

Recent decision on voluntary dismissals

In Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp. (May 22, 2009) 09 C.D.O.S. 6220, the Fifth Appellate District of the Court of Appeal reversed the trial court's decision to grant defendant's motion to set aside plaintiff's voluntary dismissal of its action.

Plaintiff was the general contractor on a school construction project in Kern County. Lynx was a subcontractor who had a contract with plaintiff under which Lynx would provide and install all structural steel on the project for a contract price of \$2.7 million. The owner of the project was the Delano Union School District. During construction, disputes between plaintiff and defendant arose. During February and March of 2007, both sides corresponded on multiple occasions setting forth their respective positions and proposals to resolve the disputes.

On April 13, 2007, plaintiff filed a complaint in Fresno County against defendants for, among other things, breach of contract for failing to perform work in accordance with the subcontract by "causing delay" and therefore damaging plaintiff.

On May 7, 2007, before the complaint in the Fresno action was served on defendants, the parties met to discuss settlement. At that meeting, the parties signed a document that "listed and resolved, item by item, the disputed change orders and backcharges." This was referred to as the "settlement agreement." The document was ambiguous, however; the court noted that "while the settlement agreement provided for Lynx's release of its claims against plaintiff, it did not expressly state that plaintiff agreed to release any of its claims against Lynx."

Plaintiff retained new counsel in the Fresno action on July 12, 2007; defendants were served in the Fresno action on July 19, 2007. Defendants "responded by filing the first of three motions seeking to enforce the settlement and enter judgment in defendants' favor pursuant to section 664.6" on September 10, 2007. They argued that the settlement agreement reached on May 7 "was intended to globally resolve all of the parties' claims." The motion was set for hearing on October 11, 2007. Plaintiff's opposition was due September 27, 2007. Rather than file an opposition, however, on September 28, 2007, plaintiff filed a voluntary dismissal of the Fresno action without prejudice. The clerk accepted and entered the dismissal on September 28, 2007.

On September 20, 2007, "plaintiff filed essentially the same lawsuit in Kern County Superior Court" and served defendants with that complaint on October 5, 2007. Defendants again filed a motion to enforce settlement, but in Kern County. The Kern County Court denied the motion because it did not have jurisdiction over the matter when the settlement occurred. "The trial court expressed that it understood defendants' frustration, and suggested that defendants might attempt to return to Fresno."

So, defendants did return to Fresno and on March 6, 2008 filed their motion to vacate plaintiff's voluntary dismissal. Plaintiff opposed the motion because it was not a foregone conclusion that the motion to enforce the settlement would have been granted. On

tentative, the trial court denied the motion because “a plaintiff’s right to voluntarily dismiss an action is only deemed to be cut off when an adverse dispositive ruling is a foregone conclusion.” However, after oral argument the trial court ended up granting the motion and vacating the dismissal on the grounds the dismissal was “purely a tactical maneuver and that defendants were “likely” to have prevailed on the motion to enforce settlement.

Once the dismissal was set aside, the defendants then made their motion to enforce the settlement. The trial court found—as plaintiff had argued—the settlement agreement to be ambiguous, but allowed parol evidence that the parties intended a global settlement, which plaintiff denied. It granted the motion and entered a dismissal with prejudice. Plaintiff appealed on the grounds that the trial court abused its discretion by vacating the Fresno dismissal and granting the motion to enforce the settlement. The appellate court agreed with the first, dispositive contention, and reversed.

The Court of Appeal held a plaintiff has a right to voluntarily dismiss an action at any time before the commencement of trial pursuant to Code of Civil Procedure section 581. “Commencement of trial” is not limited to a trial in the strict sense, but may also include dispositive motions that resolve the entire case, such as demurrers and motions for summary judgment. For example, a plaintiff’s right to voluntarily dismiss is cut off after a general demurrer is sustained without leave to amend. The court said that whether a plaintiff’s dismissal is timely “depends upon—and must remain tethered to—a reasonable construction and application of the statutory term ‘commencement of trial.’”

Most vexing to defendants, though, will be the court’s observation that a “plaintiff’s subjective lack of good faith in seeking a dismissal does not, by itself, terminate the statutory right to dismiss.” Whether a voluntary dismissal is timely is based on an “objective, not a subjective, standard.” Here, there was nothing in the opinion of the court that would constitute a “commencement of trial,” and therefore the plaintiff’s right to dismiss was not cut off, and the trial court erred in setting aside the Fresno dismissal.

Though the “settlement agreement” in this case happened very early on, a plaintiff can dismiss a case after reaching a settlement on the eve of trial if the “commencement of trial” has not occurred. A plaintiff can also dismiss a case voluntarily without prejudice after the filing of a summary judgment motion anytime before the ruling on the motion. It’s worth noting that at least one court has held that when a defendant makes a motion for summary judgment and meets her burden under 437c, the burden then shifts to plaintiff to demonstrate the existence of a triable issue. If plaintiff does not file an opposition brief the court could find that judgment in defendant’s favor was “a formality which [the plaintiff] could not avoid by the stratagem of filing a last minute request for dismissal without prejudice.”