Filed 11/2/17 Garza v. Mansuri CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ERNESTO GARZA et al., Plaintiffs and Respondents, v. IMITIAZ MANSURI, Defendant and Appellant.	B280467 (Los Angeles County Super. Ct. No. BC564094)

APPEAL from an order of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Dismissed.

Law Offices of Foroozandeh, Majid Foroozandeh, for Defendant and Appellant.

Rafii & Nazarian, Daniel J. Rafii, Joe Nazarian, and Maya Rozov, for Plaintiff and Respondent.

INTRODUCTION

After failing to object to the voluntary dismissal without prejudice of plaintiffs' wrongful death action, defendant returned to the trial court to "convert" the dismissal into an involuntary one with prejudice. The trial court denied defendant's motion. For the reasons discussed below, defendant failed to preserve any issue in the trial court and the appeal has been taken from a nonappealable order.

BACKGROUND

Defendant and Appellant Imitiaz Mansuri operated an automotive repair shop in La Habra. Plaintiffs and Respondents Ernesto Garza and Xavier Garza sued Mansuri for the wrongful death of their elderly brother, who fell into a lube pit on the premises and died shortly thereafter. After an adverse ruling on a critical defense motion in limine and the trial court's denial of their motion to permit a late expert witness designation, plaintiffs voluntarily dismissed the action without prejudice.

Several days later—and within two years of the accrual of the cause of action—plaintiffs filed a new wrongful death action in the Orange County Superior Court. Within 60 days of the entry of the voluntary dismissal, defendant filed a motion to convert the dismissal of the Los Angeles lawsuit to one with prejudice, so defendant could quickly defeat the Orange County lawsuit. Defendant argued plaintiffs should not have been permitted to file a voluntary dismissal without prejudice because an involuntary dismissal was imminent and inevitable based on the trial court's earlier rulings.

Plaintiffs opposed the motion on dual grounds. First, they argued the trial court no longer had jurisdiction to act. Second,

on the merits, they asserted the voluntary dismissal without prejudice was entered before the commencement of trial in accordance with Code of Civil Procedure section 581, subdivisions (a) and (b).[1]

The trial court denied defendant's motion after a hearing. The record does not include a reporter's transcript or a suitable substitute for the hearing on defendant's motion. No court minutes are in the record. The signed order, which appears to have been prepared by counsel for one of the parties, was signed two months after the trial court ruled on defendant's motion. It states defendant's motion was denied "[a]fter full consideration of the papers submitted, the files and records of the action, and the arguments of counsel."

Defendant timely appealed from the trial court's denial of the motion to convert the dismissal without prejudice into one with prejudice. Defendant's civil case information sheet indicates the order was appealable pursuant to section 904.1, subdivision (a)(2) as an order after judgment.

After the appellate briefs were filed, we asked counsel to submit letter briefs to address whether defendant's failure to include a reporter's transcript or suitable substitute of the

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[1] All statutory references are to the Code of Civil Procedure. Section 581, subdivision (b)(1) authorizes a plaintiff's voluntary dismissal "[w]ith or without prejudice . . . at any time before the actual commencement of trial . . . ."

Section 581, subdivision (a)(6) provides, "A trial shall be deemed to actually commence at the beginning of the opening statement or argument of any party or his or her counsel, or if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence."

hearing on defendant's motion warranted an affirmance. Defendant advised he attempted to include a reporter's transcript, but it was rejected. Plaintiffs stated the reporter's transcript to which defense counsel referred was for the earlier hearing, where the voluntary dismissal without prejudice was discussed on the record. Per plaintiffs, the hearing on defendant's motion was not reported. No one discussed the absence of a suitable substitute in lieu of a reporter's transcript from the hearing on defendant's motion. We accepted the reporter's transcript from the earlier hearing.

Though few in words, the reporter's transcript is telling. After denying plaintiffs' motion for a belated expert designation, the following discussion ensued:

"[Plaintiffs' Counsel]: Your Honor, we would file a notice of dismissal without prejudice at this time.

"The Court [addressing defense counsel]: Well, you have any objections to that?

"[Defense Counsel]: No, your Honor."

Having received the reporter's transcript from this earlier hearing, we again invited supplemental briefing to address whether "defense counsel's agreement on the record that plaintiff[s] could dismiss the action without prejudice [was] dispositive . . . ." Plaintiffs' counsel responded it was.

Defense counsel replied that once plaintiffs announced they would dismiss the action without prejudice, "the oral dismissal terminated the court's jurisdiction over the matter, and therefore [the trial judge's] making inquiry as to defense counsel's position was an act of futility." Although defendant conceded, "a plaintiff's right to a voluntary dismissal pursuant to [section 581, subdivision (b)(1)] appears to be absolute," he added, "On the

other hand, . . . it is generally accepted that the [defendant] is entitled to an appealable judgment of dismissal "with prejudice" as . . . requested in this case." Defendant then concluded this letter brief by stating, "Given the peculiar facts of this case, the distinction between without and with leave becomes meaningless."

DISCUSSION

Once a plaintiff files a voluntary dismissal, the trial court's jurisdiction to act is not extinguished, but it is limited. For example, a trial court may not, on its own motion, vacate the plaintiff's voluntary dismissal without prejudice and convert it to one with prejudice based on plaintiff's failure to comply with local rules. (*Harris v. Billings* (1993) 16 Cal.App.4th 1396, 1405 ["The trial court in this case had no jurisdiction to vacate the dismissal without prejudice, properly entered pursuant to appellant's request, or to enter a new order dismissing the action with prejudice. [¶] . . . 'A voluntary dismissal of an entire action deprives the court of subject matter jurisdiction as well as personal jurisdiction of the parties'"].)

The trial court retains jurisdiction to vacate a voluntary dismissal based on a party's mistake, inadvertence, surprise or excusable neglect. In that event, should the defendant appeal, the appeal is treated as a petition for a writ of mandate and considered on its merits. (*Id.* at p. 1369; see also *Gray v. Superior Court* (1997) 52 Cal.App.4th 165, 170-171 [neither a plaintiff's voluntary dismissal nor an order denying a motion to *vacate* a voluntary dismissal is appealable, but the latter is reviewable by petition for extraordinary relief].) Otherwise, a voluntary dismissal under section 581, subdivision (b)(1) is a ministerial act

and not an appealable judgment. (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1365.)

The foregoing authorities persuade us the trial court retained jurisdiction to vacate the voluntary dismissal pursuant to section 473. However, defendant did not seek relief based on counsel's mistake, inadvertence, surprise or excusable neglect, nor did he seek to *vacate* the voluntary dismissal without prejudice. Instead, after agreeing on the record that plaintiffs could dismiss the action without prejudice, defendant asked the trial court to convert the voluntary dismissal to an involuntary dismissal with prejudice.

Defendant's motion defies precise characterization. In one respect, it resembled a motion under section 473, but failed to include the required declaration of fault pursuant to section 473, subdivision (b). It also bore some of the trappings of a motion for reconsideration under section 1008, but did not comply with the time limits or substantive requisites of that statute.

For the purposes of this appeal, we will assume, without deciding, the trial court retained jurisdiction to entertain defendant's motion as presented. The trial court's ruling was not appealable as a postjudgment ruling. Nor do we find good cause to treat defendant's appeal as a petition for writ of mandate: On the merits, defendant would not be entitled to extraordinary relief.

Ample appellate authority suggests plaintiffs "are not permitted to voluntarily dismiss their actions after the court has made a dispositive ruling or given some indication of the legal merits of the case, or when the procedural posture is such that it is inevitable the plaintiff will lose. After such occurrences, these cases hold that plaintiffs lose their right to voluntarily dismiss

their case [even though trial has not yet commenced]." (*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 877.) Many decisions stem from plaintiffs' attempts to voluntarily dismiss without prejudice when they fail to amend within the allotted time after demurrers are sustained. (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 789.) Others concern plaintiffs who attempt to voluntarily dismiss before the hearing on a motion for summary judgment they failed to oppose (*Cravens v. State Bd. of Equalization* (1997) 52 Cal.App.4th 253, 256) or who were "in a position to deduce that there was nothing to be done to prevent the substantive dismissal of the action—the dice had already been thrown" (*Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 200).

Given this authority and the pretrial rulings adverse to plaintiffs' case, their ability to voluntarily dismiss the action without prejudice, even though trial had not yet commenced (§ 581, subds. (a)(6), (b)(1)), might be questioned. Accordingly, the trial court appropriately asked whether defendant objected to a voluntary dismissal without prejudice. But defense counsel indicated he had no objection to a voluntary dismissal without prejudice.

With the voluntary dismissal without prejudice in place, the trial court retained limited jurisdiction, e.g., it could rule on a motion pursuant to section 473. No such motion was brought, however. Even were we to review defendant's motion under section 473 criteria, it would be inadequate. (*Basinger v. Rogers & Wells* (1990) 220 Cal.App.3d 16, 21.)

The voluntary dismissal was not appealable, and neither was the subsequent order denying defendant's motion. In any event, defendant forfeited any right to appellate review by

agreeing on the record that plaintiffs could voluntarily dismiss their action without prejudice.

DISPOSITION

The appeal is dismissed. Plaintiffs are awarded their costs.
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DUNNING, J.*

We concur:

Kriegler, Acting P.J.

Baker, J.

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