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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

COURT OF APPEAL – SECOND DIST.

DIVISION SEVEN

FILED

Sep 17, 2019

DANIEL P. POTTER, Clerk

S. Lui Deputy Clerk

BRYANT PATTON et al.,

B282640

Plaintiffs and Appellants,

(Los Angeles County

v.

Super. Ct. No. MC025064)

SOUTHERN CALIFORNIA
EDISON COMPANY,

Defendant and
Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian C. Yep, Judge. Dismissed.

diDonato Law Center and Peter R. diDonato for Plaintiffs and Appellants.

Leon Bass, Jr., Carla Margolis Blanc; Greines, Martin, Stein & Richland, Robin Meadow and Geoffrey B. Kehlmann for Defendant and Respondent.

Plaintiffs Bryant Patton, Da'Mondre Patton, Patricia Hammond, and Tyler Birmingham appeal from a judgment entered after the trial court granted summary judgment in favor of defendant Southern California Edison Company (Edison). Plaintiffs brought suit against Edison, alleging causes of action for negligence and premises liability, after their mother was fatally struck by a car while crossing the street near a malfunctioning streetlight. Edison provided electrical service to the streetlight. The trial court ruled Edison had no duty to plaintiffs, and plaintiffs failed to raise a triable issue of fact whether Edison's acts or omissions were the proximate cause of the accident. After the trial court entered judgment, plaintiffs moved for a new trial, seeking to modify the judgment to delete the alternative basis for the court's ruling addressing causation because Edison had not raised causation in its motion. Plaintiffs did not challenge the trial court's ruling that Edison did not owe them a duty. The trial court granted plaintiffs' motion and issued an amended judgment, in which it eliminated causation as a basis for granting summary judgment in favor of Edison. Plaintiffs appealed from the amended judgment after the deadline for appealing from the original judgment had passed.

Edison moved to dismiss the appeal, arguing plaintiffs' appeal was untimely because the amended judgment did not materially affect plaintiffs' rights, and therefore did not result in a substantial modification of the original judgment. We agree and dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND¹

A. *The Accident and Plaintiffs' Complaint*

On the evening of January 10, 2014 Sandra Henderson was fatally struck by a car while attempting to cross a street on foot in the City of Lancaster (Lancaster). Just before the collision, the streetlight nearest to where the accident occurred was intermittently cycling on and off.² At the time the car struck Henderson, the streetlight had gone off, and the street was dark. Edison provided electrical service to the streetlight under an agreement with Lancaster.

Henderson's children brought suit against Edison,³ alleging causes of action for negligence and premises liability. Plaintiffs alleged the "inadequate lighting" of the street where Henderson

¹ We discuss only the facts necessary to our resolution of the timeliness of plaintiffs' appeal.

² A witness to the accident declared, "[T]he overhead street lamp . . . was 'flickering,' whereby the light would go 'on' for a few seconds, then the light would go 'off' for several seconds." The parties describe this phenomenon as "cycling."

³ Plaintiffs also named as defendants Daniel Ray Densley (the driver of the car), Robin Read (the owner of the car), Sandy's Coin Wash (Densley's employer), Lancaster, and 40 Doe defendants. Plaintiffs later filed a first amended complaint alleging a cause of action for products liability against Wesco International, Inc., and Phillips Lighting Corporation North America. On appeal plaintiffs contend the trial court erred in denying leave to allege a products liability cause of action against Edison in their first amended complaint. Because we dismiss the appeal as untimely, we do not reach this issue.

was struck created a “dangerous condition so as to make [Henderson] unseen by motorists while crossing the street.”

B. *Edison’s Motion for Summary Judgment*

Edison filed a motion for summary judgment, in which it argued there were no triable issues of fact as to whether Edison owed a duty of care to plaintiffs. Edison contended it had no duty to provide a particular level of lighting in the street or to maintain the streetlight in an operable condition. Edison further argued there was no evidence it had prior notice of any lighting problem or that its contract with Lancaster included an agreement to perform work that would have ameliorated the condition identified by plaintiffs.

Plaintiffs opposed the motion, arguing triable issues of fact existed whether Edison possessed a duty to plaintiffs. Plaintiffs asserted Edison knew the lightbulb used in the streetlight had a high rate of failure, but failed to remedy the problem. Plaintiffs contended the intermittent cycling on and off of the defective streetlight created a condition more dangerous than if the street had been dark.

After a hearing, the trial court granted Edison’s motion, “finding there [were] no triable issues of material fact as to the elements of causation and duty as well.” On October 19, 2016 the trial court granted Edison’s motion for summary judgment and entered judgment in favor of Edison “because (1) Edison owed plaintiffs no duty and (2) there was no evidence that Edison’s acts or omissions were the proximate cause of the accident subject of the lawsuit.” On January 20, 2017 Edison served notice of entry of judgment on all counsel by mail.

C. *Plaintiffs' Motion for New Trial*

On February 14, 2017 plaintiffs filed notice of their intention to move for a new trial and motion for new trial with respect to the “granting of summary judgment in favor of defendant [Edison].” Plaintiffs argued Edison did not address the issue of causation in its motion for summary judgment, and “therefore the judgment must be amended to delete reference to a finding that [Edison] [p]revailed . . . on the issue of ‘causation.’” Plaintiffs “[did] not seek to have the granting of [Edison’s] Motion for Summary Judgment set aside” and did not challenge the trial court’s conclusion Edison owed no duty to plaintiffs. Plaintiffs expressly acknowledged the “lack of duty is [a] sufficient basis upon which to prevail on summary judgment.” Plaintiffs concluded by “respectfully submit[ting] that the court’s order on [Edison’s] Motion for Summary Judgment should be corrected, to reflect[] that it was dispositive only as to the issue of duty, and that causation was not considered.”

Edison opposed the motion, arguing the trial court’s order granting summary judgment did not prejudice plaintiffs’ substantial rights because plaintiffs did not challenge the trial court’s conclusion Edison owed no duty to plaintiffs. Edison further argued plaintiffs’ new trial motion was defective because it was not based on any statutory ground enumerated in Code of Civil Procedure section 657.⁴

⁴ Code of Civil Procedure section 657 provides, “The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the

In reply, plaintiffs argued their motion sought “to narrow the issues in any potential [a]ppeal in this matter” and asserted they would be prejudiced by other named defendants relying on the trial court’s conclusion as to causation in future proceedings because “without correction of the court record, [the remaining defendants] may argue, incorrectly, that this court has already determined . . . the issue of causation.”

On March 14, 2017, after a hearing, the trial court issued a minute order granting plaintiffs’ motion “to modify the existing Judgment . . . to delete causation as a basis for the granting of [the] Motion for Summary Judgment and Judgment.” On March 27, 2017 the court entered an amended judgment, in which it removed any reference to “causation,” instead stating “Edison was entitled to judgment [as a] matter of law, because Edison owed plaintiffs no duty.” On April 14, 2017 Edison served notice of entry of the amended judgment.

court or abuse of discretion by which either party was prevented from having a fair trial. [¶] 2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors. [¶] 3. Accident or surprise, which ordinary prudence could not have guarded against. [¶] 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. [¶] 5. Excessive or inadequate damages. [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law. [¶] 7. Error in law, occurring at the trial and excepted to by the party making the application.”

D. *Plaintiffs' Appeal and Edison's Motion to Dismiss*

On May 18, 2017 plaintiffs filed a notice of appeal from the trial court's amended judgment. On February 2, 2018 Edison moved to dismiss plaintiffs' appeal as untimely. Plaintiffs opposed the motion. Consideration of Edison's motion to dismiss was deferred to this panel hearing the appeal on the merits.

DISCUSSION

“Compliance with the time for filing a notice of appeal is mandatory and jurisdictional. [Citations.] If a notice of appeal is not timely, the appellate court must dismiss the appeal.” (*Ellis v. Ellis* (2015) 235 Cal.App.4th 837, 842 (*Ellis*); accord, *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 504 (*Dakota*) [“If the appeal is untimely, this court has no jurisdiction to consider it, and it must be dismissed.”]; Cal. Rules of Court, rule 8.104(b) [“If a notice of appeal is filed late, the reviewing court must dismiss the appeal.”].) As relevant here, California Rules of Court, rule 8.104(a)(1) mandates that a notice of appeal must be filed “on or before . . . [¶] . . . 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled ‘Notice of Entry’ of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service.” (*Id.*, rule 8.104(a)(1)(B).)

The notice of entry of the original judgment reflects Edison served the document on plaintiffs' counsel on January 20, 2017. Accordingly, the last day to appeal from the trial court's original

judgment was March 21, 2017.⁵ Plaintiffs did not file their notice of appeal until May 18, 2017.

Plaintiffs contend the amended judgment superseded the original judgment, and thus their appeal from the later judgment was timely. Under plaintiffs' reasoning, their time to appeal ran from April 14, 2017, the date of service of the notice of entry of the amended judgment. Whether the amended judgment superseded the original judgment depends on "whether the revised judgment result[ed] in a 'substantial modification' of the judgment." (*Ellis, supra*, 235 Cal.App.4th at p. 842; accord, *Dakota, supra*, 192 Cal.App.4th at p. 504.)

A "substantial modification" is one that materially affects the rights of the parties. (*Ellis, supra*, 235 Cal.App.4th at p. 842; *Dakota, supra*, 192 Cal.App.4th at p. 505.) We consider "whether there is a substantial change in the rights of the parties such that allowing an amendment nunc pro tunc (relating back to the original judgment) would unfairly deprive them of the right to contest the issue on appeal" (*Ellis*, at p. 842, quoting *Dakota*, at p. 506.) "[I]t is ultimately the parties' ability to challenge the ruling that is key. The right we are concerned with materially affecting is the right to appeal." (*Ellis*, at pp. 842-843, quoting *Dakota*, at p. 508.) "[I]f 'a party can obtain the desired relief from a judgment before it is amended, he must act—appeal therefrom—within the time allowed after its entry.'" (*Ellis*, at p. 843.)

⁵ In calculating the time to appeal, we do not add five days for the mailing of the notice of entry of judgment. (Code Civ. Proc., § 1013, subd. (a) [five-day extension of time to respond to notice served by mail "shall not apply to extend the time for filing [a] notice of appeal"].)

In *Dakota*, the trial court granted the defendant's motion for a new trial and amended a default judgment that had been entered to reduce the damages award by over four million dollars because the award was in excess of the amount of damages requested in the complaint. (*Dakota, supra*, 192 Cal.App.4th at p. 499.) The Court of Appeal dismissed the defendant's appeal from the amended judgment, explaining the change in "the monetary positions of the litigants . . . did not deprive the parties of their ability to challenge any portion of the [original] judgment." (*Id.* at p. 509.) The court reasoned, "All other parts of the judgment not affected by the modification remained valid and could have been challenged by appeal [from the original judgment]," and therefore the appeal from the amended judgment was untimely. (*Ibid.*) Further, the court observed defendant was not deprived of his right to contest the default judgment while maintaining the amount of damages awarded was erroneous, explaining, "It is not inconsistent nor improper to file both a notice of appeal and a motion for a new trial If the motion for new trial be granted the judgment is vacated and the appeal therefrom becomes ineffective.'" (*Id.* at pp. 508-509.)

Likewise, in *Ellis*, the trial court amended a judgment of marriage dissolution to provide the remaining property would be divided "forthwith" and to set a deadline for payment of an equalizing payment by the husband to the wife. (*Ellis, supra*, 235 Cal.App.4th at p. 844.) The court reasoned the modification "did not change the amount to be paid, [the wife's] rights to receive any payment, or any other rights that [the wife] would have been unable to raise on appeal from the . . . original judgment." (*Ibid.*) Because the appeal was not timely as to the original judgment, the court dismissed the appeal. (*Id.* at p. 846.)

Here, as in *Dakota* and *Ellis*, plaintiffs had the right to appeal from the trial court's original judgment, and the court's amendment to that judgment did not affect that right. The court's judgment for Edison based on its lack duty to plaintiffs "remained valid and could have been challenged by appeal" from the original judgment. (*Dakota, supra*, 192 Cal.App.4th at p. 509.) Plaintiffs could have obtained their desired relief (reversal of the court's grant of summary judgment for Edison) by appealing from the original judgment. Insofar as the trial court erred by basing its summary judgment ruling in part on a ground not raised in Edison's motion, plaintiffs were entitled to make that argument on appeal. Further, they could have simultaneously filed a notice of appeal from the October 19, 2016 judgment and filed a motion for new trial. (*Id.* at pp. 508-509.) Importantly, plaintiffs do not dispute the issue of Edison's duty was dispositive of Edison's motion for summary judgment, irrespective of the trial court's alternative basis for its ruling, that Edison's acts or omissions had not caused the accident.

Plaintiffs contend the trial court necessarily found the amended judgment materially affected plaintiffs' substantial rights because the court granted plaintiffs' motion and amended the judgment accordingly. Plaintiffs argue no new trial motion may be granted without the trial court first finding prejudice to the plaintiff, a finding tantamount to a conclusion the error materially affected the party's substantial rights. However, the propriety of the trial court's decision on plaintiffs' new trial motion is not before us. "Moreover, the trial court's intent in modifying the judgment, even if we knew what it was, is irrelevant; the focus of our inquiry is whether that modification affected [plaintiffs'] rights on appeal." (*Ellis, supra*,

235 Cal.App.4th at pp. 844-845.) Regardless of whether plaintiffs' rights were in some manner affected by the trial court's ruling on causation, the trial court's grant of summary judgment based on a lack of duty was unchanged by the amended judgment for purposes of appeal.⁶

The holdings in *Lister v. Bowen* (2013) 215 Cal.App.4th 319 and *Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, relied on by plaintiffs, are distinguishable. The courts in *Lister* and *Sanchez* concluded the trial courts had substantially modified the

⁶ Plaintiffs assert their substantial rights were affected by the amendment to the judgment because absent amendment they would have been collaterally estopped from proving the malfunctioning streetlight was a proximate cause of the accident in opposing a future summary judgment motion filed by the remaining defendants. But had Plaintiffs appealed the original judgment, the trial court's determination of causation in the judgment would have had no preclusive effect in the litigation. (See *Thee Aguila, Inc. v. Century Law Group, LLP* (2019) 37 Cal.App.5th 22, 29 [issue preclusion does not apply unless "the issue sought to be precluded from relitigation was litigated to finality"]; *People v. Burns* (2011) 198 Cal.App.4th 726, 731 ["judgment is not final and preclusive if it is still subject to direct attack"]; *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174 [the finality required for preclusion "is not achieved until an appeal from the trial court judgment has been exhausted or the time to appeal has expired"].) Further, we are not aware of any authority, nor do plaintiffs cite any, for the proposition any collateral effect of a judgment as to claims against codefendants is a proper consideration for determining whether an amendment to a judgment is a substantial modification. Rather, we focus on "whether [the] modification affected [plaintiffs'] rights on appeal." (*Ellis, supra*, 235 Cal.App.4th at pp. 844-845.)

original order and judgment, respectively, because the changes materially altered the rights of the parties. (See *Lister*, at pp. 330-331 [modification of restraining order to reduce duration of order from five to three years “substantively alter[ed] the parties’ rights”]; *Sanchez*, at pp. 763, 767 [amendment to judgment to reduce plaintiff’s recovery to reflect his comparative fault materially affected the rights of the parties “because it changed the formula used to calculate damages”]; see also *Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 744 [modification of judgment was substantial where amendment required payment by appellant of an additional nine months of opposing party’s legal expenses].)

Likewise, plaintiffs’ reliance on *Neff v. Ernst* (1957) 48 Cal.2d 628 and *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256 is misplaced. In those cases the appellants appealed from both the trial court’s original and amended judgments; because the amended judgments substantially modified the plaintiffs’ rights, on appeal the courts considered only the merits of the modified judgment. (See *Neff*, at p. 634 [appeal from modified judgment finding for the first time plaintiffs had fee title interest in land, explaining that when the trial court “enters a substantially modified judgment, that judgment becomes the final judgment of that court and the appeal from the prior judgment becomes ineffective”]; *Avenida*, at pp. 1265-1268 [modified judgment allowing defendant city to rescind land use restriction to avoid payment of damages awarded in original judgment was operative judgment for purposes of appeal].) *Neff* and *Avenida* underscore that plaintiffs here could have appealed from the original judgment *and* filed their new trial motion without compromising the effectiveness of

their appeal. (See *Neff*, at p. 634 [“It is not inconsistent nor improper to file both a notice of appeal and a motion for a new trial.”]; *Avenida*, at p. 1267 [modification of judgment made pursuant to new trial motion is excepted from general rule that “the filing of a notice of appeal ‘divests the trial court of further jurisdiction in the cause’ ”].)

In this case, because the trial court’s modification of the judgment did not materially affect plaintiffs’ rights, their appeal, taken over 60 days after service of notice of entry of the original judgment, is untimely.

DISPOSITION

The appeal is dismissed. Edison is to recover its costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.