

**AGCC/LAC NEW CASES OF INTEREST**

(March 11 through April 5, 2002)

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**No abandonment claims against public owners**

*Amelco Electric v. City of Thousand Oaks*, 2002 Cal. LEXIS 1689 (3/13/02)

Petition for rehearing denied without opinion.

**No contractual attorneys' fees for voluntarily dismissed defendant**

*Silver v. Boatwright Home Inspection, Inc.*, 02 C.D.O.S. 2984 (4/4/02)

Trial court's denial of defendant's motion for attorneys' fees affirmed.

Plaintiffs contracted with Boatwright to inspect a house they were interested in buying. The contract provided that the prevailing party in any dispute between the parties would be entitled to recover its attorneys' fees. It also provided that any lawsuit arising from Boatwright's inspection must be brought within one year of the date of the inspection.

After plaintiffs purchased the house, they discovered extensive water and termite damage. More than one year after Boatwright's inspection, plaintiffs sued Boatwright, along with the sellers of the property, the sellers' broker, and an exterminator who also inspected the property before the sale. Plaintiffs sought \$ 70,000 in damages.

Boatwright moved for summary judgment on the ground that plaintiffs'

claims against it were time-barred. Before that motion was decided, plaintiffs settled their claims with the sellers and the exterminator for \$ 43,500, and voluntarily dismissed their claims against Boatwright. Boatwright then moved for its attorneys' fees, contending it was the prevailing party under its contract with the plaintiffs. While that motion was pending, plaintiffs settled with the remaining defendant (the sellers' broker) for an additional \$ 25,000. This brought plaintiffs' total recovery to \$ 68,500 (out of their total alleged damages of \$ 70,000). In their opposition to Boatwright's motion, plaintiffs argued that they dismissed Boatwright because, after their other settlements, their potential recovery of \$ 1,500 was not worth the resources they would have had to expend to obtain it.

The trial court denied Boatwright's motion, stating that "when plaintiffs' case is viewed as a whole, plaintiffs are the prevailing parties because they have recovered, or are in the process of recovering, significant relief." The court also stated that it would be inequitable to award Boatwright its attorneys' fees because that "would virtually eliminate the relief procured by plaintiffs from any other parties." Finally, the court noted the public policy of encouraging voluntary dismissals to avoid maintenance of pointless litigation.

The Court of Appeal affirmed, relying primarily on *Santisas v. Goodin*, 17 Cal. 4<sup>th</sup> 599 (1998). First, it noted that, as to plaintiffs' contract causes of action, Civil Code section 1717 barred recovery, since that section states that there is no prevailing party for attorneys' fees purposes when a case is voluntarily dismissed. Second, as to plaintiffs' tort causes of action, the court cited the holding in *Santisas* that, in the absence of a definition of "prevailing party" in the parties' contract, "a court may base its attorneys' fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, *settlement, or otherwise*" (italics added by *Silver* court). Applying this to the case before it, the *Silver* court held that a plaintiff may be a prevailing party where it achieves its litigation objectives from a party other than the defendant who has been voluntarily dismissed and is seeking its attorneys' fees.

In dicta (at footnote 7), the court also casts doubt on the enforceability of the limitations provision in the parties' contract, stating that "public policy considerations call into question the enforceability of the portion of that provision that impliedly requires plaintiffs to waive the benefit of the so-called delayed discovery rule."

**Judgment for subcontractor in prior action against general contractor has no collateral estoppel effect on bond surety that was not a party to that action; surety's liability to subcontractor for attorneys' fees and statutory penalties is the same as that of the general contractor**

*National Technical Systems v. Superior Court*, 02 C.D.O.S. 2980 (4/4/02)

Writ of mandate issued directing trial court to vacate orders granting surety's motions *in limine* excluding all evidence of subcontractor's prior action against general contractor and of attorneys' fees and statutory penalties claims.

Commercial Contractors, Inc. (CCI), a general contractor, entered into a contract with the City of Long Beach to perform remediation and excavation work on the Port of Long Beach. CCI hired National Technical Systems (NTS) as a subcontractor on the job. The subcontract included an attorneys' fees provision.

After CCI failed to fully pay NTS, NTS filed a stop notice. CCI obtained a stop notice release bond from UPIC, a surety. NTS subsequently sued CCI, but it did not name UPIC in that lawsuit. NTS obtained a judgment against CCI, which included awards for NTS's attorneys' fees and statutory interest penalties under Bus. & Prof. Code § 7108.5. (Section 7108.5 entitles a subcontractor to a 2 % interest penalty for each month a contractor fails to pay the subcontractor amounts due.)

NTS made a demand upon UPIC for the amount of the judgment, which UPIC refused. NTS moved the court for summary enforcement against UPIC. After the court denied that motion, NTS appealed. The Court of Appeal affirmed the trial court.

NTS then brought a separate action against UPIC. Prior to trial, UPIC moved *in limine* to exclude all evidence of NTS's prior trial and judgment against CCI. UPIC also moved to exclude all evidence of nonrecoverable damages, arguing that NTS's potential recovery under the bond was limited to the value of services and material provided and excluded attorneys' fees or statutory penalties. The trial court granted both motions, and NTS sought a writ of mandate.

The Court of Appeal vacated the trial court's orders granting both of UPIC's motions. On the first motion, the court agreed with UPIC that it was not bound by NTS's judgment against CCI and that, as a result, NTS was not entitled to submit evidence of its judgment against CCI. The Court of Appeal still granted NTS's writ because it found that the trial court's order was overbroad. NTS could refer to statements from the prior trial, rather than to the judgment itself, if for example such statements were admissible for impeachment.

The court also held that NTS should not have been precluded from

offering evidence of attorneys' fees and statutory penalties because each was potentially recoverable from UPIC under the bond. Concerning NTS's attorneys' fees claim, the court rejected UPIC's argument that Civ. Code § 3103, which requires stop notices to state the "kind of labor, services, equipment, or materials furnished" by the claimant, limits the claimant's potential recovery under a stop notice to the value of those items. Based on the attorneys' fees provision in the CCI - NTS subcontract, combined with Civ. Code § 2808, which provides that a surety's liability "is commensurate with that of the principal," the court held UPIC's liability extended to attorneys' fees to which NTS was entitled under the subcontract. Similarly, citing the general principle that "[i]f the surety makes the contract with the law before him, the law enters into and becomes a part of the agreement" and relying on *Washington Internat. Ins. Co. v. Superior Court*, 62 Cal. App. 4<sup>th</sup> 981 (1998), the court held that UPIC could be liable under the bond for statutory penalties under Bus. & Prof. Code § 7108.5.

**Parol evidence not admitted regarding meaning of unambiguous indemnity agreement**

*City of Chino v. Jackson*, 02 C.D.O.S. 2922 (4/3/02)

Judgment for defendant indemnitor reversed.

Jackson Land Company (JLC), a developer, built a subdivision in Chino. In order to do so, it entered into an agreement with the City in which JLC agreed to construct certain public improvements and maintain those improvements over a one-year warranty period. To guarantee its work, JLC obtained performance and warranty bonds from Developer's Insurance Company (DICO). In order to obtain those bonds, JLC and others, including Amy Jackson, entered into indemnity agreements with DICO.

The City sued JLC and DICO in municipal court for alleged deficiencies in the improvements, and DICO cross-complained against JLC and the other indemnitors named in its indemnity agreement. The court found for all defendants on limitations grounds and found for DICO against all cross-defendants except Amy Jackson. The City and DICO appealed to the appellate division of the Superior Court. In an order approving a settled statement prepared by the City for purposes of appeal, the trial court stated that its judgment was based exclusively on limitations grounds.

The appellate division disagreed with the trial court on the limitations issue, and, on DICO's appeal, found no substantial evidence supporting the trial court's decision, stating: "We fail to see how the statute of limitations . . . exempts Amy from her obligation to DICO." After the appellate division rendered a decision which it certified for publication, the Court of Appeal ordered the case transferred to it. The parties subsequently settled all issues except Amy Jackson's liability to DICO

under the indemnity agreement.

The Court of Appeal agreed with DICO that Ms. Jackson's liability was purely an issue of contract interpretation. It described the two-step process for determining whether a court should admit extrinsic evidence to aid in interpreting a contract. First, the court provisionally receives, without admitting, parol evidence to determine whether the contract is ambiguous, *i.e.*, reasonably susceptible to the interpretation urged by the party offering the parol evidence. If the court finds the contract to be ambiguous, it goes to step two, admitting the parol evidence and interpreting the contract.

Here, Ms. Jackson argued that parol evidence showed that the parties did not intend the indemnity agreement to cover the particular tracts that were the subject of the City's lawsuit. The court rejected this argument. The indemnity agreement was unambiguous. It clearly stated that the indemnitors, including Ms. Jackson, would indemnify DICO for any actions brought under any bond issued by DICO for the project. It was not limited to any particular tracts or claims. Thus, the court held that parol evidence regarding the contract's meaning was inadmissible, and the trial court's judgment in Ms. Jackson's favor was in error.