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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CONSUMER ADVOCACY GROUP,
INC.,

Plaintiff and Appellant,

v.

HARBOR FREIGHT TOOLS USA, INC.,

Defendant and Respondent.

A146402

(San Francisco City & County
Super. Ct. No. CGC 13-535003)

Following the close of discovery in this action, defendant Harbor Freight Tools USA, Inc. (Harbor) filed a motion for summary judgment, arguing plaintiff Consumer Advocacy Group, Inc. was precluded from submitting expert declarations in opposition to the motion because it had refused to make its experts available for deposition. Prior to the due date for its opposition to the motion, plaintiff filed a request for dismissal of the action without prejudice. The trial court later vacated the voluntary dismissal, finding plaintiff had acted in bad faith, and granted the motion for summary judgment. Because we conclude an entry of judgment for Harbor at the time plaintiff filed its request for dismissal was neither inevitable nor a mere formality, we vacate the trial court's judgment and reinstate plaintiff's voluntary dismissal.

I. BACKGROUND

This is an action under Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, § 25249.5 et seq.), filed in October 2013. The complaint alleged that four specific products distributed by Harbor improperly failed

to bear warnings under Proposition 65. Early in 2014, plaintiff served an extensive series of written discovery requests, leading to an extended meet-and-confer period. Soon after, the parties began settlement discussions that lasted nearly a year, culminating in an unsuccessful mediation on February 25, 2015.

In the meantime, their April 20, 2015 trial date crept closer. Due to an agreed stay, plaintiff did not pursue its discovery requests during the settlement negotiations. When the mediation failed less than two months before the trial date, plaintiff's extensive written discovery was still unanswered, and no other discovery had occurred.

On March 9, 2015, plaintiff filed a duplicate Proposition 65 lawsuit against Harbor in Los Angeles County Superior Court, covering the same products as this action, as well as a variety of additional products.¹ The next day, plaintiff filed a motion in this action for a continuance of the trial date and an extension of the discovery deadlines in this action. At the time, the discovery deadline was April 6, less than a month away.

Pending a ruling on the motion for a continuance, there was a flurry of last-minute discovery activity. Plaintiff insisted on a prompt response to its written discovery, while the parties began expert disclosure and depositions. Harbor disclosed only a single expert, who was deposed prior to the discovery deadline. Plaintiff, on the other hand, designated four experts, only one of whom had been deposed when the discovery deadline arrived. Harbor later contended plaintiff refused to produce its experts for deposition, while plaintiff contended Harbor had been uncooperative in scheduling the depositions. We make no attempt to review the entirety of the parties' exchanges on this topic, but the record contains letters from plaintiff's counsel offering to make its experts available on dates both before and shortly after the expert discovery deadline. It is therefore not true that, as Harbor consistently argues, plaintiff simply refused to make its experts available. Further, it does not appear Harbor ever filed a motion to compel

¹ We find the pendency of this lawsuit largely irrelevant to the outcome of this motion, and for that reason, among others, we deny plaintiff's motion to augment the record with an order relating to the lawsuit.

discovery from plaintiff's expert witnesses or otherwise sought court assistance in gaining access to the experts.

The trial court did not rule on plaintiff's motion for a continuance of the trial date until four days before the discovery deadline, on April 2. Although the court continued the trial date, it declined to rule on plaintiff's request for an extension of the discovery deadline, passing the issue to a different department. That department took no immediate action.

Four days after the close of expert discovery, on April 10, Harbor moved for summary judgment. The motion was supported by excerpts from the deposition of Harbor's expert witness, who testified that exposure to the claimed carcinogen in Harbor's products by a user of the products was below the level necessary to trigger Proposition 65's disclosure requirement. In order to foreclose plaintiff from demonstrating a triable issue of fact with respect to exposure levels, Harbor recounted the history of expert discovery in the action and argued plaintiff should not be permitted to offer a declaration from its expert witness on exposure levels because plaintiff "unreasonably failed to make their expert witnesses available for deposition" prior to the expert discovery cutoff.

Five days after Harbor filed its motion for summary judgment, on April 15, plaintiff filed a motion to "reopen all pre-trial discovery deadlines." The discussion in plaintiff's memorandum was focused entirely on its inability to complete its discovery prior to the discovery deadline. Although the expert discovery deadline would presumably have been extended had plaintiff been granted the relief it requested, the motion did not mention expert discovery. Approximately two weeks before the due date for plaintiff's opposition to the summary judgment motion, the trial court issued an order ruling on the discovery motion. The request to reopen discovery was granted in part, to the extent of requiring Harbor to respond to various outstanding discovery requests of plaintiff, including the deposition of Harbor's person most knowledgeable regarding certain issues. The order did not specifically refer to expert discovery, but it did not grant

any general extension of the discovery deadline that would permit additional expert depositions.

Plaintiff never did oppose the summary judgment motion. Instead, two days prior to the due date for its opposition, plaintiff filed a request to dismiss this action without prejudice.

Shortly thereafter, Harbor filed a motion to vacate the dismissal, arguing it was a “ ‘tactical ploy’ ” designed to avoid the summary judgment motion in San Francisco in favor of pursuing the litigation in Los Angeles. The trial court granted the motions to vacate the dismissal and for summary judgment. As to the latter, the court “[found] persuasive that the facts . . . give at least a strong inference of this being a tactical ploy.” The court’s oral ruling was followed by the entry of a detailed written order.

II. DISCUSSION

Plaintiff contends the trial court erred in vacating its dismissal and granting summary judgment. We find it unnecessary to address the summary judgment ruling because we agree the trial court erred in vacating the dismissal. We review de novo the trial court’s ruling. (*Lee v. Kwong* (2011) 193 Cal.App.4th 1275, 1280–1281.)

Under Code of Civil Procedure² section 581, subdivision (b)(1), a plaintiff is entitled to dismiss its action, with or without prejudice, “at any time before the actual commencement of trial.” Commencement of trial is defined in the statute as “the beginning of the opening statement or argument of any party or his or her counsel, or if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.” (§ 581, subd. (a)(6).)

Notwithstanding the language of section 581, the Supreme Court has long held “commencement of trial” to include certain dispositive pretrial procedures, such as demurrers, occurring long before any actual trial. (See *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 785, 788 [plaintiff loses right to dismiss under § 581 following

² All further statutory references are to the Code of Civil Procedure.

sustaining of demurrer without leave to amend or the failure timely to amend in response to sustaining of demurrer with leave to amend].) As a result, it is now accepted that “ ‘commencement of trial’ under section 581 is not restricted to only jury or court trials on the merits, but also includes *pretrial* procedures that *effectively dispose of the case.*” (*Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 262 (*Gogri*.)

Summary judgment motions are included within the category of pretrial procedures that can effectively dispose of the case. While there is no question a plaintiff loses its right to dismiss under section 581, subdivision (b)(1) once a summary judgment motion has been decided against it, the courts have also found certain events short of actual decision on a summary judgment motion to constitute “commencement of trial” for purposes of subdivision (b)(1). Exemplary is *Miller v. Marina Mercy Hospital* (1984) 157 Cal.App.3d 765, in which the plaintiffs failed to respond in a timely manner to a series of requests for admissions. After the trial court declined to relieve the plaintiffs of their default, the defendant moved for summary judgment, contending it was entitled to judgment on the basis of the admitted facts. In response, the plaintiffs dismissed their action without prejudice. (*Id.* at p. 767.) The *Miller* court affirmed an order vacating the dismissal and granting summary judgment, reasoning that once the material facts had been deemed admitted, the grant of summary judgment became a “mere formality.” At that point, the court held, plaintiff no longer had a right to dismiss without prejudice under subdivision (b)(1). (*Miller*, at p. 769.) Similarly, in *Cravens v. State Bd. of Equalization* (1997) 52 Cal.App.4th 253, the plaintiff failed to file an opposition to a motion for summary judgment and filed a request for dismissal the day before the hearing on the motion. (*Id.* at pp. 255–256.) The court again affirmed an order vacating the dismissal and granting the summary judgment motion, noting that because the defendant’s papers satisfied its burden of demonstrating no triable issue of fact and an entitlement to judgment, the plaintiff’s failure to file an opposition made granting the motion a formality. (*Id.* at p. 257.) In contrast, *Zapanta v. Universal Care, Inc.* (2003) 107 Cal.App.4th 1167, holds that if a plaintiff files a request to dismiss after the filing of a summary judgment motion but prior to the due date for the opposition, the dismissal is

effective because the action “ha[s] not yet reached a stage where a final disposition was a mere formality.” (*Id.* at pp. 1173–1174.)

When *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187 (*Franklin Capital*), surveyed the multitude of decisions addressing the issue of “commencement of trial” in the context of pretrial proceedings, the court concluded a voluntary dismissal will be found ineffective under section 581, subdivision (b)(1) if, at the time of the dismissal, there “was some objective indicia . . . that the plaintiff’s case was inherently defective on the merits. In short, *as a matter of law*, the case was a loser.” (*Franklin Capital*, at p. 199.) Applying this generalization, the court distilled two governing principles: a dismissal is ineffective if the dismissal “could be said to have been taken [¶] . . . (a) in the light of a public and formal indication by the trial court of the legal merits of the case, or [¶] . . . (b) in the light of some procedural dereliction by the dismissing plaintiff that made dismissal otherwise *inevitable*.” (*Id.* at p. 200.) In the absence of either of these factors, a plaintiff’s dismissal in the face of a pending, potentially dispositive motion must be given effect. Conducting an exhaustive review, the court found these principles to explain the outcome of virtually every pertinent decision. (*Id.* at pp. 202–205.) We conclude that *Franklin Capital* represents a fair summation of the governing law.

In the case actually before the *Franklin Capital* court, a debt collection action, the defendant had filed a motion to dismiss the action for want of prosecution under the two-year rule. Soon after, plaintiff’s counsel failed to appear for a mandatory settlement conference, after a variety of similar no-shows for other scheduled proceedings, and the trial court entered an order to show cause (OSC) for dismissal or the imposition of sanctions. (*Id.* at p. 191.) The day before the hearing on the OSC, the plaintiff filed a request for dismissal without prejudice. (*Id.* at p. 192.) Notwithstanding the dire straits faced by the plaintiff at the time of the dismissal, *Franklin Capital* held the dismissal effective. As the court explained, “the OSC did not *necessarily* contemplate complete dismissal—otherwise the ‘or sanctions’ part of the OSC would not have been included. And we dare say that the trial court might very well have exercised its discretion *not* to dismiss the case if counsel for plaintiff Franklin had shown up to provide some reason for

his failure to attend the mandatory settlement conference, or even just to beg for mercy. So, unlike [certain prior decisions] there was no inevitability of dismissal based on milk that had already been spilled. [¶] Nor was there any public announcement of impending dismissal, tentative or otherwise, which would suggest some substantive confrontation by the court with the legal merits of the case . . . or even that dismissal was procedurally mandated in light of counsel’s apparent dereliction.” (*Id.* at p. 209.)

Here, plaintiff filed its request for dismissal prior to the due date for its summary judgment opposition and before any ruling on that motion by the trial court. There was neither “a public and formal indication by the trial court of the legal merits of the case” or “some procedural dereliction by the dismissing plaintiff that made dismissal otherwise inevitable.” (*Franklin Capital, supra*, 148 Cal.App.4th at p. 200; see *Gogri, supra*, 166 Cal.App.4th at pp. 263–264, 268 [request for dismissal timely when filed prior to issuance of a tentative ruling on summary judgment motion, despite motion being fully briefed at the time].) The dismissal was therefore effective under section 581, subdivision (b)(1), and it was error for the trial court to vacate the dismissal.

Harbor argues summary judgment was inevitable because plaintiff had refused to make its expert witnesses available for deposition, which in turn would have required the trial court to strike any declaration filed by plaintiff demonstrating a triable issue of fact. Like the OSC in *Franklin Capital*, however, this result depended upon a discretionary ruling by the trial court; there was nothing inevitable about this outcome. Section 2034.300, subdivision (d) requires the exclusion of an expert witness’s testimony only if the opposing party has “unreasonably” failed to make the expert available for deposition. Whether a party’s conduct in the course of discovery has been unreasonable is a determination left to the discretion of the trial court. (E.g., *Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 422.) Given the crush of discovery at the time when Harbor was attempting to notice the depositions, it is not clear that the failure to arrange for the experts’ depositions was “unreasonable” on plaintiff’s part. The trial court could have concluded the parties shared responsibility for the failure and reopened discovery for the limited purpose of permitting the deposition of plaintiff’s experts. Alternatively,

the court could simply have permitted the filing of declarations for the purpose of opposing summary judgment, while reserving for trial a ruling on the ultimate availability of the experts' testimony. Because both of these results, and others, were possible outcomes, entry of summary judgment in favor of Harbor was far from a mere formality.³

Harbor argues for inevitability on the basis of the trial court's eventual ruling granting summary judgment, which precluded plaintiff from offering opposing declarations. As a review of the various decisions discussed in *Franklin Capital* demonstrates, however, inevitability must be measured at the time of the request for dismissal. The trial court's later grant of the requested relief did not make that relief retrospectively inevitable. For the reasons discussed above, a grant of summary judgment was in no way a mere formality at the time of plaintiff's dismissal.

Harbor argues we should regard entry of judgment in its favor as inevitable because plaintiff's motion to reopen discovery had already been denied, precluding the deposition of its experts. As discussed above, however, the issue of expert discovery was not raised in the context of the motion to reopen discovery. Although the trial court refused to reopen discovery entirely, it did permit additional specific discovery requested by plaintiff. There is nothing to suggest the trial court would not have similarly permitted expert depositions to go forward if presented with a specific request.⁴

³ Given the discretionary nature of this relief, the ruling requested by Harbor could not have been considered a "mere formality" regardless of the circumstances. However, we note that all of the cases cited by Harbor in support of its argument for exclusion feature more egregious circumstances than those found here. (*Cottini v. Enloe Medical Center, supra*, 226 Cal.App.4th at pp. 406, 422–423 [plaintiff did not disclose expert witnesses until after expert discovery deadline]; *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1112–1113 [plaintiff did not disclose expert witnesses until after expiration of discovery deadline and refused to produce them for deposition]; *Waicis v. Superior Court* (1990) 226 Cal.App.3d 283, 285–286 [exclusion of single expert witness who repeatedly dodged deposition].) *Perry v. Bakewell Hawthorne, LLC* (2016) 244 Cal.App.4th 712, review granted April 27, 2016, No. S233096, 368 P.3d 923, also cited by Harbor, was depublished prior to the submission of Harbor's brief.

⁴ At one point in its respondent's brief, Harbor argues that "a voluntary dismissal is not permitted where, as here, a summary judgment hearing has commenced and is

Harbor also argues plaintiff's dismissal should be treated as ineffective because it was a tactical maneuver executed in bad faith. While we recognize there is some decisional support for the consideration of a plaintiff's subjective motivation in connection with a motion to vacate a section 581 dismissal, notably *Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App.4th 538, 546–547, the weight of more recent authority is wholly contrary to Harbor's position. We agree with *Franklin Capital* and *Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp.* (2009) 174 Cal.App.4th 67, that a plaintiff's motive for dismissing is irrelevant to the validity of a dismissal under section 581. As explained in *Lewis C. Nelson*, "The question of whether a plaintiff's voluntarily dismissal is timely under section 581 depends upon—and must remain tethered to—a reasonable construction and application of the statutory term 'commencement of trial.' [Citation.] Hence, a plaintiff's subjective lack of good faith in seeking a dismissal does not, by itself, terminate the statutory right to dismiss." (*Id.* at p. 78; *Franklin Capital, supra*, 148 Cal.App.4th at p. 210 ["a good faith-bad faith test might be an excellent judicial policy and indeed we might adopt it ourselves if writing in vacuum. But it's not what the Legislature said. The Legislature said 'commencement of trial'"]; *Gogri, supra*, 166 Cal.App.4th at p. 265, fn. 8 [the timeliness of a § 581 dismissal is based on an "objective, not a subjective, standard"]; see *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 784–785 [permitting the plaintiff to dismiss without prejudice despite recognizing the plaintiff had acted in bad faith].)

III. DISPOSITION

The judgment of the trial court is vacated. The order vacating plaintiff's dismissal without prejudice of the action is reversed, and the dismissal is reinstated. Plaintiff may recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

continued to a later time," citing *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765. While that is an accurate characterization of the *Mary Morgan* decision, we find no evidence in the record to suggest the hearing on Harbor's summary judgment was commenced prior to plaintiff's dismissal. On the contrary, plaintiff filed its request for dismissal long before any hearing was held. *Mary Morgan* is simply inapplicable here.

Margulies, J.

We concur:

Humes, P.J.

Banke, J.

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