Filed 7/24/12 Ellis v. Pacific Health Corp. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL ELLIS et al., Plaintiffs and Appellants, v. PACIFIC HEALTH CORPORATION et al., Defendants and Respondents.	B229609 (Los Angeles County Super. Ct. No. BC380230)

APPEAL from a judgment of the Superior Court of Los Angeles County, Abraham Khan, Judge. Reversed.

Initiative Legal Group, Mark P. Estrella, Glenn A. Danas, Sang Park, Gene Williams and Alexandria Witte for Plaintiffs and Appellants.

Littler Mendelson, Gregory P. Wong and Carlos Jimenez for Defendants and Respondents.

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Michael Ellis and Angela McCrary appeal from the judgment of dismissal entered after the demurrer of Los Angeles Doctors Hospital Associates, L.P. (Los Angeles Doctors)[1] to their class action complaint for wage and hour violations was sustained without leave to amend. Ellis and McCrary contend the trial court misapplied the doctrine of collateral estoppel in ruling their claims were barred by the denial of class certification in a similar wage and hour lawsuit against Los Angeles Doctors, *Larner v. Pacific Health Foundation* (Super. Ct. L.A. County, 2007, No. BC322049) (*Larner*). As Los Angeles Doctors acknowledges in stating it does not oppose this appeal, an identical issue was resolved in class plaintiffs' favor earlier this year in *Bridgeford v. Pacific Health Corp.* (2012) 202 Cal.App.4th 1034 (*Bridgeford*), yet another wage and hour lawsuit against Los Angeles Doctors, in which Division Three of this court held, "[U]nnamed putative class members of a class that was never certified cannot be bound by collateral estoppel." (*Bridgeford*, at p. 1037.) We agree with *Bridgeford* and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Ellis/McCrary Complaint*

Ellis and McCrary filed their putative class action complaint on November 5, 2007 alleging causes of action for unpaid overtime (Lab. Code, §§ 501, 1198), wages not paid upon termination (Lab. Code, §§ 201, 202), failure to timely pay wages (Lab. Code, § 204), failure to provide required meal periods (Lab. Code, §§ 226.7, subd. (a), 512, subd. (a)), failure to provide required rest periods (Lab. Code, § 226.7, subd. (a)), improper wage statements (Lab. Code, § 226, subd. (a)) and violation of California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.). The complaint defined four putative subclasses of nonexempt or hourly employees of Los Angeles Metropolitan Medical Center (an overtime subclass of nonexempt employees who were employed from September 24, 2000 until resolution of the lawsuit; a wage statement subclass of

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[1] Ellis and McCrary's complaint was amended by stipulation to substitute Los Angeles Doctors Associates, L.P., d/b/a Los Angeles Metropolitan Medical Center in place of Pacific Health Corporation.

nonexempt employees who were employed from September 24, 2003 until resolution of the lawsuit; and two separate meal period and rest break subclasses of nonexempt employees who were employed from November 5, 2003 until resolution of the lawsuit).

2. *The Larner Action*

Josephine Larner filed a second amended class action complaint in May 2006 alleging causes of action for failure to pay overtime wages, failure to maintain accurate records of hours worked, failure to pay wages due upon discharge or resignation and unfair competition. Larner moved for certification of a class of all nonexempt employees of Los Angeles Metropolitan Medical Center from September 24, 2000 forward (with a proposed subclass of employees from September 24, 2003 forward). The motion was denied on the grounds it was untimely, Larner's claims were not typical of those of other putative class members, the class definition was overbroad and the class unascertainable. (See *Bridgeport, supra*, 202 Cal.App.4th at p. 1038.)

Larner and Los Angeles Doctors then settled her individual claims and stipulated to the entry of a defense judgment. (See *Bridgeport, supra*, 202 Cal.App.4th at p. 1038.) Larner appealed the judgment, challenging the denial of class certification. The Court of Appeal concluded the settlement of Larner's individual claims deprived her of any personal interest in the litigation and rendered the appeal moot. (*Larner v. Los Angeles Doctors Hospital Associates, LP* (2008) 168 Cal.App.4th 1291, 1304-1305.)

3. *The Trial Court's Order Sustaining Los Angeles Doctors' Demurrer*

While the *Larner* appeal was still pending, Los Angeles Doctors demurred to the Ellis and McCrary complaint, contending their class claims were barred by collateral estoppel as a result of denial of class certification in *Larner*.[2] Relying on *Alvarez v. May Dept. Stores Co.* (2006) 143 Cal.App.4th 1223 (*Alvarez*), which applied established principles of collateral estoppel to class certification issues, the trial court sustained the

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[2] Los Angeles Doctors also moved to strike all references to the lawsuit proceeding as a class action on the same ground.

demurrers to all causes of action without leave to amend.[3] The action was thereafter stayed pending resolution of the appeal in *Larner*. Ultimately, a judgment of dismissal was entered. Ellis and McCrary filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

On appeal from an order dismissing an action after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We may also consider matters that have been judicially noticed. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; see *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) We give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." (*Aubry*, at p. 967; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; see *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20 [demurrer tests sufficiency of complaint based on facts included in the complaint, those subject to judicial notice and those conceded by plaintiffs].) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

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[3] Los Angeles Doctors argued only that the decision in *Larner* collaterally estopped subsequent class litigation and did not challenge Ellis and McCrary's right to pursue their individual claims for wage and hour violations. The trial court did not explain the basis for dismissing those claims. In addition, there apparently was some uncertainty whether the court intended to sustain the demurrers to the fourth and fifth causes of action, which asserted meal and rest period claims that had not been raised in *Larner*. We need not address those issues in light of our conclusion collateral estoppel does not bar any of Ellis and McCrary's claims.

2. *Denial of Class Certification Does Bind Absent Class Members*

"Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.'" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; accord, *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.) Collateral estoppel applies "only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, *the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.* [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, italics added; see *Hernandez,* at p. 511 [same].)

As *Bridgeford* explained, the court in *Alvarez, supra,* 143 Cal.App.4th 1223 had held denial of class certification can be the basis for collateral estoppel against absent putative class members on issues actually decided in connection with the denial (for example, whether a class is ascertainable and whether common issues of law or fact predominate).[4] (See *Bridgeford, supra,* 202 Cal.App.4th at p. 1043.) In reaching this result the *Alvarez* court employed the concept of "virtual representation" to enforce a ruling denying class certification against an absent putative class member not otherwise in privity with the named representatives involved in the earlier litigation. (See *Alvarez,* at pp. 1236-1237.)

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[4] "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. [Citations.] In turn, the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.)

This court questioned *Alvarez* and expressed serious reservations about the use of collateral estoppel against absent putative class members in *Johnson v. GlaxoSmithKine, Inc*. (2008) 166 Cal.App.4th 1497, 1510-1513, footnote 8, based on the United States Supreme Court's limitation of the concept of virtual representation and nonparty preclusion in *Taylor v. Sturgell* (2008) 553 U.S. 880 [128 S.Ct. 2161, 171 L.Ed.2d 155].[5] Last year, applying *Taylor*'s reasoning and common law principles of issue preclusion, the Supreme Court in *Smith v. Bayer Corp.* (2011) 564 U.S. ___ [131 S.Ct. 2368, 180 L.Ed.2d 341] held there can be no issue preclusion (collateral estoppel) against unnamed putative class members if the class was not certified in the prior proceeding: "Neither a proposed class action nor a rejected class action may bind nonparties." (*Id*. at p. ___ [131 S.Ct. at p. 2380].) In support of its holding the Court noted, "The great weight of scholarly authority—from the Restatement of Judgments to the American Law Institute to Wright and Miller—agrees that an uncertified class action cannot bind proposed class members." (*Id*. at p. __, fn. 11.)

Following *Smith v. Bayer Corp*., *supra*, 564 U.S. ___, in *Bridgeford, supra,* 202 Cal.App.4th 1034, the Court of Appeal reviewed the dismissal of Dan Bridgeford and Lucianna Tarin's class action complaint alleging numerous wage and hour violations by Los Angeles Doctors and related entities. In a ruling substantively identical to the one now before us, the trial court had held the putative class representatives were collaterally estopped from seeking class certification as a result of the denial of class certification in *Larner*, which asserted the same wage and hour causes of action. Finding the reasoning in *Smith* "persuasive" (*Bridgeford,* at p. 1044), our colleagues in Division Three of this court reversed, holding "[U]nder California law . . . the denial of class certification

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[5] Although we explained *Taylor* "would appear to preclude the use of collateral estoppel to bar absent putative class members from seeking class certification following the denial of a certification motion in an earlier lawsuit" (*Johnson v. GlaxoSmithKline, Inc., supra,*166 Cal.App.4th at p. 1513, fn. 8), we ultimately reversed the trial court's application of collateral estoppel on a different ground, concluding the issues actually litigated in the prior proceedings differed from those presented in the case at bar. (*Id*. at pp. 1513-1515.)

cannot establish collateral estoppel against unnamed putative class members on any issue because unnamed putative class members were neither parties to the prior proceeding nor represented by a party to the prior proceeding so as to be considered in privity with such a party for purposes of collateral estoppel." (*Ibid.*) Rejecting the contrary analysis in *Alvarez, supra,* 143 Cal.App.4th at page 1236, the *Bridgeford* court explained, "[I]f no class was certified by the court in the prior proceeding, the interests of absent putative class members were not represented in the prior proceeding and the requirements for collateral estoppel cannot be established . . . ." (*Bridgeford*, at p. 1043.)

We agree with *Bridgeford* and its adoption as a matter of California law of the United States Supreme Court's analysis in *Smith v. Bayer Corp.*, *supra*, 564 U.S. ___ [131 S.Ct. 2368]. Here, Ellis and McCrary were not named parties in *Larner* nor in privity with any party to that action for purposes of collateral estoppel. Although their economic interests may have been substantially aligned with Larner's when she began her lawsuit against Los Angeles Doctors, without class certification issues decided in the prior proceeding cannot bind absent putative class members. (See *Bridgeford*, *supra*, 202 Cal.App.4th at p. 1044; see also *Johnson v. GlaxoSmithKline, Inc.*, *supra*, 166 Cal.App.4th at p. 1513, fn. 8.)

DISPOSITION

The judgment dismissing the action is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Ellis and McCrary are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. JACKSON, J.