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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JULIO SOTO CORONEL,

Plaintiff and Appellant,

v.

SEARS LOGISTICS SERVICES, INC.,

Defendant and Respondent.

E055381

(Super.Ct.No. CIVRS910694)

OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis, Judge. Affirmed.

Karasik Law Firm and Gregory N. Karasik for Plaintiff and Appellant.

Orrick, Herrington & Sutcliffe, Joseph C. Liburt and Christian N. Brown for Defendant and Respondent.

This is a class action lawsuit against defendant Sears Logistics Services, Inc. (Sears) regarding its alleged failure to pay final wages in a timely manner. Julio Soto Coronel acts as the named plaintiff. The parties settled the class action claims and the

trial court granted preliminary approval of the settlement. Following expiration of the period for unnamed members of the class to assert their objections, plaintiff failed to file a motion seeking the court's final approval of the settlement. Instead, plaintiff no longer favored acting as the named plaintiff because of his personal claims against Sears. Thus, Sears moved for, and the court granted (over plaintiff's objection), final approval of the class action settlement agreement. Plaintiff appeals, contending the trial court erred in granting final approval because the elements required for class certification were missing, namely, an adequate class representative. In reply, Sears claims that plaintiff lacks standing to pursue this appeal because "(1) he failed to object to the settlement, (2) by signing the settlement agreement he stipulated to the judgment, and (3) he expressly waived his right to appeal."¹

I. PROCEDURAL BACKGROUND AND FACTS

On September 22, 2009, plaintiff, individually and on behalf of others similarly situated, initiated this action against Sears based on its alleged failure to pay final wages in a timely manner. Sears filed its answer on December 17 denying the claims. Following active litigation, mediation and settlement negotiations, a settlement was reached in April 2011. Plaintiff filed a motion for preliminary approval of the class action settlement. In plaintiff's motion, he represented that the settlement "is fair and reasonable and is well suited for class certification." The parties agreed that all

¹ By order dated March 21, 2012, we denied, without prejudice to the raising of the issue in its respondent's brief, Sears's separate motion to dismiss plaintiff's appeal on ground that he lacked standing,.

requirements for class certification were satisfied, including that plaintiff and his counsel adequately represented the class. Plaintiff assured the trial court that his counsel was “unquestionably ‘qualified, experienced and generally able to conduct the proposed litigation,’” and that plaintiff’s interests were “co-extensive with those of the other members of the Class since all have been allegedly injured in the same manner by [Sears] and Plaintiff seeks relief identical to that sought by every other Class member.”

In addition to a limited class-wide release of the claims at issue, the settlement agreement included a standard general release of plaintiff’s individual (nonclass) claims in exchange for an enhancement payment of \$5,000.² Plaintiff also waived his right to object to the settlement,³ and both parties waived their rights to appeal final approval of the settlement unless the court materially altered the terms of the agreement or reduced the named plaintiff award, or the agreed-upon attorney’s fees and costs. Plaintiff signed the settlement agreement on April 7, 2011.

On May 3, 2011, the trial court granted preliminary approval. At the hearing, counsel for plaintiff confirmed that the settlement was the result of “hard fought litigation,” and the trial court noted that the parties had “spent a great deal of time, effort

² Plaintiffs waived any and all claims “arising out of, relating to, or in connection with any facts, transactions . . . policies, occurrences, acts . . . statements, omissions or failures to act, which are or could be the basis of any claim that the Released Parties acted in any manner that was unlawful,” including, without limitation, “the Fair Labor Standards Act . . . the California Fair Employment and Housing Act, The California Unfair Competition Act . . . and the California Labor Code.”

³ “Plaintiff . . . agrees not to request or be excluded from the Settlement Class and agrees not to object to any of the terms of this Agreement.”

and energy in settlement discussions” to reach what the court agreed was a fair and reasonable settlement. The preliminary approval order required class members to file any objections to the settlement within 30 days after receiving the notice, or be barred from opposing the settlement at the final approval.

On August 12, 2011, plaintiff filed notice that he was unable to seek a final approval of the class action settlement due to a conflict in interest between him and absent class members. Plaintiff offered no explanation as to the conflict. In response, Sears moved for final approval of the settlement. Sears’s motion provided an explanation for plaintiff’s change of heart, namely, that, according to plaintiff’s counsel, the class action settlement would preclude him from pursuing his discrimination claims against Sears. Sears’s counsel was not personally aware of any claims; however, upon information and belief, Sears’s counsel noted that before and during the pendency of the class action lawsuit, plaintiff had filed several claims of discrimination with the Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing (DFEH) against Sears. The settlement agreement’s general release language released Sears from any and all of plaintiff’s claims. Apparently, counsel that represented the parties in the class action did not represent the parties in the discrimination action.

Plaintiff opposed the final approval of the class action settlement on the grounds that he was not an adequate class representative, and thus, his counsel could not represent the interests of the absent class. Plaintiff argued that all the requirements for class certification did not exist and the settlement was not effective absent final approval by the

trial court. Plaintiff explained that he misunderstood the effect of paragraph 15 of the settlement agreement, which contained the general release language. He claimed he was given wrong advice from his counsel; however, if he had known that he was releasing his EEOC claims,⁴ he would never have agreed to settle. Plaintiff's counsel submitted a declaration wherein he stated that plaintiff claimed counsel's cocounsel informed plaintiff that the release did not include his EEOC claims; however, cocounsel denied ever being advised by plaintiff of his EEOC claims or telling plaintiff that the release did not include them. Plaintiff's counsel attempted to resolve the issue; however, Sears maintained that plaintiff signed the settlement agreement that contained the general release of any and all claims, including plaintiff's EEOC claims.

Because plaintiff opposed the final approval of the class action settlement, a hearing was held and the trial court considered the arguments of both sides. The court began by noting that plaintiff's primary issue with the settlement agreement was the general release that would result in plaintiff releasing his EEOC claims. Turning to the motion at hand, the court recognized its final approval of the settlement would be based on its finding that the settlement was "fair, adequate, and reasonable and . . . not the product of collusion between the parties." After considering the applicable factors, the court concluded that they weighed in favor of the settlement. The court pointed out that plaintiff was not claiming the settlement was unfair to class members, only that it was unfair to him.

⁴ According to plaintiff, Sears initially offered him \$20,000 to settle his EEOC claims.

The trial court noted that case law holds the reason for final court approval is to protect the class members “whose rights may not have been given due regard by the negotiating parties.” Further case law explains that “the reason for judicial approval isn’t to give the negotiating parties more time or even to ensure that the settlement is fair as between the negotiating parties, but rather that the other unrepresented parties and the public interest are treated fairly by the settlement.” Thus, the court found that its approval was merely a “condition subsequent,” which did not affect the legality of the formation of the settlement agreement. Accordingly, the fact that plaintiff was experiencing buyer’s remorse was “no reason for the court to deprive the unnamed class members of the benefits that that settlement agreement provides to them.” Moreover, the court noted that plaintiff would be receiving an additional \$5,000, along with his costs and attorney fees. In exchange, plaintiff was waiving all of his claims, including the EEOC claims, against Sears. The court found there was “no basis upon which [it] could find this morning that any of those claims, whatever they might be, have any merit as to [plaintiff].”

Regarding plaintiff’s claim that he was no longer an adequate class representative because of a conflict between his interest and those of the unnamed class members, the court did not see any conflict. Assuming plaintiff’s claims were removed from those of the class, and plaintiff was allowed to pursue them separately, the court observed that Sears would “move to enter judgment pursuant to the settlement agreement fully executed by the parties in this matter.” The court referenced Code of Civil Procedure

section 664.6.⁵ Thus, on October 21, 2011, the court granted Sears’s motion and filed the final judgment granting approval of the class action settlement and attorney fees.

II. STANDARD OF REVIEW

“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.] [¶] . . . To the extent that it appears the trial court’s decision was based on improper criteria or rests upon erroneous legal assumptions, these are questions of law warranting our independent review. [Citations.]” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235.)

III. STANDING

At the outset, Sears contends plaintiff lacks standing to pursue this appeal because “(1) he failed to object to the settlement, (2) by signing the settlement agreement he stipulated to the judgment, and (3) he expressly waived his right to appeal.” However,

⁵ “If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.” (Code Civ. Proc., § 664.6.)

the trial court allowed plaintiff to present his objections below and considered them. It was within the trial court's discretion to do so, and we find no reason to disturb its discretion. Because plaintiff was allowed to object to the proposed settlement at the final fairness hearing, he has standing here. (*Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 235 [“[c]lass members who appear at a final fairness hearing and object to the proposed settlement have standing to appeal”]; *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 139.)

IV. CLASS CERTIFICATION AT TIME OF FINAL APPROVAL

Plaintiff asserts that the trial court erred in granting final approval of the class action settlement because the elements required for class certification were missing, namely, an adequate class representative. He claims he was not an adequate representative because his interests as an individual conflicted with the collective interests of the absent class members and he was not willing to fulfill his fiduciary duty towards absent class members. Furthermore, he contends that because of his inability to be an adequate representative of the class, his counsel could not fulfill his fiduciary obligations to absent class members by seeking a final approval. We reject plaintiff's assertions for the following reasons.

Beginning with plaintiff's alleged conflict of interest between himself as an individual and the class members, Sears contends that plaintiff's “desire to hold up final approval so he could void his general release had nothing to do with class aspects of the settlement, and did not represent a disqualifying conflict.” We, like the trial court, agree. Plaintiff actively participated in the litigation, mediation and settlement. He personally

signed the settlement agreement. In seeking court approval, plaintiff's counsel represented that the settlement met all the requirements for class certification, and that the settlement was fair and reasonable. The court agreed, and preliminary approval was obtained on May 3, 2011. Unrepresented class members were given 30 days following receipt of notice of the settlement to object; however, the time for plaintiff to object was prior to his signing the agreement. (Code Civ. Proc., § 664.6.) Nonetheless, more than 60 days after preliminary approval, plaintiff experienced buyer's remorse. He no longer favored the agreement because he wanted to pursue alleged discrimination claims against Sears but discovered he would be precluded from doing so by the language in paragraph 15 of the agreement that released Sears from any and all of plaintiff's claims.

We find it interesting that plaintiff was aware of his discrimination claims prior to and at the time of settling the class action, and yet he signed the settlement agreement anyway. He claims that his attorney's cocounsel assured him the language in the release would not apply to his discrimination claims. However, the language is *very clear*, i.e., plaintiff waived any and all claims "arising out of, relating to, or in connection with any facts, transactions, . . . policies, occurrences, acts, . . . statements, omissions or failures to act, which are or could be the basis of any claim that the Released Parties acted in any manner that was unlawful," including, without limitation, "the Fair Labor Standards Act . . . the California Fair Employment and Housing Act, the California Unfair Competition Act . . . and the California Labor Code." Thus, it is difficult to believe that an attorney would advise any client that his discrimination claims would remain viable after signing an agreement with this language.

According to plaintiff's attorney, the cocounsel denies any knowledge of plaintiff's alleged discrimination claims or that he provided plaintiff with any advice regarding the language in the release with respect to those alleged discrimination claims. Plaintiff failed to provide the trial court with any evidence of his alleged discrimination claims against Sears. Further, he failed to provide any evidence of who was representing him regarding these claims, who was representing Sears, or what the claims were about. The only evidence of the existence of these claims is the hearsay evidence in plaintiff's counsel's declaration that consisted of what plaintiff had told his counsel. Were there really any discrimination claims? Without such claims, there is no conflict between plaintiff and the class members. Is the hearsay evidence contained in plaintiff's counsel's declaration sufficient to support a finding that an actual conflict of interest existed between plaintiff and the class members? In our view it is not.

Notwithstanding the above, even if we were to assume that plaintiff really did possess viable claims of discrimination against Sears, such claims did not affect the subject matter of the class action litigation such that it resulted in disqualifying plaintiff. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) "It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent. But only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid.*) Disqualifying conflicts include those situations where the named plaintiff has an interest in the plaintiffs winning the case while wearing one hat, but also an interest in the plaintiffs losing the case while wearing another hat. (*J.P.*

Morgan & Co., Inc. v. Superior Court (2003) 113 Cal.App.4th 195, 214; *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1501-1502.) Plaintiff's alleged discrimination claims do not fit the type of claims that would disqualify him as the class representative.

Likewise, plaintiff's self-declared inadequacy, caused by his unwillingness to proceed, was based on personal reasons. He acknowledges in his reply brief that he "did not want to sacrifice his personal interests for the benefit of the class" Plaintiff did not seek to back out of the settlement as the named representative because it was unfair, unreasonable, or not in the best interests of the class. Rather, his decision to back out amounted to nothing more than a last ditch attempt to avoid the terms of the general release in the settlement agreement. However, as the parties maintained and the trial court agreed, the settlement was fair, reasonable, and in the best interests of the class. By the time of final approval, the trial court's inquiry was focused on, and limited to, whether the terms of the settlement were fair to the absent class members, not whether plaintiff would represent the class adequately in future litigation. Given the settlement, there would be no future litigation.

Nonetheless, plaintiff claims "it ultimately does not matter that final approval of the settlement was in the best interests of absent class members[, because a]s a matter of law, a class cannot be certified without a named plaintiff ready, willing and able to fulfill his fiduciary responsibilities to absent class members." He cites *J.P. Morgan & Co. v. Superior Court, supra*, 113 Cal.App.4th 195, 215, for the proposition that "the trial court abused its discretion in disregarding the evidence of a conflict of interest" among the

proposed class members. However, he fails to include the rest of the sentence. What our colleagues in Division One wrote was “the trial court abused its discretion in disregarding the evidence of a conflict of interest among the proposed class members that ‘goes to the very subject matter of the litigation.’” (*Ibid.*) In that case, the conflict arose because “the proposed class members were operating, in both buyer and seller capacities, and over a long period of time.” (*Ibid.*)

Finally, regarding counsel’s adequacy, the record demonstrates that plaintiff’s counsel was experienced in class actions, competent, and adequate to represent both plaintiff and the class members at the final approval. Because we reject plaintiff’s claim of personal inadequacy and disqualifying conflict of interest, we likewise reject his claim of counsel’s inadequacy. Even if we did not, we conclude that the fact plaintiff no longer favored the settlement did not mean his counsel was disqualified. Plaintiff does not suggest that his counsel obtained any confidential information from him or that counsel engaged in any conduct displaying disloyalty to the class members. “[T]he named plaintiffs should not be permitted to hold the absentee class hostage by refusing to assent to an otherwise fair and adequate settlement in order to secure their individual demands.” (*Parker v. Anderson* (5th Cir. 1982) 667 F.2d 1204, 1211 [agreement of named plaintiff is not essential to approval of fair and reasonable settlement]; *Kullar v. Foot Locker Retail, Inc.* (2011) 191 Cal.App.4th 1201, 1204-1207 [there is nothing particular about California ethics rules that counsels against use of a pragmatic balancing test when deciding whether to disqualify class counsel]; *Koo v. Rubio’s Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735 [“the traditional rules that have been developed in the course

of attorneys’ representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in . . . class action litigation”]; *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1159 [“counsel’s duty runs to the class as a whole and the governing rule is, in the event of conflicts, withdrawal is the appropriate course for counsel to take”].)

Based on the above, we conclude the trial court did not err in granting final approval of the class action settlement, and that the elements required for class certification were not missing. For the same reasons, we reject plaintiff’s claim that the court erred in improperly awarding an enhancement payment to him.

V. DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendant and respondent.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

RICHLI

J.