

Amis v Greenberg Traurig LLP 3/18/15

Mediation Confidentiality; Legal Malpractice; Admissibility of Advice in Mediation

Plaintiff John Amis was a minority shareholder and officer of Pacific Marketing Works, Inc. (Pacific), a company that exported woman's clothing apparel to Japan. In 2006, Pacific sued Path Productions, LLC and its principals (collectively, Path) alleging Path breached a 2002 contract to design apparel for Pacific. Path responded with a cross-complaint against Pacific, Amis and other Pacific shareholders, alleging, breach of contract, fraud and alter ego liability (the Path Litigation).

In June 2007, while the Path Litigation was pending, Pacific entered into a proposal for acquisition with a Japanese entity, Sojitz Corporation, which had expressed interest in purchasing Pacific's assets. Greenberg Traurig (GT) represented Sojitz in the proposed transaction. One of the proposal's terms required "favorable settlement or resolution" of the Path Litigation.

Until September 2007, Amis and his co-cross defendants were represented in the Path Litigation by two law firms—Miller Barondess and Radcliff & Saiki. When those firms withdrew, Amis and company engaged GT to represent them in the Path Litigation, and Sojitz agreed to pay GT's fees for the representation. GT obtained a written conflict waiver from all interested parties, which included a declaration that its "representation of Pacific and its shareholders in the Path Litigation will not be compromised or adversely affected by our representation of Sojitz in connection with the Pacific acquisition."

Shortly after GT took over Amis's representation in the Path Litigation, the parties engaged in two separate rounds of mediation in October and November of 2007. Amis attended both mediations. At the November 2007 mediation, the parties negotiated and executed a written settlement agreement and mutual general release.

Under the settlement agreement, Amis and the other Pacific parties agreed, jointly and severally, to pay \$2.4 million to Path on an agreed payment schedule beginning on December 26, 2007, in exchange for dismissals with prejudice of each side's claims and mutual releases. The parties further agreed to a stipulation for entry of judgment in the amount of \$2.4 million (less any payments made) in favor of Path if the Pacific parties failed to make the agreed payments when due.

Shortly after the parties executed the mediated settlement agreement in the Path Litigation, Sojitz decided not to acquire Pacific's assets, leaving Amis and the other Pacific shareholders without sufficient funds to make the scheduled settlement payments. In January 2008, Path declared a default and successfully moved for entry of the stipulated judgment pursuant to the settlement agreement. When Path attempted to enforce the judgment, Amis and the other Pacific parties declared bankruptcy.

In November 2009, Amis filed this legal malpractice action against GT. The first amended complaint asserted **three causes of action, for breach of fiduciary duty, attorney malpractice and breach of the conflict waiver**. In support of the claims, Amis alleging GT (1) "failed to advise him of the risks involved for his personal liability under the proposed settlement agreement"; (2) "drafted, structured, and caused to be executed a settlement agreement and stipulated judgment converting the corporate

obligations of Pacific into Amis's personal obligations"; and (3) breached the conflict waiver by "failing to negotiate a settlement that was contingent on Sojitz's purchase of Pacific's assets in an amount sufficient to fund the settlement."

GT deposed Amis in advance of its motion for summary judgment. **At his deposition, Amis admitted that all "discussions," "explanations," and "recommendations" that he had with or received from GT regarding the settlement agreement occurred during the mediation. Amis also admitted that all his claimed damages resulted from executing the settlement agreement at the mediation.**

Based on the foregoing undisputed facts, GT moved for summary judgment. Because Amis alleged GT caused him to execute the settlement agreement without advising him of the implications for his personal liability, and all GT's discussions with Amis regarding the settlement agreement occurred during the mediation, GT argued "both sides must necessarily rely on communications made in connection with that mediation in order to prove or rebut Amis's claims." However, since the mediation confidentiality statutes barred each side from offering evidence of such communications, GT argued Amis could not prove an essential element of his claims, nor could it effectively defend itself against his allegations. Under either circumstance, GT maintained it was entitled to summary judgment.

Amis opposed the motion with his own declaration and declarations from other attorneys in the Path Litigation, including Path's attorney, Douglas Dal Cielo, and the Pacific parties' former attorney, Eric H. Saiki. With his declaration, Amis sought to establish that he never would have

attended the mediation, nor would he have agreed to be jointly and severally liable for Pacific's liabilities, had he been advised prior to mediation that he had little to no risk of being held personally liable on Path's claims. Dal Cielo and Saiki each declared that if the Path Litigation had gone to trial, Amis would not have been found personally liable.

Amis also submitted the declaration of his proffered legal malpractice expert, Robert C. Baker. Baker opined that GT's conduct fell below the standard of care and there was "no advice GT could have given to John Amis during mediation that would justify making John Amis personally liable for payment of \$2,400,000." Setting aside any communications that might have occurred during the mediation, Amis argued all the evidence, when taken together, permitted a reasonable inference that GT's misconduct caused him to execute the settlement agreement and incur personal liability that he otherwise would have avoided had the Path Litigation gone to trial.

The trial court granted GT's summary judgment motion. The court agreed that Amis could not establish an essential element of his claims, because it was undisputed that any act or omission by GT that purportedly caused Amis to execute the settlement agreement occurred during the mediation. The court also refused to entertain an inference that GT caused Amis to execute the settlement agreement during mediation, because the mediation confidentiality statutes effectively barred GT from defending itself against such an inference.

The Second District Court of Appeal began its opinion by noting that Amis admitted that his alleged damages in this action stem entirely from entering into the settlement agreement. He also admits that any

communications he had with GT regarding the settlement agreement occurred in the course of the mediation. Based on these undisputed facts, the trial court concluded the mediation confidentiality statutes preclude Amis from proving that GT's acts or omissions caused his damages in this case.

Mediation confidentiality is codified in Evidence Code section 1115 et seq. “With specified statutory exceptions, neither ‘evidence of anything said,’ nor any ‘writing,’ is discoverable or admissible ‘in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which . . . testimony can be compelled to be given,’ if the statement was made, or the writing was prepared, ‘for the purpose of, in the course of, or pursuant to, a mediation’ ” (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 117 (*Cassel*), quoting § 1119, subs. (a), (b).) Even after mediation ends, communications and writings protected by the statutes are to remain confidential. (§ 1126.)

The California Supreme Court has broadly applied the mediation confidentiality statutes and all but categorically prohibited judicially crafted exceptions, even in situations where justice seems to call for a different result. (*Cassel*, 51 Cal.4th at p. 118; see *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 152 (*Wimsatt*).) “To carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme . . . unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception.” (*Foxgate Homeowners’ Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 15 (*Foxgate*); accord, *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 416; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194.) “Judicial construction, and judicially crafted exceptions, are permitted only where due process is implicated, or where literal

construction would produce absurd results, thus clearly violating the Legislature's presumed intent. Otherwise, the mediation confidentiality statutes must be applied in strict accordance with their plain terms. Where competing policy concerns are present, it is for the Legislature to resolve them." (*Cassel*, at p. 124; *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 582-583)

The Supreme Court's holding in *Cassel* dictates the result we reach in this case. The plaintiff in *Cassel* sued his attorneys for malpractice, alleging the attorneys "induced him to settle" a business dispute for less than the case was worth by coercing him to enter a settlement agreement during mediation. (*Cassel* at p. 118.) The Supreme Court upheld the trial court's order precluding evidence related to the mediation, including private discussions the plaintiff had with his attorneys about the settlement. In doing so, the high court rejected the Court of Appeal majority's view that "the mediation confidentiality statutes do not extend to communications between a mediation participant and his or her own attorneys outside the presence of other participants in the mediation."

The *Cassel* court recognized its holding may hinder the client's ability to prove a legal malpractice claim against his or her lawyers. (*Cassel*, at pp. 122, 133-134.) Nevertheless, the court emphasized the judiciary had no authority to craft its own exceptions to the mediation confidentiality statutes, "even where the equities appeared to favor them." Quoting from the Second DCA opinion in *Wimsatt*, the high court acknowledged "the stringent result we reach here means that when clients, such as the malpractice plaintiff in *Wimsatt*, participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel." (*Cassel*, at p. 133, quoting *Wimsatt*, 152 Cal.App.4th at p. 163)

“This holding will effectively shield an attorney’s actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive.” Be that as it may, the court stated, “... if an exception is to be made for legal misconduct, it is for the Legislature to do, and not the courts.” (*Cassel*, at p. 133, quoting *Wimsatt*, at p. 163.)

Applying *Cassel* to the undisputed facts of this case, the Justices reach the same conclusion as the trial court. Amis cannot prove that any act or omission by GT caused him to enter the settlement agreement and, hence, to suffer his alleged injuries, because all communications he had with GT regarding the settlement agreement occurred in the context of mediation. (*Cassel*, 51 Cal.4th at pp. 132, 136.) The Appellate Court nevertheless sympathizes with Amis’s assertion that “mediation confidentiality was never intended to protect attorneys from malpractice claims”; however, as recognized in *Wimsatt*, that seemingly unintended consequence is for the Legislature, not the courts, to correct. (See *Wimsatt*, at p. 164 “... Given the number of cases in which the fair and equitable administration of justice has been thwarted, perhaps it is time for the Legislature to reconsider California’s broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies be considered.”) Because the mediation confidentiality statutes bar Amis from presenting the critical evidence necessary to establish GT’s acts or omissions caused his alleged injuries, the trial court properly granted summary judgment.

On appeal, Amis does not dispute that “whatever advice he received regarding the Settlement Agreement was given during mediation,” nor does he dispute that evidence of such advice is inadmissible under the

mediation confidentiality statutes. He nevertheless contends “there is direct, admissible, and undisputed evidence that Amis consulted with GT, and was advised by GT, during mediation before signing the agreement,” and that “whatever specific advice was given, or not given, resulted in a contract making Amis personally liable.” Thus, he argues “it is reasonable to infer from the fact that GT advised Amis regarding the terms of the settlement documents, that GT consented to Amis signing those documents” at mediation. Insofar as the trial court refused to draw this inference to find a triable issue of fact on causation, Amis contends the court erred.

The Justices point out, however, that Amis’s proposed inference is fundamentally at odds with the mediation confidentiality statutes’ directive. To permit such an inference would allow Amis to attempt to accomplish indirectly what the statutes prohibit him from doing directly—namely, proving GT advised him to execute the settlement agreement during the mediation. Further, insofar as there is no statutory exception to mediation confidentiality that permits GT to rebut the inference by showing what advice it actually gave Amis during mediation, the relevant authorities all counsel against permitting the inference to be drawn.

In re Marriage of Woolsey (2013) 220 Cal.App.4th 881 (*Woolsey*) is instructive. In that case, a husband challenged a mediated marital settlement agreement, claiming “undue influence on him during the mediation rendered the agreement unenforceable.” The husband did not attempt to introduce direct evidence showing the wife actually engaged in undue influence during the mediation; rather, he resorted to the rule that “when an interspousal transaction advantages one spouse, the law, from considerations of public policy, presumes such transactions to have been

induced by undue influence.” (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293; *Woolsey*, at p. 901.) The *Woolsey* court rejected the proffered presumption, concluding “the mediation confidentiality provisions of Evidence Code section 1119 protect the mediation process and preclude any claim of undue influence.” (*Woolsey*, at p. 903.) Addressing the presumption directly, the court explained: “ ... To apply the presumption of undue influence to mediated marital settlements would severely undermine the practice of mediating such agreements. Application of the presumption would turn the shield of mediation confidentiality into a sword by which any unequal agreement could be invalidated. We do not believe that the Legislature could have intended that result when it provided for spousal fiduciary duties on the one hand and for mediation confidentiality on the other.” (*Woolsey* at p. 902; accord *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 86 reasoning that if undue influence presumption attached to mediated marital settlement agreement “the disadvantaged party could claim, for example, to have acted under duress, refuse to waive the [mediation confidentiality] privilege, and thereby prevent the other party from introducing the evidence required to carry the burden of proving that no duress occurred”)

The Justices find the *Woolsey* court’s reasoning is apposite and compelling. Here, Amis does not dispute that the mediation confidentiality statutes preclude him and GT from relying upon mediation communications to support or rebut the causation element of his claims. Nevertheless, even without direct “eye-witness evidence” of what occurred during mediation, Amis contends the trier of fact should be permitted to draw the inference that the “oral advice he was given, or not given, by GT during the mediation” caused him to execute the settlement agreement. But this, as in *Woolsey*, would turn mediation confidentiality into a sword

by which Amis could claim he received negligent legal advice during mediation, while precluding GT from rebutting the inference by explaining the context and content of the advice that was actually given. Such a result cannot be squared with *Woolsey* or the Supreme Court's holding in *Cassel*. (See *Cassel*, at p. 136 "... The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.")

Along the same lines, permitting a jury to draw the inference Amis advances would amount to an irregularity in proceedings mandating a new trial. **Section 1128 provides, "Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure."** The Law Revision Commission Comments to section 1128 explain that "an appropriate situation for invoking this section is where a party urges the trier of fact to draw an adverse inference from an adversary's refusal to disclose mediation communications." The inference Amis would have the jury draw—that GT's advice during mediation caused him to enter the settlement agreement—is tantamount to the adverse inference that section 1128 prohibits, because GT is barred from disclosing relevant mediation communications to rebut the charge. The trial court properly refused to entertain Amis's proffered inference in ruling on GT's summary judgment motion.

The Justices acknowledge the Supreme Court's near categorical prohibition against judicially crafted exceptions to the mediation confidentiality statutes and hold a malpractice plaintiff cannot circumvent mediation confidentiality by advancing inferences about his former attorney's supposed acts or omissions during an underlying mediation.

The summary judgment is affirmed. Defendants Greenberg Traurig, LLP, Naoki Kawada and John M. Gatti are entitled to their costs.

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