Filed 5/4/20 Stockwell v. City and County of San Francisco CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JUANITA STOCKWELL et al., Plaintiffs and Appellants, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent.	A156372 (City and County of San Francisco Super. Ct. No. CGC15549482)

Plaintiffs and appellants Juanita Stockwell, et al. (appellants), active and retired police officers,[1] contend the trial court erred in granting a motion to enforce a settlement filed by defendant and respondent City and County of San Francisco (respondent) under Code of Civil Procedure section 664.6.[2] We reverse.

[1] The twelve appellants are E.R. Balinton, Peter Busalacchi, George Fogarty, Jason Hui, Jacklyn Jehl, Bartholomew Johnson, Robert Leung, Thomas O'Connor, Susan Rolovich, Juanita Stockwell, Jessie Washington, and Michael Wells.

[2] All undesignated statutory references are to the Code of Civil Procedure.

BACKGROUND

In December 2015, appellants filed suit against respondent, alleging the San Francisco Police Department's promotion practices discriminated against them on the basis of age. Appellants are 12 of the 29 plaintiffs.[3] The trial court denied the City's motion for summary judgment or adjudication, and trial was scheduled for June 2018.

On April 10, 2018, the attorneys who then represented appellants scheduled an April 17 meeting with the plaintiffs "to discuss trial strategy and getting all of you prepared to testify at the trial . . . ." At the April 17 meeting, the attorneys told the plaintiffs they could not win at trial and presented the plaintiffs with forms to sign stating they agreed to be bound by a majority vote of the plaintiffs as to any settlement. The form stated, "I hereby agree that if the City proposes a settlement amount to the group of 29 plaintiffs in *Stockwell v City and County of San Francisco* . . . , the proposed settlement amount and method of distribution will be put to a vote for acceptance by the 29 Plaintiffs, of which I am one of the plaintiffs. If a majority of the 29 plaintiffs agree to accept the settlement and distribution, then I agree to be bound by that majority vote." All 29 plaintiffs ultimately signed the majority rule form.[4]

---

[3] 30 individuals are named as plaintiffs in the complaint but the parties agree there were 29 plaintiffs at the time of the May 2018 settlement conference.

[4] Appellants dispute that two of the plaintiffs signed the form voluntarily. We need not address that issue because we conclude there is insufficient evidence plaintiffs understood and agreed with the May 4, 2018 proposed settlement.

On April 20, 2018, plaintiffs' former attorneys sent an e-mail informing the plaintiffs of a "Mandatory Settlement Conference" on May 4. The court's docket reflects that it actually was a voluntary settlement conference.

At the May 4, 2018 settlement conference before Judge Anne-Christine Massulo, respondent offered to settle the action as to all plaintiffs for a total of $400,000.00. On the understanding that the parties had reached a settlement, the settlement judge put the proposed settlement on the record. There were 23 plaintiffs present at the time. Respondent's counsel summarized the terms of the proposed settlement as follows: "So the settlement will be between the City and all twenty-nine plaintiffs . . . The settlement sum will be $400,000 that will be allocated to general damages . . . A single check to [plaintiffs' former counsel] . . . There will be no admission of liability . . . Each side will bear its own fees and costs . . . This is in return for a general release of any and all claims arising out of the Plaintiffs' employment through the date of this agreement . . . the Plaintiffs are not releasing any benefits they currently receive or may receive in the future related to their health and pension benefits . . . The settlement is contingent upon the approval of the San Francisco Police Commission and the San Francisco Board of Supervisors . . . The settlement will need to be commemorated in a written agreement . . . there will be a waiver of . . . the age claims . . . the settlement agreement, once commemorated in writing . . . [and] accepted by the Board of Supervisors, will not be changed absent a written agreement approved by the Board of Supervisors."

After back and forth on other details, plaintiffs' then counsel added, "The other item is the Plaintiffs have all executed an agreement by which a majority vote would bind each and every one of them to the settlement amount of the $400,000." The settlement judge then spoke to the plaintiffs,

stating, "So, I'm just going to—for completeness, I guess, just ask each of you, and I'll go around the room, to state your name, and whether or not—and that you have agreed to be bound by the majority rule with respect to this settlement." The judge then swore in the plaintiffs and proceeded to ask each of them whether they had "agreed to be bound by the majority rule?"[5] The judge's wording varied somewhat, but the judge clarified at one point, "And, again, the question is just so that everyone has it in mind. I'll just ask now if you agree to be bound through the majority rule; that you've all agreed to that, that's the question." The judge did *not* ask any of the plaintiffs whether they understood and agreed to the proposed settlement as described by respondent's counsel. Appellant Stockwell, who responded after 15 other plaintiffs, made explicit that the judge's question only related to the majority rule agreement, stating, "I don't agree with the settlement but I agree with the conditions to be bound by the majority." The settlement judge responded only, "Thank you."

Following the settlement conference, appellant Stockwell contacted plaintiffs' then counsel and requested an accounting. Counsel informed Stockwell that, after fees and costs there would be just under $150,000 available for distribution to the 29 plaintiffs. On May 11, 2018, appellant Stockwell sent then counsel an email advising them she was among 15 plaintiffs who wanted to vacate the settlement agreement. On May 22, counsel informed Stockwell that the firm would be withdrawing as counsel in the action. A motion to withdraw was approved in August.

---

[5] Some of the plaintiffs said that four other plaintiffs had provided them proxies to express their agreement to the majority rule. Given that the plaintiffs were not asked about their agreement to or understanding of the settlement, we need not consider whether those purported proxies were sufficient to bind those plaintiffs to the proposed settlement.

In October 2018, respondent filed a "Motion for Judgment Pursuant to Stipulated Settlement," seeking entry of judgment based on the May 4 purported settlement under section 664.6. Respondent's counsel averred that he e-mailed a draft settlement agreement to plaintiffs' former counsel on May 10, but did not receive a response to that or a May 23 follow-up e-mail. Fourteen plaintiffs, including the 12 appellants, filed an opposition to the section 664.6 motion.

In November 2018, the trial court granted respondent's section 664.6 motion. The ruling was based on findings that all the plaintiffs had "signed an agreement to be bound by a majority vote to accept or reject any 'settlement amount and method of distribution' offered by the City" and that "[a]t a May 4, 2018 settlement conference with another judge of this Court, the City offered $400,000 to be distributed through plaintiffs' counsel.[] A majority of plaintiffs agreed to the settlement—under oath on the record before the judge. However, 14 of the 29 plaintiffs later reneged, refusing to memorialize their deal in writing." The court's order also stated, "all 29 plaintiffs signed agreements to be bound by a majority vote, and a majority agreed to the settlement on the court record." In December, the trial court entered judgment pursuant to the May 4 settlement.

DISCUSSION

Section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

" 'Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit.' [Citation.] A trial court 'hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment.' [Citation.] The trial court may not 'create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon.' [Citation.] Thus, a trial court cannot enforce a settlement under section 664.6 unless the trial court finds the parties expressly consented . . . to the material terms of the settlement." (*Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, 732; accord *Karpinski v. Smitty's Bar, Inc.* (2016) 246 Cal.App.4th 456, 460–461 (*Karpinski*).)

"[S]ection 664.6 . . . created a summary, expedited procedure to enforce settlement agreements when certain requirements that decrease the likelihood of misunderstandings are met. . . . The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent. This protects the parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle, and minimizes the possibility of conflicting interpretations of the settlement. [Citations.] It also protects parties from impairment of their substantial rights without their knowledge and consent." (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 585 (*Levy*); accord *Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1429.)

"Past cases have established that, in ruling upon a section 664.6 motion for entry of judgment enforcing a settlement agreement, and in determining whether the parties entered into a binding settlement of all or part of a case, a trial court should consider whether (1) the material terms of the settlement

were explicitly defined, (2) the supervising judicial officer questioned the parties regarding their understanding of those terms, and (3) the parties expressly acknowledged their understanding of and agreement to be bound by those terms. In making the foregoing determination, the trial court may consider declarations of the parties and their counsel, any transcript of the stipulation orally presented and recorded by a certified reporter, and any additional oral testimony. [Citations.] The standard governing review of such determinations by a trial court is whether the court's ruling is supported by substantial evidence." (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.)

In the present case, the trial court found that "[a] majority of plaintiffs agreed to the settlement—under oath on the record before the judge." However, the transcript of the May 4, 2018 proceeding reflects that the settlement judge never asked *any* of the plaintiffs whether they agreed to the settlement *or* whether they understood the settlement terms. Instead, the settlement judge asked the plaintiffs only whether they "agreed to be bound by the majority rule." Agreement to the majority rule was necessary to the enforceability of any settlement with respect to any plaintiffs who did not agree with the proposed settlement, but questioning about the majority rule agreement could not take the place of the critical preliminary determination whether the plaintiffs (or at least a majority of them) actually *agreed to and understood the settlement*. Because plaintiffs were never asked those questions, there was no basis in the record to support a determination that the settlement judge "questioned the parties regarding their understanding of [the settlement] terms" or that "the parties expressly acknowledged their understanding of and agreement to be bound by those terms." (*Assemi*, *supra*, 7 Cal.4th at p. 911; cf. *ibid*. ["the parties . . . in response to [the

settlement judge's] inquiry, expressly stated they understood and agreed to [the settlement] terms"]; *Elyaoudayan v. Hoffman*, *supra*, 104 Cal.App.4th at p. 1425 ["After the settlement was placed on the record, each party who was present stated orally and individually that he agreed with the terms."].)

Respondent acknowledges *Assemi* is controlling law and asserts that the settlement judge "asked each Plaintiff in court if he or she agreed to be bound by those settlement terms," but that simply is not so. Instead, the judge asked the plaintiffs whether they "agreed to be bound by the majority rule with respect to this settlement." That question implied that there was a settlement under consideration, but it did *not* constitute asking the plaintiffs whether they agreed with the settlement, much less whether they understood the settlement terms. In a supplemental brief, respondent argues "the way for the settlement judge to establish that these plaintiffs had agreed to be bound by the settlement was by asking each of them whether they had agreed to 'the majority rule with respect to this settlement.' " That argument is misplaced. Although agreement to the majority rule was required to bind any minority of plaintiffs who did not agree to the settlement, agreement to the majority rule could not bind any plaintiffs absent an agreement by a majority of the plaintiffs to the settlement itself. The settlement judge did not ask *any* of the plaintiffs whether they agreed with and understood the settlement.

Thus, despite respondent's attempt to recharacterize the settlement judge's questioning, the record simply fails to demonstrate compliance with *Assemi*.[6] (See *Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 550

---

[6] In its supplemental brief, respondent asserts that "if the settlement judge's inquiry left any doubt, the trial court was permitted to consider the transcript of the settlement proceeding, declarations of the parties and their counsel, and any additional oral testimony. [Citations.] And Judge Ulmer

[holding that nod of the head was insufficient to show oral assent to settlement and stating "it is undisputed that [the settlement judge] did not question the parties regarding their understanding of the settlement terms, the parties did not expressly acknowledge their understanding of those terms, and the parties did not orally agree to be bound by those terms"].) We acknowledge that, given the backdrop of the settlement conference and the circumstance that only 14 plaintiffs joined the opposition to respondent's section 664.6 motion, it is probable that many of the plaintiffs approved of the proposed settlement on May 4, 2018 and would have said so *had they been asked*. However, it is also possible that a number of the plaintiffs, like appellant Stockwell, agreed with the majority rule but not the settlement. Moreover, it is unknown whether any of the plaintiffs *understood* the settlement, because they were never asked if they understood the settlement terms or if they had any questions.

The "summary, expedited" section 664.6 procedure applies "when certain requirements that decrease the likelihood of misunderstandings are met." (*Levy*, *supra*, 10 Cal.4th at p. 585.) In the present case, appellants allege their former counsel did not act in their interests and misled them about the litigation and settlement. The confusion around the May 4, 2018 purported settlement could have been avoided had the settlement judge expressly inquired about the plaintiffs' agreement to and understanding of the settlement: either the concerns expressed by appellants would have been disclosed, or appellants would not now be able to argue they (or a majority of

---

did that, and he made independent factual findings, which are supported by substantial evidence." However, respondent never identifies any such additional evidence that shows compliance with *Assemi*, and no such evidence is referenced in the trial court's order.

the plaintiffs) did not agree to or understand the settlement.[7] The trial court erred in granting respondent's section 664.6 motion absent the clear evidence of acceptance and understanding of the settlement that is the justification for the expedited procedure in the first place.

DISPOSITION

The trial court's judgment is reversed. Costs on appeal are awarded to appellants.

[7] We need not address the additional issues raised by appellants, including the voluntariness and enforceability of the majority rule agreement, the effectiveness of the settlement as to absent plaintiffs, and whether the settlement was adequately explained to the plaintiffs.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BURNS, J.

Stockwell v. City and County of San Francisco / A156372