

Not Reported in Cal.Rptr.3d, 2007 WL 2703022 (Cal.App. 2 Dist.)

Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

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Court of Appeal, Second District, Division 2, California.

LA DONNA CORPORATION et al., Plaintiffs and Appellants,

v.

QANTAS AIRWAYS LIMITED et al., Defendants and Respondents.

No. B194743.

(Los Angeles County Super. Ct. No. BC342141).

Sept. 18, 2007.

APPEAL from a judgment of the Superior Court of Los Angeles County. Andria K. Richey, Judge. Affirmed.

Dunn **Koes**, Pamela E. Dunn, Daniel J. **Koes**, Mayo L. Makarczyk for Plaintiffs and Appellants.

Condon & Forsyth, Rod D. Margo, Scott D. Cunningham, James C. Finney for Defendants and Respondents Qantas Airways Limited and Maurice Palumbo.

Weston, Benshoof, Rochefort, Rubalcava & MacCuish, John D. Arya, Sayaka Karitani for Defendants and Respondents Sky Chefs, Inc., and Henry Delallana.

BOREN, P.J.

*1 A food vendor has sued an airline and the airline's meal preparer for allegedly breaching a contract to purchase products from the vendor. The trial court sustained demurrers to most of the complaint, without leave to amend. The vendor's attorney withdrew from the case. The vendor, a corporation, did not hire new counsel, though state law

prohibits it from representing itself. The trial court issued an OSC regarding the corporation's lack of representation. After a hearing, the court dismissed the case: the absence of counsel prejudiced defendants' efforts to prepare for the upcoming trial, and there was no indication that the vendor would hire counsel in the foreseeable future. We affirm.

ALLEGATIONS^{FN1}

FN1. The allegations are from the second amended complaint (SAC).

Respondent Qantas Airways Limited (Qantas) conducts international airline flights. Respondent Sky Chefs prepares in-flight meals for Qantas. Vendors submit bids indicating a fixed price at which they are willing to sell food to Sky Chefs for the duration of Qantas's six-month meal cycles. In exchange for a vendor's agreement to sell food at a fixed price, Qantas and Sky Chefs agree to purchase specified products from that vendor for six months.

Appellant La Donna Corporation is a food vendor doing business as A & B Specialty Foods. In January 2001, La Donna's president Barbara Russo met with Qantas's in-flight service manager, respondent Maurice Palumbo, to introduce La Donna's food products and services. Palumbo chose La Donna as a vendor for selected food items on Qantas flights between March and October 2001.

At a meeting with La Donna and Sky Chefs representatives in mid-2001, Palumbo informed La Donna that it could not change its food prices or substitute any items during the six-month meal cycle. Palumbo indicated that La Donna should receive estimated usages for food items from Sky Chefs, so that La Donna could stock sufficient quantities to provide Qantas with all of its requirements throughout the cycle, without changing its prices. In return, Qantas would purchase, through Sky Chefs, all that it required from La Donna alone.

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La Donna, Sky Chefs, and Qantas orally agreed to these terms.

In late 2002, respondent Henry Delallana began to work as materials manager for Sky Chefs. He instructed Sky Chefs buyers to purchase food items from vendors other than La Donna. Sky Chefs began to order less than the estimated usage amounts from La Donna. La Donna believes that Delallana (1) received kickbacks as an inducement to purchase food items from vendors other than La Donna; and (2) disclosed information about La Donna's bids, which are confidential and proprietary trade secrets, enabling competing vendors to undercut La Donna's prices.

In November 2004, a Sky Chefs buyer informed Barbara Russo that Sky Chefs was not purchasing all of Qantas's usage requirements from La Donna. La Donna was previously unaware of this because only Sky Chefs and Qantas know what Qantas's usage requirements are. Palumbo from Qantas confirmed that Sky Chefs was not ordering all items from La Donna. He assured Russo that he would create a spreadsheet with all products required from La Donna for the current meal cycle. Palumbo instructed La Donna to mark its products with a stamp, so that he could confirm that items in Sky Chefs' kitchens came from La Donna, and not from another vendor.

*2 La Donna was assured by Delallana that Sky Chefs and Qantas were purchasing all of Qantas's requirements from La Donna. However, by May 2005, it became clear that the new system implemented by Palumbo was not effective. La Donna discovered that Qantas and Sky Chefs did not intend to abide by their agreement for the meal cycle running from March-October 2005.

PROCEDURAL HISTORY

In October 2005, La Donna filed suit against Qantas, Sky Chefs and Delallana. Defendants demurred and La Donna amended the complaint, adding Palumbo as a defendant. The trial court sustained demurrers to the first amended complaint,

with leave to amend. The SAC asserts claims for (1) breach of a partly written, partly oral contract; (2) breach of a written contract; (3) goods had and received; (4) promissory estoppel; (5) fraud; (6) breach of joint venture; (7) breach of fiduciary duty; (8) discrimination; (9) unfair business practices; and (10) unfair trade practices.

The trial court sustained most of the demurrers to the SAC without leave to amend, overruling only the demurrer to the ninth cause of action for unfair business practices against Delallana, and the demurrer to the third cause of action for goods had and received against Qantas. The court observed that La Donna failed to cure defects in the pleadings and that new allegations in the SAC were inconsistent with prior versions of La Donna's complaint.

La Donna's trial counsel asked to withdraw from representation in September 2006. La Donna agreed that the relationship between it and trial counsel "has deteriorated, and that La Donna needs new counsel" because it cannot represent itself. Nevertheless, La Donna opposed the withdrawal because it was unable to find new counsel, given the February 2007 trial date, and because of the cost of hiring new counsel. While the motion to withdraw was pending, La Donna failed to respond to requests for discovery. On October 13, 2006, the trial court granted counsel's motion to withdraw and set an OSC hearing regarding La Donna's failure to find new counsel. The court ordered that La Donna serve discovery answers and Russo appear for a deposition before December 14, 2006.

On November 14, 2006, the court held the hearing on the OSC, and entertained La Donna's excuses for failing to hire new counsel. Due to the unanswered discovery requests, which affected defendants' pending motion for summary judgment, and the unlikelihood that La Donna would soon find new counsel, the court ruled that defendants were prejudiced by La Donna's delays and it dismissed the lawsuit.

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DISCUSSION

La Donna's two appeals were consolidated on January 8, 2007. The trial court's signed dismissal of La Donna's case (for failure to hire an attorney and respond to discovery) is a final, appealable judgment, and is reviewed for an abuse of discretion. (Code Civ. Proc., § 904.1, subd. (a)(1); *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145.)

1. Dismissal Order

*3 The trial court dismissed La Donna's case because the corporation lacked counsel, could not represent itself, was not responding to discovery, and had failed to hire a new lawyer. La Donna learned in September 2006 that its trial counsel was withdrawing, and that it could not represent itself. For the next two months, La Donna failed to find new counsel and had not, in the trial court's view, "shown any reasonable likelihood of so doing in any reasonable period of time." While counsel was in the process of withdrawing, "numerous outstanding discovery obligations, summary judgment briefing, and other trial preparation matters" were impeded, according to the court. The court found that La Donna did not "demonstrate a willingness to obtain counsel and proceed with its obligations in this action in any reasonable or even foreseeable time frame," thereby prejudicing the defense's ability to prepare for trial.

A corporation cannot participate in litigation unless it is represented by a lawyer. (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 729-730; *Paradise v. Nowlin* (1948) 86 Cal.App.2d 897, 898.) A corporation that attempts to appear in court without an attorney is entitled to "a reasonable time to secure counsel." (*CLD Construction, Inc. v. City of San Ramon, supra*, 120 Cal.App.4th at p. 1148.) It is appropriate "to treat a corporation's failure to be represented by an attorney as a defect that may be corrected, on such terms as are just in the sound discretion of the court." (*Id.* at p. 1149.) The trial court "retains authority to

dismiss an action if an unrepresented corporation does not obtain counsel within reasonable time." (*Id.* at p. 1150.)

It lies within the trial court's discretion to determine what constitutes a "reasonable time" in which a corporation must retain counsel. In *Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 547, for example, the appellate court upheld a trial court order informing a trustee that he had to obtain counsel to represent the trust within 30 days or face dismissal.

The court has a duty to advise the corporation of the need for counsel; if the entity then fails to hire counsel, the court may enter a default against the corporation for nonappearance. (*Van Gundy v. Camelot Resorts, Inc.* (1983) 152 Cal.App.3d Supp. 29, 31-32.) By granting an attorney's motion to withdraw from representation of a corporation, the court puts "extreme pressure" on an "uncooperative corporate client who has not been willing to bring in new counsel" because the corporation "risks forfeiture of its rights through nonrepresentation." (*Ferruzzo v. Superior Court* (1980) 104 Cal.App.3d 501, 504; *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284, fn. 5; *Smith v. Microskills San Diego L.P.* (2007) 153 Cal.App.4th 892, 895, fn. 3.)^{FN2}

FN2. In federal court, it is "perfectly appropriate" to enter a default against a corporation that ignores a trial court order to retain counsel, because the corporation cannot appear in federal court without licensed counsel. (*U.S. v. High Country Broadcasting Co., Inc.* (9th Cir.1993) 3 F.3d 1244, 1245.)

La Donna maintains that the trial court had no authority to dismiss the case. A court has inherent authority to dismiss claims where "(1) the plaintiff has failed to prosecute diligently [citation]; or (2) the complaint has been shown to be 'fictitious or sham' such that the plaintiff has no cause of action." (*Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 915.) The court also has authority to dismiss a case

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for failure to respond or submit to an authorized method of discovery. (Code Civ. Proc., §§ 2023.010, subd. (d), 2023.030, subd. (d)(3); *Rail Services of American v. State Comp. Ins. Fund* (2003) 110 Cal.App.4th 323, 331.)

*4 In this instance, La Donna had a reasonable and sufficient length of time to hire legal counsel and move its case forward. In September, La Donna's attorney announced her intent to withdraw. In October, the court issued an OSC regarding La Donna's failure to hire new counsel. In November, the corporation still had no attorney and had no plans to hire one until after Barbara Russo returned from caring for her ailing mother in Italy, at some indeterminate time in the future.^{FN3}

FN3. At the November 14 hearing, the court was informed that until Russo "is back in Los Angeles to meet fact to face with trial counsel, trial counsel can't come into the case."

Without counsel, the corporate plaintiff had no ability to prosecute its lawsuit. Without counsel, La Donna could not and did not respond to discovery. Its failure to respond to discovery prejudiced respondents' ability to complete their pretrial motions for summary judgment and prepare for trial. La Donna president Barbara Russo was in Italy, with no return date. It is not reasonable that this litigation should be delayed indefinitely, pending Russo's return and hinging upon her ability to find a lawyer willing to represent the corporation. Absent any indication that the unrepresented corporation intended to hire counsel, respond to discovery, and participate in the litigation by a certain date, or even in the foreseeable future, the trial court properly dismissed the case because there was no alternative means of exercising its authority.

2. Ruling on Demurrer

Apart from the dismissal order, La Donna seeks review of the trial court's intermediate rulings on demurrer. In an appeal from a final judgment, "the reviewing court may review the verdict or de-

cision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party...." (Code Civ. Proc., § 906.) "Section 906 permits review of an intermediate ruling which is a necessary predicate to the appellant's claim of error." (*Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1671.) The case must be viewed "as if the correct intermediate ruling had been made." (*Ibid.*)

An order sustaining demurrers is generally reviewable on appeal from the final judgment in the action. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 128; *Singhania v. Uttarwar* (2006) 136 Cal.App.4th 416, 425.) However, review of a ruling on demurrer may be rendered unnecessary, if that ruling is moot. For example, a court may strike a pleading because it was filed without the court's permission and without statutory authority. (*United States Nat. Bank v. Bank of America* (1963) 214 Cal.App.2d 74, 76.) If the pleading is properly stricken, there is no point in reviewing the trial court's ruling on demurrers to the pleading: the demurrers are moot because the pleading "is no more." (*Ibid.*)

In this case, the trial court's ruling on the demurrers was mooted by its decision to dismiss the entire case for failure to hire an attorney. The ruling on the demurrers was not a necessary predicate leading to the court's dismissal of La Donna's case. The two rulings were entirely unrelated. Assuming, for purposes of argument, that the ruling sustaining the demurrers was erroneous, the error would not change the outcome of the case. The case would have been dismissed for failure to hire an attorney even if every cause of action asserted by La Donna was well pleaded.

*5 Having found that the trial court did not abuse its discretion by dismissing the case for failure to hire an attorney, we are not free to reverse the judgment based on an unrelated, interim order. No judgment may be reversed "by reason of any error, ruling, instruction, or defect" unless the error was "prejudicial" and "a different result would have

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been probable" absent the error. (Code Civ. Proc., § 475.) The error must result in a miscarriage of justice. (Cal. Const., art. VI, § 13.) Any error in this case was not prejudicial: the same result would have occurred even if all of the demurrers were overruled. La Donna is not entitled to resurrect its case-after failing to timely hire an attorney-merely because some of its claims were disposed of before the trial court dismissed La Donna's action in its entirety.

DISPOSITION

The judgment is affirmed.

We concur: DOI TODD and ASHMANN-GERST,
JJ.

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