Appellate Reports and Cases in Brief

By Jeffrey Isaac Ehrlich

Insurance; subrogation; assignment

Dobbas v. Vitas

(2011) __ Cal.App.4th __ (3d Dist.)

Dobbas owned a bull that escaped from his pasture and caused a fatal auto accident. He sued his insurance agent, Vitas, for failing to procure and maintain excess coverage from CalFarm Insurance on his ranching operations. The claims of the injured parties were ultimately paid by an excess policy issued by American Guarantee Insurance to Dobbas. Dobbas assigned his rights against Vitas to the accident victims, who then assigned them to American Guarantee. American Guarantee, as Dobbas's assignee, then sought reimbursement of the amounts paid from Vitas – not the party who caused the accident. American Guarantee sought to intervene in Dobbas's negligence and breach-of-contract action against Vitas. The trial court denied the motion, and the appellate court affirmed.

The court held that American Guarantee had no right to intervene because it had no interest in the matter in litigation, or in the success of either of the parties, as required by Code of Civil Procedure section 387. American Guarantee had no right to a claim of equitable subrogation against Vitas because (1) even if Vitas had procured excess insurance, American Guarantee would have had to pay its share of the loss; and (2) where two parties are contractually bound to provide insurance on the same loss, the payment by one does not create superior equities, but rather a right to equitable contribution.

University of California immunity: Labor Law, Attorney's fees under Labor Code section 218.5

Goldbaum v. Regents of the Univ. of California

(2011) __ Cal.App.4th__ (Fourth Dist. Div. 1.)

The California Constitution, article IX, section 9, subd. (a) grants the Regents broad powers to organize and govern the university and limits the Legislature's power to regulate either the university or the Regents. Hence, in some ways the Regents function like an independent sovereign, retaining a degree of control over the terms and scope of its own liability. Courts have consistently held that the Regents are exempt from statutes regulating the wages and benefits of employees and other workers, including those pertaining to prevailing wages, overtime pay, and indemnification for the cost of work uniforms and maintenance, on the ground those matters are internal affairs of the university that do not come within any of the exceptions to constitutional immunity. Labor Code section 218.5 mandates an award of attorney's fees and costs to the prevailing party in an action to recover nonpayment of wages, fringe benefits, or pension-fund contributions. Dr. Goldbaum worked at UCSD as a professor of ophthalmology. He sued the Regents for failing to properly fund his pension contributions. The parties settled, with Goldbaum retaining his right to seek fees under Labor Code section 218.5. The trial court denied his motion for fees on the grounds that the Regents were constitutionally immune from liability under the statute. Affirmed. Matters pertaining to wages and benefits are internal university affairs not subject to any of the exceptions to the Regents' constitutional immunity from state regulation.

Arbitration: cost of arbitration insufficient ground to lift stay

MKJA, Inc. v. 123 Fit Franchising, LLC

(2011) __ Cal.App.4th __ (Fourth Dist. Div. 1.)

Code of Civil Procedure section 1281.41 requires that a court impose a stay of litigation whenever that court, or another court, has ordered arbitration of a controversy that is an issue in the litigation. The court in which the litigation is pending is required to stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies. Here, the trial court lifted a stay of litigation that had been imposed pursuant to section 1281.4, on the ground that the plaintiffs could not afford to pay the costs associated with arbitration, which included a $6,000 filing fee, a $2,500 case service fee, arbitrator's fees of $10,000 to $14,000, and unknown facilities' fees. The plaintiffs claimed that they had sought fee waivers in the arbitration, but without success. Reversed. A party's inability to afford to pay the costs of arbitration is not a ground on which a trial court may lift a stay of litigation that was imposed pursuant to section 1281.4.

Fraud exception to parol evidence rule

Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n

(2011) __ Cal.App.4th __ (Fifth Dist.)

Plaintiffs claimed that their signature on a written forbearance agreement with the defendant was obtained by defendant's false statements concerning the terms contained in the agreement, made at the time it was executed. Specifically, they claimed that the defendant's vice president met with them and told them that the only security for the agreement would be the plaintiff's two orchards – but not their residence or their truck yard. Plaintiffs claimed that they did not read the actual agreement before signing it, but relied on the vice president's promise of what it contained when they signed it.

Plaintiffs sued defendant on several grounds, including fraud, negligent misrepresentation, rescission, and reformation. Defendant moved for summary judgment based on the terms of the written agreement, arguing that evidence of any contemporaneous oral agreements that contradicted the terms of the written agreement would be barred by the parol evidence rule. The trial court granted the motion. Reversed. The evidence fell within the fraud exception to the parol evidence rule, and was therefore admissible. The parol evidence rule is codified at section 1625 of the Civil Code and section 1856 of the Code of Civil Procedure. Section 1856, subd. (g) provides that, "This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or *to establish illegality or fraud*." (Emphasis added.) California courts distinguish between promissory fraud (inducing a party to enter into the agreement which the promisor has no intent to perform), which is held to be outside the scope of the fraud exception to the parol evidence rule, and misrepresentations of fact over the content of the agreement.

This distinction can be very fine. For example, in *Continental Airlines, Inc. v. McDonnell Douglas Corp*. (1989) 216 Cal.App.3d 388, the court held that statements made orally and in precontract promotional sales brochures that "[t]he fuel tank will not rupture under crash load conditions" were promises that contradicted the language of the contract, and were inadmissible to prove promissory fraud. But, statements made in the promotional sales brochures that "[t]he landing gear, flaps and wing engines/pylons are designed for wipe-off without rupturing the wing fuel tank" and "the main landing gear is designed to break away from the wing structure without rupturing fuel lines or the integral wing fuel tank" were factual misrepresentations that were admissible pursuant to the fraud exception to the parol evidence rule, even if they contradicted the provisions of the contract.

Ultimately, to come within the fraud exception, parol evidence must tend to establish some independent fact or representation, or some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing. Here, the plaintiffs allege statements that misrepresented the terms of the written contract and thereby induced its execution. This falls within the fraud exception to the parol evidence rule.

Negligence; duty of care in parking trucks

Lawson v. Safeway, Inc.

(2010) __ Cal.App.4th __ (First Dist., Div. 1.)

A large Safeway tractor trailer was parked legally on the side of U.S. Highway 101, close to an intersection in Crescent City. It was positioned in a way that blocked the view of oncoming traffic for a driver attempting to cross and turn onto Hwy 101. As the driver pulled out, he collided with a motorcyclist. The injured motorcyclist sued the driver, Safeway, and its truck driver. The jury awarded substantial damages to the plaintiffs, and apportioned 35 percent fault to Safeway. The issue on appeal was whether the driver of the Safeway truck owed a duty of care to those injured in the accident when he parked in an area that was not prohibited by the Vehicle Code or any statute or ordinance.

The appellate court held that a duty existed. If found that "a duty to park safely, as well as legally, was owed because of the particular facts of this case, where the parked vehicle was a 65 feet long, 13 1/2 feet tall, 8 1/2 feet wide commercial truck and the evidence showed that: the drivers of such trucks are or should be professionally trained to be aware of the risk of blocking other drivers' sight lines when parking; the truck was parked at a high-speed well-traveled intersection; and a safe parking spot was available right around the corner. In the final analysis, the line to be drawn is between a risk of harm that is unreasonably great and one that is not. Under the circumstances . . . we conclude that the risk of harm was sufficiently great that a jury should have been allowed to determine whether the driver of the truck, in parking where he did, bore some responsibility for the accident. [Editor's note. The California Supreme Court is hearing argument in a case presenting similar facts, *Cabral v. Ralph's Grocery* on Feb. 8, 2011. In *Cabral*, the driver of a Ralph's Grocery truck parked illegally, 14-feet off the freeway in an area designated, "emergency parking only." A passing motorist who lost control of his vehicle veered off the road, and hit the parked truck, was killed. The jury apportioned 10 percent of the fault to Ralph's. The Court of Appeal held that no duty was owed and reversed.]

Alter-ego; modification of judgments to add new judgment debtor

Greenspan v. LADT, Inc.

(2010) __ Cal.App.4th __ (Second Dist. Div. 1)

Shy, a real estate developer, created several limited liability companies to supervise his various construction projects. He transferred ownership of the companies to a trust, chose his brother as the trustee, and acted as the manager of the companies.

Greenspan filed suit against two of the companies, alleging a claim for breach of contract, among others. He sued Shy on different claims, such as breach of fiduciary duty but not breach of contract. The case was arbitrated. At the time of the arbitration, one of the companies had recently received more than $47 million in property sales. Greenspan prevailed against the two companies for breach of contract. Shy prevailed on the claims against him. The arbitrator awarded plaintiff $8.45 million against the companies. The results of the arbitration were confirmed in the trial court and affirmed on appeal.

Meanwhile, the $47 million had dwindled to less than $13,000. The two companies appeared to be judgment proof. Greenspan commenced proceedings to satisfy the judgment. After conducting judgment debtor examinations, he filed a motion to amend the judgment to add Shy, among others, as judgment debtors, relying on the alter ego doctrine. (See Code Civ. Proc., § 187.) The trial court denied the motion, finding that it would be inequitable to add Shy as a judgment debtor because he had been a party to the arbitration and had prevailed. Reversed.

The appellate court held that whether it would be inequitable to add as a judgment debtor a party who prevailed in an arbitration would depend on the facts of the case. Here, Shy was not sued for breach of contract and hence did not prevail on that claim. The judgment is based on a claim to which he was not a party. His addition as a judgment debtor would not constitute a finding that he breached the companies' contract but would instead serve to remedy his alleged disregard of the companies' separate existence. The court also held that although a trust is not subject to the alter ego doctrine because it is not a legal entity, a trustee may be added as a judgment debtor. Hence, Shy's brother could be added as a judgment debtor in his role as trustee.

Declaratory relief; trial court discretion not to entertain action

Osseous Technologies of America, Inc. v. Discovery-Ortho Partners, LLC.

(2010) __ Cal.App.4th __ (Fourth App. Dist., Div. 3.)

Osseous entered into written marketing agreement with DiscoveryOrtho to market a medical-device technology that Osseous had developed. The agreement provided that, during its term, that Osseous would work with DiscoveryOrtho exclusively in developing markets for the technology. Osseous disputed the amounts billed to it by DiscoveryOrtho. Rather than wait for DiscoveryOrtho to sue it for refusing to pay the disputed bill, Osseous initiated a declaratory-relief action against DiscoveryOrtho, seeking a declaration on multiple issues pertaining to the interpretation of the agreement between the parties. DiscoveryOrtho demurred, and the trial court sustained the demurrer without leave to amend. It held that, as alleged, the action was nothing beyond a breach-of-contract action. Because there are no allegations that the declaratory relief will regulate future conduct by the parties, the declaration sought was not necessary or proper. Affirmed. Prior cases explain that, the purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.

Another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation. One test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff's future conduct. Although the case is clearly ripe for declaratory relief, it may be too ripe – there is no basis for declaratory relief when only past wrongs are involved. Here, the nature of the action was such that the trial court was neither obligated to dismiss the action, nor precluded from dismissing it. Rather, it fell within the trial court's discretion to entertain the action or to decline to do so. On the facts presented, the court did not abuse its discretion in dismissing the case, which dealt principally concerns past wrongs.

Dispute between attorneys over division of fees; quantum meruit; litigation privilege

Olsen v. Harbison

(2010) __ Cal.App.4th __ (Third Dist.)

In 1998 Kathleen Klawitter was injured at a golf course. She hired Olsen to represent her on a contingent-fee basis. In 2002, Olsen associated Harbison, a more experienced trial attorney. Klawitter signed an authorization allowing Olsen and Harbison to divide the fees in accordance with an agreement they presented to her in accordance with Rule 2-200 of the California Rules of Professsional Conduct. A few weeks later, Klawitter fired Olsen and entered into a new agreement with Harbison. Her case settled for $775,000. Olsen received no fees. He sued Harbison for quantum meruit, breach of contract, fraud, intentional interference with contract, and imposition of constructive trust. Olsen alleged that Harbison planned from the outset to lure Klawitter as his client, and recover 100 percent of the fees from her action.

The trial court granted a series of motions for summary adjudication and judgment on the pleadings, and entered

judgment in favor of Harbison. Affirmed. When Klawitter terminated Olsen, he may have had a cause of action against her for recovery in quantum meruit, but he did not sue her; he sued Harbison. Olsen could not maintain any claim against him for quantum meruit because Olsen worked for Klawitter; not Harbison. Olsen could not sue for breach of contract, because Klawitter's termination of his representation voided the agreement with Harbison concerning division of fees. And the balance of Olsen's claims were based on conduct falling within the litigation privilege.

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