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**BELINDA MAGLIOCCO et al., Plaintiffs and Respondents, v. MAURICE
KANBAR, Defendant and Appellant.**

A113538

**COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT,
DIVISION FOUR**

2007 Cal. App. Unpub. LEXIS 1030

February 8, 2007, Filed

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PRIOR HISTORY: San Francisco County Super. Ct. No. 312942.

CORE TERMS: tenants, settlement, opinion letter, former tenants, Ellis Act, waive, settlement agreement, landlord-tenant, settling, waived, unenforceable, respondents' counsel, ordinance, lawsuit, rent, express waiver, declaration, approve, mediation, power of attorney, waiver of rights, required to obtain, reversible error, personally, subjective, nonparty, notice, good faith, attorney fee, respondents failed

JUDGES: Sepulveda, J.; Reardon, Acting P.J., Rivera, J. concurred.

OPINION BY: Sepulveda

OPINION

Appellant Maurice Kanbar appeals a judgment enforcing a settlement agreement pursuant to Code of Civil Procedure section 664.6. ¹ He claims on appeal that the settlement agreement is unenforceable under section 664.6 because it was not signed by all settling parties and that the parties did not comply with the terms of the agreement. We disagree and affirm.

¹ All statutory references are to the Code of Civil Procedure unless otherwise specified.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Respondents Belinda Magliocco, Dortha Hellman, [*2] Betsy Feichtmeir, Michael Barcun, and Ronald Schwarz filed a complaint against appellant on August 18, 2000, alleging violation of San Francisco's rent ordinance and other causes of action.²

² Michael Moore and Michael Thakar, who are not parties to this appeal, also were listed as plaintiffs. For reasons not relevant to this appeal, appellant states that his ability to collect his attorney fee award against them has been extinguished. Plaintiffs also sued Elliott Kanbar, who was later dismissed as a defendant and also is not a party to this appeal.

The trial court awarded appellant costs in the amount of \$ 11,209.17 on October 22, 2001, and respondents appealed. On February 7, 2002, the trial court awarded appellant \$ 237,500 in attorney fees.

Four days later, the parties participated in a mediation at Judicial Arbitration & Mediation Services with Jill Fannin, who was assigned through this court's mediation program. The parties agreed on a settlement that day and signed an agreement dated February 11, 2002 (the [*3] February 11 agreement). Respondents Barcun, Magliocco, Feichtmeir, and Schwarz personally signed the agreement. Respondent Hellman was unable to attend the mediation, and someone else signed the agreement as her attorney in fact. Moore and Thakar also were unable to attend, but their attorney signed the agreement on their behalf as their power of attorney.

The agreement called for appellant to waive his attorney fees and costs in exchange for plaintiffs dropping their appeal and waiving their rights under the San Francisco Rent Ordinance and the Ellis Act (Gov. Code, § 7060 et seq.). The settlement was memorialized on a typed settlement form, with provisions specific to the parties' dispute handwritten on the form. The agreement provided, in part, "A. All tenants and former tenants waive any rights to return under the Ellis Act or the San Francisco Rent Ordinance or to sue for subsequent violations of the Ellis Act or the San Francisco Rent Ordinance (short of open and arms-length rental to other parties). B. Tenants' counsel to provide an opinion that the tenants and former tenants' waivers are valid and acceptable defendants' landlord-tenant lawyer. [[*4] *Sic.*]" The agreement also contained a handwritten note that stated, "The parties will agree to a final settlement reflecting this agreement." Respondents' counsel wrote to this court requesting a 30-day stay of all proceedings while the settlement was "finalized and reduced to a writing."

As contemplated by the February 11 agreement, respondents' counsel prepared a five-page opinion letter dated May 2, 2002, that set forth why the release of claims in the settlement was valid. Appellant's counsel wrote back on July 12 stating he had some "relatively minor concerns" about the letter. He requested that respondents agree to a rescission of appellant's original notices of intent under the Ellis Act to prevent any nonparties to the settlement raising objections in the future to his use of his property. Respondents' counsel responded that he could not accept such a proposal, which was not contemplated in the February 11 agreement. Appellant's counsel wrote on August 6, 2002, that he could not approve the May 2 opinion letter and that "this matter has not settled." (Original underline.)

Over the next few months, counsel continued to exchange proposals about how to address appellant's [*5] concerns about potential liability under the Ellis Act. Respondents' counsel submitted a declaration stating that "[t]he only reason plaintiffs entered into negotiations with [appellant] to modify the terms of the original settlement agreement was in order to avoid a break down of the settlement and further litigation." As of February 23, 2003, all respondents (but not appellant) had signed a revised settlement agreement that called for, among other things, respondents' counsel obtaining a written waiver of Ellis Act rights from former tenant Ruth Allen. The agreement provided, "this settlement is contingent upon receipt of a written waiver from Ms. Allen." Ms. Allen never provided such a waiver because she did not understand it and did not want to pay a lawyer to explain it to her. The agreement also stated, "Plaintiffs' counsel has provided a written legal opinion that the tenants and former tenants' waivers [of Ellis Act rights] in this agreement are valid and enforceable by defendant. Defendant approves the legal opinion or waives any further objection to it." Appellant did not sign the modified versions of the settlement agreement that appear in the record.

Following an [*6] order from this court requesting information about the status of respondents' then-pending appeal, respondents' counsel wrote to the court on February 6, 2003, describing ongoing settlement efforts and stating that counsel expected to move to dismiss the appeal by February 28, 2003. This court dismissed the appeal on April 7, 2003, for failure to procure the record. (Cal. Rules of Court, rule 8.140(a)(1).)

In December 2004, appellant filed a notice of levy against respondent Magliocco seeking to collect \$ 322,081.52, plus daily interest. The parties then apparently attempted further settlement negotiations. When the parties still were unable to agree on a final settlement, respondents on November 9, 2005, filed a notice of motion pursuant to section 664.6 to enforce the February 11 agreement.

The trial court held a hearing on the motion on December 8, 2005. It granted respondents' motion on January 18, 2006; the order was silent as to the basis for the trial court's ruling. Judgment was entered two days later. The judgment listed the material terms of the February 11 agreement but again did not provide the trial court's reasoning. Appellant timely appealed [*7] from the judgment.

II.

DISCUSSION

A. Appellant Waived Argument Over Whether February 11 Agreement Was Properly Signed.

Appellant first claims that the February 11 agreement is unenforceable under section 664.6 because it was not personally signed by all settling parties. Section 664.6 provides, in relevant part: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court . . . for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." Our Supreme Court has concluded that the term "parties" in the statute refers to the litigants themselves and not their attorneys of record, and that therefore an agreement is unenforceable under section 664.6 where it is not personally signed by the litigants. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 586.) "Unlike the steps an attorney may take on behalf of the client that are incidental to the management of a lawsuit, such as making or opposing motions, seeking continuances, or conducting discovery, the settlement of a lawsuit is not incidental to the management of the lawsuit; it ends the lawsuit. [*8] Accordingly, settlement is such a serious step that it requires the client's knowledge and express consent. [Citation.]" (*Id.* at p. 583.)

Appellant argues that because three of the seven plaintiffs signed the February 11 agreement through powers of attorney, the entire agreement is unenforceable under section 664.6. Respondents disagree and assert that "[n]owhere in the record is there any hint that [appellant] felt the agreement was unenforceable due to the use of powers of attorney, until his new attorneys, after the fact, came in to try to repudiate the agreement on any basis in order to re-negotiate." More importantly, appellant did not raise the issue below in opposition to respondents' motion to enforce the settlement agreement and therefore has waived the issue. (*Hussey-Head v. World Savings & Loan Assn.* (2003) 111 Cal.App.4th 773, 783, fn. 7 [declining to exercise discretion to review issue raised for first time on appeal].)

Respondents argued in their moving papers to the trial court that the February 11 agreement was enforceable notwithstanding the fact that three settling plaintiffs signed through powers of attorney. Nowhere in [*9] appellant's opposition did he argue otherwise, nor did his attorney raise the issue at the hearing on the motion. While it is true that this court *may* consider for the first time on appeal the legal issue of whether the signatures on the February 11 agreement complied with section 664.6 (*Burckhard v. Del Monte Corp.* (1996) 48 Cal.App.4th 1912, 1918), we find no compelling reason to do so here. (Cf. *Palmer v. Shawback* (1993) 17 Cal.App.4th 296, 300 [good cause for not citing statute below because cases cited on appeal were decided after trial court ruling].)³

³ We note that in the cases cited by appellant, the party challenging enforcement of a settlement agreement under section 664.6 is generally

someone who did not personally sign the agreement. (*Levy v. Superior Court*, *supra*, 10 Cal.4th at p. 580; *Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110, 1116; *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 303.) Here, by contrast, there is no dispute that appellant signed the February 11 agreement.

[*10] B. Trial Court Did Not Err In Enforcing The Parties' Settlement Agreement.

1. Standard of review.

"A section 664.6 motion is appropriate . . . even when issues relating to the binding nature or terms of the settlement are in dispute, because, in ruling upon the motion, the trial court is empowered to resolve these disputed issues and ultimately determine whether the parties reached a binding mutual accord as to the material terms." (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 905.) "The trial court's factual findings on a motion to enforce settlement pursuant to section 664.6 are subject to limited appellate review and will not be disturbed if supported by substantial evidence. [Citation.]" (*Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1162; see also *In re Marriage of Assemi*, *supra*, 7 Cal.4th at p. 911; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 815.)

Appellant urges this court to review all issues on appeal de novo because no conflicting extrinsic evidence was presented; instead, appellant argues, the only conflict was in the inferences to be drawn from the evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, fn. 2, 44 Cal. Rptr. 767.) [*11] That is arguably true with respect to appellant's argument that respondents were required to obtain an express waiver of rights from a nonparty (*post*, § II.B.2); however, even under a de novo standard of review, we reject appellant's argument. As for appellant's argument that the rejection of an opinion letter was reasonable (*post*, § II.B.3), we conclude that there was a conflict in extrinsic evidence and that appellant has not met his burden to show that the trial court committed reversible error.⁴

⁴ Appellant claims that certain declarations submitted to the trial court regarding the parties' subjective belief about whether the February 11 agreement was meant to be final, *including his own declaration*, are not admissible. Appellant did not object below to the admissibility of the declarations, and, indeed, he submitted one of the declarations he now claims is inadmissible. Even assuming *arguendo* that this issue was not waived and that the declarations were inadmissible, they are unnecessary to our decision.

[*12] 2. Respondents not required to obtain Ruth Allen's waiver of rights.

Appellant argues that respondents failed to comply with the February 11 agreement because they did not obtain an express waiver of Ellis Act rights from former tenant Ruth Allen, who was not a party to the original lawsuit and thus was not involved in the February 11 mediation. This argument rests on the assumption that respondents were required under the February 11 agreement to secure Ms. Allen's express waiver. We conclude that they were not, and therefore any failure to secure such a waiver does not invalidate the parties' agreement.

The February 11 agreement provides, "All tenants and former tenants waive any rights to return under the Ellis Act or the San Francisco Rent Ordinance or to sue for subsequent violations of the Ellis Act or the San Francisco Rent Ordinance (short of open and arms-length rental to other parties)." The agreement does not specifically provide that the settling plaintiffs were required to obtain any additional waivers, other than the ones contained in the agreement itself, and appellant concedes that substantial evidence supports a finding that respondents formally waived their Ellis [*13] Act rights. Appellant claims, however, that the term "tenants and former tenants" encompasses people other than "plaintiffs," a term that is used elsewhere in the agreement, and that therefore the settling plaintiffs were required to secure waivers of tenants and former tenants who were not plaintiffs to the action--specifically, Ms. Allen.

Respondents provided evidence to the trial court that the term "tenants and former tenants" referred only to plaintiffs, some of whom had vacated appellant's property and some of whom apparently still resided there at the time of the

settlement. We reject appellant's argument that it is "nonsensical" to assume that the term "tenants and former tenants" referred only to plaintiffs because the agreement referred to action to be taken by "[t]enants' counsel." He states that to accept this explanation "is to find that [plaintiffs' trial counsel], in his capacity as attorney for only some of the Plaintiffs, as opposed to his capacity as attorney for all of the Plaintiffs, was to provide an opinion that all of the waivers were valid." He apparently assumes that the opinion letter was meant to address the waiver of rights by all *tenants*, as opposed [*14] to all *plaintiffs*. To the contrary, the May 2, 2002, opinion letter referred only to waivers by "plaintiffs," not to waivers by any other tenants or former tenants. The letter specifically refers to the requirement that "*plaintiffs'* counsel" was to prepare the opinion letter. (Italics added.) Moreover, there is nothing in the record that shows there was an attorney who represented "[a]ll tenants" (including nonparties), as opposed to *all plaintiffs*. It would thus make sense that the reference to "[t]enants' counsel" in the agreement was a reference to plaintiffs' counsel, as opposed to some unnamed attorney who represented all tenants.

We also reject appellant's argument that the "grammar" of the language in the agreement demonstrated that plaintiffs were required to secure additional waivers from nonparties. Appellant notes that the agreement calls for tenants and former tenants to "waive" their Ellis Act rights, and the use of the present tense demonstrates that some additional affirmative action was necessary. Because Ruth Allen never affirmatively waived her Ellis Act rights, appellant argues, respondents failed to comply with the terms of the February 11 agreement. [*15] In fact, a more reasonable interpretation of the term "waive" is that by signing the February 11 agreement, the settling plaintiffs were waiving their Ellis Act rights, and no additional conduct was necessary.

The cases cited by appellant are not to the contrary. In *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 950, the Supreme Court held that predispute waivers of jury trials are unenforceable. The court interpreted section 631, subdivision (d)(2), which provides that "[a] party waives trial by jury . . . [P] . . . [b]y written consent filed with the clerk or judge." (*Grafton Partners, supra*, at p. 957.) The court did not conclude, as appellant claims, that the use of the word "waives" automatically required "some new affirmative conduct." Rather, the court concluded that because the statute refers to a "party" doing something in the present tense, this presupposes that an action be pending, and thus no predispute waivers are valid under the statute. (*Id.* at pp. 957-959.) *Smith v. State Bd. of Pharmacy* (1995) 37 Cal.App.4th 229, 241 addressed whether a pleading that accused a defendant of [*16] doing something in the past put him on notice that the prosecution was going to rely on a negligence theory. In *Patton v. Royal Industries, Inc.* (1968) 263 Cal.App.2d 760, 765-766, 70 Cal. Rptr. 44, the court concluded that a letter stating that employees "have been terminated" clearly showed that they had been fired. Neither *Smith* nor *Patton* supports appellant's argument that the term "waives" in the February 11 agreement indicated that the settling plaintiffs were to take some action in the future.

We disagree with appellant's contention that "[t]he only plausible interpretation of the agreement is that even though she was not a party, Allen is a former tenant and [respondents] were obligated to obtain her express waiver." ⁵ We conclude that the only plausible interpretation is a contrary one—that the February 11 agreement required no express waivers except the ones secured by the settling plaintiffs. We thus need not address appellant's argument that respondents somehow breached the parties' agreement by not securing Ms. Allen's express waiver. ⁶

⁵ Appellant apparently does not dispute respondents' argument that Ms. Allen has impliedly waived her rights by failing to timely assert a claim.

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⁶ The trial court's judgment states that "[a]ll tenants and former tenants waive any rights" to return to the property and to sue under the Ellis Act, but does not state how the court defined the term "[a]ll tenants and former tenants." Although the trial court did not provide its rationale underlying its ruling, we may uphold the judgment if it is correct for any reason. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) "It is judicial action and not judicial reasoning which is the subject of review [citation]." (*El Centro Grain Co. v. Bank of Italy, etc.* (1932) 123 Cal.App. 564, 567.)

3. Trial court did not commit reversible error in ruling that opinion letter was deemed acceptable to appellant's attorney.

Finally, appellant argues that the February 11 agreement is unenforceable because respondents failed to comply with the agreement's requirement that "[t]enants' counsel . . . provide an opinion that the tenants and former tenants' waivers are valid and acceptable [to] defendant's landlord-tenant lawyer." Appellant argues that [*18] this clause established a condition precedent, that the failure to approve the opinion letter should be judged under a subjective test, and that under that test, the failure to approve the letter need not have been reasonable so long as it was made in good faith.

The trial court's judgment states, "Tenants' counsel's opinion letter that the tenants and former tenants' waivers are valid is deemed acceptable to defendant's landlord-tenant lawyer." "A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principal of appellate practice but an ingredient of the constitutional doctrine of reversible error." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 349, p. 394 [citing cases].) Appellant fails to overcome the presumption that the trial court's ruling was correct.

Appellant's first argument, that the requirement that his landlord-tenant attorney approve tenants' opinion letter establishes a condition precedent in the February 11 agreement, is not inconsistent with the [*19] trial court's ruling. The trial court did not rule that the clause was not a condition precedent. Instead, it ruled that the condition had been satisfied-that the opinion letter was "deemed acceptable to defendant's landlord-tenant lawyer."

Appellant next argues at length that the satisfaction of the approval clause in the February 11 agreement was subject to a subjective, as opposed to a reasonable person, standard, and that his attorney's rejection of respondents' opinion letter was subjectively reasonable. (Cf. *Kadner v. Shields* (1971) 20 Cal.App.3d 251, 259, 262-263, 97 Cal. Rptr. 742 [preference for reasonable person standard where writing lacks explicit language regarding parties' intent].) Again, there is nothing in the record that reveals which test the trial court used in concluding that the opinion letter should be "deemed acceptable" to appellant's landlord-tenant lawyer.

Even if we assume, without deciding, that the trial court was required to, and in fact did use, the subjective test, it does not follow that the trial court erred in concluding that the opinion letter should be acceptable to appellant's attorney. Appellant devotes less than a paragraph [*20] of his opening brief to arguing that the record lacks substantial evidence that the landlord-tenant attorney's failure to approve the opinion letter lacked good faith. He argues that the attorney "was executing his duty to his client to ensure that in return for giving up a substantial amount of money he was not getting an illusory benefit. If the structure of the settlement and the waivers left [appellant] open to legal trouble with the City [of San Francisco] for doing what was contemplated by the agreement, then he would have settled into a lawsuit." But as respondents' counsel explained in a letter to appellant's counsel on July 22, 2003, "my clients cannot negotiate claims on behalf of public entities. Nevertheless, I believe the likelihood of such an action occurring is nil when the tenants themselves have waived any such rights."

Appellant points to a February 6, 2003 letter that respondents' counsel sent to this court regarding the status of respondents' previous appeal as evidence of his attorney's good faith in rejecting the opinion letter. The letter summarizes the efforts then being made to modify the opinion letter to satisfy appellant's counsel. The letter, which [*21] was not submitted to the trial court, acknowledges that the parties agreed to the need for changes following amendments in 2002 to the Ellis Act. The February 6 letter does not, however, provide any admission that the ultimate rejection of the efforts to modify the agreement were made in good faith.

Appellant likewise argues that even under the objective test, his attorney's rejection of the opinion letter was valid. He simply states that "under an objective test, the issue is whether the decision [to reject the opinion letter] was reasonable. The parties contemplated that [appellant] would be able to allow friends and family to stay at the premises." Again, given the fact that appellant apparently does not dispute the fact that all tenants and former tenants have either expressly or, in the case of Ms. Allen, impliedly waived their rights, it is unclear what else respondents were required to do in order to satisfy appellant's counsel. To the extent appellant argues that the failure to provide him with an express waiver

of rights from Ms. Allen breached the parties' agreement, we have already rejected the argument that respondents were required to obtain Ms. Allen's express waiver. [*22] (*Ante*, § II.B.2.)

In short, appellant has failed to demonstrate that the trial court committed reversible error in ruling that the opinion letter of respondent's counsel is "deemed acceptable" to defendant's landlord-tenant lawyer.

III.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

Sepulveda, J.

We concur:

Reardon, Acting P.J.

Rivera, J.