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Court of Appeal, First District, Division 4, California.

CALIFORNIANS FOR DISABILITY RIGHTS,
Plaintiff and Appellant,
v.
MERVYN'S, LLC, Defendant and Respondent.

No. A106199.
|
(Alameda County Super. Ct. No. 2002-051738).
|
April 17, 2007.

Attorneys and Law Firms

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Opinion

SEPULVEDA, J.

***1** We deny a motion to dismiss an appeal upon concluding that appellant has standing to appeal as a party aggrieved by the judgment. (Code Civ. Proc., § 902.) We express no opinion on the merits of the appeal.

I. FACTS

We are again presented with a motion to dismiss the appeal following a transfer of the case from the California Supreme Court. The background facts of this case have been fully stated by our high court: "Plaintiff Californians for Disability Rights (CDR), a nonprofit corporation, sued defendant Mervyn's, LLC (Mervyn's), a corporation that owns and operates department stores, for alleged violations of the unfair competition law. ([Bus. & Prof.Code,] § 17200 et seq. [hereafter, the UCL; all further statutory citations are to this code except as noted].) CDR alleged that pathways between fixtures and shelves in Mervyn's stores were too close to permit access by persons who use mobility aids such as wheelchairs, scooters, crutches and walkers. CDR did not claim to have suffered any harm as a result of Mervyn's conduct. Instead, CDR purported to sue on behalf of the general public under former section 17204. As relief, CDR sought an order declaring Mervyn's practices to be unlawful, an injunction barring those practices and requiring remedial action, CDR's costs and expenses of suit, and attorneys' fees. Following a bench trial, the superior court entered judgment for Mervyn's. CDR appealed." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227 (*Mervyn's*).)

On November 3, 2004, while the appeal was pending, Proposition 64 took effect. (*Mervyn's, supra,* 39 Cal.4th at p. 227.) Before Proposition 64, the UCL "authorized any person acting for the general public to sue for relief from unfair competition." (*Ibid* .) "Standing to bring such an action did not depend on a showing of injury or damage." (*Id.* at p. 228.) Proposition 64 amends the UCL to limit private enforcement to those who have "suffered injury in fact and [have] lost money or property as a result of such unfair competition." (§ 17204.) Now, private parties may not obtain an injunction unless they meet the standing requirement. (§ 17203.)

The California Supreme Court held that Proposition 64's standing provisions do not substantially impact existing rights and obligations and thus apply to cases pending when the measure took effect. (*Mervyn's, supra,* 39 Cal.4th at p. 230-233.) The court reversed our decision

denying Mervyn's motion to dismiss the appeal. (*Id.* at pp. 228, 234.) CDR asked the Supreme Court to clarify the precise consequences of its holding and to modify its opinion to state that CDR is entitled to seek substitution of plaintiff in the Court of Appeal. The Supreme Court denied the request.

On remand to this court, plaintiff asked leave to move for substitution of plaintiff on appeal. Plaintiff relied upon California Rules of Court, rule 48(a) (now rule 8.36) permitting substitution of parties in an appeal. Importantly, plaintiff never claimed standing to appeal in its own right as an aggrieved party. Instead, plaintiff CDR asked to substitute an individual member of its organization on appeal or, alternatively, asked us to vacate the judgment entered on the merits following a bench trial and to remand the case to the superior court for amendment of its complaint to substitute an injured party with standing.

***2** Mervyn's opposed substitution on appeal. Mervyn's cited *Hollaway v. Scripps Memorial Hospital* (1980) 111 Cal.App.3d 719, 724, footnote 1, a case which observed that substitution on appeal was meant for "routine substitutions of parties pending appeal, made necessary by an objective event such as death of a party or transfer of his interest." Mervyn's noted that the California Supreme Court decisions in *Mervyn's, supra,* 39 Cal.4th 223 and *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235 (*Branick*) did not endorse substitution of parties on appeal where the party lost standing by passage of Proposition 64. Instead, *Branick* approved plaintiff bringing a motion in superior court for leave to amend a complaint to satisfy Proposition 64's standing requirement where judgment was entered on the pleadings before the measure was enacted. (*Branick, supra,* at pp. 239-244.) Mervyn's argued that *Branick* is inapplicable here because the instant case involves judgment after a trial on the merits, when leave to amend is precluded unless the judgment is vacated. (*Young v. Berry Equipment Rentals, Inc.* (1976) 55 Cal.App.3d 35, 38.) Mervyn's maintained that no grounds existed for summarily vacating the judgment on appeal to allow CDR immediate recourse to a superior court motion for leave to amend its complaint to substitute a party with Proposition 64 standing.

We considered the parties' contentions and the Supreme Court's decisions on Proposition 64's effect on pending cases, particularly its decision reversing our denial of Mervyn's motion to dismiss the appeal. (*Branick, supra,* 39 Cal.4th 235; *Mervyn's, supra,* 39 Cal.4th 223.) We granted Mervyn's motion and dismissed the appeal for lack of standing. CDR petitioned for review in the Supreme Court. CDR repeated the request it made here; namely, that it be permitted to substitute a plaintiff in either the Court of Appeal or superior court. CDR did not contend that it had standing to appeal in its own right.

The Supreme Court granted review and transferred the case to us with directions to vacate our decision and "to reconsider the cause in light of *United Investors Life Insurance Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300 [*United Investors*] and *Branick* [, *supra,* 39 Cal.4th 235.]" The parties submitted supplemental briefing addressing the Supreme Court's order. Upon reconsideration, we deny Mervyn's motion to dismiss the appeal.

II. DISCUSSION

This case has had a strange procedural history on appeal. We denied Mervyn's motion to dismiss the appeal, and the Supreme Court reversed. We then granted Mervyn's motion to dismiss the appeal, and the Supreme Court reversed. This odd result is largely a product of the difficulty of applying Proposition 64-which is silent about its intended effect on pending cases-to particular cases in various stages of litigation. The result is also the product, in part, of the way the parties framed the issues.

***3** The parties' initial focus was on whether Proposition 64's standing requirements applied to pending cases. After the Supreme Court found the measure applicable and remanded the case to us, the parties' focus shifted to the allowable means and manner of substituting a plaintiff with standing. As noted earlier, CDR never asked to continue the appeal in its own name but, instead, sought to substitute a new plaintiff on appeal. We accepted the issue as framed by CDR. (See *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466 fn. 6 [issues not briefed by parties deemed waived].) Finding no authority for substitution on appeal, we granted the motion to dismiss. CDR renewed its claimed right to substitution on appeal in its petition for review in the Supreme Court. The Supreme Court granted review and transferred the matter to us for reconsideration in light of two cases, *United Investors, supra,* 125 Cal.App.4th 1300, and *Branick, supra,* 39 Cal.4th 235. CDR never cited *United Investors* to this

court previous to the Supreme Court's grant and transfer order. We now turn to a consideration of the cases referenced by our high court.

In *United Investors,* the trial court dismissed a UCL action after sustaining defendants' demurrer without leave to amend and plaintiff appealed. (*United Investors, supra,* 125 Cal.App.4th at pp. 1302-1303.) Proposition 64 was enacted after the complaint was dismissed and the notice of appeal was filed. (*Id.* at p. 1303.) Defendants moved to dismiss the appeal and the court denied the motion. (*Id.* at pp. 1303, 1306.) The court held that plaintiff had standing to appeal the demurrer dismissal regardless of whether it had standing to maintain its suit in superior court after passage of Proposition 64. (*Id.* at pp. 1304-1305.) The court reasoned: "Code of Civil Procedure section 902 sets forth the statutory basis for standing to appeal, 'Any party aggrieved may appeal in the cases prescribed in this title.' The Supreme Court has explained the test of whether a party is aggrieved: 'One is considered "aggrieved" whose rights or interests are injuriously affected by the judgment.' " (*Id.* at p. 1304.) The appellate court found that plaintiff was aggrieved because plaintiff's complaint was dismissed: "Even if plaintiff has no authority to maintain its suit in superior court, it is sufficiently aggrieved by the dismissal of its complaint that it has standing to appeal under Code of Civil Procedure section 902." (*Id.* at p. 1305.)

In *Branick,* the trial court entered judgment on the pleadings upon finding that UCL claims alleging loan overcharges were preempted by federal law. (*Branick, supra,* 39 Cal.4th at pp. 239-240.) Plaintiffs appealed and Proposition 64 was enacted while the appeal was pending. (*Id.* at p. 240.) The Court of Appeal held that federal law did not preempt plaintiff's claim and reversed the judgment. (*Ibid.*) As to Proposition 64, the court held that the measure's standing provisions governed pending cases but remanded the case to the superior court to determine if the circumstances warranted granting leave to amend to substitute a plaintiff with standing. (*Ibid.*) Our Supreme Court affirmed the judgment of the Court of Appeal. (*Id.* at p. 245.) The high court held that Proposition 64 does not forbid the amendment of complaints to substitute new plaintiffs for those who have lost standing under the new measure. (*Id.* at p. 241-242.) The "ordinary rules governing the amendment of complaints" apply. (*Id.* at p. 239.)

***4** These two cases, when read in conjunction, lead to the following conclusion: CDR is a party aggrieved by entry of judgment against it and thus has standing to appeal the judgment even if CDR has no authority to maintain its suit in superior court (*United Investors, supra,* 125 Cal.App.4th at pp. 1304-1305); and, if CDR succeeds in its effort to reverse the judgment on appeal, it may seek leave in the superior court to amend its complaint to substitute a plaintiff who meets the Proposition 64 standing requirement. (*Branick, supra,* 39 Cal.4th at pp. 240-244.)

Mervyn's ignores the import of these two cases and continues to argue against substitution of plaintiff on appeal. While the right to substitution on appeal was CDR's long-held position, it has now changed position after receiving new guidance from the Supreme Court. CDR observes that, "[a]s is made plain by the Supreme Court's order and the holdings in both cases, the issue facing this Court now is whether to consider the merits of the appeal, not whether to allow the plaintiff to substitute a new plaintiff prior to a merits determination."

We shall consider the merits of the appeal. Proposition 64 does not compel dismissal of the appeal given CDR's appellate standing as an aggrieved person. (Code Civ. Proc., § 902.) Briefing on the merits was suspended when Mervyn's filed its motion to dismiss the appeal. Only CDR's opening brief has been filed. Briefing shall resume with the filing of Mervyn's respondent's brief.

III. DISPOSITION

Our previous decision dismissing the appeal is vacated and respondent's motion to dismiss the appeal is denied. Respondent's brief on the merits shall be filed within 30 days after this opinion is final. Any requests for extensions of time and appellant's reply brief shall be filed in accordance with California Rules of Court, rule 8.212.

We concur: RUVOLO, P.J., and REARDON, J.

All Citations

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