Filed 10/1/18 Sumo v. Torrance Memorial Medical Center CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

EVELYN SUMO, Plaintiff and Appellant, v. TORRANCE MEMORIAL MEDICAL CENTER, Defendant and Respondent.	B279369 Los Angeles County Super. Ct. No. BC530954)

APPEAL from an order of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Appeal Dismissed.

Law Office of Neal J. Fialkow, Neal J. Fialkow and James S. Cahill; Law Office of J.D. Henderson and J.D. Henderson; Law Offices of Sahag Majarian and Sahag Majarian for Plaintiff and Appellant.

Sheppard Mullin Richter & Hampton, Richard J. Simmons, Derek R. Havel, Jonathan P. Barker and Cassidy M. English, for Defendant and Respondent.

Plaintiff Evelyn Sumo filed a wages and hours class action alleging that Torrance Memorial Medical Center had violated Labor Code provisions governing overtime pay and meal periods. The complaint also alleged a representative claim under the Private Attorneys General Act (Labor Code, §§ 2698 *et seq*. (PAGA) seeking civil penalties for these statutory violations. The trial court denied class certification, concluding that Sumo had failed to establish common issues would predominate over individual issues.

Sumo appeals the court's denial of class certification under the "death knell doctrine." Torrance argues the doctrine is inapplicable because Sumo's PAGA claim remains in the trial court, rendering the order nonappealable. We agree, and dismiss the appeal.

FACTUAL BACKGROUND

*A. **Summary of the Complaint***

In December 2013, plaintiff Evelyn Sumo filed a class action complaint against defendant Torrance Memorial Medical Center alleging numerous violations of the Labor Code, including failure to pay overtime (Labor Code, § 510[1]) and failure to provide meal periods (§§ 226.7; 512).[2] The complaint also alleged a representative claim under PAGA seeking civil penalties for each

---

1 Unless otherwise noted, all further statutory citations are to the Labor Code.

2 The complaint also alleged claims for failure to pay wages at specified intervals (§ 204); failure to pay wages due upon termination (§§ 201-203); failure to provide proper wage statements (§ 226, subd. (a)); and failure to pay minimum wage (§§ 1194, 1194.2.)

of these statutory violations on behalf of herself and all "similarly situated aggrieved employees."[3]

Sumo's complaint did not identify or describe the specific nature of Torrance's Labor Code violations. Instead, the pleading asserted only that Torrance had failed to pay members of the class, defined as all "non-exempt, hourly paid employees," premium pay for all hours worked in excess of 8 hours a day, or 40 hours a week, and had failed to provide meal periods in the manner required under Labor Code section 226.7.

B. ***Motion for Class Certification***

1. Summary of Sumo's motion for class certification

In January 2016, Sumo filed a motion to certify a class consisting of "all current and former non-exempt employees of [Torrance] who worked an Alternative Workweek Schedule

---

[3] PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360.) "Generally speaking, the civil penalties available under the PAGA are $100 'for each aggrieved employee per pay period for the initial violation and [$200] for each aggrieved employee per pay period for each subsequent violation.' [Citation.] Seventy-five percent of penalties 'recovered by aggrieved employees' must be distributed to the 'Labor and Workforce Development Agency . . .,' with the remaining 25 percent to be distributed to the 'aggrieved employees.' [Citation.] A prevailing PAGA plaintiff may recover his or her attorney fees and costs as well. (Lab. Code, § 2699, subd. (g)(1).)" (*Munoz v. Chipotle Mexican Grill, Inc.* (2015) 238 Cal.App.4th 291, 310-311 (*Munoz*).)

[AWS] at any time during the Class Period."[4] The motion also sought certification of a subclass for the meal period claim consisting of "All current and former non-exempt employees of [Torrance] who worked an [AWS] at any time during the Class Period, and who worked more than 10 hours without taking a second meal period."

Sumo's motion acknowledged that when she "filed [her] lawsuit, the exact nature of Torrance's Labor Code violations was not known." Sumo asserted, however, that "investigation by [her] counsel [had] uncovered [an] unlawful [AWS] policy with unlawful meal period waivers." Sumo provided evidence showing that class members had signed an AWS agreement that allowed them to select from the following work schedules:

"□ Full Time = Three twelve-hour shifts per week

□ Part Time = □ Two twelve-hour shifts one week and Three twelve-hour shifts the other week or

□ One twelve-hour shift one week and Three twelve-hour shifts the other week or

□ Alternating work weeks with one twelve-hour shift one week and two twelve-hour shifts the other week."

The AWS agreement also included a meal period waiver stating: "I understand when I am working a 12-hour shift schedule, I would be entitled to receive two unpaid meal periods of 30 minutes each. However, I voluntarily agree to waive one of my two meal periods. [¶] I understand that I may revoke this meal period waiver at any time by providing my supervisor with at least one day's written notice."

---

[4] The motion defined the "Class Period" as January 10, 2010 to present.

Sumo argued that Torrance's inclusion of full-time and part-time work schedule options on a single AWS agreement violated language in the applicable wage order stating: "The proposed [AWS] agreement . . . . may propose a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose." (Wage Order 5-2001, § 3(C)(1), codified at 8 Cal. Code Regs. § 11050, 3(C)(1).) Sumo theorized that the AWS agreement failed to comply with these requirements, and was therefore "null and void," because it offered one "schedule for full-time employees which part time employees [we]re not eligible to choose," and "multiple options" for part-time employees that "[f]ull-time employees [we]re not eligible to choose."

Sumo also argued that the meal period waiver set forth in the AWS agreement was invalid. Specifically, Sumo asserted that by incorporating the meal period waiver directly into the AWS agreement, Torrance had effectively required its employees to waive their meal period as a condition of working an AWS. Sumo contended Torrance's actions violated a wage order provision requiring that meal period waivers "be documented in a written agreement that is voluntarily signed by . . . the employee." (Wage Order 5-2001, § 11(D), codified at 8 Cal. Code Regs. § 11050, § 11(D).)

Sumo argued that determining the legality of each class member's identical AWS agreement and meal periods waiver involved a "common . . . question suitable for class-wide determination."[5] Sumo clarified, however, that she was not

---

[5] Sumo's motion for class certification raised several additional theories of liability that are not referenced in her

seeking to "certify her . . . [PAGA] Cause of Action . . . as it is a representative action that does not require certification."

2. Summary of Torrance's opposition

Torrance argued that class certification was inappropriate because Sumo's complaint failed to allege any of the theories of liability set forth in her certification motion. Noting that the complaint did not refer to "any AWS . . . or any meal period waiver," Torrance asserted "the propriety of class certification [could not be determined] . . . unless and until the claims [were properly] raised . . . in the pleadings."[6]

---

appellate briefing. Because Sumo has not addressed those theories in her appeal, we presume she is no longer pursuing them on a class-wide basis. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal. 3d 211, 216, fn. 4 [argument that was presented to the trial court, but "not raised . . . on appeal . . . may . . . be deemed waived"]; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 ["[c]ourts will ordinarily treat the appellant's failure to raise an issue in his or her opening brief as a waiver of that challenge"]; *Humes v. Margil Ventures, Inc.* (1985) 174 Cal.App.3d 486, 493 ["A point not presented in a party's opening brief is deemed to have been abandoned or waived"].)

[6] After Torrance filed its opposition, Sumo submitted a motion to file a second amended complaint that contained "a new class definition . . . match[ing] the one used in [Sumo's] Motion for Class Certification," and new factual allegations "concerning Torrance's affirmative defenses of AWS/meal period waiver." As discussed below (see infra, fn. 7), the court's order denying class certification also denied the motion to file the second amended complaint.

Torrance also argued that Sumo's newly-raised theories of liability would require "individualized factual inquiry." On Sumo's overtime claim, Torrance argued that the declarations it had filed in support of the opposition showed that some employees were permitted to "choose between [full-time and part-time] schedules," and "regularly move[d] between these schedules." Torrance raised similar arguments regarding Sumo's meal period claim, asserting that the declarations showed many employees were told "they did not have to sign an agreement containing a waiver in order to work an AWS," and "did not perceive the meal period waiver as involuntary."

Torrance also argued the court should deny class certification because the theories underlying Sumo's overtime and meal period claims had no merit. Torrance contended that Sumo had failed to identify any legal authority suggesting that the inclusion of full-time and part-time work schedule options in a single AWS agreement was unlawful. Torrance also argued that Sumo had failed to cite any authority showing that a meal period waiver could not be included in an AWS agreement.

3. The trial court's order denying class certification

The trial court denied certification, concluding that Torrance's evidence showed the court would "have to conduct highly individualized assessments in order to establish whether Defendant's AWS policy or practice[s] [were] unlawful." The court noted that the employee declarations Torrance had submitted demonstrated that many members of the proposed class preferred to work the 12-hour shift set forth in the AWS, and did not believe the AWS policy was "unlawful." The court further explained that the declarations showed many employees did not "perceive[] the meal period waiver as involuntary," and

were aware that they could receive a second meal period by revoking the waiver.

The court also concluded Sumo was "not a typical class representative" because she had provided no evidence that any other employee had ever objected to Torrance's AWS agreement or meal period waiver policies. Torrance, in contrast, had provided evidence showing that many employees "ha[d] no desire to challenge the AWS policy at issue." The court also noted that Sumo admitted at her deposition that she had never participated in any AWS election, and had no knowledge of any AWS election.[7]

DISCUSSION

Sumo appeals the denial of her motion for class certification pursuant to the "death knell doctrine, a judicially created exception to the one final judgment rule [that] treats an order that dismisses class claims while allowing individual claims to survive as an appealable order." (*Cortez v. Doty Bros. Equip. Co.* (2017) 15 Cal.App.5th 1, 8 (*Cortez*).) Torrance, however, argues that the death knell doctrine is inapplicable because

---

[7] The court's order also denied Sumo's request to file a second amended complaint that contained new allegations regarding the AWS agreement and meal period waiver. The order explained that Sumo's proposed amendments would be "futile" because the court had had already considered Sumo's "AWS/meal period theory in analyzing the motion for class certification. The proposed amended [SAC] would, for all intents and purposes, merely place in the proposed amended complaint the class definition which this Court has determined would not be amenable to class treatment."

Sumo's PAGA claim remains pending in the trial court, rendering the order nonappealable.[8]

In *Munoz, supra,* 238 Cal.App.4th 291, Division One of this District addressed this precise issue, holding that the "presence of PAGA claims following a trial court's denial of class certification precludes application of the death knell doctrine." (*Id*. p. 310.) In its analysis, the court explained that "the rationale of [the death knell doctrine] . . . is that absent immediate review, the plaintiff would have no financial incentive to pursue his or her case to final judgment just to preserve the ability to appeal the denial of the plaintiff's class certification motion. [Citations.] Accordingly, denial of such a class certification motion is "'in effect a final judgment'" [Citation.]" (*Id*. at p. 308.) The court further explained that this rationale does not apply when the plaintiff retains a representative PAGA claim: "Given the potential for recovery of significant civil penalties if the PAGA claims are successful, as well as attorney fees and costs, plaintiffs have ample financial incentive to pursue the remaining representative claims under the PAGA and, thereafter, pursue their appeal from the trial court's order denying class certification." (*Id*. at p. 311.)

While Sumo's appeal was pending, this court decided *Cortez, supra,* 15 Cal.App.5th 1, which joined *Munoz* (and several subsequent decisions) in holding that "the death knell exception

---

[8] Torrance initially raised this argument in a motion to dismiss that was filed before Sumo had submitted her opening appellate brief. On February 3, 2017, we issued an order directing that the motion would be referred to the panel for decision after briefing on the merits had been completed. Torrance raised the issue of appealability again in its respondent's brief.

to the one final judgment rule does not apply when a PAGA claim remains pending in the trial court following termination of the class claims." (*Id.* at p. 9; see also *Young v. Remx, Inc.* (2016) 2 Cal.App.5th 630, 635-636; *Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 243; *Miranda v. Anderson Enterprises, Inc.* (2015) 241 Cal.App.4th 196, 201-202.) Based on our holding in *Cortez*, we conclude that the certification order is not appealable in this case because Sumo still has a PAGA claim remaining in the trial court.

Sumo argues that even if the order is nonappealable, we should exercise our discretion to treat her appeal as a petition for writ of mandate, and consider the merits of the order dismissing the class claims. (See *Cortez, supra*, 15 Cal.App.5th at p. 10 [reviewing court retains "discretion to treat the appeal from the termination of class claims as a petition for writ of mandate"].) The Supreme Court has cautioned that "the power to treat a purported appeal as a petition for writ of mandate . . . should not [be] exercise[d] . . . except under unusual circumstances." (*Olson v. Cory* (1983) 35 Cal.3d 390, 401; see also *Katzenstein v. Chabad of Poway* (2015) 237 Cal.App.4th 759, 770, fn. 16 ["a request to treat an appeal from a nonappealable order as a writ petition "'should only be granted under [the most] extraordinary circumstances'"'].) As explained by one court, "'[r]outine granting of requests to treat improper appeals as writs where there are no exigent reasons for doing so would only encourage parties to burden appellate courts with reviews of intermediate orders.'" (*Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42.) "The interests of clients, counsel, and the courts are best served by maintaining, to the extent possible, bright-line rules which distinguish between appealable and

nonappealable orders." (*Mid-Wilshire Associates v. O'Leary* (1992) 7 Cal.App.4th 1450, 1455-1456.)

Sumo contends "extraordinary circumstances" exist here because the trial court's order denying class certification includes erroneous legal findings that could impact the merits of her wage and hour claims. Sumo argues it would be more efficient to review these legal questions now, rather than await entry of a final judgment.[9] The court's certification order, however, did not evaluate or determine the merits of Sumo's claims. Rather, the order concluded that class treatment would be inappropriate because: (1) Sumo's claims would require individualized inquiry; and (2) Sumo claims were not typical of the class. The order does not address the validity of Sumo's theory that the class members' AWS agreements are void because they included both full-time and part-time work schedule options, nor does it address her contention that the meal period waivers were involuntary because they were incorporated into the AWS agreement. To the extent the order contains some statements or findings that might be relevant to the merits, Sumo may raise those issues with the court during the litigation of her remaining PAGA claim and her individual claims. (See *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1106 ["the one final judgment rule . . . allow[s] for the possibility that "'the trial court may . . . alter[] rulings from which an appeal would otherwise have been taken'"'].) We find no

---

[9] Sumo's appellate brief cites only one case in support of her contention that writ review is appropriate when a denial of class certification addresses issues relevant to the merits of the plaintiff's claims. The Supreme Court has ordered that decision depublished. (See *Bartoni v. American Medical Response West* (2017) 11 Cal.App.5th 1084, review denied and ordered not to be officially published (Aug. 30, 2017).)

unusual or extraordinary circumstance that justifies departure from the one final judgment rule.

DISPOSITION

The appeal is dismissed. Torrance shall recover its costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.