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Tactical Consent

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Complaints often contain a key cause of action accompanied by subsidiary or weaker claims that otherwise would not be pursued on their own but are included to bolster the primary action or provide fallback options. When a defendant successfully knocks out the primary claim - perhaps through demurrer or summary adjudication - the remaining, secondary claims present a quandary for the plaintiff. The plaintiff wants to appeal the loss of the real issue but cannot perfect an appeal because of the one-final-judgment rule. See, for example, *Morehart v. County of Santa Barbara*, 7 Cal.4th 725 (1994). Can a plaintiff solve this problem by consenting to a stipulated judgment?

Final Judgment

In 1986, the California Supreme Court seemed to approve this approach in *Building Industry Association v. City of Camarillo*, 41 Cal.3d 810 (1986). In that case, following the entry of an unappealable partial summary-judgment order, the parties stipulated to a final judgment in order to allow the plaintiff to appeal its main cause of action. One Court of Appeal justice argued that the appeal should have been dismissed because the parties should not have been able to avoid the effect of the final-judgment rule and because the parties should not have been allowed to appeal a judgment to which they consented.

The other two justices reasoned that forcing a plaintiff to proceed to trial merely to obtain an appealable judgment would be a waste of resources. Further, these justices did not view the stipulated judgment as the plaintiff's consent to the judgment but as merely an acknowledgement that the plaintiff could not win the case as postured. These justices cited precedent holding that, if consent is given merely to facilitate an appeal following an adverse determination of a critical issue, then the right to be heard on appeal is not lost.

In recounting this dispute between the Court of Appeal justices and addressing the merits, the Supreme Court approved appealing a stipulated judgment of this sort. See also *Connolly v. Orange County*, 1 Cal.4th 1104 (1992) (again noting this exception to the rule preventing appeals from consent judgments). Similarly, in *Sullivan v. Delta Air Lines*, 15 Cal.4th 288 (1997), the Supreme Court made clear that, if a judgment on appeal is in fact not final because some claim remains unresolved, the appellant can save the appeal by voluntarily dismissing the troublesome claim on appeal with prejudice.

The 'Don Jose's' Case

Dismissing the outstanding claim with prejudice is essential, as the Court of Appeal made clear 10 years ago in *Don Jose's Restaurant v. Truck Insurance Exchange*, 53 Cal.App.4th 115 (1997). In *Don Jose's,* the trial court granted summary adjudication on two of 11 causes of action. The parties cut a deal: the plaintiff would dismiss all remaining claims without prejudice; the defendant would waive any time bar; the parties would enter a stipulated judgment to allow an appeal; and if the plaintiff won on appeal, it could reinstate its dismissed claims. If the plaintiff lost on appeal, however, it would dismiss the other claims with prejudice.

The Court of Appeal was not amused by this strategy, forcefully stating, "We condemn the artifice of trying to create an appealable order from an otherwise nonappealable grant of summary adjudication by dismissing the remaining causes of action without prejudice but with a waiver of applicable time bars." The court explained that "the one final judgment rule does not allow contingent causes of action to exist in a kind of appellate netherworld. ... It makes no difference that this state of affairs is the product of a

stipulation, or even of encouragement by the trial court. Parties cannot create by stipulation appellate jurisdiction where none otherwise exists."

Don Jose's was promptly followed by *Jackson v. Wells Fargo Bank*, 54 Cal.App.4th 240 (1997). In *Jackson*, after the trial court granted summary adjudication on seven of eight claims, the parties entered a stipulated dismissal of the final claim without prejudice, which would allow the plaintiff to pursue that claim regardless of the outcome on appeal. The court shot down what it called the plaintiff's "delightful stipulation," noting, "We can scarcely conceive of anything more clearly inconsistent with finality than such a stipulation."

This reasoning was reiterated by *Four Point Entertainment v. New World Entertainment*, 60 Cal.App.4th 79 (1997): "We agree wholeheartedly with *Don Jose's* and *Jackson*. We see no reason to permit [appellant] or any party to get in line for appellate review ahead of those who are awaiting entry of appealable orders and final judgments. When there is a legitimate need for interlocutory review of an order that eviscerates a case without terminating its legal existence or where there are other truly unusual or extraordinary circumstances, a petition for a writ of mandate is the appropriate means by which to seek appellate review." See *Hill v. City of Clovis*, 63 Cal.App.4th 434 (1998); and see *Campbell v. Alger*, 71 Cal.App.4th 200 (1999) (treating an appeal from a stipulated judgment premised on a dismissal without prejudice as a writ).

Necessary Prejudice

Don Jose's and its progeny thus underscored the fact that, to craft an appealable stipulated judgment, any voluntary dismissals of otherwise-viable claims have to be with prejudice. But what if the judgment or dismissal is silent on the question of prejudice, as was the case in *Tudor Ranches v. State Compensation Insurance Fund*, 65 Cal.App.4th 1422 (1998)? The court there concluded that, by taking the appeal, the appellant "confirmed its consent to the dismissal of the unadjudicated claims with prejudice."

Tudor Ranches also explains why *Don Jose's* analysis does not conflict with the Supreme Court's *Building Industry* rule. Superficially at least, the *Building Industry* rule seems to allow appeals from stipulated judgments, whereas the analysis in *Don Jose's* does not. Yet *Don Jose's* merely supplements the Supreme Court's rule allowing appeals from stipulated judgments with the proviso that any underlying voluntary dismissals must be with prejudice.

The Supreme Court again confirmed the propriety of an appeal from a stipulated judgment in *Norgart v. Upjohn Co.*, 21 Cal.4th 383 (1999). The emphasis in *Norgart* was that a plaintiff that consents to a judgment solely for the purposes of facilitating and hastening an appeal will not be thwarted by the general rule that a party cannot appeal from a consent judgment.

The relationship between the analyses of *Don Jose's* and the Supreme Court was set forth more recently in *Hoveida v. Scripps Health*, 125 Cal.App.4th 1466 (2005). There, after the trial court granted summary adjudication as to all claims but one, the parties entered into a stipulation just like that in *Don Jose's*: the plaintiff dismissed the outstanding claim without prejudice; the defendant agreed to toll any statute of limitations; and the plaintiff allowed that he would pursue the final claim only if he prevailed on appeal. Following *Don Jose's*, the court dismissed the appeal and rejected the plaintiff's argument that *Building Industry* created an exception to the final-judgment rule.

Significant Idiosyncrasies

Given that *Don Jose's*, *Jackson* and *Four Point* are now a decade old, one would think that lawyers no longer would try to create appellate jurisdiction using nonprejudicial dismissals. Yet the issue continues to arise. In three recent cases, the appellant had to voluntarily dismiss with prejudice outstanding claims to preserve appellate jurisdiction: *Fonseca v. City of Gilroy*, 148 Cal.App.4th 1174 (2007); *Atkinson v. Elk Corp.*, 142 Cal.App.4th 212 (2006); *Quiroz v. Seventh Avenue Center*, 140 Cal.App.4th 1256 (2006).

Finally, *Don Jose's* rule that a dismissal underlying a stipulated judgment must be with prejudice to ensure appealability has an interesting wrinkle: The rule is limited to appellants. Thus, a prevailing party in the trial court may dismiss claims voluntarily without prejudice to assist the losing party in creating an appealable judgment. This twist comes from a footnote in *Vedanta Society v. California Quartet*, 84 Cal.App.4th 517 (2000) - an opinion by the same justice who wrote *Don Jose's* - noting that *Don Jose's*

"and its progeny have no application where the party dismissing causes of action without prejudice is the respondent on appeal." Subsequent cases have followed *Vedanta*. *Emerdinger v. Teng*, H029686 (Cal. App. 6th Dist. July 26, 2007); *Ozeri v. Itzhaki*, B168459 (unpublished, Cal. App. 2nd Dist. 2005).

In sum then, barring appellate writ relief, a plaintiff whose case has been gutted by a nonappealable order must make the hard choice of pursuing the remaining claims to finality or dismissing them with prejudice. No sneaky stipulation will work to put the remaining claims on ice pending an appeal.

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