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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHN FAITRO, Plaintiff and Respondent, v. TOP SURGEONS, INC., et al., Defendants and Appellants.	B241353 (Los Angeles County Super. Ct. No. BC454464)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Dismissed.

Law Offices of Robert Rice, Robert J. Rice; Aristov Law, Dmitriy Aristov; Law Offices of Mark Jubelt and Mark Jubelt for Defendants and Appellants.

Law Offices of John M. Walker, John M. Walker; Robertson & Associates and Alexander Robertson, IV, for Plaintiff and Respondent.

In 2011, plaintiff John Faitro on behalf of himself and a putative class (collectively "plaintiffs") sued various individuals, corporations, and limited liability companies (collectively "defendants"), alleging violations of California's false advertising and unfair competition laws in relation to defendants' advertising campaign for lap band weight loss surgery. Defendants appeal from the trial court's denial of their petition to compel arbitration. We dismiss the appeal.

BACKGROUND

I. *Litigation Activity*

On February 4, 2011, plaintiff and others on behalf of themselves and a purported class filed a complaint against Dr. Michael Omidi, Julian Omidi, Cindy Omidi and their affiliated lap band surgery centers, asserting claims under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) (UCL), the False Advertising Law (Bus. & Prof. Code, § 17500 et seq.) (FAL) and the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) (CLRA).

On May 11, 2011, the parties filed a joint initial status conference report, in which plaintiffs indicated they would file a first amended complaint to add additional class representatives in order to satisfy new standing requirements. Plaintiffs also expressed their intent to name additional affiliates of the defendants as additional defendants. The joint status conference report included the statement that "[t]here are no arbitration clauses or ADR agreements which govern this dispute."

On June 13, 2011, plaintiffs filed a first amended complaint, alleging that they were all consumers who had called the defendants' 1-800-GET-THIN phone number, attended purportedly "free" seminars, and contracted with defendants' companies for lap band surgery. Plaintiffs sought injunctive relief and restitution for the alleged violations of the UCL, FAL and CLRA. Plaintiffs asserted that they "do not seek damages for wrongful death or personal injuries for themselves, their decedents, or represented plaintiffs. Plaintiffs, however, reserve their individual rights to seek damages in a separate action for wrongful death, medical malpractice, and/or survival actions."

The complaint alleged that defendants falsely advertised that they are "top rated surgical specialists" who "go beyond the standard of care." Plaintiffs asserted that the State of California had revoked the medical licenses of Julian Omidi and Michael Omidi, and had disciplined a surgeon employed by defendants. Plaintiffs further alleged that defendants' advertising falsely claimed a lower morbidity rate associated with the lap band surgery than plaintiffs believed was true and failed to provide adequate information about the side effects and risks of the surgery. Defendants' advertising also allegedly falsely claimed the surgery needed to be performed "immediately" in order to be covered by insurance. Plaintiffs alleged defendants concealed the true identity of the principals, owners, and surgeons affiliated with defendants, thus preventing consumers from researching their disciplinary records with the Medical Board of California. The complaint further alleged defendants' advertising was false and

misleading in its use of photographs of models and of "before" and "after" photographs of patients, and in its claims of professional superiority and favorable results. Plaintiffs alleged that defendants engaged in insurance fraud, operated their surgery centers without proper accreditation, and violated plaintiffs' right to access their medical records.

On June 24, 2011, the parties filed a joint status conference report. Defendants indicated their intent to file an anti-SLAPP motion (Code Civ. Proc., § 425.16), and a demurrer, setting forth their six grounds for the demurrer.[1] None of the grounds for demurrer included the contention that the claim was subject to arbitration.

On January 20, 2012, defendants filed a demurrer to the complaint and a petition to compel arbitration. Defendants contended in their petition that the claims were subject to arbitration agreements signed by plaintiffs before their surgery was performed.

The arbitration agreements provide in pertinent part as follows: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort

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[1] In October 2011, the trial court denied defendants' anti-SLAPP motion. Defendants filed a notice of appeal of the order, but they abandoned the appeal. We subsequently denied defendants' petition for writ of mandate regarding the denial of their anti-SLAPP motion.

to court process except as California law provides for judicial review of arbitration proceedings. . . . [¶] . . . **All Claims Must Be Arbitrated:** It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to treatment or service provided by the physician including any spouse or heirs of the patient . . . [¶] All claims for monetary damages exceeding the jurisdiction limit of the small claims court against the physician, and the physician's partners, associates, association, corporation or partnership, and the employees, agents and estates of any of them, must be arbitrated including, without limitation, claims for loss of consortium, wrongful death, emotional distress or punitive damages."

On May 10, 2012, the trial court denied the petition to compel arbitration. The court found that the complaint's claims for alleged violations of the UCL, FAL, and CLRA were not subject to the arbitration agreement because they were not claims for medical malpractice and did not "arise out of or relate to treatment or service provided by the physician." This is the order at issue in this appeal. However, subsequent events in the case are pertinent to the appeal and therefore are described below.

On December 7, 2012, the parties filed a joint application for the suspension of appellate filing deadlines and relief from the stay of proceedings in the superior court. The parties stated that they engaged in private mediation in September 2012 and would not be able to finalize the settlement agreement before the due date for appellants' opening brief. This court granted the application, instructing the

parties to notify the court promptly if they did not settle the action or if the superior court did not approve the settlement. The order stated: "In the event that the Parties do not settle the underlying action or the Superior Court does not approve the settlement of the underlying action, the Parties will promptly notify this Court. In such event, the appellate filing deadlines will be reinstated thirty (30) days from such notification. Ninety days from the filing date of this order, appellants shall file a report with this court of status & progress of the settlement negotiations; failure to file the report will result in the setting aside of this order."

On March 15, 2013, defendants filed a status report with this court, indicating that the parties had executed written settlement agreements and the trial court had set a hearing for approval of the settlement on April 18, 2013. Beginning in May 2013, defendants filed almost 20 more letters with this court, keeping the court apprised of the status of the settlement. The final letter, on October 16, 2015, indicated that the superior court had granted the motion for preliminary approval of the class settlement and set a hearing for final approval of the settlement. The letter also indicated that the court had granted defendants' counsel's motion to be relieved as counsel. Substitution of counsel was filed with this court, and no more letters regarding the status of the settlement were filed. In March 2016, therefore, we notified defendants of their failure to file an opening brief. After numerous requests for extensions, the opening brief was filed.

II. *Settlement Proceedings*

In April 2013, plaintiffs filed a motion seeking preliminary approval of the settlement. The trial court deferred ruling on the motion for preliminary approval of the class settlement, raising several concerns for the parties to address.

On December 20, 2013, a written settlement agreement was executed by all the parties. On January 16, 2014, the parties filed a joint status conference statement indicating that they had addressed the court's concerns and would re-file their motion for preliminary approval, which they did on January 31, 2014. After two more revisions of the motion for preliminary approval, the defendants indicated in June 2014 that they did not oppose the motion for preliminary approval of the settlement. However, in September 2014, the trial court denied the motion for preliminary approval and instructed the parties to address more issues in a re-filed motion.

The parties addressed the court's concerns and submitted a joint supplemental brief in support of their motion for preliminary approval of the class settlement. The parties jointly requested approval of the settlement, effective August 1, 2015. The settlement agreement stated that the parties entered into the agreement "in order to settle all claims and disputes relating to" the class action.

On October 15, 2015, the court granted preliminary approval of the class action settlement and granted conditional certification of the class, as defined by the parties in the settlement agreement.

III. *Post-Settlement Activity*

On January 6, 2016, plaintiffs filed a motion to enforce the settlement agreement on the ground that defendants had failed to comply with their obligation to provide the settlement administrator with the contact information for the estimated 10,500 class members. The court granted the motion in an April 2016 order. The court reasoned that "[b]oth sides agreed on the terms of the settlement, and thus, mutual consent was present." Defendants did not dispute that they had failed to comply with their obligations under the settlement. Instead, they filed a declaration stating that two of the defendants, Top Surgeons and Surgery Center Management, did not have funds to pay the settlement. The court noted that the United States Department of Justice had seized $109 million of defendants' funds as part of a criminal investigation, but that plaintiffs' counsel had asked the United States Attorney's office to release part of the funds to fund the settlement. The court did not "issue any blanket order authorizing discovery," but urged plaintiffs to "seek discovery through appropriate channels." The court thus granted the motion to enforce the settlement and indicated that it would set a final approval hearing.

On May 23, 2016, the court issued an order setting forth an implementation schedule with deadlines for the events leading to final approval of the settlement, adopting the deadlines the parties had agreed upon in a joint status conference statement. The court further ordered that defendants' failure to comply with the deadlines would result in an order to show cause regarding contempt. On June 24, 2016,

plaintiffs filed a motion for application of an order to show cause regarding contempt, based on defendants' failure to pay the settlement administrator his fee, which prevented the administrator from meeting the court's deadline to send out the requisite notice to the class members.

In September 2016, the court lifted the discovery stay to allow plaintiffs to conduct discovery to learn what happened to the funds that defendants purportedly had set aside for the settlement. The court explained that, although it did not have enough information before it, there appeared to be "a shell game of moving assets from here to there," and that discovery was needed to determine what happened to the funds. The court stated that normally, "once we grant preliminary approval, there's a fairness hearing sometime within six months or so, and we're done." The court therefore asked the parties to cooperate in determining the facts. The court continued the hearing on the motion for contempt to December 6, 2016.

DISCUSSION

Defendants appeal from the trial court's May 10, 2012 order denying their petition to compel arbitration. Plaintiffs contend the appeal is moot because the parties executed a written settlement agreement after the denial of the petition. We agree.[2]

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[2] Although this court previously denied plaintiffs' motion to dismiss the appeal, we did not have the benefit of the entire record in making that decision.

We begin by describing the class action settlement procedure. "Rule 3.769 of the California Rules of Court [CRC] sets forth the procedures for settlement of class actions in California. (See also Code Civ. Proc., § 581, subd. (k).) A two-step process is required. First, the court preliminarily approves the settlement and the class members are notified as directed by the court. [CRC, rule 3.769(c)-(f).] 'The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.' [CRC, rule 3.769(f).] Second, the court conducts a final approval hearing to inquire into the fairness of the proposed settlement. [CRC, rule 3.769(g).] If the court approves the settlement, a judgment is entered with provision for continued jurisdiction for the enforcement of the judgment. [CRC, rule 3.769(h).]" (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118.)

"A court must approve a class action settlement because the rights of absent class members are being compromised. The settlement process aims to safeguard those absent class members' rights, and that goal explains" the process of preliminary approval, notice to the class members, and final approval. (William B. Rubenstein, Newberg on Class Actions (5th ed. 2016) § 13:39 (Newberg).) "At the preliminary stage, the court considers general settlement terms. It reviews information on the arms-length nature of the negotiation, any obvious signs of collusion, presence or absence of conflicts within the class, and possible preferential treatment within the class. The court also

determines whether the settlement is likely to be approved at the hearing to be scheduled after notice." (Timothy D. Cohelan, Cohelan on California Class Actions (2016 ed.) § 9:10.)

Here, the court granted preliminary approval of the settlement, set a schedule of events leading to final approval, granted a motion to enforce the settlement, and ordered defendants to comply with the deadlines leading to final approval. Defendants contend that the lack of final approval means there is no settlement agreement. However, the purpose of judicial approval of a class settlement is to protect the rights of absent class members. (Newberg, *supra*, § 13:39.) That the parties have not yet obtained final approval does not signify that no agreement was reached between the parties.

The settlement agreement was executed by both parties and provides: "Plaintiffs and Defendants enter into this settlement agreement . . . in order to settle all claims and disputes relating to the [instant] class action. . . . This settlement . . . is fair and reasonable, and has been reached as a result of good faith, arms-length negotiations, including a multi-day of mediation before [Judge Tevrizian]." Under the agreement, the settling defendant was Top Surgeons, LLC, the guarantying defendant was Surgery Center Management, LLC, and the other defendants were dismissed. The agreement defined the class and required the settling defendant to provide a $500,000 settlement fund, pay for advertising, pay administrative costs of the settlement and other costs, and provided a timeline for distributions. The agreement set forth the process for final

approval, which included the requirement that the defendant provide names and addresses for class members so that notice could be mailed. The agreement gave defendants the right to rescind the settlement "[i]f five percent (5%) or more of the Class Members validly elect to opt out of the Class." The agreement further provided that "[i]f Defendants do not exercise the right to rescind the Settlement based on the number of Class Members who elect not to participate in the Settlement, the Parties will jointly move the Court for final approval of the Settlement . . . . [¶] If the Court does not grant final approval of the Settlement, or if the Court's final approval of the Settlement is reversed or materially modified on appellate review, then this Settlement will become null and void . . . . [¶] The Parties will work together expeditiously and in good faith to obtain preliminary and final approval of the Settlement." In addition, the agreement provided that the court would retain jurisdiction over the action "until the completion of the performance of all other responsibilities and obligations pursuant to this Settlement Agreement. . . . Each of the Parties agrees to do all things reasonably necessary to implement this Settlement Agreement."

The agreement does not provide that the agreement is null and void if the parties have not obtained final approval by a certain date. Nor does it allow defendants to back out of the agreement for any reason other than if too many class members opt out. Defendants argue that the settlement was contingent on final approval, but that contingency was based on the parties first having moved for final approval of the settlement. The agreement does not state that it

becomes null and void if defendants fail to fulfill their obligations required to move for final approval. Under the terms of the agreement, the agreement is still in place, and the parties are still in the midst of the process for final approval.

Courts generally "decide only 'actual controversies'" and do not "render opinions on moot questions." (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178 (*Ebensteiner*).) "One such event occurring for which a reviewing court will dismiss an appeal is when the underlying claim is settled or compromised. [Citations.]" (*Id.* at p. 1179.) The reason for this rule is that that "the law favors and encourages compromises and settlements of controversies made in or out of court. [Citation.] The [California] Supreme Court has explained that a settlement operates as a merger and ban as to all preexisting claims and those alleged in the lawsuit that have been resolved." (*Id.* at p. 1179.)

In *Ebensteiner*, the plaintiff appealed from the demurrer dismissal of its second amended complaint. While the appeal was pending, the parties executed a stipulated settlement agreement. The defendant filed a motion to dismiss the appeal for mootness, but the plaintiff argued that the settlement was invalid. The appellate court assigned the trial judge to act as a referee to determine whether the settlement agreement was enforceable. After the referee found the agreement to be enforceable, the plaintiff raised other arguments opposing dismissal, including that "the parties have not performed under the terms of the settlement agreement." (*Ebensteiner*, *supra*, 143 Cal.App.4th at p.

1181.) The court rejected the plaintiff's contention that the appeal should not be dismissed because of the parties' failure to perform under the terms of the settlement, explaining that "[t]he appeal was based on the sufficiency of the allegations in the second amended complaint. Any issues concerning the sufficiency of the second amended complaint were rendered moot by the settlement agreement. Once the settlement agreement was signed, the only issue remaining between the parties was its enforceability. . . . The original dispute has been superseded by the settlement agreement." (*Id.* at p. 1181; compare *Larner v. Los Angeles Doctors Hospital Associates, LP* (2008) 168 Cal.App.4th 1291, 1304 [where named plaintiff voluntarily settled all her claims before trial, she "retained no justiciable interest in the litigation"].)

Similar to *Ebensteiner*, the parties here executed a written settlement agreement "in order to settle all claims and disputes" relating to the class action. "A disposition of reversal in this case would require [the parties to arbitrate the claims and disputes in the class action]. However, by the express terms of the settlement agreement, that controversy no longer exists. As a result, we cannot grant [defendants] any relief by reversing an order for claims that have been settled and compromised." (*Ebensteiner*, *supra*, 143 Cal.App.4th at p. 1180.)

Defendants argue that there has been no final approval of the settlement. However, the record indicates that the reason there has been no final approval is defendants' failure to fulfill their obligations

under the terms of the settlement agreement.[3] (See *Ebensteiner*, *supra*, 143 Cal.App.4th at p. 1181 ["Once the settlement agreement was signed, the only issue remaining between the parties was its enforceability."].) Defendants' failure to comply with their obligations under the settlement agreement resulted in the trial court's grant of plaintiffs' motion to enforce the settlement, and the lift of the discovery stay for plaintiffs to determine what happened to the settlement funds. The superior court docket indicates that, after those orders, plaintiffs moved to compel depositions and sought monetary sanctions against defendants and their counsel, and defendants attempted to have the superior court judge disqualified. Thus, the fact that a final approval hearing has not been held does not mean that there is no settlement agreement, but only that other events and filings have prevented the case from moving forward to the final approval hearing.

Defendants further argue that "the passage of time has made the Settlement Agreement virtually impossible to perform, and the likelihood of the Settlement being funded is nil." There is no support in the record for defendants' contention that the settlement will not be funded. Indeed, the need to determine what happened to the funds that

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[3] Defendants contend that "[t]he fault of who is responsible for the aborted settlement cannot be resolved" by this court. However, in its order granting the motion to enforce the settlement, the trial court noted that defendants did not dispute that they had failed to comply with their obligations under the settlement.

purportedly were removed from the client trust account was the very reason the trial court lifted the discovery stay for plaintiffs.[4]

Defendants' contention that they "have opposed any approval of the settlement" is not supported by the record. Not only did defendants execute the written settlement agreement in December 2013, but in January 2014, they filed a joint status conference statement with plaintiffs indicating their intent to "re-file their motion for preliminary approval." The joint status conference statement further stated, "It has been sixteen (16) months since the parties reached a settlement at mediation and the parties are anxious to get this case resolved without any further delays." In June 2014, the defendants indicated to the court and opposing counsel that they would not oppose the motion for preliminary approval of the settlement.

In a May 2015 letter from defendants' counsel to plaintiffs' counsel, defendants declared their intent to continue with the settlement agreement but stated that the government had seized over $100 million in funds in June 2014. Defendants' counsel stated, "we can no longer represent that the settlement funds for the class action are being held in our client trust account." Nonetheless, in August 2015, defendants, together with plaintiffs, filed a joint supplement brief in support of the motion for preliminary approval of the class settlement. The record therefore shows that defendants have not opposed approval of the settlement. Rather, after the alleged seizure of

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[4] Defendants state that plaintiffs withdrew their motion for an order to show cause regarding contempt on December 6, 2016. We have been unable to find an entry indicating this in the superior court docket.

their funds by the government, they expressed their uncertainty as to whether they had sufficient funds to comply with the settlement but continued to support the approval of the settlement.

Although the parties have not yet moved for and received final approval of the settlement agreement, it remains true that defendants entered into a settlement agreement that expressly settled all claims and disputes at issue. As the trial court reasoned in granting the motion to enforce the settlement, "[b]oth sides agreed on the terms of the settlement, and thus, mutual consent was present." (See *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1389 [when court reviews the fairness of a class action settlement, ""[d]ue regard" . . . "should be given to what is otherwise a private consensual agreement between the parties.""].)

"'The reason why an appeal is dismissed if the judgment is satisfied is because the satisfaction moots the issues on appeal. [Citation.] A prejudgment settlement has the same effect. It is decisive of the rights of the parties and bars reopening the issues settled. Absent a fundamental defect the terms are binding on the parties. [Citation.] ". . . [T]he merits of the original controversy are no longer in issue when a compromise agreement is made in good faith and without fraud, duress or undue influence."" (*Larner v. Los Angeles Doctors Hospital Associates, supra,* 168 Cal.App.4th at pp. 1296–1297.) Defendants do not contend the settlement agreement was not made in good faith or was made under duress or undue influence. The settlement disposed of all the disputes and claims at issue in the action

– there is no reason to compel the parties to arbitrate the case. Proceedings to move the settlement toward final approval are ongoing in the trial court. This appeal accordingly should be dismissed.

DISPOSITION

The appeal is dismissed. Respondents are entitled to costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.