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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOSE MORENO et al.,
Plaintiffs and Appellants,
v.
J. REDFERN, INC. (dba GOLDEN
STATE LANDSCAPING), et al.,
Defendants and Respondents.

A133046

(Alameda County
Super. Ct. No. RG08375539)

Plaintiffs Jose Moreno and Otto Pascual appeal from an order denying class certification of Labor Code claims for unpaid time against defendants J. Redfern, Inc., dba Golden State Landscaping (Golden State), Empire Landscape Construction, Inc. (Empire) and John Earl Redfern. Defendants argue that the appeal must be dismissed as premature, having been taken from an interlocutory order rather than a final judgment. (See Code Civ. Proc., § 904.1.) We conclude that defendants are correct and dismiss the appeal. Due to the pendency of additional class claims and a representative cause of action under the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.), the order denying certification did not sound the “death knell” of the class action, and was not tantamount to a dismissal or final judgment.

FACTS AND PROCEDURAL HISTORY¹

Defendant Golden State is a landscaping and construction company that services commercial and residential construction industries. Its offices and yard are located in Livermore, California, and its customer jobsites are located throughout the Bay Area. Golden State organizes its employees into work crews and owns a fleet of company trucks, some of which are used by the crews to commute from their homes to the various job sites. Defendant Empire was a small landscaping company with residential customers that similarly assigns its workers into crews, some of whom commute to jobsites in company trucks. (Empire ceased doing business in Spring 2009.) Defendant John Earle Redfern is the Responsible Managing Officer and Chief Executive Officer of both companies. Plaintiff Moreno worked for Empire from November 2006 through March 2007 as a laborer and driver; plaintiff Pasqual worked for Golden State from May 2004 through April 2007 as a gardener/driver.

On March 10, 2008, plaintiffs filed this wage and hour class action on behalf of themselves and approximately 1,000 current and former landscaping and construction employees of Golden State and Empire. The complaint contained eight causes of action: (1) failure to pay the minimum wage; (2) failure to pay overtime compensation; (3) failure to provide rest and meal periods or additional pay in lieu thereof; (4) failure to pay reporting time wages; (5) knowing and intentional failure to provide itemized employee wage statements; (6) failure to pay all wages owed upon termination or resignation; (7) violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.); and (8) recovery of civil penalties under PAGA.

On March 12, 2009, the superior court ordered that discovery on the rest and meal period issues be stayed pending the resolution of similar issues before the California Supreme Court. (See *BrinkerRestaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.)

¹ Because we dismiss the appeal on procedural grounds, we do not set forth the underlying facts in the same detail as we would if reviewing the order denying class certification on its merits.

On August 12, 2009, plaintiffs filed a motion to certify as a class “All non-exempt persons who are employed or have been employed by Defendants in the State of California who, within four (4) years of the filing of [this Complaint], who have worked as non-exempt Landscaping or Construction workers.” Consistent with the court’s order staying discovery on the rest and meal period issues, the motion was limited to Labor Code claims for unpaid time, occasioned by defendants’ alleged failure to pay for time spent traveling to, from and between customer jobsites, and for time employees were required to work before and after the scheduled shift. An extensive process of discovery, briefing and argument followed.

The court issued a written tentative ruling denying class certification. It agreed that the putative class was sufficiently numerous and readily ascertainable, and that plaintiff’s claims were typical of the class. But it concluded that common questions of fact did not predominate. (See *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*)). In response to the tentative ruling, plaintiffs asked the court to alternatively certify two subclasses: (1) a “driver class” consisting of “all non-exempt employees of Defendants who drove company trucks as Class C drivers at any time from March 10, 2004 to the present;” and (2) a “rounding” class consisting of employees who clocked in before the 7:00 a.m. start time but were only paid from 7:00 a.m. onwards. The court allowed additional briefing on these issues, after which it issued a final decision denying certification of the subclasses, again concluding that common questions of fact did not predominate.

Plaintiffs appeal, arguing that the trial court abused its discretion when it denied class certification. Defendants argue that the appeal was not taken from a final judgment and must be dismissed as premature.

DISCUSSION

The “one final judgment rule” is “a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case. ‘The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final

disposition of the case.’ ” (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697; see Code Civ. Proc., § 904.1.) Although courts have recognized exceptions to this rule, they have done so sparingly: “ ‘[E]very exception to the one final judgment rule not only forges another weapon for the obstructive litigant but also requires a genuinely aggrieved party to choose between immediate appeal and the permanent loss of possibly meritorious objections.’ [Citation.] Accordingly, ‘exceptions to the one final judgment rule should not be allowed unless clearly mandated.’ ” (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757 (*Baycol*).

One such exception is the so-called “death knell” doctrine, under which an intermediate order in a class action will be treated as a final judgment when it is “tantamount to a dismissal of the action as to all members of the class other than plaintiff.” (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699 (*Daar*); *Baycol, supra*, 51 Cal.4th at p. 757.) An order denying class certification has the legal effect of a final judgment, from which an appeal will lie, if it “virtually demolishe[s] the action as a class action.” (*Daar*, at p. 699) “ ‘[T]he gist of the death knell doctrine is that the denial of class action certification is the *death knell of the action itself*; i.e., that without a class, there will not be an action or actions.’ ” (*Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067, 1077-1078.)

“Notwithstanding its colorful title, the ‘death knell’ doctrine is a tightly defined and narrow concept.” (*Farwell v. Sunset Mesa Property Owners Assn., Inc.* (2008) 163 Cal.App.4th 1545, 1547.) It is predicated on the assumption that without the possibility of a group recovery, the named plaintiff may lack the incentive to pursue claims to final judgment and then appeal the denial of class certification. (*Baycol, supra*, 51 Cal.4th at p. 758.) Consequently, an order will not be treated as immediately appealable if it does not dispose of the class claims in their entirety. (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1448.) “[O]rders that only limit the scope of a class or the number of claims available to it are not similarly tantamount to dismissal and do not

qualify for immediate appeal under the death knell doctrine; only an order that entirely terminates the class claims is appealable.” (*Baycol, supra*, 51 Cal.4th at pp. 757-758.)²

In this case, the court denied certification of three classes/subclasses of employees: (1) the general travel class, consisting of employees who were allegedly required to travel to and from jobsites in company vehicles and were not paid for their travel time; (2) the driver subclass, consisting of employees who drove those company vehicles to the jobsites and were not paid for their driving time; and (3) the rounding subclass, consisting of employees who clocked in before their start time and allegedly worked before that start time without compensation. The order denying certification of the claims for unpaid time did not resolve the still-pending class claims relating to meal and rest periods, involving a putative class which might have considerable overlap with the travel, driver, and rounding classes. (See *Green v. Obledo, supra*, 29 Cal.3d at p. 149, fn. 18.) With class claims still pending, it cannot be said that the named plaintiffs lack the incentive to press on until they obtain a final appealable judgment. (*Baycol, supra*, 51 Cal.4th at p. 760.) There is no justification for applying the death knell doctrine and allowing serial appeals in this matter. (*Ibid.*)

The death knell doctrine is also inapplicable because the complaint includes a representative claim under PAGA, based on the same allegations as the causes of action for which class certification was denied. Under PAGA, an aggrieved employee may bring a private enforcement action to collect penalties from employers who violate labor laws. (Lab. Code § 2699, subd. (a); *Franco v. Athens Disposal Co., Inc.* (2009) 171

² Compare *Linder, supra*, 23 Cal.4th at p. 435 and *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 [orders denying certification of entire class appealable] with *Green v. Obledo* (1981) 29 Cal.3d 126, 149, fn. 18 [order partially decertifying class to exclude welfare recipients seeking retroactive relief was not appealable]; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 806 [order granting demurrer without leave to amend as to one of two causes of action brought by same class was nonappealable]; *Shelley v. City of Los Angeles* (1995) 36 Cal.App.4th 692, 694, 696-697 [order that had effect of limiting class to 469 members from intended class of 247,000 members was not appealable]; *General Motors Corp. v. Superior Court* (1988) 199 Cal.App.3d 247 [certification of statewide class rather than nationwide class was not appealable order].

Cal.App.4th 1277, 1300.) While a PAGA claim is not a class action, and does not require class certification, it must be brought as a representative action that includes “other current or former employees.” (*Reyes v. Macy’s, Inc.* (2011) 202 Cal.App.4th 1119, 1123; see *Arias v. Superior Court* (2009) 46 Cal.4th 969, 975.)

The complaint seeks penalties under PAGA on behalf of both the named plaintiffs and “other current and former employees” who are also members of the putative class for which certification was denied. Those putative class members therefore retain a stake in this lawsuit, even though the class claim was not certified. The order denying certification of the class claims was not tantamount to a dismissal of the action as to the unnamed putative class members, because the named plaintiffs are still seeking civil penalties for Labor Code violations on their behalf. (Contrast *Daar, supra*, 67 Cal.2d at p. 699.) Moreover, the PAGA claim gives the named plaintiffs the incentive to push forward with the litigation notwithstanding the denial of class certification, obviating the need for immediate review under the death knell doctrine. (See *Baycol, supra*, 51 Cal.4th at p. 758.)

In a supplemental letter brief,³ plaintiffs urge us to exercise our discretion to treat this appeal as a writ and resolve their claims on the merits. “ ‘A petition to treat a nonappealable order as a writ should only be granted under extraordinary circumstances, “ ‘compelling enough to indicate the propriety of a petition for writ . . . in the first instance. . . .’ ” (*H.D. Arnaz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1367.) Such extraordinary circumstances were found in *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1097-1098, in which the court concluded that an order compelling the arbitration of the class claims, though not appealable under the death knell doctrine, should be treated as a writ because the issue would otherwise evade appellate review. Here, plaintiffs have not established that writ relief is necessary to secure review of the

³ Plaintiffs were denied leave to file an untimely reply brief, and so did not initially address defendants’ argument that the appeal should be dismissed. We requested supplemental briefing strictly on the issue of appealability.

order denying certification because they may challenge that order in an appeal from the final judgment.

Plaintiffs also urge us to stay this appeal pending resolution of the remaining class claims in the trial court. We decline to do so.

DISPOSITION

Although the order denying certification of the travel, driver, and rounding classes may in the future be reviewed in an appeal from any final judgment that might be obtained in this case, the circumstances do not warrant immediate review under the death knell doctrine. The appeal is dismissed as having been taken from a nonappealable interlocutory order. Defendants/respondents shall recover their ordinary costs on appeal.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.