Barba v Perez

8/28

Early section 998 offer; Reasonableness of offer

Defendant Lupe Perez owned the Tropical Club in Lodi, which included a rental housing unit above the club. Perez was 82 years old, blind, and confined to a wheelchair. His wife Leticia Perez managed the property for him, paid the employees and collected rent. On May 18, 2004, plaintiff Barba visited Leticia at the apartment above the Club.

Earlier, Leticia had asked Juan Mendoza, a musician employed by the club, to move an old refrigerator. When Barba arrived, she asked if he could help Mendoza move the unit. As they lowered the refrigerator down some stairs, with Barba below the unit, Mendoza suddenly let go of the dolly handles and the refrigerator fell toward Barba landing on his left foot. He eventually sustained about $70,000 in medical expenses.

Barba sued Lupe Perez, alleging Mendoza was acting as his agent at the time of the incident. He also simultaneously served him with a CCP 998 offer in the amount of $99,999.99. The case was tried to a jury which returned a verdict in the amount of $117,053.42. Perez appealed the verdict, claiming the CCP 998 was ineffective. In an opinion certified for ***partial publication***, the 3rd DCA found the offer to compromise was valid.

The trial court's jurisdiction over Perez commenced on the date he was served with the summons and complaint, along with the section 998 offer. A section 998 that is served simultaneously with the summons and complaint in personal injury cases is timely. (***Ward v Superior Court*** (1973) 35 Cal.App.3d 67)

Perez further contended that the offer to compromise was premature, and thus unreasonable. Perez argued he had no basis to determine if the offer was reasonable at a time when he had just been served, and had not conducted any discovery. The Justices observed that whether a section 998 offer was reasonable and made in good faith is a matter left to the sound discretion of the trial court, and will not be reversed on appeal except for a clear abuse of discretion. (***Nelson v Anderson*** (1999) 72 Cal.App. 4th 111)

One *factor* to be considered by the trial court as to the reasonableness of a section 998 offer is the amount offered as compared to the judgment ultimately recovered. Where the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable. (***Elrod v Oregon Cummins Diesel, Inc***. (1987) 195 Cal.App.3d 692)

In ***Elrod***, the appellate court upheld the trial court's determination that a defendant's low-ball settlement offer to a plaintiff was not reasonable, where the defendant possessed crucial information limiting its exposure that was unknown to the

plaintiff. Here, Barba was not playing hide the ball. The parties had a close familial relationship and there was free flow of information between them. Barba's lawyer wrote a letter before the suit was filed, informing defendant's agent that his medical bills were about $70,000, and requested they be paid.

The purpose of section 998 is to encourage pretrial settlements and avoid needless litigation. (***T.M. Cobb Co. v Superior Court*** (1984) 36 Cal. 3d 273) Even assuming a situation where a defendant has no information about the plaintiff's damages when served with an early section 998 offer, defense counsel may request that plaintiff provide informal discovery on the damage issue and /or allow an extension of time to respond to the demand. If plaintiff's counsel refused to accord the defendant these courtesies and unyieldingly insisted that defendant respond without information, such conduct could then be presented to the trial court when it considered whether to award special fees and costs. Undoubtedly such obstinacy would be viewed as potent evidence that plaintiff's offer was neither reasonable nor made in good faith.

While the Legislature purposely set a deadline beyond which the offer may not be served, it did not impose any minimum period that must elapse following commencement of suit for service of a valid section 998 offer. Accordingly, the concurring Justices in the majority refused to impose a judicial "waiting period" for serving an offer to compromise. The judgment is affirmed and plaintiff is awarded his costs on appeal.

In **dissent,** Justice Sims stated, "*I do not think the defendant in this case was given a reasonable opportunity to evaluate plaintiff's 998 offer, which was served with the summons and complaint. I think a defendant should be entitled to complete minimal discovery before being expected to evaluate and respond to a 998 offer. In the present case, for example, I should think that a defendant should be entitled, at a minimum, to take the plaintiff's deposition and use formal discovery procedures to discover his medical specials from medical providers*."

He continued, "*I do not think a defendant should be obligated to evaluate a $99,000 offer based on damages information supplied informally (not under oath) by a plaintiff or his attorney. Although plaintiffs' attorneys are officers of the court, on rare occasions such attorneys have been known to inflate their client's damages in demand letters written prior to discovery*."

The dissent concludes that the defendant did not have a reasonable opportunity to learn the facts and circumstance of plaintiff's claim, and following ***Elrod,*** the 998 was invalid.