FOCUS

SAN FRANCISCO DAILY JOURNAL • FRIDAY, MAY 30, 1997 • PAGE 5

The Practitioner Civil Procedure

Mulligan Stew

New Limits on Voluntary Dismissals Without Prejudice

By James C. Martin and Benjamin G. Shatz

Imagine that after trying a case to a jury, both parties move for a directed verdict. In chambers, the judge says he is going to grant the defendant's motion. But before the motion is actually granted, the plaintiff moves to dismiss the case voluntarily without prejudice. Amazingly, the judge goes along with this, allowing the plaintiff to claim the judicial equivalent of what golfers call a mulligan and pretend that the complaint never was filed. Has justice been served or has an outrage occurred?

In addressing precisely this situation in *Casner v. Daily News Company*, 16 Cal.2d 410 (1940), California Supreme Court Associate Justice Douglas Edmonds wrote that allowing the plaintiff to dismiss with impunity and start all over again would cause "the greatest astonishment among the bench and the bar" and would be an "obvious" and "gross injustice" and a waste of judicial resources. But Justice Edmonds was a lone dissenter.

Things have changed since *Casner*. Most notably, the dismissal statute was rewritten in 1947 to preclude dismissal after "the actual commencement of trial." 6 Witkin, California Procedure, Proceedings Without Trial Section 262 (4th ed. 1997). See California Code of Civil Procedure Sections 581(b)(1) and 581(c). But the kind of mischief condemned by Justice Edmonds can just as easily result from a voluntary dismissal before trial. It would disserve justice just as much, for example, to allow a plaintiff to voluntarily dismiss moments before a summary judgment is granted for the defendant. Mindful of this potential unfairness, courts have found other limitations on the right to voluntarily dismiss an action.

And, as three appellate cases decided this year show, the law in this area is still developing, with the basic rule being that plaintiffs shouldn't be able to use a voluntary dismissal to manipulate the system or cause unfairness. Practically speaking, the absolute right to dismiss without prejudice is foreclosed once the action has proceeded to a determinative adjudication or to a decision that's equal to an adjudication. *Harris v. Billings*, 16 Cal.App.4th 1396 (1993); Weil & Brown, "Civil Procedure Before Trial," Ch. 11 (TRG 1996).

Thus, a plaintiff cannot dismiss without prejudice in any of the following situations:

- After a demurrer is sustained without leave to amend. *Wells v. Marina City Properties Inc.*, 29 Cal.3d 781, 789-90 (1981).
- After summary judgment is ordered for a defendant. *Sweat v. Hollister*, 37 Cal.App.4th 603, 611-15 (1995).
- When a ruling for mandatory dismissal is pending. *M&R Properties v. Thomson*, 11 Cal.App.4th 899, 904 (1992).
- After the plaintiff has admitted dispositive facts entitling the defendant to judgment. *Miller v. Marina Mercy Hospital*, 157 Cal.App.3d 765, 768 (1984).
- Where a referee has already issued an opinion after a hearing. *Gray v. Superior Court (Hunter)*, 52 Cal.App.4th 1615 (1997).
- Where the plaintiff has failed to file a timely opposition to a motion for summary judgment. *Cravens v. State Board of Equalization*, 52 Cal.App.4th 253 (1997). (The appellate courts added the last two fact patterns in January.)

In *Gray*, an action to partition real property, the parties stipulated to the appointment of a referee, who presided over a two-day evidentiary hearing that involved argument and evidence, including testimony from seven witnesses. After the referee issued eight pages of findings and a recommendation favoring Gray, the losing plaintiff voluntarily dismissed the complaint without prejudice under Section 581, indicating that the proceedings before the referee did not amount to the commencement of an actual trial. Gray moved to vacate the dismissal, pointing out that he had already spent more than $50,000 on attorney fees, witness fees and costs, and that allowing plaintiff to drop the suit without prejudice would expose him to another round of duplicative and costly litigation.

Although the trial court denied Gray's motion to vacate, Division 5 of the 1st District Court of Appeal disagreed. That court found that a plaintiff's right to dismiss without prejudice "at any time before the actual commencement of trial" is cut off by the commencement of evidentiary proceedings before a referee. Accordingly, the court of appeal granted the writ, and ordered the trial court to vacate the dismissal and reinstate the complaint.

James C. Martin is the managing partner of the Los Angeles office of Crosby, Heafey, Roach & May and **Benjamin G. Shatz** is an associate. Both practice in the firm's appellate department.

The fundamental issue is fairness to the defendant. But the integrity of the judicial system is also implicated.

In finding against the voluntary dismissal, the *Gray* court looked to *Herbert Hawkins Realtors Inc. v. Milheiser*, 140 Cal.App.3d 334 (1983), where the court of appeal had found that allowing a voluntary dismissal after an unfavorable arbitration would mock the integrity of the arbitration, produce an absurd result, and promote mischievous lawyering. By the same token, said the court of appeal, the trial court's ruling in *Gray* would undermine proceedings before a referee. As the *Gray* court explained, the fundamental issue is fairness to the defendant. But the integrity of the judicial system is also implicated — that is, allowing a plaintiff to dismiss after the parties had began to put forth evidence before a fact finder, or after a pretrial ruling effectively disposed of the case, would be a mockery of the system.

Similar sentiments guided Division 4 of the 2nd District in *Cravens*, which was filed just one day after *Gray* and relied on much of the same authority. After Inez Cravens sued the Board of Equalization for various tort claims, the board moved for summary judgment. Cravens filed no opposition; indeed, she did nothing until the day before the scheduled hearing on the board's motion, when she requested dismissal without prejudice. Notice of the dismissal didn't reach the board or the judge before the hearing the following day, so counsel for the board appeared as scheduled and the judge granted summary judgment for the board. Even when the trial court learned that plaintiff had dismissed, it ignored the dismissal and entered judgment based on the summary judgment ruling.

The Court of Appeal affirmed, holding that if a plaintiff fails to oppose a properly noticed summary judgment motion and tries to dismiss after the date for opposition has passed, the trial court remains free to rule on the pending motion. As the court put it, the "right of a plaintiff to voluntarily dismiss an action before commencement of trial is not absolute." Looking, as the court did in *Gray*, at the fairness of a dismissal and the integrity of the process, the *Cravens* court said recognizing plaintiff's dismissal would "frustrate the summary judgment statute."

Just two months after the 2nd District's decision in *Cravens*, the 1st District faced a similar issue in *La Galleria Condominium v. Wells Fargo Bank*, 97 Daily Journal D.A.R. 3953 (March 25, 1997). But that court upheld the voluntary dismissal, voiding the trial court's ruling that had modified the dismissal into one with prejudice. The *La Galleria* court did not disagree with *Cravens* (actually, it didn't even mention *Cravens* or *Gray*); it simply reached a different result because it did not find the voluntary dismissal unfair to the defendant or offensive to the process.

In *La Galleria*, a tenant brought two causes of action against its landlord. The first sought a declaration that the landlord had used the wrong formula in calculating a rent increase; the second claimed the landlord had breached the lease by charging too much rent. The landlord won summary adjudication of the declaratory relief action, thus establishing that the formula used had been correct. More than eight months later, the landlord said it was going to file another motion for summary adjudication, arguing that the court's approving the rent increase was dispositive of the breach of contract claim. The plaintiff immediately filed a voluntary dismissal.

What makes *La Galleria* different from *Cravens* is what happened during the eight months after the summary adjudication of the first cause of action: The parties were negotiating the terms of a dismissal. The plaintiff had not yet abandoned its claim that the landlord had waived any rent increase by accepting the original rent during an earlier period when it could have raised the rent, and the landlord was offering to accept a reduced award of costs from the first summary adjudication if the plaintiff would dismiss the second cause of action. Thus, the court found, neither the defendant nor the process was prejudiced by the timing of the voluntary dismissal.

These cases illustrate that where the interests of justice demand it, a plaintiff doesn't retain the absolute right to dismiss an action even though an actual trial — in the strictest sense — has not commenced. On the other hand, courts are not necessarily trying to draw some other bright line short of the commencement of trial. Rather, they are looking to the interests of justice. These cases further reflect the view (so eloquently stated by Justice Edmonds) that the judicial system should not in any circumstances hold itself up to any manipulation that compromises the integrity of the process. When the outcome in a case has become clear, a plaintiff thus will not be able to simply dismiss the case without prejudice to avoid an adverse result.