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February 13, 2013

SUPREME COURT
FILED

FEB 21 2013

Frank A. McGuire Clerk

Deputy

Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Dear Sir:

Re: Steen v. Appellate Division
S-174773
(2d Dist.No. B217263; App.Div. No. BR046020; LASC No. 6200307)

Petitioner has received the Opposition to petitioner's Motion to Strike filed by the Appellate Division. Petitioner respectfully requests that this court receive and consider this letter in reply.

The Appellate Division once again claims that petitioner's motion is untimely. (Opp., p. 3.) Petitioner disputes the claim, but since the Appellate Division again fails to identify any prejudice which may have been caused by petitioner's purported delay, the argument is without merit at any rate. (Jones v. H.F. Ahmanson & Co. (1969) 1 Cal.3d 93, 120; Peterson v. Superior Court (1982) 31 Cal.3d 147, 163; People v. Superior Court (Clements) (1988) 200 Cal.App.3d 491, 496.)

The Appellate Division claims it is appearing in this court "to give the Court assistance in interpreting and applying section 959.1(c)." (Opp., p. 4.) However, there is no authority for a lower reviewing court to appear as a party in litigation for that purpose. The narrow exception to the rule that lower courts should not appear as a party when their decisions are being reviewed applies only when the lower court's own court operations and procedures are at issue. The Appellate Division has yet to identify any operation or procedure of the Appellate Division which might be affected by this litigation.

The Appellate Division asserts that it has appropriately included declarations setting forth facts both outside the appellate record upon which the Appellate Division's decision was based, but also outside the trial court record. (Opp., p. 5.) In claiming that new evidence may be presented in a mandate action the Appellate Division has confused mandate actions which seek to compel some action by a civil litigant and mandate actions which are initiated to review a lower court decision.

The rule was set forth with precision and clarity in Winton v. Municipal Court (1975) 48 Cal.App.3d 228, involving a writ action heard in the superior court in a misdemeanor matter:

> "Normally judgments and orders are reviewed by appeal to the appellate division of the superior court. The extraordinary remedy of mandamus will, however, lie where the remedy of appeal is inadequate, not to control the discretion of the lower court, but to determine if discretion has been abused. In such a case, therefore, the writ procedure takes the place of the appeal and is governed by the same principles as to scope of review. The higher court reviews the action of the inferior court, on the record made in the inferior court , and determines if discretion has been abused.
>
> "* * * The function of the superior court in the mandamus proceeding was to determine whether there was sufficient evidence to support the municipal court's determination (thus deciding if discretion was abused), not to determine the question de novo and without reference to [the trial judge's] ruling." (Id. , at pp. 236-237, citations omitted, emphasis added.)

In other words, when mandate is pursued as an alternative remedy to an appeal the rules on appeal apply, and no new evidence may be presented to the reviewing court. The question is whether or not the lower court acted properly on the record made in that court. No party may add to or subtract from that record.

This court has adopted the above discussion from Winton (People v. Superior Court (Hartway) (1977) 19 Cal.3d 338, 350, fn. 6), and the rule that no new evidence may be presented when extraordinary relief is sought as a means of reviewing a lower court's exercise of discretion has been repeatedly affirmed in California case law. (See, for example, Applegate Drayage Co. v. Municipal Court W(1972) 23 Cal.App.3d 628, 632, fn. 3; People v. Preslie (1977) 70 Cal.App.3d 690, 693;

Carruthers v. Municipal Court (1980) 110 Cal.App.3d 439, 442; Mihlon v. Superior Court (1985) 169 Cal.App.3d 703, 708, fn. 2.)

The Appellate Division asserts that if this court allows it to present affidavits which were never before the trial court or the Appellate Division, this court is required to accept those affidavits at face value and that petitioner is precluded from cross-examining the maker of those affidavits. It would be a curious rule if the law were that the testimony of a witness at a hearing may be tested by cross-examination, but if the same testimony is reduced to an affidavit no cross-examination is permitted. Of course, that is not the rule.

The Appellate Division claims that People v. Williams (1973) 30 Cal.App.3d 502, "held only that a criminal defendant cannot testify on his or her own behalf without subjecting him- or herself to cross-examination." (Opp., p. 6.) This is incorrect. In Williams, the defendant submitted a declaration which was stricken when the defendant refused to be cross-examined. The Court of Appeal's discussion affirming the trial court's order placed that situation in the context of all witnesses, not just criminal defendants: "It is a commonly known rule that no witness, even a defendant in a criminal cases, will be permitted to testify concerning a matter while refusing cross-examination as to the same matter." (Id., 30 Cal.App.3d at p. 510.) The Williams court then applied this general rule to declarations: "Had Williams testified on the witness stand this rule would certainly have applied. No good reason appears why his election to testify on the subject by way of a declaration under penalty of perjury should place him in a more favorable position as to 'matters he himself has put in dispute.'" (Ibid; emphasis original.)

However, it is possible that this court need not address this issue. The Appellate Division sets forth the various facts which the Appellate Division seeks to establish by means of the proffered declarations, and then states, "None of these issues, however, is material to the constitutionality, interpretation, or application of section 959.1(c)–the issues before the Court here–and Steen does not attempt to show otherwise." (Opp., p. 8.) If, as asserted, the facts the Appellate Division attempts to prove by the affidavits are immaterial, then the declarations should be stricken not because they were not before the trial court or the Appellate Division, but because they are irrelevant.

Finally, the Appellate Division asserts that petitioner no longer disputes the claim that the complaint filed in this case was filed "electronically." (Opp., p. 8.) Petitioner has no idea how the Appellate Division came to that conclusion, but

petitioner stresses that she in no way abandons her contention that the evidence in this case does not show that the complaint was electronically filed. (See Pet.Supp.Traverse to Return of RPI, p. 2, Para. III; Pet.Supp.Traverse to Return of Resp., p. 4, Para. I.)

Petitioner thus again urges this court to grant his motion to strike or, if that motion is denied, to provide for an evidentiary hearing where petitioner may cross-examine the maker of the disputed affidavits submitted to this court.

Respectfully submitted,

RONALD L. BROWN, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By _____
John Hamilton Scott
Deputy Public Defender

Attorneys for Petitioner

JHS/hs

DECLARATION OF SERVICE

I, the undersigned, declare:

I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012; that on February 13, 2013, I served a copy of the within LETTER, STEEN v. APPELLATE DIVISION, on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid in the United States Mail in the County of Los Angeles, California, addressed as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

PRESIDING JUDGE
SUPERIOR COURT
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

CLERK, APPELLATE DIVISION
SUPERIOR COURT
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

CARMEN TRUTANICH
CITY ATTORNEY
CRIMINAL APPELLATE DIVISION
500 CITY HALL EAST
200 N. MAIN STREET
LOS ANGELES, CA 90012

CLERK,
CALIFORNIA COURT OF APPEAL
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

REED SMITH, LLP
PAUL D. FOGEL, ESQ.
101 SECOND ST., SUITE 1800
SAN FRANCISCO, CA 94105

I further declare that I served the above referred-to document by hand delivering a copy thereof addressed to:

JACKIE LACEY, DISTRICT ATTORNEY
APPELLATE DIVISION
320 WEST TEMPLE STREET, SUITE 540
LOS ANGELES, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 13, 2013, at Los Angeles, California.

ZENAIDA GAETOS