



1 of 1 DOCUMENT

**SILVANA EGIZII et al., Plaintiffs and Appellants, v. SHAPELL INDUSTRIES,
INC., et al., Defendants and Respondents.**

G044125

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION THREE**

2011 Cal. App. Unpub. LEXIS 8547

November 7, 2011, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

PRIOR HISTORY: [*1]

Appeal from a judgment of the Superior Court of Orange County. Super. Ct. No. 30-2009-00118755. Gregory H. Lewis, Judge.

DISPOSITION: Affirmed.

COUNSEL: Law of Offices of Mark B. Plummer and Mark B. Plummer for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Dana A. Fox, Lisa W. Cooney, Michael S. Moss and Matthew B. Stucky for Defendants and Respondents.

JUDGES: RYLAARSDAM, ACTING P. J.; MOORE, J., FYBEL, J. concurred.

OPINION BY: RYLAARSDAM

OPINION

Plaintiffs Silvana Egizii and Alexandra Egizii, through her guardian ad litem, Ana Egizii, appeal from a judgment rendered in their favor. They complain the court erred in refusing to permit the introduction of evidence of what they characterize as "causation," and [*2] in denying their motion to amend their complaint to allege punitive damages. After the court entered judgment, appellants accepted a tender of the full amount owed and filed a full satisfaction of judgment. Under these circumstances they waived any claim of error in connection with the trial. The waiver does not extend to appellants' punitive damages claim but, for reasons stated below, the trial court did not err in denying appellants' motion to amend their complaint to assert such damages. We therefore affirm the judgment.

FACTS

Plaintiffs, aged 12 and 13 at the time, were awakened when the house owned by their parents was flooded. They and their parents escaped. The flood resulted from defendants performing grading on the property above the Egizii's house. Before plaintiffs filed suit, their parents settled their claims with defendants.

Plaintiffs' operative complaint asserts two cause of action: trespass and nuisance. The original complaint

contained a prayer for punitive damages. In June 2009, the trial court granted defendants' unopposed motion to strike the punitive damage request. In February 2010, one month before the scheduled trial, plaintiffs moved for leave to amend to again [*3] add a prayer for punitive damages. The court denied the request as an untimely motion for reconsideration and found there were no new facts justifying reconsideration. On the first day of trial, plaintiffs filed a second motion for leave to amend to add punitive damages. It was also denied.

Defendants admitted liability and the case was tried on the issue of damages only. The jury awarded each plaintiff \$250 in economic and \$5,000 in non-economic damages.

In June 2010, defendants sent plaintiffs' lawyer a check for the full amount of the judgment including interest, after having been told by the latter to whom the check should be payable. Plaintiffs' lawyer then executed and filed an acknowledgement of full satisfaction of judgment whereupon defendants moved to dismiss the appeal. We denied the motion.

DISCUSSION

1. Any trial error was waived by the execution and filing of the satisfaction of judgment

"Ordinarily, a party cannot accept the benefits of a judgment, in whole or in part, and then attack it by appeal. The party's conduct in taking any of a judgment's advantages while seeking to reverse it is inconsistent, and the result is a waiver of the right." (9 Witkin, Cal. Procedure (5th [*4] ed. 2008) Appeal, § 67, pp. 127-128 and cases cited there.)

There are exceptions to this rule. Where defendant acknowledges that plaintiff had the right to recover the amount tendered and the only issue is whether plaintiff is entitled to a larger amount, plaintiff may accept the amount tendered and still appeal. (*Browning v. Browning* (1929) 208 Cal. 518, 525; *Coffman v. Bushard* (1913) 164 Cal. 663, 665.) Another way to characterize this exception is that it applies where the appeal is limited to a specific and severable portion of the judgment. (*Preluzsky v. Pacific Co-operative Cafeteria Co.* (1925) 195 Cal. 290, 294.) This exception does apply to plaintiffs' punitive damages because that appeal is limited to a specific and severable portion of the judgment. We will therefore deal with that issue separately below.

As for plaintiffs' causation argument their acceptance of defendants' tender and issuance of the satisfaction of judgment constitutes a waiver of the claim. Although they undoubtedly hope that, if the case were remanded for a new trial, they would receive a larger judgment, such a result is not inevitable; a new trial could also result in a smaller award. Other cases hold [*5] that where the funds tendered by the losing party are held in a trust account, there is no waiver. (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1363-1364; *Phillips v. Isham* (1951) 105 Cal.App.2d 608, 611.) Although plaintiffs' lawyer claims to have deposited the moneys in his trust account, he also executed and filed a full satisfaction of judgment. This was not done in either of the cited cases. "Even if one of the exceptions to the waiver rule applies . . ., executing a satisfaction of judgment will preclude an appeal." (9 Witkin, *supra*, Cal. Procedure, § 78 at p. 140; see also *Mathys v. Turner* (1956) 46 Cal.2d 364, 366.)

In a letter brief, plaintiffs' lawyer states "[n]o [s]atisfaction of [j]udgment was offered until such time as the [d]efendants demanded that a satisfaction of [j]udgment be filed pursuant to *Code of Civil Procedure* § 724.010, which [p]laintiffs complied with" (Underlining omitted.) During oral argument plaintiffs' lawyer stated that this demand was accompanied by a threat of sanctions. These assertions are outside the record. But even were we to consider them, they are not sufficient. Plaintiffs could have waited for defendants [*6] to move the court for an order requiring the filing of a satisfaction under *Code of Civil Procedure* section 724.050. The motion procedure provides for sanctions only if the failure to file the satisfaction is "without just cause." (*Code Civ. Proc.*, § 724.050, *subd. (e)*.) Here, plaintiffs could have shown just cause for a refusal to file a satisfaction and could have tendered the sum deposited in his trust account back to defendants.

2. The trial court did not err in denying the motion to amend the complaint to seek punitive damages.

As noted, defendants' motion to strike the punitive damage allegations from the complaint was granted in June 2009. The motion to amend to again add these same allegations was filed in February 2010. Regardless of the title plaintiffs put on the notice of motion, this was, in effect, a motion to reconsider the court's earlier order. The name of the motion is not controlling. Where the motion asks the judge to decide the same matter

previously ruled on, the requirements for motions to reconsider apply. (*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 373 (conc. opn of Rylaarsdam, Acting P. J.); *Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 878.)

Motions [*7] to reconsider are governed by *Code of Civil Procedure* section 1008. Subdivision (a) thereof requires that such a motion be brought within 10 days from "service . . . of written notice of entry of [the] order." (*Forrest v. Department of Corporations* (2007) 150 Cal.App.4th 183, 202-203, disapproved on another ground in *Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1172, *fn.3.*) The court's order denying the motion indicates, among other reasons, that the motion was untimely. The parties failed to supply us with a record showing service of a notice of entry of the June 2009 order. But the first motion was also denied because plaintiffs failed to show "new or different facts," another statutory requirement. (*Code of Civ. Pros.*, § 1008, *subd. (b).*) The trial court found that there were no "new facts"; plaintiffs contention that punitive damages could be based on evidence defendants knew a flood was possible was known to them before they filed their complaint.

The second motion was based on evidence allegedly showing defendants could have repaired the house much sooner than they did. The trial court denied this motion because it was filed too late: "[T]his is devastatingly prejudicial by reason [*8] of the fact that it's filed, basically, as the motions in limine are filed just prior to trial." The court also concluded that the facts alleged failed to show fraud or oppression. Based on these findings we cannot conclude the court abused its discretion in denying permission to amend the complaint.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.