Filed 8/6/02 McCormick v. Reddi Brake Supply CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THOMAS P. McCORMICK et al., Plaintiffs and Respondents, v. REDDI BRAKE SUPPLY CORPORATION et al., Defendants and Respondents; RICHARD I. FINE, Appellant.	B150736 (Los Angeles County Super. Ct. No. BC180840)

APPEAL from an order of the Superior Court of Los Angeles County. Bruce E. Mitchell, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Dismissed.

Richard I. Fine, in pro. per, for Appellant.

Law Offices of John A. Case, Jr., and John A. Case, Jr. for Plaintiffs and Respondents.

Gibson, Dunn & Crutcher, Jonathan C. Dickey, Paul J. Collins, Damien P. Lillis for Defendants and Respondents.

* * * * * *

Richard I. Fine appeals from an order removing him as class counsel and decertifying the class that he had previously represented as counsel. Fine contends that he was wrongfully removed as class counsel, that Commissioner Bruce E. Mitchell is disqualified under section 170.1, subdivision (a)(1) of the Code of Civil Procedure,[1] that his due process rights were violated, and that Commissioner Mitchell has engaged in judicial misconduct. Respondents, the named plaintiffs and defendants Reddi Brake Supply Corporation (Reddi Brake), Richard McGorrian, Gerald Birin, Stanley L. Timmins, and Eric Openshaw, contend, inter alia, that appellant appeals from a nonappealable order and lacks standing to appeal.[2]

In November 1997, plaintiffs filed a shareholder class action, alleging breach of fiduciary duty by defendant Reddi Brake and its officers and directors in connection with a plan to sell convertible preferred shares of stock. As a result of the plan, the value of Reddi Brake common stock declined and Reddi Brake ceased to be a viable operating concern. Baytree Associates Incorporated (Baytree) was named as a defendant as the exclusive agent in connection with the placement of the shares.

Appellant negotiated a class action settlement in May 1999. Reddi Brake's insurance carrier had denied coverage. The agreement provided for a judgment against Reddi Brake for $20 million (but no cash payment); that the class would release all claims against the individual directors and officers; that Reddi Brake would assign to the

---

[1] All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

[2] This court has previously denied Fine's July 23, 2002 request for disqualification of the justices of this division, his May 8, 2002 request for recusal or in the alternative disqualification of the justices of this division, his August 15, 2001 request for recusal or in the alternative disqualification of the justices of this division, and his September 6, 2001, request for reconsideration of the August 15, 2001 request. We also denied Fine's motion for leave to file a complaint in intervention and to intervene in the present appeal on behalf of a former member of the decertified class, John W. Fox.

class any rights to proceed against its directors' and officers' liability insurer; and that defendants would assign to the class any rights against Baytree related to alleged acts of improper trading in Reddi Brake's securities.

In November 1999, the trial court preliminarily approved the settlement, certified the class for settlement purposes, and ordered that notice of settlement be given to the class members. Notice to the class members was given in compliance with court order. A hearing to consider final approval was scheduled for January 28, 2000.

In the meantime, the trial court became concerned about Fine's fitness to continue to serve as class counsel in another class action case, *DeFlores v. EHG National Health Services* (Oct. 17, 2000, B141231) (nonpub. opn.) (*DeFlores*) and set an order to show cause hearing for December 1999.[3] In response, Fine filed a series of section 170.3 challenges to Commissioner Mitchell in the present case and in other pending class action cases. After Fine's challenges for cause were denied, the settlement approval hearing in this case was reset for September 7, 2000. At that hearing, the court stated that it was willing to grant final approval of the proposed settlement, but that it had lost confidence in Fine. The court requested that defense counsel prepare a proposed judgment and set a further hearing for October 2000, to resolve the form of the judgment and to discuss substitution of class counsel.

Fine filed a notice of appeal from the September 7, 2000 minute order on behalf of himself and of the plaintiff class.[4] Fine filed his third and fourth section 170.3 challenges

---

[3] In May 2002, we granted respondents' motion for judicial notice of various court filings, including this division's unpublished opinions in *DeFlores* and *Churchfield v. Wilson* (Mar. 7, 2002, B146845) (*Churchfield*).

[4] The record contains two versions of minutes for the September 7, 2000 hearing. Commissioner Mitchell entered a clarifying order with regard to those minutes. The first version was drafted by the clerk without review by Commissioner Mitchell and incorrectly states that the court "denies the designation of class counsel." This was apparently interpreted by Fine as his removal. Commissioner Mitchell subsequently

against Commissioner Mitchell in this action in October 2000. The trial court struck the challenges as baseless on November 2, 2000. In the meantime, named plaintiffs in this action sought substitute counsel and wrote to the trial court to express their dissatisfaction with Fine's representation.

On January 8, 2001, the trial court issued an order to show cause as to whether Fine should be replaced by new counsel for the settlement class in this action. The court, which had suspended hearings in the matter pending Fine's appeal, concluded that the appeal from the September 7, 2000 draft order was a legal nullity, and that the action could proceed. Fine filed two class action lawsuits against Commissioner Mitchell in the United States District Court for the Central District of California in January 2001. Fine also filed his fifth section 170.3 challenge, citing the existence of the federal lawsuits. That challenge was struck by the trial court. Law firms contacted as possible class counsel informed the court that they declined to undertake the representation. On January 30, 2001, defendants filed and served notice of their withdrawal from the proposed settlement on the grounds that there had been excessive delay and uncertainty and that Reddi Brake had in the interim gained the ability to defend the action.

On February 7, 2001, Fine filed a petition for writ of supersedeas, seeking to enforce the settlement agreement and to obtain an immediate stay. He did so despite the fact that the named plaintiffs had informed the trial court that they no longer sought to have a judgment entered on the proposed settlement. The writ was denied, and Fine ultimately voluntarily dismissed his appeal. In his supporting papers, Fine stated that the terms of the proposed settlement and the appeal had become "moot" because insurance companies had come into the case to provide a defense.

---

reviewed and corrected the minutes, and entered the corrected version. It states that the court "has lost confidence in class counsel." Fine, however, purported to appeal from the earlier minutes.

The order to show cause regarding removal of Fine as class counsel that issued on January 8, 2001, was set for hearing on February 14, 2001. At that hearing, the trial court issued a new order to show cause based on the same grounds. In March 2001, Fine began advancing a class member, John Fox, as class representative in place of the named plaintiffs. According to a named plaintiff, Fine also initially refused to sign substitution of attorney forms.[5] In April 2001, the trial court issued an amended order to show cause, and the hearing was ultimately set for May 11, 2001.

On May 2, 2001, Fine filed and served his sixth section 170.3 challenge to Commissioner Mitchell, which was struck by the court. At the May 11, 2001 hearing, the trial court announced its ruling declaring the proposed settlement of no further force and effect, decertifying the settlement class, removing Fine as counsel for the class, barring him from acting as class counsel in the future, and striking the class allegations from the complaint. The minute order stated that a formal order would be prepared and entered. Fine filed a notice of appeal purporting to appeal from the May 11, 2001, minute order. The formal order was entered June 19, 2001.

DISCUSSION

I. *Appealable order*

Fine's notice of appeal was filed on May 30, 2001. It states that Fine "on his own behalf does hereby appeal from the whole of the order entered March 11, 2001." The notice was subsequently amended to state the correct date of the order as May 11, 2001. The minute order expressly states that a formal order will be prepared and entered. Fine did not appeal from the June 19, 2001 formal order.

The May 11, 2001 minute order was preliminary to a final order and was not appealable. (See *Engel v. Worthington* (1997) 60 Cal.App.4th 628, 630-631.) We

---

[5] The named plaintiff has subsequently retained new counsel.

therefore deem Fine's appeal to be from the subsequently filed appealable order. (See Cal. Rules of Court, rule 2(d).)

II. *Standing*

Any aggrieved party may appeal from an adverse judgment. (§ 902.) "It is generally held, however, that only parties of record may appeal . . . ." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736.) A party is aggrieved if the immediate, pecuniary, and substantial interest of the party is directly and injuriously affected by the judgment. (*Id.* at p. 737.) An attorney is not a party aggrieved who is entitled to appeal from the judgment unless some exception applies. (*In re Marriage of Tushinsky* (1988) 203 Cal.App.3d 136, 142-143 [attorney had no standing to appeal attorney fees order].) Fine is not a party of record here. Furthermore, no exception has been established to support standing to appeal. Selecting an attorney is a decision reserved for the client exclusively. Fine's interest in earning a fee is no different than any lawyer's financial interest in the continued representation of a client. He therefore lacks standing.[6] Even if he had standing, however, as we discuss below, he would not prevail on the merits.

---

[6] In his request for disqualification, filed with this court on July 23, 2002, Fine cited several previous appeals before this division, including *DeFlores, Churchfield, Debbs v. Department of Veterans Affairs* (Apr. 23, 2002, B146844) (nonpub. opn.) (*Debbs*), *Silva v. Garcetti* (Feb. 6, 2002, B150641) (nonpub. opn.) (*Silva*), and *DeFlores v. Superior Court* (Feb. 14, 2002, B147721) (nonpub. opn.) (*DeFlores 2*). Fine was counsel and not the sole appellant in any of those appeals. In *DeFlores 2*, we held that Fine was not a party aggrieved and did not have standing to appeal from a ruling removing him as counsel. We hereby take judicial notice of our opinions in *Debbs*, *Silva*, and *DeFlores 2* pursuant to sections 451 and 459 of the Evidence Code.

III. *Removal as class counsel*

"In reviewing the trial court's exercise of discretion to disqualify counsel, we apply the traditional substantial evidence standard of review." (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 10.) "'In the class action context, the Court has an obligation to closely scrutinize the qualifications of counsel to assure that all interests, including those of as yet unnamed plaintiffs are adequately represented. [Citation.] This is because in certifying a class action, the Court confers on absent persons the status of litigants and "creates an attorney-client relationship between those persons and a lawyer or group of lawyers." [Citations.] Precisely because of the responsibility to absent class members, counsel's qualifications in the class action context are subject to a "heightened standard." [Citations.]'" (*Id.* at p. 12.) In determining whether disqualification is proper, the trial court determines whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court. (*Id.* at p. 11.)

In the present case, ample evidence supports the trial court's ruling. Once the trial court took action against Fine in *DeFlores*, Fine began a campaign to oust Commissioner Mitchell from this case. His actions delayed approval of the settlement agreement, placed in jeopardy any actions that might be brought pursuant to that agreement due to the running of the limitations period, and risked mandatory dismissal pursuant to section 583.310. Moreover, Fine's actions were not accomplished in order to forward the interests of the class. Named plaintiff George McCormick, on behalf of plaintiffs, informed the trial court that Fine was acting contrary to the interests and wishes of the class. Fine then found a new class member client, John Fox, on whose behalf Fine began making settlement offers and taking other action even though he was still counsel of record for the named plaintiffs. He initially refused to sign substitution of counsel forms, and he failed to nominate alternate class counsel.

In addition to Fine's actions in the present case, the trial court relied upon Fine's actions in *DeFlores* and in *Churchfield* in removing Fine. (See *Cal Pak Delivery, Inc. v.*

United Parcel Service, Inc., *supra*, 52 Cal.App.4th at pp. 12-13 [court could consider attorney's past acts in determining whether he was an adequate class representative].) Fine urges that those cases were wrongly decided. In both of those cases, Fine was removed as class counsel. The reasons supporting disqualification include a severe financial crisis that led Fine to lay off his entire staff because he could not pay them. It also led to disputes with the trial court and cocounsel and to his breach of fiduciary duty to certain of his clients. The issues litigated in those proceedings are final. Despite Fine's arguments to the contrary, he is bound by the rulings in those cases. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201, fn.1 [collateral estoppel precludes relitigation where the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; the previous proceeding terminated with a final judgment on the merits, and the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding]; *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1334 [a stranger to a prior judgment may assert defensive issue preclusion]; *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1485 [court may determine that an issue has been previously adjudicated after a contested adversarial hearing by taking judicial notice of an unpublished opinion].) Fine presented no evidence to show that his financial problems had been corrected.

IV. *The class settlement*

"In general, questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion. [Citation.] Our review is therefore limited to a determination whether the record shows 'a clear abuse of discretion.' [Citation.] Our task is not to determine in the first instance whether the settlement was reasonable or whether certification was appropriate. We determine only whether the trial court acted within its discretion in

making the rulings that it did. [Citations.]" (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235.)

The June 19, 2001, order states: "The class settlement proposed to the Court in June 1999 has failed. Defendants have withdrawn from the settlement and both Mr. Fine and the named plaintiffs have acquiesced in that withdrawal. Further, Mr. Fine is unsuitable to represent a settlement class in the collection of the judgment contemplated by the proposed settlement and plaintiffs have been unable to secure representation by new counsel despite their apparently diligent efforts and repeated extensions of time from the Court. The Court therefore DENIES FINAL APPROVAL OF THE SETTLEMENT."

The trial court did not abuse its discretion in denying final approval of the settlement. Defendants withdrew from the settlement before it was made final. Fine stated in court documents that final approval of the settlement was mooted by defendants' withdrawal from it. Fine subsequently made a counteroffer on behalf of purported class member John Fox. Moreover, at the time of the May 11, 2001 order, the named plaintiffs did not have counsel to replace Fine who could litigate claims assigned to the class by defendants against Reddi Brake's insurers and against Baytree. Thus, the trial court did not abuse its discretion in denying final approval of the class settlement.

V. *Due process*

Appellant asserts that Commissioner Mitchell has engaged in a series of actions designed to deny due process to Fine's clients and to stop Fine from earning a living based upon Commissioner Mitchell's rulings in *DeFlores*, *Churchfield*, *Debbs* and the present case. Those rulings have been upheld, however, and reviewing judges have determined that Commissioner Mitchell did not demonstrate bias toward Fine.

Due process requires that a litigant be given adequate notice and an opportunity to be heard. (*Laborers' Internat. Union of North America v. El Dorado Landscape Co.* (1989) 208 Cal.App.3d 993, 1008.) The May 11, 2001 and June 19, 2001 orders resulted

from an order to show cause issued February 14, 2001. It fully apprised Fine of the reasons for the proposed disqualification. Defendants gave notice of the order to show cause on February 22, 2001. The hearing date was continued to May 11, 2001, almost three months after issuance of the order to show cause. Fine filed a written response on May 11, 2001, the day of the hearing. That response was ordered stricken as not in compliance with the court's briefing schedule. Fine was permitted to present oral argument at the hearing. Substantial evidence, including evidence of Fine's misconduct in the present case, supports the trial court's ruling. Fine was not deprived of due process. (See *Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1007 [due process not violated where attorney was given notice and opportunity to brief and argue the issue of sanctions].)

Fine also urges that the June 19, 2001 order is not based upon any facts because there are no documents attached to it, and no documents were presented at the May 11, 2001 hearing. (AOB 13) The trial court's January 8, 2001 order to show cause included a factual recitation and had as attachments four minute orders, a letter from a named class plaintiff, and the order removing Fine as class counsel in *DeFlores*. Defendants' response to the order to show cause included 22 exhibits. The June 19, 2001 removal order is 28 pages long, and is devoted largely to a recitation of facts. In addition, the trial court based its decision in part upon the trial court's own observations of Fine's conduct. As discussed above, the order is supported by substantial evidence.

VI. *Jurisdiction over contempt proceedings*

Fine contends that the trial court engaged in judicial misconduct by retaining jurisdiction to set and hear orders to show cause for contempt. The parties entered into a stipulation authorizing Commissioner Mitchell to conduct all pretrial proceedings; waived all rights to withdraw from the stipulation; and bound all parties and subsequent counsel to the stipulation. The appointment carried with it the power to act until the final disposition of the proceeding. (*McCartney v. Superior Court* (1990) 223 Cal.App.3d

1334, 1339.) Temporary judges who act under stipulation have "full judicial powers" until final determination of the cause. (*In re Mark L.* (1983) 34 Cal.3d 171, 178.) One of those judicial powers is to punish for contempt. (§§ 177, 178.) Commissioner Mitchell was therefore authorized to decide all matters pertaining to the settlement class, including sanctions against class counsel. (See *Fine v. Superior Court* (2002) 97 Cal.App.4th 651, 665.)

DISPOSITION

The appeal is dismissed. Respondents will recover their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

_____, J.
NOTT

We concur:

_____, P.J.
BOREN

_____, J.
ASHMANN-GERST