S S232582

IN THE
SUPREME COURT OF CALIFORNIA

STEPHEN RYAN

Plaintiff, Appellant and Petitioner

vs.

MITCHELL S. ROSENFELD et al.

Defendants and Respondents

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
CASE NO. 145465

PETITION FOR REVIEW

STEPHEN RYAN
1728 Bryant Street
San Francisco, CA 94110
dotsold@yahoo.com
415-308-7653

Plaintiff, Appellant and Petitioner *in pro per*

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ISSUES PRESENTED

1. Is the denial of a Motion to Vacate judgment under Code of Civil Procedure section 663 an appealable order, from the date of which the time limits for filing a Notice of Appeal under California Rules of Court, Rule 8.108 begin to run, independently of their application to the underlying judgment itself?

2. Is a pro per litigant who files a Motion to Vacate judgment under Code of Civil Procedure section 663 for a hearing date that would enable him or her to file Notice of Appeal of the underlying

judgment in a timely fashion per California Rules of Court, Rules 8.104 or 8.108, entitled to equitable relief when the Court on its own motion continues the hearing to a date by which an appeal from the judgment has become untimely, without advising the litigant of that possible consequence?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

This case probes two matters of statewide importance: (a) whether or not the denial of a statutory motion challenging a judgment in the trial court is an appealable order as to which the time limits of CRC 8.104 or 8.108 for filing a Notice of Appeal begin running anew; and (b) independently of the prior issue: the extent to which a pro per party, otherwise conducting himself responsibly as a litigant, who is put into a position of default, without warning, as a result of some action of the Court, is entitled to equitable relief therefrom.

The underlying case concerns a matter of nasty partnership fraud between former best friends, with Defendant/Respondent Rosenfeld additionally having been Plaintiff/Appellant/Petitioner Ryan's attorney for years. There was and is approximately $1,500,000 at stake.

On October 20, 2014, the Court issued from the bench a harsh ruling: dismissing Plaintiff Stephen Ryan's lawsuit, over his objection, when he was temporarily unable to be present for trial because he was hospitalized with a serious medical condition in Tijuana, Mexico. Further complicating Mr. Ryan's adverse circumstances was the fact that his attorney of record had filed several

motions to withdraw from the case, and in effect totally abandoned Petitioner. The ruling of dismissal resulted in a formal order on **October 24, 2014.**

Petitioner filed a timely Motion to Vacate under CCP 663 on **December 19, 2014**, which was set for hearing on **February 17, 2015.** However, on the latter date the court (with some prodding by Respondent Rosenberg) continued the hearing to **March 17, 2015**, and on that date further continued it to **May 11.** Petitioner was forced to wait for five months, from filing to a decision on his Motion to Vacate. The Motion to Vacate was denied from the bench on **May 11**, and a formal Order to that effect was entered on **May 22, 2015.**

Petitioner filed Notice of Appeal on **June 12, 2015**, *from the May 22, 2015 denial of his Motion to Vacate* (along with an accompanying CCP 473 Motion for Relief).

On or about December 6, 2015, Respondent Rosenberg filed a Motion (initially mistakenly in the Superior Court; but promptly transferred to the Court of Appeal) to Dismiss the Appeal based on allegedly untimely filing of the Notice of Appeal under the time limits of CRC 8.108: 30 days from service of the order denying the motion; 90 days from the initial filing of the motion; and 180 days from entry of judgment. On or about December 21, 2015, Petitioner Ryan filed Opposition to the Motion. On or about January 13, 2016, the Court of Appeal granted the Motion to Dismiss. On or about January 28, Petitioner petitioned the Court of Appeal for a rehearing; and on or about February 11, 2016 the Court of Appeal denied that rehearing.

In his opposition to the Motion to Dismiss the Appeal and his Petition for Rehearing, Petitioner Ryan made and the Court of Appeal rejected, the legal points as to which review is sought herein:

(a) The first is that a very long-standing, substantial body of California case law, and the assessments of leading commentators, hold that the denial of a Motion to Vacate is itself an appealable order—as to which, consequently, the time limits for filing Notice of Appeal begin to run anew, with the result that the June 22, 2015 Notice of Appeal was entirely timely—in regard not to the October 22, 2014 order dismissal of the Superior Court case, but to the May 22, 2015 order denying the Motion to Vacate. The Court of Appeal rejected this argument and held, based on one opinion by this Court and one from another Court of Appeal, both of which have been treated as maverick decisions by other courts and commentators, that denials of statutory motions are *supposedly not* appealable—rendering the Notice of Appeal herein tardy.

Supreme Court review is needed to resolve the conflict between the aforesaid opposing holdings, and set forth the bright-line law that California litigants and practitioners need and deserve. Can a party moving to vacate a judgment rest secure that he or she can appeal directly from the ruling on that judgment; or is the time to appeal governed solely by the date of the underlying judgment and the application of CRC 8.108, such that the party might be forced to abandon a motion to vacate which the trial court has delayed in addressing, and to file a Notice of Appeal which transfers jurisdiction to the Court of Appeal? Only this Court can provide that long-needed clarity.

(b) Second, without disputing the basic principle that pro per litigants are held to the same standards as attorneys, Petitioner argued below that when some affirmative act on the part of the Court throws off course a pro per litigant attempting in good faith to comply with the law, that litigant is entitled to equitable relief—and that that is what happened in terms of the unsought repeated continuances of Petitioner's Motion to Vacate, which proximately caused the delay in his filing Notice of Appeal. This Court has in the past granted such relief in exceptional circumstances. Supreme Court review is needed to clarify what obligations, if any, the courts have, in the event that they interfere with a pro per litigant's set litigation schedule to tell him or her about any consequences that the interference might have; and subsequently, the limits on and extent to which equitable relief may be granted to a pro per party hindered in his self-representation by actions of the court imposed without any warning of their potential consequences.

BACKGROUND: THE COURT OF APPEAL RULING

Given the narrow nature of the issues presented, Petitioner relies on the foregoing sections of this Petition to provide the court with sufficient background on the facts, and confines this section to identification of the salient portions of the Court of Appeals Order of January 13, 2016, to which the arguments herein will be addressed.

(a) In regard to the primary issue of the appealability of the May 22, 2015 Order denying Petitioner's Motion to Vacate, the Court of

Appeal based its ruling on the following legal holdings which we will show to be erroneous:

"The order denying the motion to vacate the order dismissing the action, however, is not appealable. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, sec. 197, pp. 273-274.) To permit an appeal from an order denying a motion to vacate would effectively authorize two appeals from the same decision. (Ibid, City of Los Angeles v. Glair (2007) 153 Cal. App.4th 813, 822 [denial of a statutory motion to vacate the judgment is not separately appealable [criticizing Howard v. Lufkin (1988) 206 Cal. App.3d 297, cited by plaintiff in hhis opposition at p. 6].) Therefore, good cause appearing, respondent's motion to dismiss the appeal is granted."

We propose to show that this is a distorted statement of the law, that while there exists authority on both sides of the question, the authority in support of Petitioner's position actually manifestly includes the Witkin treatise, and is far more substantial and makes more sense than the opposing position.

(b) In regard to the Petitioner's contention that the Court's unsought continuances of his Motion to Vacate from February 17 to May 22, 2015 entitle him to equitable relief, the Court of Appeal said: "Plaintiff's status as a pro per litigant does not excuse him from the duty to comply with the rules. An appellant in propria persona is held to the same standard of conduct as that of an attorney on appeal. (Cassidy v. Board of Accountancy (2013) 220 Cal. App.4th 620, 628.)" This holding misses Petitioner's point, which is not that pro per litigants deserve special treatment in the normal course of events; but that they deserve fair warning *in the unique circumstances of court-initiated action which moves the pro per litigant theretofore on track*

to be in compliance with the law, into non-compliance. In order for the public to fully respect the courts, the courts must in turn show this degree of minimal respect for pro per litigants. It is a matter of statewide interest that this Court set appropriate standards to this effect.

LEGAL DISCUSSION

1. This case should be decided in accord with the overwhelming weight of legal authority which would treat Denial of Petitioner's Motion to Vacate, as an appealable order, in light of which his June 12 Notice of Appeal was patently timely.

The Court of Appeal ruling of January 13, 2015 is based in crucial part on its assessment that *Howard v. Lufkin* (1988) 206 C.A.3d 297, 301 has been "questioned" and in effect overruled by *City of Los Angeles v. Glair* (2007) 153 C.A.4th 813; that Petitioner Ryan is therefore entitled to appeal, if at all, only from the Order of Dismissal of October 24, 2014; while the May 22, 2015 dismissal of the December 19, 2014 Motion to Vacate, is supposedly not an appealable one; and that Witkin—and therefore the weight of California law—fully supports this holding. However, such is *not* the law.

We urge this Court to grant a hearing to review the Court of Appeal's decision, based on a broader, deeper look at the applicable, contrary authorities.

The Motion to Vacate is expressly a statutory one, based on CCP 663 (as well as 473).

Here, then is what, 9 Witkin, *Cal. Procedure, 5th*, Appeal,, section 200, actually says about "Statutory Motions":

(1) However, despite early conflict in the decisions, it has become an established rule that an appeal lies from the denial of a statutory motion to vacate an appealable judgment or order, i.e. from denial made under C.C.P. 473, 473.5. or 663. *California Delta Farms vs. Chinese Amer. Farms* (1927) 201 C. 201 [Pacific Reporter citations omitted throughout] ["notwithstanding the obvious fact that on appeal from a judgment which the court below refuses to set aside, the very same matters may be reviewed...it seems definitely settled that our law gives a separate appeal" from the order]; *Funk v. Campbell* (1940) 15 C.2d 250, 251; *Rounds v. Dippolito* (1949) 34 C.2d 59, 61; *Socol v. King* (1949) 34 C.2d 292, 296;...*Rice v. Stevens* (1958) 160 C.A.2d 222, citing the text; *Fitzsimmons v. Jones* (1960) 179 C.A.2d 5, 11, quoting the text; ...*Evelyth v. American Iron and Brass* (1962) 203 C.A.2d 41, 44; *Ventura v. Tillett* (1982) 133 C.A.3d 105, 110 [motion to vacate judgment as void due to lack of jurisdiction]; *Los Angeles v. Thompson* (1985) 172 C.A.3d 18, 20, citing the text [motion to vacate stipulated judgment of paternity on ground that it was obtained unconstitutionally];...*Howard v. Lufkin* (1988) 206 C.A.3d 297, 301, quoting the text; *Jade K. v. Viguri* (1989) 210 C.A.3d 1459, 1469, citing the text [motion under C.C.P. 473 to vacate default judgment];...(See *Los Angeles v. Gleneagle Dev. Co.* (1976) 62 C.A. 3d 543, 553...[appeal from judgment of dismissal was treated as if it were appeal from denial of motion to vacate....]; *Peltier v. McCloud River R. Co.* (1995) 34 C.A.4th 1809, 1814 [motion under C.C.P. 473 to vacate discretionary dismissal for lack of prosecution]....

Witkin's 2015 Supplement re Section 200 goes on to further cite *Shisler v. Sanfer Sports Cars* (2008) 167 C.A.4th 1, 5; and *Doppes v. Bentley Motors* (2009) 174 C.A.4th 1004, 1008, as holding motions to vacate under CCP 473 to be appealable orders. It should be clear that Witkin, and the courts as a whole treat orders of denial under CCP 663 as being as appealable as those under 473.

Witkin at section 200 (3) also distinguishes this Court's decision in *Clemmer v. Hartford Ins. Co.* (1978) 22 C.3d 865, 871, 890, which held, without citation of authority, an order denying a CCP 663 motion to be non-appealable, as being "incongruous" and mere "dicta"; especially in light of contrary outcomes in such cases, prior and subsequent, as *Hollister Convalescent Hosp. v, Rico* (1975) 15 C.3d 660, 663, *Forman v. Knapp Press* (1985) 173 C.A.3d 200 and of course, *Howard v. Lufkin, supra,* (1988) 206 C.A.3d at 301-302, which deem *Clemmer, supra,* a maverick decision rather than binding authority; and which this Court has permitted to remain in place

Eisenberg, et al, *Cal. Practice Guide, Civil Appeals & Writs,* Rutter Group, sections 2:171 and 2:173, is in accord. While the Court of Appeal's January 13, 2016 order of dismissal also cites Eisenberg et al, 2:169, to the effect that "as a general rule, orders denying a motion to vacate are not appealable", it distorts the assessment of the law in that treatise by blatantly ignoring the statement to the contrary at sections 2:171 and 2:173, which recognize, like Witkin, an exception for "statutory motions"...such as the very CCP 663 motion brought herein by Plaintiff/Appellant Ryan!

City of Los Angeles v Glair, supra, (2007) 153 C.A.4th 813 is inadequate to overrule what Witkin calls this "established rule". Apart from being a single, stand-alone case versus some 88 years of appellate decisions, *City of Los Angeles v. Glair* bases its decision in large part on *Clemmer, supra,* which as we have seen is generally perceived as "incongruous" and not a binding precedent. It also

concerns a post-trial motion filed more than six months following the judgment it sought to overturn, thus a motion patently invalid in the first place. And it concerns what is not so clearly a *statutory motion* like the CCP 663 motion in the present case (the determinative factor, per both Witkin and Eisenberg and the cases they discuss) but a more non-statutory motion--for judgment NOV. Thus, the *City of Los Angeles v. Glair* court's discussion of CCP 663 motions was all in the context of "let's *pretend* we were dealing with a 663 motion". This renders its decision dicta at best. That decision accordingly can hardly reasonably be read by this Court as overturning the 88-year body of case law, including many of this Court's decisions, cited in Witkin, *supra.*

In light of this broader, deeper look into the case law and commentary in the leading treatises, Petitioner respectfully requests that this Court (a) grant a hearing in order to clarify once and for all the appealability of post-trial statutory motions; (b) ultimately uphold and apply the "established rule" of law summarized at length in Witkin, Appeal, section 200; (c) recognize Petitioner's motion to vacate under CCP 663, filed on December 19, 2014 and denied on May 22, 2015, to be such a statutory motion, subject to an appeal; (d) rule that Petitioner's Notice of Appeal of June 12, 2015 was timely in regard to the denial of that motion, and (e) accordingly overrule the Court of Appeal's order of dismissal of January 13 and allow Petitioner's appeal in that court to proceed.

2. The Superior Court's active interference with Petitioner's original post-judgment motion hearing schedule which would have had him on track to file a timely appeal, without any warning of possible consequences, and in the context of complete abandonment by his attorney, entitles him to equitable relief.

In *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985, this Court held that two pro per defendants applying for CCP 473 relief from a default, even beyond the statutory six months jurisdictional limit, were entitled to that relief, when the default had stemmed from misadvice from a court clerk about the applicable filing fee, and the failure to seek timely relief was exacerbated by Plaintiff's counsel's intimidating and false statements. We extract from the holding of that case the essence that when some affirmative act by the court results in or contributes to a pro per party's default, e quitable relief to that party is appropriate. All the more so when, as here, the party's pro per status results from abandonment by his or her counsel.

A concurring opinion in *Rappleya* (at p. 985) explains that while "special privileges cannot be shown litigants who choose to represent themselves...they should not be penalized *because* they represent themselves. In extreme cases like this, legal technicalities must, and under our statutes may, be tempered by justice....'Time limits and procedural technicalities [Defendants] lacked the expertise to know about were turned against them". Much the same, Petitioner suggests, may be said of his situation as he waited five months for the Superior Court to get around to ruling on his Motion to Vacate the October 24,

dismissing his case because of his absence for trial in San Francisco--due to his being hospitalized in Tijuana, Mexico

Compounding Petitioner's lack of bearings were his attorney of record Ian Kelley's aggressive attempts to be relieved as Petitioner's counsel (CT 19-46). Thereafter, Mr. Kelley refused to have anything further to do with Petitioner. It will be noted that all motions following the Order of Dismissal, beginning November 4, 2014 (CT 90) were *necessarily filed in pro per, because Mr. Kelley had by that point abandoned Petitioner; even though no Substitution of Attorneys was filed until December 5* (CT 152).

It surely adds weight to Petitioner's claim to relief on grounds of equity and fairness, that a litigant's total abandonment by counsel constitutes grounds for relief from a default. *Seacall Dev., Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 C.A.4th 201, 208. This is true even in regard to a default on a jurisdictional matter. *Baccus v. Sup. Ct.* (1989) 208 Cal. App.3d 1526, 1533 (dictum).

For after all, Petitioner was, from the order dismissing his case until the filing of the Notice of Appeal, an active, involved pro per litigant, not a dilatory one. Actively fighting for relief, he filed motions for reconsideration on November 4 and 19 (CT 90-150); and his subject statutory Motion to Vacate, which includes the attorney-abandonment argument, on December 19 (CT 185-187).

It is counter-intuitive that [leaving aside for sake of argument the legal fact that denials of statutory motions are themselves appealable] one should be obligated to file a Notice of Appeal before a pending Motion to Vacate has been ruled on. Yet it is inferable from Petitioners' behavior that he had a general understanding that the

motions he had filed extended his time to file Notice of Appeal to some degree, *and* that such would need to be done in short order following any adverse ruling on the motions; since he did file Notice of Appeal on June 12, only 21 days following the May 22 formal denial of the Motions to Vacate and for Reconsideration.

Thus, having diligently filed the Motion to Vacate on December 19, 2014 and obtained a February 17, 2015 hearing date, Petitioner was *on track to file a timely Notice of Appeal* of the October 24 order, probably by early March, if his Motion were denied. *The* ***only thing*** *that threw him off track was the court's blithe, plodding repeated continuances of his motion hearing, dates, against his will...with no intimation that there could be major consequences* as to the deadline for an appeal. Petitioner submits that all the above, particularly the Court's intervention on changing Petitioner's hearing dates, creates a sufficient analogy with the principles and holding of *Rappleyea v. Campbell, supra,* to entitle Petitioner to equitable relief from failure to file a timely appeal of the October 24 order.

CONCLUSION

For all the foregoing reasons, Appellant respectfully moves this Court to grant a hearing; and ultimately to reverse the Court of Appeals order of dismissal of January 13, 2016, and remand the appeal to that court for further proceedings.

Dated: February 22, 2016

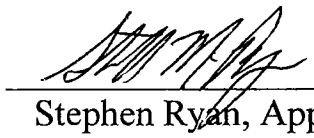
Respectfully Submitted,

Stephen Ryan, Petitioner in pro per

CERTIFICATE OF WORD COUNT

The text of this petition consists of 3604 words as counted by the Microsoft Word program sued to generate the brief.

Dated: February 22, 2016



Stephen Ryan, Appellant in pro per

PROOF OF SERVICE

I, Doug Hourcade, being over the age of 18 years and not a party to this action, having the business or residential address of 3181 Crestmoor, San Bruno, CA 94066 and the telephone number 650-219-0975, declare under penalty of perjury under the laws of California that on the date set forth below I served the foregoing Petition for Hearing in the manner and on the parties and/or entities set forth below:

By US Mail, First Class Postage Affixed (one copy each):

Andrew S. Cantor, Esq., 4132 3d Street, Suite # 7, SF, CA 94124

Mitchell S. Rosenfeld, Esq. 1638 Filbert St. SF, CA 94123

San Francisco Superior Court, 400 McAllister, SF, CA 94102, attn.

By hand delivery: Court of Appeal of California, 350 McAllister, SF, CA 94102

Dated: February 22, 2016

Doug Hourcade

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

STEVE RYAN,

Plaintiff and Appellant,

v.

MITCHELL S. ROSENFELD,

Defendant and Respondent.

A145465

(San Francisco County
Super. Ct. No. CGC 10-504983)

BY THE COURT:

On December 4, 2015, respondent Mitchell S. Rosenfeld filed a motion to dismiss this appeal on the ground that the appeal was untimely. An opposition has been filed by appellant. For good cause appearing, this court rules as follows:

"The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Under California Rules of Court, rule 8.104, (a)(1), plaintiff was required to file the notice of appeal within 60 days of service of the notice of entry of judgment or 180 days after entry of judgment. Even if plaintiff was not served with the notice of entry of judgment within 60 days, he did not file his notice of appeal within 180 days of the order dismissing the action.

The 180-day period is the outside limit for filing a notice of appeal. "The latest possible time within which a notice of appeal must be filed is 180 days after entry of judgment or entry of an appealable order . . . ." (*Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1454. Moreover, the 180-day rule is not "triggered" only upon the filing a valid proof of service, but it applies even where the record does not contain a document showing when notice of entry of order was mailed by the court clerk or served by the respondent on the appellant. (*Ibid.*) Finally, the 180-day period is not extended by

Cal. Rules of Court, rule 8.108, when the appellant has filed a post-trial motion for reconsideration or to vacate the judgment. (*Carpiaux v. Peralta Community College Dist.* (1989) 215 Cal.App.3d 1220, 1223 [180-day period is an outside limit and is not extended by rule 2 (predecessor rule to rule 8.108]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) [¶] 3.18, p. 3-9].)

On October 24, 2014 the trial court entered an order dismissing the action. Inasmuch as plaintiff's notice of appeal was filed on June 12, 2015, more than 180 days after the order or dismissal was filed, the appeal must be dismissed as untimely.

Plaintiff also argues that application of the 180-day rule in his case would be inequitable since the court did not warn him that its delay in ruling on his reconsideration motions would impact his appeal rights. ~(Opposition, pp. 4-5)~ This argument lacks merit. Plaintiff's status as a proper litigant does not excuse him from the duty to comply with the rules. An appellant in propria persona is held to the same standard of conduct as that of an attorney on appeal. (*Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 628.)

Plaintiff further argues that his appeal of the court's May 22, 2015 order denying his motion to vacate the judgment is timely. ~(Opposition, p. 6.)~ The order denying the motion to vacate the order dismissing the action, however, is not appealable. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 197, pp. 273-274.) To permit an appeal from an order denying a motion to vacate would effectively authorize two appeals from the same decision. (*Ibid.*, *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 822 [denial of a statutory motion to vacate the judgment is not separately appealable [criticizing *Howard v. Lufkin* (1988) 206 Cal.App.3d 297, cited by plaintiff in his opposition at p. 6].)

Therefore, good cause appearing, respondents' motion to dismiss the appeal is granted. Each party to bear their respective costs on appeal.

(Ruvolo, P.J., Reardon, J. and Rivera, J. concurred in this decision.)

Date: JAN 13 2016 _____ P.J.