2d Civil No. B202085

COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

JOSEPHINE LARNER,

Plaintiff and Appellant,

vs.

PACIFIC HEALTH CORPORATION,

Defendant and Respondent.

Appeal from the Los Angeles Superior Court
Honorable Irving Feffer, Judge Presiding
Case No. BC322049

OPPOSITION TO APPELLANT'S REQUEST FOR JUDICIAL NOTICE

FISHER, SPARKS, GRAYSON & WOLFE
Jerry R. Sparks, SBN 166292
David R. Fisher, SBN 119773
9401 Wilshire Boulevard, 11th Floor
Beverly Hills, California 90212
(310) 278-4300 // Fax (310) 278-5430

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson, SBN 109374
Alana H. Rotter, SBN 236666
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 // Fax (310) 276-5261

Attorneys for Defendant and Respondent
LOS ANGELES DOCTORS HOSPITAL ASSOCIATES, LP dba LOS ANGELES METROPOLITAN MEDICAL CENTER

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INTRODUCTION

Appellant Josephine Larner's Request for Judicial Notice comes too late, seeking notice of settlement agreements and regulatory history materials that were not before the trial court. It does so at the close of appellate briefing, when respondent Los Angeles Metropolitan Medical Center would have no opportunity to address the materials or Ms. Larner's new arguments based upon them. Basic considerations of fairness and orderly judicial functioning require that the request be denied. In any event, private parties' contracts are not facts of such common knowledge as to be subject to judicial notice. The request accordingly should be denied.

ARGUMENT

I. A REVIEWING COURT SHOULD NOT JUDICIALLY NOTICE MATERIALS OUTSIDE THE RECORD AND PRESENTED FOR THE FIRST TIME AT THE CLOSE OF APPELLATE BRIEFING.

Reviewing courts generally do not take judicial notice of matters "if, upon examination of the entire record, it appears that the matter has not been presented to and considered by the trial court in the first instance." (*People v. Preslie* (1977) 70 Cal.App.3d 486, 493; see also *Brosterhous v. State Bar of California* (1995) 12 Cal.4th 315, 325-326 [refusing to notice materials not presented to the trial court].)

That rule is all the more important where the appellant does not seek judicial notice until the end of briefing. (See *City of Oakland v. Hassey* (2008) 163 Cal.App.4th 1477, 1489, fn. 5 [refusing to notice statute and administrative enforcement manual presented for the first time after close of briefing and shortly before oral argument]; *People v. Preslie*, *supra*, 70 Cal.App.3d at p. 494 ["it is desirable in the interest of orderly judicial

procedure" to request judicial notice well before the briefing stage].) Appellants may not raise arguments for the first time in a reply brief absent a showing of good cause because "[t]o withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission." (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) Permitting appellants to introduce new materials through a request for judicial notice accompanying the reply brief would have the same ill effect. It cannot be permitted absent a strong showing of good cause, not present here.

II. THERE IS NO BASIS FOR NOTICING THE SETTLEMENT AGREEMENTS AND REGULATORY HISTORY MATERIALS AT ISSUE.

Ms. Larner seeks judicial notice of two settlement agreements and various regulatory history materials. There is no basis for granting either component of the request.

A. The Settlement Agreements Are Not Judicially Noticeable.

LAMMC's Respondent's Brief argued that the appeal should be dismissed because Ms. Larner has settled all her claims and causes of action against LAMMC. (Respondent's Brief ("RB") 8-11.) That argument relied on a joint stipulation that the parties filed in the trial court. The stipulation recites that "Larner and LAMMC have entered into a Settlement Agreement whereby the parties intend to settle and resolve all disputes . . . and causes of action relating to or arising out of Larner's employment with LAMMC . . . ." (6 AA 1356.) The court entered judgment for LAMMC pursuant to the stipulation. (6 AA 1360.)

The settlement agreement underlying the filed stipulation was not part of the trial court record. LAMMC therefore did not discuss the

agreement in its brief. (See RB 9, fn. 3.) Ms. Larner, however, now seeks judicial notice of the underlying agreement and another settlement agreement in a separate suit between Ms. Larner and LAMMC. (Request for Judicial Notice ("RJN") 2 and Exhibits 1-2.) Her request fails for two independent reasons.

1. The agreements are not in the trial court record and Ms. Larner has presented no compelling reason for this Court to consider them.

Ms. Larner's only justification for noticing the private settlement agreement in this case is that LAMMC's brief discussed the terms of the settlement and that she "seeks to get the pertinent information discussed by Respondent in front of this court." (RJN 2.) But LAMMC discussed only the joint stipulation which is in the record, not the underlying agreement, which is not. (See 6 AA 1355-1358.) Ms. Larner has not developed an argument as to why this Court should instead consider the underlying agreement. Even if she had, the argument could not prevail. Ms. Larner agreed to the description of the settlement reflected in the joint stipulation. (See 6 AA 1355, 1358.) That description is controlling. It is a judicial admission as to the effect of the settlement. And, Ms. Larner is judicially estopped from arguing otherwise. Her representation that she had *no* claims remaining caused the trial court to enter a final, appealable judgment. If she has contingently retained claims in the event of reversal, there was no final appealable judgment. (*Don Jose's Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115, 118-119; *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, 1468-1469.)

Ms. Larner's request for judicial notice of an earlier settlement agreement in a separate suit between her and LAMMC is even more misdirected. (RJN 2 and Exhibit 1.) LAMMC's Respondent's Brief did not

mention, let alone argue based on, the earlier settlement agreement. The Request for Judicial Notice does not explain its relevance to this case. While Ms. Larner's reply brief asserts that the earlier agreement is referenced in the settlement agreement in this case, that relationship is not elaborated in the Request for Judicial Notice and, in any event, is too tenuous to justify the request.

2. Parties' private contracts are not judicially noticeable as facts not subject to reasonable dispute.

Ms. Larner's request for notice of the settlement agreements also fails because the agreements are not a proper subject for judicial notice. She bases the request on Evidence Code section 452, subdivision (h), which permits the court to notice "[f]acts and propositions that are not reasonably subject to dispute . . . ." (Evid. Code, § 452, subd. (h).) This provision covers, for example, facts that are widely accepted "by experts and specialists in the natural, physical, and social sciences [and] which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter. [Citation.]" (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145.) Ms. Larner provides no authority for the proposition that the provision also permits notice of the terms of the parties' private contract. To the contrary, "the existence of a contract between private parties cannot be established by judicial notice under Evidence Code section 452, subdivision (h)." (*Ibid.*) The same is true of a contract's terms.

B. It Is Too Late To Introduce New Regulatory History Materials That Could Have Been Presented In The Trial Court, Or At The Very Least, At The Outset Of Appellate Briefing.

Ms. Larner also seeks judicial notice of materials regarding the history of Industrial Welfare Commission Wage Order No. 5-2001, subdivision 3(B)(8) ("section 3(B)(8)"), which governs overtime pay for employees in the healthcare industry. (Cal. Code Regs., tit. 8, § 11050, subd. 3(B)(8).) The parties have contested the section's interpretation throughout this case. Accordingly, Ms. Larner had ample opportunity to request notice of the regulatory history materials in the trial court or in connection with her opening brief. Because she failed to do so, and because she has offered no explanation for waiting until her reply brief to do so, the request should be denied.

1. Ms. Larner withheld the regulatory history materials until after LAMMC could no longer respond to them.

The parties briefed the interpretation of section 3(B)(8) in the trial court. (See 1 AA 22-31, 50-58, 99-104.) Although the briefing touched on some aspects of the section's regulatory history, neither party addressed the materials at issue in Ms. Larner's request for judicial notice. The court summarily adjudicated the interpretation dispute in LAMMC's favor. (1 AA 139, 141-142.)

After the trial court's ruling but before this appeal, this District decided the identical interpretation issue in *Singh v. Superior Court* (2006) 140 Cal.App.4th 387 (*Singh*). *Singh* rejected the interpretation of section 3(B)(8) advanced by Ms. Larner based on both the provision's plain language and on its regulatory history. (*Id.* at pp. 392-401.)

Ms. Larner renewed her argument regarding the interpretation of section 3(B)(8) on appeal. Her opening brief ignored the extensive regulatory history discussed in *Singh*, despite the fact that her counsel was counsel in *Singh* and therefore unquestionably aware of that history. Her

sole regulatory history argument relied on a declaration by a member of the Industrial Welfare Commission regarding his view of the section, the same declaration on which Ms. Larner unsuccessfully relied in the trial court. (Appellant's Opening Brief ("AOB") 24-26; 1 AA 54-55.) The opening brief did not mention, much less address, the regulatory history materials of which Ms. Larner now seeks judicial notice.

LAMMC's Respondent's Brief responded to the regulatory history materials then at issue: (1) the sole declaration discussed in the opening brief, and (2) the history recounted in *Singh*, which the parties agree is directly on point. (RB 15-17.) It showed that the history covered in *Singh* supports its interpretation of section 3(B)(8) and that the declaration cited by Ms. Larner does not dictate a different result.

Faced with the fact that she cannot prevail on the current record, Ms. Larner now seeks to change the scope of the analysis by selectively introducing additional regulatory history materials with her reply brief. (RJN Exhibits 3-5.) She should not be permitted to do so. (See *City of Oakland v. Hassey, supra*, 163 Cal.App.4th at p. 1489, fn. 5.)

2. Ms. Larner has offered no persuasive justification for introducing new regulatory history snippets at this late stage of the proceedings.

Ms. Larner's only stated reason for seeking judicial notice of new regulatory history materials in connection with her reply brief is that the Respondent's Brief covers section 3(B)(8)'s history. (RJN 3-4.) That is no justification. Ms. Larner knew in the trial court and when she filed her opening appellate brief that the section's history was at issue. She argued at both stages that her interpretation was correct in light of a declaration by an Industrial Welfare Commission member regarding the section's adoption. (See 1 AA 49, 54-55, 65-70; AOB 24-26.) If she wanted to rely on other regulatory history materials to buttress that contention, she could have sought judicial notice of them at the time. She chose not to do so. It is too late to introduce them now.

The belated request is particularly unpersuasive with regard to materials from the May 26, 2000 meeting at which the Industrial Welfare Commission considered the adoption of section 3(B)(8). (RJN Exhibits 4-5.) Ms. Larner contends that notice of these materials is appropriate because the Respondent's Brief characterizes the events of the meeting. (RJN 3-4.) But the events of the meeting have been squarely at issue throughout this case, not just in the Respondent's Brief. Both Ms. Larner's trial court opposition to summary adjudication and her opening appellate brief relied on an individual commissioner's summary of the Dombrowski proposal and of the Commission's actions at the meeting. (1 AA 54-55, 65-70; AOB 24-26.) It is no surprise, then, that the Respondent's Brief also discussed the outcome of the meeting. In doing so, it did not introduce any new regulatory history materials. It relied only on a notice of hearing and the hearing minutes already in the trial court record and on *Singh*'s discussion of these materials. (See RB 16, 19-20.) This

entirely foreseeable discussion does not justify Ms. Larner's quest to introduce additional regulatory history materials for the first time at the close of briefing.

Ms. Larner's concession that *Singh* judicially noticed the same Dombrowski proposal and the May 26, 2000 meeting transcript further undermines her belated request. (RJN 3-4.) Ms. Larner's counsel also represented the *Singh* plaintiff. (*Singh*, *supra,* 140 Cal.App.4th at p. 390.) Her counsel sought judicial notice of the Dombrowski proposal and the transcript in *Singh* before that case was decided in June 2006. (*Id.* at pp. 387, 391, fn. 3.) Counsel therefore was clearly aware of these materials when filing Ms. Larner's opening appellate brief in April 2008. Yet, Ms. Larner did not seek judicial notice of the materials at that time. She instead chose to wait until after LAMMC had filed its Respondent's Brief, thereby depriving it of an opportunity to respond. This gamesmanship cannot stand.

Compounding the problem, Ms. Larner does not seek judicial notice of the entire regulatory record, but only of those isolated and disconnected portions of the record that she thinks support her position. This one-sided, last minute attempt to distort the record is improper.

III. IF THE COURT GRANTS MS. LARNER'S REQUEST, IT MUST GIVE LAMMC AN OPPORTUNITY TO ADDRESS THE NEW MATERIALS.

This Court should deny Ms. Larner's late request for judicial notice for the reasons discussed above. If the Court nonetheless grants any portion of the request, the Evidence Code entitles LAMMC to an opportunity to address the noticed materials. (See Evid. Code, §§ 455, subd. (a) and 459, subd. (c) [reviewing court taking notice of a matter "of substantial consequence to the determination of the action" for the first time must permit parties to present information relevant to the tenor of the matter to be

noticed]; see also *People v. Hamilton* (1986) 191 Cal.App.3d Supp. 13, 21.) Because LAMMC has already filed its Respondent's Brief, this opportunity would have to be in the form of supplemental briefing and an opportunity to present its own judicially noticeable materials.

CONCLUSION

Ms. Larner's request for judicial notice is without merit. It is too late in the proceedings to introduce new materials that were never before the trial court and that LAMMC has not had an opportunity to address. The parties' private contracts are not judicially noticeable in any event. The request should be denied in full. If any part of the request is granted, LAMMC must be given an opportunity to file a supplemental brief addressing the new materials.

Dated: July __, 2008

Respectfully submitted,

FISHER, SPARKS, GRAYSON & WOLFE
Jerry R. Sparks
David R. Fisher

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Alana H. Rotter

By_____
Alana H. Rotter

Attorneys for Defendant and Respondent
LOS ANGELES DOCTORS HOSPITAL ASSOCIATES, LP dba LOS ANGELES METROPOLITAN MEDICAL CENTER