

CHRISTOPHER SMITH et al., Plaintiffs and Respondents,
v.
THE WALTERS GROUP, Defendant and Appellant;
GALEN C. PAVELKO, INC., et al., Defendants and Respondents.
D058693

COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA

Dated: June 14, 2012

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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(Super. Ct. No. 37-2007-00073116-CU-CD-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Dismissed.

In this construction defect case, the seller challenges the trial court's order determining the settlement between the buyers and the builder was made in good faith. (Code Civ. Proc., § 877.)¹ The seller contends the settlement did not qualify for good faith determination because it was not made until after the builder's liability to the buyers had been established by an arbitration award. We dismiss the appeal because it is barred by the seller's post-judgment settlement with the buyers and satisfaction of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Real estate developer The Walters Group (Walters) purchased five lots from a master developer and contracted with Galen C. Pavelko and his construction firm, Galen C. Pavelko, Inc. (collectively Pavelko), to build houses on the lots. Walters sold one of the improved lots to Christopher and Maud Smith. After moving in, the Smiths noticed a strong and obnoxious odor permeating the house.

The Smiths sued Walters and Pavelko (as well as several other defendants not involved in this appeal) for damages and other relief based on construction defects. On the petition of Walters, joined by Pavelko, the trial court ordered the Smiths to arbitrate their claims against Walters and Pavelko pursuant to the arbitration clause in the purchase agreement, and stayed the action pending completion of the arbitration. (§§ 1281.2, 1281.4.)

The arbitrator awarded the Smiths damages of approximately \$1.5 million jointly and severally against Walters and Pavelko. After receiving the award, Walters requested the arbitration hearing remain open to address, among other issues, whether Walters was entitled to a setoff for settlements the Smiths had received from other defendants not involved in the arbitration. Counsel for Walters and the Smiths, but not Pavelko, submitted letter briefs and met with the arbitrator regarding that issue.

While the issue of Walters's entitlement to a setoff was pending before the arbitrator, Pavelko reached a settlement with the Smiths and moved the trial court to find the settlement was made in good faith. (§ 877.6, subd. (a)(1).)² Pavelko agreed to pay the Smiths \$500,000 "contingent upon," among other things, "[a]n order finding the settlement to be in good faith pursuant to [sections] 877 and 877.6." The court determined the settlement was made in good faith, granted Pavelko's unopposed motion, and ruled the settlement "bar[red] any other joint tortfeasor or co-obligor from any further claims against Pavelko for equitable comparative contribution or partial or comparative indemnity based on comparative negligence or comparative fault." (§ 877.6, subd. (c).)

On the same day the trial court determined the Smith-Pavelko settlement qualified as a good faith settlement under section 877, the arbitrator issued a supplemental award in which he reached the opposite conclusion. The arbitrator reasoned (1) only settlements made "in good faith before verdict or judgment" qualified for setoff (§ 877, subd. (a), italics added); (2) his initial award, which determined liability and damages, qualified as a "verdict" within the meaning of section 877; and (3) the settlement between the Smiths and Pavelko was made after issuance of that award.

After receiving the arbitrator's supplemental award, Walters moved the trial court to "correct" the award, as modified by the supplemental award, on the ground the arbitrator exceeded his powers by refusing to reduce the damages for sums the Smiths had agreed to accept from Pavelko and other defendants in settlement. (§ 1286.6, subd. (b).) The trial court ruled it could not order such a "correction" because it would affect the merits of the arbitrator's decision; instead, the court confirmed the arbitration award and entered judgment in favor of the Smiths and against Walters for approximately \$1.5 million. (§ 1286.)

Next, Walters moved the trial court to reconsider its order granting Pavelko's motion for good faith settlement determination. (§ 1008.) Walters contended reconsideration was warranted because the order was inconsistent with the arbitrator's ruling that the Smith-Pavelko settlement was not a good faith settlement under section 877, which ruling the trial court had confirmed when it confirmed the arbitration award. Pavelko opposed the motion on procedural and substantive grounds.

The trial court granted reconsideration but affirmed its original ruling on Pavelko's section 877.6 motion. The court found the settlement between the Smiths and Pavelko "was reached 'before verdict or judgment,' as required by . . . sections 877 and 877.6," because "[a]rbitration awards are neither verdicts nor judgments, and thus do not trigger the application of [those statutes]." The court recognized its ruling conflicted with the arbitrator's decision, but nonetheless concluded the Smith-Pavelko settlement qualified as a good faith settlement that precluded Walters from suing Pavelko for indemnity or contribution. (§§ 877, subd. (b), 877.6, subd. (c).) Walters challenged the trial court's reconsideration order via petition for writ of mandate (§ 877.6, subd. (e)), which this court summarily denied. Walters then filed a notice of appeal from the judgment and certain orders, including the order finding the Smith-Pavelko settlement was made in good faith. (§ 904.1, subd. (a).)

While its appeal was pending, Walters moved the trial court for an order directing the Smiths "to execute acknowledgement of partial satisfaction of judgment in the amount of \$837,500 or alternatively to reduce the judgment by the same amount because the Smiths received \$837,500 in consideration pursuant to good faith settlements." (§ 724.110.) The trial court awarded Walters a credit of \$244,166.66, which constituted a portion of the credits Walters sought for settlements the Smiths had received from defendants that did not participate in the arbitration, and ordered the Smiths to execute a partial satisfaction of judgment in that amount. The court, however, refused to award Walters any credit for the \$500,000 Smith-Pavelko settlement, because that "settlement is specifically contingent on a good faith determination," and Walters's appeal of that "determination is still pending."

Three weeks later, the Smiths and Walters executed a Stipulation re: Satisfaction of Judgment (hereafter, Stipulation) pursuant to which (1) the Smiths agreed the \$500,000 settlement payment from Pavelko "further reduced the amount of the judgment"; (2) Walters agreed to pay the Smiths \$845,000, which the Smiths agreed to accept as "full satisfaction of the judgment"; and (3) the Smiths agreed to execute an acknowledgment of full satisfaction of judgment. The Smiths' counsel subsequently signed the acknowledgment, which states, "Judgment is satisfied in full."

DISCUSSION

Walters raises only one issue on appeal: "whether Pavelko's settlement occurred 'before verdict or judgment,' " as that phrase is used in section 877, "given that Pavelko's settlement did not occur until two weeks after liability and damages for Pavelko and [Walters] had been established in the [initial] arbitration award." After briefing was completed but before oral argument, we solicited supplemental

briefs from the parties on whether Walters's settlement with the Smiths and satisfaction of the judgment bar Walters from pursuing this appeal. (Gov. Code, § 68081.) Having considered those briefs, we conclude the appeal must be dismissed for the reasons discussed below.

"It has been generally stated that the voluntary satisfaction of a judgment forecloses the right to have it reviewed on appeal." (Reitano v. Yankwich (1951), 38 Cal.2d 1, italics added; accord, Rancho Solano Master Assn. v. Amos & Andrews, Inc. (2002), 97 Cal.App.4th 681 (Rancho Solano).) Although an appellant who satisfies a judgment under compulsion (e.g., under threat of execution or risk of forfeiture) does not lose the right to appeal (Reitano, at p. 3; Selby Constructors v. McCarthy (1979), 91 Cal.App.3d 517), the right is lost when the appellant satisfies the judgment by way of compromise or with an agreement not to appeal (Lee v. Brown (1976), 18 Cal.3d 110 (Lee); Reitano, at p. 3). Thus, because a valid settlement "is decisive of the rights of the parties and bars reopening the issues settled," after settlement and satisfaction an appeal will be dismissed "because the satisfaction moots the issues on appeal." (A.L.L. Roofing & Bldg. Materials Corp. v. Community Bank (1986), 182 Cal.App.3d 356 (A.L.L. Roofing); see also People v. Burns (1889), 78 Cal. 645 ["The judgment, being satisfied, 'has passed beyond review,' for the satisfaction thereof 'is the last act and end of the proceeding.' "].)

Here, Walters entered into the Stipulation and paid the Smiths \$845,000 in exchange for their acknowledgment of full satisfaction of the judgment. "By settling with [the Smiths] and voluntarily paying the judgment, [Walters] affirmed the validity of the judgment against it." (Rancho Solano, supra, 97 Cal.App.4th at p. 688.) Consequently, Walters lost its right to pursue this appeal. (Ibid.; see also A.L.L. Roofing, supra, 182 Cal.App.3d at pp. 358-360 [dismissing appeal after parties fully performed settlement contract].)

Walters contends its appeal is not barred because it did not voluntarily satisfy the judgment, but did so only "[i]n order to prevent the Smiths from executing upon the judgment and seeking additional attorney's fees and interest." The record belies this contention. As stated earlier, the Smiths recovered a judgment of more than \$1.5 million against Walters. When the Smiths agreed to accept \$845,000 from Walters as full satisfaction of the judgment, Walters owed more than that amount because the trial court had credited it only \$244,166.66 for sums the Smiths had received in settlements from other parties. The court refused to reduce the judgment by the \$500,000 Pavelko agreed to pay the Smiths in settlement, because that payment was conditioned upon the court's order finding the settlement was in good faith, and Walters was challenging that order on appeal. As part of the Stipulation, however, the Smiths agreed to give Walters credit for that \$500,000 and to acknowledge full satisfaction of the judgment in exchange for Walters's prompt payment of \$845,000. The satisfaction of judgment was thus plainly the result of a voluntary compromise. (See Kelly v. Steinberg (1957), 148 Cal.App.2d 211 ["compromise is a settlement of differences by mutual concessions"].) Because "the controversy arising out of this action was terminated by the settlement agreed upon between the parties thereto there is nothing for this court to decide," and the appeal must be dismissed. (Bank of Martinez v. Jahn (1894), 104 Cal. 238; see also A.L.L. Roofing, supra, 182 Cal.App.3d at p. 359 [settlement "is decisive of the rights of the parties and bars reopening the issues settled"].)

Walters alternatively argues its settlement with the Smiths does not bar this appeal because it is not appealing the judgment as it pertains to the Smiths; Walters is appealing only the trial court's order determining Pavelko's settlement was in good faith and barring Walters from suing Pavelko for contribution or indemnity.³ This argument is unpersuasive. Although the appeal was pending at the time of the settlement, Walters had not yet filed its opening brief, and the notice of appeal in no way suggested the appeal was limited to the order granting Pavelko's motion for good faith settlement determination. To the contrary, the notice stated Walters appealed not only that order but also the judgment, the order confirming the arbitration award, and the order denying Walters's motion for certain setoffs for good faith settlements. Thus, at the time of the settlement, the entire judgment was potentially subject to reversal. Only after Walters had settled with the Smiths and satisfied the judgment did Walters limit its appellate challenge to the order determining the Smiths' settlement with Pavelko was in good faith, and thereby attempt to avoid the rule prohibiting a party from appealing after voluntarily satisfying a judgment.

The appellant in *Rancho Solano*, supra, 97 Cal.App.4th 681, advanced an argument very similar to Walters's, without success. There, a construction company was found liable for damages on a homeowners association's claims for strict liability and negligence. Based on special jury verdicts finding certain unit builders were not at fault, the trial court rejected the construction company's claims for equitable indemnity against the unit builders and entered judgment against the company. The construction company filed a notice of appeal from the entire judgment, but before filing its opening brief, settled with the homeowners association, which then filed a satisfaction of judgment. The unit builders argued that by satisfying the judgment the construction company waived its right to appeal. In response, the company argued, as Walters does here, that it was entitled to pursue an equitable indemnity claim against the unit builders arising from the satisfaction of the judgment. The Court of Appeal rejected the construction company's argument: "The satisfaction of the judgment did not resurrect an equitable indemnity claim already rejected by the court. Instead, by satisfying the judgment, [the construction company] assumed full responsibility for [the homeowners association's] damages, as the judgment required." (Id. at p. 690.) The same is true here: By satisfying the judgment, Walters did not revive an indemnity or contribution claim against Pavelko that was barred by the trial court's order finding the Smith-Pavelko settlement was in good faith (§§ 877, subd. (b), 877.6, subd. (c)); rather, by settling with the Smiths and satisfying the judgment, Walters assumed full responsibility for payment of the Smiths' damages, as the judgment required.

In any event, even if Walters's appellate challenge were limited to the order granting Pavelko's motion for good faith settlement determination, it would be barred by "the general rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal, since the right to accept the fruits of the judgment [or order] and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other." (*Mathys v. Turner* (1956), 46 Cal.2d 364; accord, *Satchmed Plaza Owners Assn. v. UWMC Hospital Corp.* (2008), 167 Cal.App.4th 1034.) Here, by taking the agreed-upon \$500,000 credit for the Smith-Pavelko settlement when it settled with the Smiths, Walters effectively accepted the benefit of the order determining the settlement was made in good faith. (§ 877, subd. (a) [defendant's good faith settlement with plaintiff "shall reduce the claims against the others" by amount of settlement].) Such acceptance constitutes an "affirmance of the validity of the [order] against [it]" (Lee, supra, 18 Cal.3d at p. 114), and bars Walters's appellate challenge to the order insofar as it discharges Pavelko from liability to Walters for contribution or indemnity (§§ 877, subd. (b) [good faith settlement discharges settling defendant from liability for contribution], 877.6, subd. (c) [good faith settlement discharges settling defendant from liability for certain forms of contribution and indemnity]; *Al J. Vela & Associates, Inc. v. Glendora Unified School Dist.* (1982), 129 Cal.App.3d 766 (Al J. Vela) [party who accepted payment under judgment ordering conveyance of property upon payment could not appeal judgment insofar as it ordered conveyance].)

Walters argues, however, that this case falls within an exception to the general rule barring appeals after acceptance of benefits: "[W]here the benefits accepted are those to which the appellant would be entitled even in the event of reversal, acceptance thereof does not bar prosecution of the appeal." (In re *Marriage of Fonstein* (1976), 17 Cal.3d 738.) Walters claims it "is entitled to the setoff for Pavelko's payment regardless of whether the Section 877 good-faith determination is upheld" because "the setoff is equitable." We disagree.

Walters would not be entitled to a \$500,000 setoff if we reversed the trial court's order determining the Smith-Pavelko settlement was made in good faith because Pavelko's \$500,000 payment was expressly conditioned on such an order. In fact, it was precisely because of this condition precedent and the pendency of Walters's appeal that the trial court refused to grant Walters a setoff for the Smith-Pavelko settlement on the grounds of equity. Were we to reverse the trial court's order, Pavelko would have no obligation to pay the Smiths the \$500,000 in settlement because an express condition precedent would not have occurred. (See *Detwiler v. Clune* (1926), 77 Cal.App. 562, 566-567 [no obligation to perform contract if condition precedent does not occur].) Thus, although a reversal would relieve Walters of the statutory bar to contribution and indemnity claims against Pavelko (§§ 877, subd. (b), 877.6, subd. (c)), it would also deprive Walters of the corresponding statutory right to a setoff against the judgment for

Pavelko's \$500,000 settlement payment (§ 877, subd. (a)), because the bar and the right are "inextricably linked" (Abbott Ford, supra, 43 Cal.3d at p. 873).

Accordingly, because a reversal of the trial court's order granting Pavelko's motion for good faith settlement determination would eliminate the beneficial aspect of the order Walters accepted by signing the Stipulation and satisfying the judgment, "the exception to waiver [of the right to appeal] based on the severability of the benefit accepted does not apply." (Epstein v. DeDomenico (1990), 224 Cal.App.3d 1243; see also Al J. Vela, supra, 129 Cal.App.3d at p. 770 [benefit not severable for purposes of exception when reversal would require its return].) Rather, where, as here, "a party to a judgment [or order] accepts payment or satisfaction of a part thereof which is favorable to him, and that part is of such a character that the part adverse to him cannot be reversed without affecting the part which is in his favor and requiring reversal of that part also, the party so accepting the fruits of a part of the judgment [or order] in his favor is estopped from prosecuting an appeal from those parts which are against him." (Preluzsky v. Pacific Co-operative C. Co. (1925), 195 Cal. 290.)

DISPOSITION

The appeal is dismissed.

IRION, J.

WE CONCUR:

MCDONALD, Acting P. J.

AARON, J.

Notes:

¹ Undesignated section references are to the Code of Civil Procedure.

² A "release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment [that] is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort" "reduce[s] the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater," and "discharge[s] the party to whom it is given from all liability for any contribution to any other parties." (§ 877, subds. (a), (b).) A settlement made in good faith also "bar[s] any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (§ 877.6, subd. (c).) "Thus, while a good faith settlement cuts off the right of other defendants to seek contribution or comparative indemnity from the settling defendant, the nonsettling defendants obtain in return a reduction in their ultimate liability to the plaintiff." (Abbott Ford, Inc. v. Superior Court (1987), 43 Cal.3d 858 (Abbott Ford).)

³ In support of this argument, Walters filed a motion to submit additional evidence consisting of declarations from counsel who negotiated the Stipulation. (§ 909; Cal. Rules of Court, rule 8.252(b).) The declarations state that by executing the Stipulation, counsel did not understand or intend that Walters was waiving its right to appeal the judgment insofar as it precluded Walters from suing Pavelko for indemnity or contribution. Counsel's understanding or intent is irrelevant, however, because waiver of the right to appeal after voluntarily satisfying a judgment is implied as a matter of law. (Lee, supra, 18 Cal.3d at p.

115; Rancho Solano, supra, 97 Cal.App.4th at p. 688.) Thus, because the additional evidence would not affect our analysis or disposition of the appeal, we deny Walters's motion. (Continental Cas. Co. v. Phoenix Constr. Co. (1956), 46 Cal.2d 423.)
