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Premature Notices of Appeal

Sometimes there is confusion as to whether the court's ruling is an appealable order. This uncertainty arises most often in rulings on demurrer and motions for summary judgment. After an order granting summary judgment or sustaining a demurrer, everyone knows that the case is fully-adjudicated in the trial court, but the formality of the rendition and entry of judgment has not yet occurred. This article discusses the importance of appealing from the judgment and not the ruling on demurrer or summary judgment. Although the California Courts of Appeal have the power to "save" premature appeal, this is a discretionary power that should not be relied upon.

The Right To Appeal

In California, the right to appeal is governed by statute. California Civil Procedure Code section 904.1 sets forth the types of judgments and orders that may be appealed, which includes final judgments, certain interlocutory judgments, post-judgment orders, and other statutorily enumerated orders. As a matter of jurisdiction, appellate courts cannot decide an appeal taken from a nonappealable order.

Rulings On Demurrer And Summary Judgment Are Not Appealable Orders

There is no direct appeal from an order sustaining or overruling a demurrer. Rather, consistent with the general rule, the right to appeal is from the judgment of dismissal entered after a court order sustaining a demurrer. In the same vein, there is no direct appeal from an order granting summary judgment. The appeal lies from the subsequent judgment in favor of the moving party.

Premature Notice Of Appeal

Where the notice of appeal is filed from the order sustaining a demurrer or granting summary judgment and a judgment is subsequently entered, the notice of appeal is premature. California Rules of Court, Rule 8.104(e) attempts to solve the problem by allowing appellate courts to construe premature notices of appeal as timely, if and only if, a final judgment subsequently is rendered and entered. Rule 8.104(e)(1) provides that a "notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment." This provision appears to give the appellate court no discretion to dismiss an appeal when the notice of appeal is filed after judgment is rendered, but before it is entered.

In contrast, Rule 8.104(e)(2) provides that the appellate court "may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after the entry of judgment." Significantly, the power set forth in Rule 8.104(e)(2) is a matter of the appellate court's discretion. Rule 8.104(e)(2) uses the term "may,"

and thus, it is not mandatory that the appellate court treat such premature notices of appeal as timely filed.

In a recent case, *Los Altos Golf and Country Club v. County of Santa Clara*, 165 Cal. App. 4th 198 (2008), Sixth Appellate District relied upon Rule 8.104(e)(2) to allow an appeal from an order sustaining demurrer. The respondents argued that the appellate court should dismiss the appeal because the order sustaining the demurrer is a nonappealable order. In exercising its discretion to hear the appeal, the court recognized that a judgment of dismissal had been entered after the filing of the notice of appeal. Relying on Rule 8.104(e)(2), the appellate court reasoned that “because a judgment of dismissal has actually been entered, we will liberally construe the appeal to have been taken from the judgment of dismissal.”

Similarly, in *Mukthar v. Latin American Security Service*, 139 Cal. App. 4th 284 (2006), the Second Appellate District, Division Eight, exercised its discretion to decide an appeal from a minute order granting summary judgment. In that case, a judgment was subsequently entered. The appellate court rejected the respondent’s argument that the appeal should be dismissed because the appellant appealed from a nonappealable order. The court relied upon the representation of appellant’s counsel that the proposed judgment had been lost or misplaced and that counsel filed the notice of appeal from the summary judgment order to protect the right to appeal. The court reasoned as follows: “We conclude that, in light of these circumstances, the ends of justice are served if we deem the notice of appeal to have been filed after the entry of judgment. This is not one of those cases when counsel has ignored the rule that the appeal is from the judgment, and not the order granting the motion for summary judgment.”

Do Not Rely On The Court’s Discretionary Power To “Save” An Appeal

Appellate courts tend to be sticklers for following the rules. There are six appellate districts in California and each district (and in some cases each division within the district) may exercise its discretion under Rule 8.104(e)(2) in a different manner. Because the timely filing of the notice of appeal is jurisdictional, practitioners must pay careful attention to whether the order is appealable or whether the appeal lies from a subsequent judgment. If the losing party intends to appeal after an order sustaining a demurrer or granting summary judgment, it makes sense to be proactive in ensuring that a judgment is rendered and entered. The risk of appealing from a nonappealable order and then relying on the discretion of the Court of Appeal to save your client’s appeal is much too great a risk to take.

Peg Carew Toledo is Of Counsel at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Toledo can be reached at (916) 551-2592 or toledo@mgslaw.com.

C. Athena Roussos contributed to this article. Roussos is an attorney in Elk Grove, California, and is also certified as an Appellate Law Specialist by the California State Bar Board of Legal

Specialization. She also teaches Appellate & International Advocacy at McGeorge School of Law in Sacramento. Roussos can be reached at (916) 670-7901 or athena@athenaroussoslaw.com.