeared at the case management conference before Judge Minning, where the final status conference was set for January 4, 2011 and the trial was set for January 10, 2011, both in Judge Minning's courtroom.

On January 4, 2011, the date of the final status conference, Kartiganer filed a peremptory challenge to Judge Minning under section 170.6. During the conference that day, at which Kartiganer was present, the trial court (Judge Minning) denied the peremptory challenge as untimely on the record. Kartiganer acknowledged that the trial was in six days, and gave no indication that he was not planning to attend.

On January 13, 2011, the date the case was called for trial before Judge Minning, Kartiganer failed to appear. The trial court dismissed the case. On February 4, 2011, the court entered judgment against Kartiganer.

On March 14, 2011, CKE served notice of entry of judgment on Kartiganer. Kartiganer filed this appeal on May 5, 2011.[3]

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

[2] Citigroup Center is not a party to this appeal.

[3] As CKE points out, Kartiganer's notice indicates that the appeal is from an order after judgment. The record contains no such order. In his opening brief, Kartiganer states that he is appealing from the final judgment.

DISCUSSION

Kartiganer contends that his peremptory challenge to Judge Minning under section 170.6 was timely, and that the trial court erred in denying it. He asserts that the judgment is "invalid" because it was entered after the improper denial of his peremptory challenge.

CKE argues that the order denying the peremptory challenge is not reviewable on appeal. We agree. Section 170.3, subdivision (d), provides in pertinent part: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding." Thus, the order denying the peremptory challenge under section 170.6 is not directly appealable or reviewable on appeal from the final judgment. The order is reviewable only by a petition for writ of mandate. (*D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 849–850.) Kartiganer did not file a petition for writ of mandate.

In his reply brief, Kartiganer argues that we may review his claim on appeal because the trial court failed to serve written notice of entry of its order denying the peremptory challenge, as the court was required to do under section 170.3, subdivision (d). As Kartiganer points out, section 170.3, subdivision (d), provides in pertinent part that, "The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification." It appears from the record that the court did not serve such a written notice.

This provision about the timeliness of a writ petition is not pertinent here because Kartiganer did not file a writ petition. This is not a case in which Kartiganer filed a writ petition and CKE challenged its timeliness. (Cf. *D.M. v. Superior Court* (2011) 196 Cal.App.4th 879, 885–886 [petition for writ of mandate filed 20 days after denial of peremptory challenge deemed timely where it did not appear that the trial court served written notice of entry of the order].) The trial court's failure to serve written notice of entry of the order does not mean that Kartiganer may challenge the order on appeal instead of by writ petition. A petition for writ of mandate is the exclusive means of

challenging the denial of a peremptory challenge under section 170.6. (*D.C. v. Harvard-Westlake School*, *supra*, 176 Cal.App.4th at pp. 849–850.)

We have discretion to treat an appeal as a writ of mandate when extraordinary circumstances are present. (*Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342, 1349.) Kartiganer has not requested that we treat his appeal as a writ of mandate, and we are aware of no extraordinary circumstances which would warrant treating this appeal as a writ of mandate. Accordingly, we dismiss the appeal.

DISPOSITION

The appeal is dismissed. Respondent is entitled to costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.