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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALBERT CHEATHAM, Plaintiff and Respondent, v. CITY OF CHINO, Defendant and Appellant.	E056850 (Super.Ct.No. CIVRS1109196) **OPINION**

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

Kinkle, Rodiger & Spriggs and Bruce E. Disenhouse for Defendant and Appellant.

Law Offices of Sandra L. Noël and Sandra L. Noël for Plaintiff and Respondent.

This is a wrongful termination action by Albert Cheatham against the City of Chino (City). The trial court sustained a demurrer, ruling that the complaint failed to allege that Cheatham had exhausted his administrative remedies before the Labor

Commissioner; it entered judgment accordingly. Cheatham then filed a motion to "vacat[e] . . . and motion for reconsideration," arguing that he was not required to exhaust his administrative remedies before the Labor Commissioner and citing a case that he had not cited previously in connection with the demurrer. The trial court found the newly cited case persuasive and vacated the judgment.

The City appeals. It contends that, because judgment had already been entered, the trial court lacked jurisdiction to grant a motion for reconsideration. It further contends that, even if Cheatham's motion could be deemed a motion to vacate the judgment under Code of Civil Procedure section 663, which the trial court did still have jurisdiction to grant, the prerequisites for relief under that section do not apply.

We agree with both of the City's contentions. Nevertheless, we will hold that we can and should deem Cheatham's motion to be a motion for new trial under Code of Civil Procedure section 657, which the trial court also still had jurisdiction to grant. Accordingly, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Cheatham filed a complaint against the City, alleging that he had been fired from his job as dispatcher in retaliation for testifying in another employee's arbitration proceeding.

The City filed a demurrer, arguing, among other things, that Cheatham had not alleged exhaustion of administrative remedies before the Labor Commissioner. In his

opposition to the demurrer, Cheatham argued that he was not required to exhaust administrative remedies before the Labor Commissioner. The trial court sustained the demurrer, without leave to amend, based solely on failure to allege exhaustion of administrative remedies. It entered a judgment of dismissal.

Cheatham then filed a motion "for an order vacating and setting aside the Judgment [and] Order on Demurrer . . . and motion for reconsideration . . . ." He argued again that he was not required to exhaust his administrative remedies before the Labor Commissioner. This time, however, he cited *Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, which he had not cited in his opposition to the demurrer. As authority for reconsideration, he cited Code of Civil Procedure section 1008. He did not cite any particular authority for vacating the judgment.

In its opposition, the City did not discuss or attempt to distinguish *Lloyd*. However, the City did argue that the entry of judgment deprived the trial court of jurisdiction to grant reconsideration. It also argued that the trial court was not authorized to vacate the judgment under Code of Civil Procedure section 663.

In his reply, Cheatham argued for the first time that he was entitled to vacation of the judgment under Code of Civil Procedure section 663.

After hearing argument, the trial court granted the motion. It explained:

"First, to the extent that Counsel was indicating in any of the papers that the [C]ourt has somehow lost jurisdiction to reconsider its own rulings and orders at this point because there's been a final order signed, I am not at all persuaded that is accurate.

“ . . . [T]he Court can always on its own reconsider any rulings or orders that it has made.

“And, obviously, while the Court would certainly have preferred to have had an opportunity to read the *Lloyd* case much earlier, my recollection is that was a case not discussed by either side.

“ . . . I am persuaded that, in fact, the *Lloyd* case does apply, and that reconsideration is appropriate . . . .”

It vacated the judgment, and it entered a new order overruling the demurrer.

The City filed a timely notice of appeal. The order vacating the judgment is appealable as an order made after a final judgment. (Code Civ. Proc., § 904.1, subd. (a)(2); *Hensley v. Hensley* (1987) 190 Cal.App.3d 895, 898.)

Cheatham did not file a protective cross-appeal from the judgment. (See generally Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) ¶ 3:169.)

II

DISCUSSION

A. *The Trial Court Lacked Jurisdiction to Grant Reconsideration*.

After entry of judgment, a trial court loses jurisdiction to grant reconsideration of the judgment. (*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 622; *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 994, fn. 8; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 192; *20th Century Ins. Co. v. Superior Court* (2001) 90

Cal.App.4th 1247, 1259; *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 181; *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1236-1237; *Nave v. Taggart* (1995) 34 Cal.App.4th 1173, 1177; *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1606 [Fourth Dist., Div. Two]; *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 863, fn. 3.)

"The general rule is that once a judgment has been entered, the trial court loses its unrestricted power to change that judgment. The court does retain power to correct clerical errors in a judgment which has been entered. However, it may not amend such a judgment to substantially modify it or materially alter the rights of the parties under its authority to correct clerical error. [Citations.] . . .

"Once judgment has been entered, the trial court does retain jurisdiction for a limited period of time to entertain and grant a motion for a new trial ([Code Civ. Proc.,] § 655 et seq.) or a motion for a judgment notwithstanding the verdict. ([Code Civ. Proc.,] § 629.) The court also retains jurisdiction to consider and grant a motion to vacate a judgment and enter a different judgment for either of two reasons: an incorrect or erroneous legal basis for the decision, not consistent with or supported by the facts, or a judgment not consistent with or not supported by the special verdict. ([Code Civ. Proc.,] §§ 663, 663a.) The court also retains jurisdiction to entertain and grant a motion for relief from a judgment taken against a party through mistake, inadvertence, surprise, or excusable neglect. ([Code Civ. Proc.,] § 473.)

"In each of the foregoing situations, the court is explicitly authorized by the pertinent statute to change an entered judgment, provided certain conditions are satisfied. [Citation.]" (*Craven v. Crout* (1985) 163 Cal.App.3d 779, 782-783.)

The trial court stated that it could "always" reconsider its own orders sua sponte. It seems to have been thinking of *Le Francois v. Goel* (2005) 35 Cal.4th 1094. There, the Supreme Court held that a trial court has inherent power to reconsider an interim order on its own motion, and that this power is not subject to the statutory limitations on a party's ability to seek reconsideration under Code of Civil Procedure section 1008. (*Le Francois v. Goel*, *supra*, at pp. 1098-1109.) The court cautioned, however: "What we say about the court's ability to reconsider *interim* orders does not necessarily apply to *final* orders, which present quite different concerns." (*Id*. at p. 1105, fn. 4.) Actually, a trial court does not have inherent power to grant reconsideration after judgment has been entered. (*Nave v. Taggart*, *supra*, 34 Cal.App.4th at p. 1177.)

B. *We Can Uphold the Trial Court's Order as an Order Granting a New Trial*.

This brings us to whether we can uphold the trial court's order on some other theory. Ordinarily, "[i]f the appealed judgment or order is correct on any theory, then it must be affirmed regardless of the trial court's reasoning, whether such basis was actually invoked. [Citations.] . . . 'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be

sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1201 [Fourth Dist., Div. Two].)

It is axiomatic that "[t]he law respects form less than substance." (Civ. Code, § 3528.) Thus, an appellate court has some leeway to treat a motion made below as if it were a different motion. For example, in *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, the trial court had denied a motion to vacate the judgment, "evidently on the basis that such a motion is unavailable to review judicial error." (*Id*. at p. 737, fn. omitted; see also *id*., at p. 735, fn. 3.) The Supreme Court acknowledged that "ordinarily a trial court cannot correct judicial, as distinguished from clerical, error except in accordance with statutory procedures. [Citations.]" (*Id*. at pp. 737-738.) It noted, however, that Code of Civil Procedure "[s]ection 663 . . . furnishes sufficient statutory basis for [the] motion in the instant case." (*Id*. at p. 738.) It therefore proceeded to review the merits of the ruling. (*Ibid*.)

Similarly, in *Passavanti v. Williams*, *supra*, 225 Cal.App.3d 1602, this court construed a postjudgment motion for reconsideration to be a motion for new trial for purposes of determining whether the appeal was timely. (*Id*. at pp. 1608, 1610-1611.) We even conceded, "[o]ne might argue that in refusing to construe a motion for reconsideration to be a motion for new trial, the appellate court would be elevating form over substance and that if the motion, regardless of its label, arguably would qualify as a

valid motion for new trial or a valid motion to vacate the judgment, this court should treat it as such." (*Id*. at p. 1610.)

Admittedly, we also cautioned: "[W]e believe, generally, appellate courts should not construe a motion expressly identified as being a particular motion to be an entirely different motion in the appellate court." (*Passavanti v. Williams*, *supra*, 225 Cal.App.3d at p. 1608.) In *Passavanti*, characterization of the motion was relevant to whether the appeal was timely (see *id*. at pp. 1604-1608); we noted that "[t]he timeliness of the appeal is not merely a matter of policy but rather is fundamental to this court's jurisdiction." (*Id*. at p. 1609.) We added that recharacterizing a motion could "lead . . . to . . . complications": "For example, if we construe the motion for reconsideration to . . . be a motion for new trial or a motion to vacate for purposes of the timeliness of the appeal, should we not also construe it to be a motion for new trial or to vacate for purposes of review? If so, what standard of review would we employ in determining whether the court's order denying or granting the motion was proper? Would we have to review its propriety, for example, under each of the seven alternate grounds for new trial listed in Code of Civil Procedure section 657 even though normally we only review the order granting or denying a new trial on the grounds specified by the party or the court? Should a party who fails to file a proper motion for new trial receive more liberal review of the court's order on appeal than a party who properly files such a motion limiting its grounds? Further, if the appellate courts construe motions made in the trial court to be a different motion, what law should a trial court apply in ruling on the motion in the first

instance?" (*Id*. at p. 1610.) We concluded, "Absent a showing of extremely good cause, we are disinclined to engage in the practice of 'construing' motions and will hold counsel to the label they attach to their motions." (*Ibid*.)

Under both *Carleson* and *Passavanti*, we have *discretion* to treat Cheatham's motion as some other kind of motion. While *Passavanti* counsels us to exercise that discretion charily, the concerns that we expressed in *Passavanti* simply do not apply in this case. First, here, the characterization of the motion goes to the merits of the appeal, not the timeliness of the appeal. Thus, it does not go to our jurisdiction; and, for the same reason, there is no possibility of treating the motion differently for purposes of timeliness than for purposes of the merits. Second, the relevant grounds for the motion were clear, namely, that the trial court had made an error of law in sustaining the demurrer. The trial court was well aware of the law that applied in ruling on the motion, and we have no difficulty in determining what standard of review applies. Third and finally, it is significant that in *Passavanti*, the trial court *denied* the motion, whereas here, the trial court *granted* the motion. "[A]n 'order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.' [Citation.]" (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718.)

Moreover, in this case, there is good cause to relabel the motion. The equities are strongly in Cheatham's favor. The trial court's final decision was that the complaint states a cause of action. At the pleading stage, we are supposed to bend over backwards to make sure that a good cause of action is not lost through a remediable procedural

defect. For example, we must construe the complaint liberally, "with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) Even if a demurrer is well-taken, "[i]t is an abuse of discretion for the court to deny leave to amend where there is any *reasonable possibility* that plaintiff can state a good cause of action. [Citations.]" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 7:129.1.)

We are likewise supposed to bend over backwards to avoid visiting the sins of an attorney on the attorney's innocent client. For example, a client is entitled to be relieved from any default that is due to his or her attorney's mistake, inadvertence, surprise, or neglect. (Code Civ. Proc., § 473, subd. (b).) And an award of frivolous appeal sanctions should be made solely against the attorney, unless there is evidence that the client affirmatively participated in the misconduct. (*Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1080 [Fourth Dist., Div. Two].)

Finally, the City was not prejudiced by the fact that the motion was not labeled as a motion for new trial. No matter what kind of motion it was, the key issue, which the trial court found to be dispositive, was whether Cheatham was required to allege exhaustion of his administrative remedies before the Labor Commissioner. The City had a full and fair opportunity to brief and argue this issue.

One type of postjudgment motion that the trial court had jurisdiction to hear is a motion to vacate a judgment under Code of Civil Procedure section 663. This statute provides, as relevant here: "A judgment or decree, when based upon a decision by the court, . . . may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts . . . ."

The City argues that Code of Civil Procedure section 663, by its terms, did not apply here. We agree. "[A] section 663 motion does *not* lie to vacate a judgment following an erroneous ruling on a demurrer," because "[t]he relief sought would not involve the entry of a different judgment but would merely allow [the plaintiff] to file further pleadings." (*Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1574-1575.)

But the trial court also had jurisdiction to hear a motion for new trial. (Code Civ. Proc., §§ 656-660.) Perhaps surprisingly, a motion for new trial may be used to vacate a judgment entered after the sustaining of a demurrer, even though there has been no "trial" in the usual sense. (*Carney v. Simmonds* (1957) 49 Cal.2d 84, 88–91; *20th Century Ins. Co. v. Superior Court*, *supra*, 90 Cal.App.4th at p. 1261.) "[I]n effect, where issues of law are joined by the demurrer there is a trial and 'hence a situation proper for a new trial motion . . . .' [Citation.]" (*Good v. State of California* (1969) 273 Cal.App.2d 587, 591.)

Moreover, an "[e]rror in law" is grounds for granting a new trial. (Code Civ. Proc., § 657, subd. 7.)

Viewed as a motion for new trial, Cheatham's motion was timely. A notice of intention to move for a new trial must be served and filed "[w]ithin 15 days of the date of mailing notice of entry of judgment by the clerk of the court . . . , or service upon him or her by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest . . . ." (Code Civ. Proc., § 659, subd. (a)(2).) Here, the judgment was entered on May 10, 2012. On May 24, 2012, the City served notice of entry of judgment.[1] And on May 29, 2012 — just five days later — Cheatham served and filed his motion.

The trial court's ruling was also timely. A trial court must rule on a motion for new trial within "[1] 60 days from and after the mailing of notice of entry of judgment by the clerk of the court . . . or [2] 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or [3] if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial." (Code Civ. Proc., § 660.) The trial court granted Cheatham's motion on June 26, 2012. This was 33 days after May 24, 2012, when the City served notice of entry of judgment, and 28 days after May 29, 2012, when the

[1] Cheatham later asserted that the City did not properly serve the notice of entry. Somewhat unhelpfully, the copy of the notice of entry that the City has included in its appellant's appendix has no proof of service. For present purposes, however, we may assume, without deciding, that the notice of entry was properly served.

motion was filed. In fact, it was only 47 days after the judgment itself was entered, on May 10, 2012.

We recognize that "[w]hen a new trial is granted, . . . the court [must] specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated." (Code Civ. Proc., § 657.) "Both the order and statement of reasons must be in *writing*, not oral . . . ." (Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2014) ¶ 18:377.) However, the order granting a new trial may be a minute order rather than a signed formal order. (Code Civ. Proc., § 660; *Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 868 [Fourth Dist., Div. Two].)

Here, the trial court granted the motion for reconsideration in a minute order; it did not enter any formal order. The minute order stated that the judgment was "[s]et aside," but it did not state any grounds or reasons. Thus, it did not comply with these statutory requirements for an order granting a motion for new trial.

A new trial order that fails to specify grounds or reasons is "defective but not void . . . ." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 900.) "On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, *whether or not specified in the order or specification of reasons*, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order

granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (Code Civ. Proc., § 657, italics added.) Neither insufficiency of the evidence nor excessive or inadequate damages is involved here. Rather, the trial court essentially granted a new trial based on error of law. We may affirm the order on this ground, even if it was not stated in the order. (See, e.g., *Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 229.)

We therefore conclude that, while the trial court lacked jurisdiction to grant reconsideration, it could and, in effect, it did grant a motion for new trial.

III

THE MERITS OF THE NEW TRIAL MOTION

The City argues that the trial court erred by relying on *Lloyd*. This argument is a day late and a dollar short. A day late, because the City never argued below that *Lloyd* was not controlling. "As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried. This rule is based on fairness — it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on

appeal; and it also reflects principles of estoppel and waiver [citation]. [Citations.]" (Eisenberg et al., *supra*, ¶ 8:229.)

And a dollar short, because *Lloyd* did, in fact, require the trial court to overrule the demurrer. In *Lloyd*, the plaintiff alleged that he had been terminated from his job with a county due to his whistleblowing activity. He further alleged that this violated specified Labor Code sections, including Labor Code sections 98.6 and 1102.5. (*Id*. at p. 324.) The county argued that he had failed to exhaust his administrative remedies under Labor Code section 98.7, which allows a person who believes that he or she has been discriminated against in violation of the Labor Code to file a complaint with the Labor Commissioner. (*Lloyd*, *supra*, at p. 331.)

The appellate court held that the plaintiff was not required to exhaust his remedies before the Labor Commissioner. (*Lloyd*, *supra*, 172 Cal.App.4th at pp. 331-332.) It stated: "[C]ase law has recognized there is no requirement that a plaintiff proceed through the Labor Code administrative procedure in order to pursue a statutory cause of action. [Citations.]" (*Ibid*.) "[S]ubdivision (f) of Labor Code section 98.7 provides: 'The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law.' [Citation.] Therefore, it would appear Labor Code section 98.7 merely provides the employee with an additional remedy, which the employee may choose to pursue." (*Id*. at p. 331, italics omitted.) The court also relied on the Labor Code Private Attorneys General Act of 2004 (PAG Act) (Lab. Code, § 2698 et seq.). It noted that the PAG Act was intended to allow individuals

to bring actions to enforce the labor laws as private attorneys general, to make up for declining staffing levels in the Labor Commissioner's office. (*Id*. at p. 332.) It concluded that "[t]he PAG Act's approach . . . undermines the notion that Labor Code section 98.7 compels exhaustion of administrative remedies with the Labor Commissioner." (*Ibid*.)

Here, almost identically, Cheatham alleges that the City fired him in retaliation for whistleblowing activity. He alleges that such retaliation violated specified Labor code sections, including Labor Code sections 98.6 and 1102.5. In its demurrer, with respect to these statutory claims, the City argued that Cheatham was required to exhaust his administrative remedies before the Labor Commissioner. Thus, *Lloyd* is on point, and the trial court properly relied on it in overruling the demurrer.

The City argues that *Lloyd* conflicts with the Supreme Court's decision in *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311. *Campbell*, however, merely held that an alleged whistleblower who had been terminated by the University of California was required to exhaust the university's administrative remedies. (*Id*. at p. 333.) It did not deal with exhaustion of administrative remedies before the Labor Commissioner. Thus, it did not conflict with the reasoning in *Lloyd*, which was based on the specific wording of Labor Code section 98.7 and on the PAG Act.

IV

DISPOSITION

The order appealed from is affirmed. In the interests of justice, the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

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RICHLI
J.

We concur:

RAMIREZ
P. J.

MILLER
J.