Not Reported in Cal.Rptr.3d, 2007 WL 3379990 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 3379990 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 5, California.
MINEHART SURGERY CENTER, et al., Plaintiffs and Appellants,
v.
PRISMA CONSTRUCTION COMPANY, INC., et al., Defendants and Respondents.

No. B194496.
(Los Angeles County Super. Ct. No. BC282014).
Nov. 15, 2007.

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed.
Negele & Associates, Kenneth H. Coronel; Dunn **Koes**, Pamela E. Dunn and Daniel J. **Koes** for Plaintiffs and Appellants.

Victor & Victor and Robert M. Victor for Defendants and Respondents Prisma Construction Company, Inc. and Alberto Santizo.

Law Office of N. Munro Merrick and N. Munro Merrick for Defendant and Respondent Gordon Merrick.

ARMSTRONG, J.

***1** Plaintiffs and appellants Dr. Michael Minehart, Nancy Minehart, and Minehart Surgery Center (together the "Mineharts") appeal two separate judgments entered by the trial court: a judgment entered in favor of defendant and respondent Gordon Merrick following his successful motion for summary judgment, and a judgment of dismissal entered in favor of defendants and respondents Prisma Construction Company, Inc. (Prisma) and Albert Santizo. Finding no error, we affirm both judgments.

FACTUAL AND PROCEDURAL BACKGROUND

In 2000, the Mineharts initiated a construction project to build an ambulatory surgical center in Encino (the "Surgery Center") within an existing building. In October 2000, the Mineharts and Merrick entered into a contract pursuant to which Merrick agreed to provide consulting services with respect to "certification/licensure/ accreditation" activities relating to the Surgery Center. They also engaged the engineering services of Pedro Montenegro & Partners ("Montenegro") to draw plans for the Surgery Center (the "Plans"), which Plans were to incorporate Merrick's advice regarding features that were required in order to obtain "state licensure and Medicare certification." In April 2001, the Mineharts contracted with Prisma to construct the Surgery Center in accordance with the Plans. Construction commenced in September 2001, and was to be completed in 16 weeks.

The Mineharts were not satisfied with the services of Merrick or Prisma. Specifically, they contend on appeal that Prisma "failed to build the center in accordance with the plans because among other things (1) the building was constructed too high from the grade, (2) the ceilings were installed at the wrong height, (3) the HVAC ducting was improperly installed, and (4) the bathrooms were not built as dictated by the plans. [¶] By building the ceilings too high from grade, Prisma made it impossible for the air conditioning units to be placed on top of the ground floor roof-as the plans required-because they would have blocked the building's second-floor windows. As a result, the air conditioning units were placed inside the building, occupying otherwise usable space. As a result, the Mineharts had to rent additional space in the building to make up for the loss of square footage and therefore the value of the property decreased. [¶]

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The defects caused a delay in the completion of the surgical center, causing the Mineharts to lose scheduled appointments and revenue. The Mineharts were also forced to spend thousands of dollars to fix the construction problems."

As to Merrick, the Mineharts claim that when they met with Eric Stone, an employee of the Los Angeles County Department of Health Services in 2002, they "discovered that-despite Merrick's representations to the contrary-Mr. Stone had not approved the plans. The Mineharts also learned that various elements necessary for Mr. Stone's approval had not been incorporated into the project. After the meeting, the plans were re-worked and approved by Mr. Stone. [¶] The plans were required to comply with requirements promulgated by the Office of Statewide Health Planning Division (OSHPD) known as OSHPD 3. But Merrick never informed the Mineharts about the need to comply with these requirements. As a result, the Mineharts amended their contract with Pedro Montenegro and he redesigned the project to comply with OSHPD 3 and receive OSHPD certification."

***2** On September 24, 2002, the Mineharts sued Prisma and its owner, Albert Santizo, for breach of contract; a second amended complaint included allegations of negligence and fraud as well. Prisma filed a cross-complaint against Montenegro. As explained in their opening brief, "Although the Mineharts believed that all necessary parties had been named in the action, they determined that it would be necessary to include Merrick as a defendant because Merrick was hired to ensure that the plans would pass all state and federal requirements and failed to do so. Accordingly, the Mineharts substituted Merrick as a doe defendant." After answering the complaint, Merrick cross-complained against the Mineharts for breach of contract.

On January 4, 2005, Merrick filed a motion for summary judgment. The court granted that motion on March 25, 2005, and entered judgment thereon on August 23, 2006.

Trial of the lawsuit against Prisma and Santizo commenced on August 22, 2006. The next day, Dr. Minehart, acting in pro. per., failed to appear for trial. After a telephone conference in which Dr. Minehart stated that he did not know when he would be able to appear, the trial court declared a mistrial and set an Order to Show Cause re Dismissal. At the subsequent hearing, the court dismissed the lawsuit against Prisma and Santizo.

The Mineharts appeal the judgments in favor of Merrick, Prisma and Santizo.

DISCUSSION

1. *Denial of leave to amend as to Merrick*

As mentioned above, Merrick, who had been added as a Doe defendant in October 2003, filed his motion for summary judgment on January 4, 2005. In that motion, Merrick asserted that there was only one cause of action in the Mineharts' complaint which could theoretically apply to him-the "Third Cause of Action Against All Defendants for Negligence." [FN1] That cause of action alleged four failures of the "Defendants": "(1) "built the building too high from the grade;" (2) "built the bathrooms improperly and not according to plans;" (3) "installed the ceiling at an improper height;" (4) "failed to open and install proper HVAC ducting." However, the consulting agreement between Merrick and the Mineharts stated that Merrick was to provide consulting services, not construction services, and specifically provided that Merrick "shall not be responsible for the performance of the architect or of the construction contractor, or for any failure of the architect or the construction contractor to comply with the terms of his or its respective contracts." In sum, Merrick's summary judgment motion was well-founded.

> FN1. The other three causes of action identified specific defendants by name, but did not name Merrick.

On February 25, 2005, over seven weeks after Merrick filed his motion for summary judgment, the Mineharts filed a motion to amend their com-

plaint to allege that Merrick had misrepresented that the city had approved the Plans and that he failed to advise them about certain licensing requirements. Hearing on the Mineharts' motion was scheduled for April 4, 2005, approximately two weeks after March 25, 2005, the date on which Merrick's summary judgment motion was to be heard.

***3** The trial court granted Merrick's motion for summary judgment. In so doing, the court rejected the Mineharts' contention that they were entitled to amend the complaint to allege viable causes of action against Merrick because the allegations of the proposed amended complaint "were not new to Merrick because discovery had been conducted based on these allegations." The court also denied a subsequent motion for reconsideration, in which the Mineharts argued that, the summary judgment motion notwithstanding, they were entitled to amend their pleadings if they could allege facts stating a cause of action against Merrick.

In ruling on the motion for reconsideration, the trial court commented on the fact that Merrick had come into the case as a Doe defendant, which the court noted "was unwarranted [and] unjustified under the statute" because "[t]he facts pleaded did not address his ... wrongful conduct." Indeed, Merrick's identity and involvement with the Surgery Center were known to the Mineharts at the time they originally filed the complaint, compounding the issue of delay. The court was also concerned about the substantial delay-more than seven weeks-between the filing of Merrick's summary judgment motion and the Mineharts' motion for leave to amend. This delay prevented the motion for leave to amend from being heard before the motion for summary judgment. Notwithstanding the fact that the Mineharts had all of the facts necessary to name Merrick when they filed their original complaint in September 2002, they named him as a Doe defendant in October 2003, knowing that the complaint was deficient as to him; failed to seek leave to amend before Merrick filed a meritorious motion for summary judgment; and failed to have their belated motion for leave to amend heard until after the trial court heard and ruled on Merrick's motion. The Mineharts contend on appeal that the trial court abused its discretion in disallowing an amendment to the complaint to allege viable claims against Merrick.

Initially we note that this case comes to us in an unusual procedural posture. While the Mineharts purport to appeal the August 23, 2006 judgment entered in favor of Merrick, they do not argue that the trial court erred in granting summary judgment. Rather, their contention is that the court should have permitted them leave to amend their complaint. However, the hearing on their motion for leave to amend was never held, since the court granted Merrick's motion for summary judgment. The Mineharts subsequently moved for reconsideration, which motion was denied.

The Mineharts rely on *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960 (" *Honig*"), *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, *Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, and *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059 (" *Kirby* "), to argue in effect that the trial court had no discretion to deny leave to amend under the facts of this case. The cited cases do not support the argument.

***4** In *Honig,* like the instant case, the plaintiff filed a motion for leave to amend after the defendants filed motions for summary judgment. That is, however, the only similarity to the case before us. In *Honig,* all motions were heard together. The trial court granted the summary judgment motions and denied the motion for leave to amend. The appellate court reversed, finding an abuse of discretion in the refusal to permit the amendment. However, the court's reason for doing so was not simply that plaintiff could state a viable cause of action. It was because the viable cause of action which he did not allege in his original complaint arose *after* the complaint was filed. As the *Honig* court noted, "The proposed amendments finished telling the story be-

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gun in the original complaint. The added assertions described the continuation of the events asserted in the initial pleading." (*Id.* at p. 966.) Unlike this case, there was no deficiency in the complaint as originally filed, which deficiency the plaintiff sought to cure by belatedly seeking to amend the complaint. Thus, *Honig* does not provide authority for this court to reverse the trial court's ruling in this case.

Similarly, in *Mesler v. Bragg Management Co., supra,* 39 Cal.3d 290, two years after filing the original complaint, the plaintiff substituted the defendant in as a Doe defendant based on information learned during discovery. The defendant moved for summary judgment, contending that the alter ego theory upon which plaintiff was relying to hold it liable was not pled in the original complaint. The Supreme Court ruled that, under these facts, the plaintiff should have been allowed to amend his complaint. (*Id.* at pp. 296-297.) The Mineharts do not occupy a position similar to the plaintiff in *Mesler.* They did not add Merrick as a Doe defendant based on information learned in discovery, and did not seek to amend their complaint to assert a new theory of recovery based upon facts which did not exist at the time the complaint was filed. Again, *Mesler* does not support the Mineharts' position.

Roemer v. Retail Credit Co., supra, 44 Cal.App.3d 926, involved the retrial of a defamation case after a jury verdict in favor of the plaintiff had been reversed based on erroneous jury instructions. "At the close of defendant's case and prior to the giving of instructions to the jury, defendant requested leave to amend its answer to plead partial truth of the defamatory statements in mitigation of damages. This request was denied...." (*Id.* at p. 938.) As the court stated, "Although failure to permit such amendment where justice requires it is an abuse of discretion [citations], the objectionable subject matter of the amendment, the conduct of the moving party, or the belated presentation of the amendment are appropriate matters for the reviewing court to consider in evaluating the trial court's exercise of discretion." (*Id.* at p. 939.) The court noted as well that, "The law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may-of itself-be a valid reason for denial. The cases indicate that the denial may rest upon the element of lack of diligence in offering the amendment after knowledge of the facts, or the effect of the delay on the adverse party [citations]." (*Id.* at pp. 939-940.) *Roemer* affirmed the trial court's denial of leave to amend. Not surprisingly, the appellate court found that "a long delay in offering the amendment after knowledge of the facts could very reasonably be construed by the court to constitute a lack of due diligence, a finding which is implicit in the trial judge's observation that it would be improper to permit the proposed amendment after the entire case had been tried on the basis of the stipulation of falsity." (*Id.* at p. 940.)

***5** Here, the trial court relied on *Record v. Reason* (1999) 73 Cal.App.4th 472 in denying the Mineharts' motion for reconsideration. In that personal injury case arising from an inner tube/boating accident, the trial court denied the plaintiff leave to amend to allege a cause of action for intentional or reckless conduct. The *Record* court noted that, "The only facts supporting the motion to amend were put forth in a conclusory declaration of counsel in which he stated: '[I]t was discovered through the process of discovery that [appellant] had asked [respondent] to please drive the boat slowly so that [appellant] would not get hurt due to the fact that this was [appellant's] first time on an inflatable 'swept wing' (tube). It was also discovered that at the time of the injury and prior thereto, [respondent] was very much aware of [appellant's] prior medical condition. [Respondent] acted with intentional, willful, and recklessness [sic] abandon when, while exceeding the recommended speed limit and breaking recommended rules regarding turning while pulling said 'swept wing,' maneuvered the boat in such a way as to swing the [appellant] side-to-side causing great velocity and a whipping sensation which threw [appellant] off...."

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(*Id.* at p. 486.)

Quoting *Roemer v. Retail Credit Co., supra,* 44 Cal.App.3d at pages 939-940, the appellate court in *Record* observed that, " 'even if a good amendment is proposed in proper form, unwarranted delay in presenting it may-of itself-be a valid reason for denial.' " The Mineharts tell us that *Record* "does *not* stand broadly for the idea that a plaintiff's delay in bringing new allegations to defeat a motion for summary judgment is a sufficient basis for denying leave to amend without considering other factors." We believe that this is precisely what *Record* and *Roemer* hold.

In sum, in denying the motion for reconsideration, the trial court remarked: "There is no diligen[ce] showing in seeking to amend. The Plaintiff knew of Merrick's involvement and identity before the original, First Amended and Second Amended Complaints were filed. Plaintiff's subsequent naming of Merrick as a Doe was manifestly improper under the criteria in CCP Section 474.[¶] The existing Second Amended Complaint did not set forth what Merrick was actually charged with doing, but Plaintiff made no efforts to change that pleading until after Merrick had filed his summary judgment motion which, on its face, had merit. Even then, Plaintiff waited over seven weeks to move to amend, only filing the papers about the time the opposition to the summary judgment motion was due and noticing it for hearing after the summary judgment motion was to be heard. Plaintiff made no attempt whatsoever to have the issue heard prior to summary judgment. Neither in its papers nor in oral argument does Plaintiff make any appropriate explanation for this history of delay. Under *Record v. Reason,* 73 Cal.App.4th 472, this unexplained delay is an appropriate basis ... for denying late leave to amend. Plaintiffs' Counsel has made a succession of tactical choices and now must live with them, ..."

***6** As the trial court noted, *Record v. Reason, supra,* makes clear that the Mineharts were not, as they repeatedly assert, "entitled" to amend their complaint. Rather, the trial court was entitled to conclude that the Mineharts' unexplained delay in properly asserting their claims against Merrick did not warrant the exercise of discretion in their favor. That decision is fully supported by the record on appeal. Consequently, we affirm it.

2. *Judgment of dismissal in favor of Prisma and Santizo*

After several continuances at defendants' request, the trial on the complaint and cross-complaint between the Mineharts and the contractor, Prisma, was set for August 22, 2006, with a final status conference on August 11, 2006. At the status conference, the Mineharts' attorney, Michael O'Brien, stated that he was prepared to go to trial on August 22, 2006. At his clients' request, O'Brien asked for a continuance, explaining that he believed that the Mineharts intended to fire him. The court stated that the case had already been continued, and that it would not grant any further continuances, even if the Mineharts fired their lawyer. At that point, the Mineharts began to look for new trial counsel.

The Mineharts appeared for trial with attorney O'Brien on August 22, 2006, and requested a continuance. The request was denied. The Mineharts then announced that they were firing Mr. O'Brien. Before accepting the Substitution of Attorney by which Dr. and Mrs. Minehart undertook to represent themselves, the court asked Mr. O'Brien: "are you doing this on the assumption that you are getting a continuance?" Mr. O'Brien replied in the negative. Within minutes of having been substituted in, Dr. Minehart requested a continuance of the trial, stating for the first time that he terminated Mr. O'Brien for lack of preparedness for trial. The court responded: "Sir, this trial date has been set for quite some time.... And you have chosen on the very day of trial ... to do this...." Dr. Minehart informed the court that, "Something occurred at lunch time that I didn't like." When asked how that was relevant to the request for a continuance, Dr. Minehart stated, "Well, I think I have a solid case, and I think I need better counseling."

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"The court: ... are you telling me we can't go forward or you want to suggest that we ought not to go forward and have got no notion when we could?

"[Dr. Minehart]: At this point, Judge, I have a patient in the hospital who is critical, who has got a severe infection. My mind is over there thinking about that patient. I have got too many issues on my plate.... And I think I need a-you know, adequate representation. I am asking the court to honor that request.

"...

"The court: I don't see that there is good cause to continue this, sir. This is the day of trial. You can't waltz in here on the day of trial and decide you are going to dump your attorney and say, well, now that I have dumped my attorney, I don't know what I am doing[,][s]o I have got to have time to do it. You have chosen this particular course, sir, and this case has been twice continued. We are here with a jury. You have demanded [a] jury, and I have got the jury waiting. And we have got the time to do this. So we are going to proceed forward."

*7 The court then empanelled the jury and discussed various issues with the parties about the verdict forms, jury voir dire, etc.

That night, the Mineharts and their appellate counsel prepared a writ petition seeking to continue the trial. The petition was filed in this court on August 23, 2006, and denied the same day.

On August 23, 2006, Dr. Minehart did not appear for trial. Mrs. Minehart presented his declaration explaining that he was caring for a patient in the hospital on an emergency basis; the patient was in dire straits, and could only be treated by Dr. Minehart. During a telephone conference in open court, Dr. Minehart indicated that he did not know when he would be able to appear at trial. The court found that, "because of Dr. Minehart's nonappearance on August 23rd, 2006, and his statement that he cannot tell when he will be able to appear to participate in the trial, that a mistrial is necessary." The court also determined, however, that responsibility for the mistrial lay squarely with the Mineharts, was a direct result of their decision to discharge their attorney after the case had been called for trial, "[a]nd was motivated in significant part by their desire to seek a global settlement of litigation including with parties not before the court." Defendants requested that the complaint be dismissed for failure to appear for trial, and that plaintiffs' default be entered on the cross-complaint. The court issued an order to show cause "why the Mineharts' complaint should not be dismissed and their answer to the cross-complaint stricken and their defaults entered and/or why monetary sanctions should not be imposed upon them."

At the hearing on the order to show cause, the court remarked: "The court has the impression, substantiated by the terms of the writ petition-the writ petition was filed on the morning of the [23rd], on the morning of the day that Doctor Minehart failed to appear-that this situation-his [newly-retained] attorney was manipulating for the express purposes of obtaining a continuance; and he required, he caused the situation where a mistrial had to be declared, and we wasted a jury and we wasted two days and the defense was put to considerable trouble and expense because Doctor Minehart became dissatisfied with his [old] attorney; and after trial-on the day of trial, after trial had already begun, after the case had already been called for trial, he fired that attorney and then didn't want to go forward. [¶] ... [¶] Now, the various papers that have been submitted to me suggest that Doctor Minehart's dissatisfaction went back some considerable period of time...." Indeed, the court focused on the fact that the Mineharts "substituted out Mr. O'Brien at one thirty in the afternoon with a jury waiting in the hallway knowing, according to him, that he was unprepared to try the case. He had no intention of trying the case. [¶] The substitution was manipulated. If I accept the assertion in his declaration, the writ petition, the substitution was manipulated at that point in time, and without the knowledge of

this one patient's condition to attempt to obtain-that's what I view he was doing in court." In short, the trial court concluded that Dr. Minehart terminated his counsel and substituted himself into the case knowing and intending that he would not appear in court to represent himself. The record is replete with substantial evidence of this finding.

***8** Based on the Order to Show Cause, the court stated: "Dr. Minehart undertook a course of action which was of dubious legitimacy and which was fraught with risk. His actions were prejudicial to the defendants, who were ready for trial on both their defense of the Complaint, and on the affirmative recovery sought in their Cross-Complaint, but who were denied their day in court with consequent significant expense and inconvenience. His actions were prejudicial to the Court, which had specifically reserved a block of time to try his case and had specifically scheduled other matters so as not to interfere with this trial. His actions were prejudicial to the public perception of the administration of justice, and tend to bring the court system into disrepute, because he wasted the services of a panel of 35 jurors, who had to be sent home without having been profitably used."

The court concluded that Dr. Minehart abandoned his claim. The complaint was dismissed with prejudice pursuant to Government Code section 68608, subdivision (b) and Code of Civil Procedure section 581, subdivision (d), and the plaintiffs' answers to the cross-complaint were stricken and their defaults entered.

The Mineharts contend on appeal that the trial court was not authorized to dismiss their complaint under the foregoing facts. If the Mineharts are correct, then the parties need not ask the court to grant them a continuance-they can simply fail to appear at trial and cite the many cases reciting a preference for trial on the merits. In truth, the trial court did not impose a terminating sanction in response to the Mineharts' failure to appear; it simply dismissed the complaint after the plaintiffs abandoned it. Indeed, the court could have dismissed the complaint at the time it declared the mistrial. It was only out of an abundance of caution and a willingness to give the Mineharts one more opportunity to establish their good faith that the court issued an order to show cause.

DISPOSITION

The judgment is affirmed. Respondents to recover costs.

We concur: TURNER, P.J., and MOSK, J.

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