

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG

Alternative Dispute Resolution

❖ Resolution Arts Building ❖

2630 J Street, Sacramento, CA 95816

ph: (916) 442-6739 • fx: (916) 442-4107

elong@ernestalongadr.com • www.ernestalongadr.com

Chan v Lund (9/29/10)

Attorney-client; Undue Influence; Economic Duress

Plaintiff's cypress trees had branches extending over his fence onto defendants' property. Defendants hired a contractor to remove all of the branches. Plaintiff sued his neighbors for trespass and negligence, and violation of Code of Civil Procedure section 9733 and Civil Code section 3346(a) allowing treble damages. Over the course of nine months, four mediation sessions were conducted. The parties agreed on a monetary settlement but no agreement was reached on a proposed stipulation for injunctive relief.

Prior to the August 2008 trial date, a final mediation took place, and a notice of settlement was sent to the court thereafter. Within a month, plaintiff filed a substitution of attorney, and defendants filed a motion to enforce the settlement agreement. Plaintiff opposed, claiming he was "wrongfully coerced" through tactics of his former attorney that "amounted legally to duress, undue influence, fraud, prohibited financial dealing with a client in violation of the Rules of Professional Conduct, and undisclosed dual agency."

The trial court granted the motion to enforce the settlement agreement. Plaintiff brought a motion for reconsideration, offering additional evidence that his attorney had offered to reduce his fees, and had threatened to abandon his client just prior to the trial if he did not agree to settle. The motion was denied. Plaintiff then filed a second application for reconsideration on the basis that the mediator's testimony would prove plaintiff's claims. When the second motion was denied, plaintiff appealed.

The Sixth District Court of Appeal referred to **CCP 664.6** which was enacted to provide a summary procedure for **specifically enforcing a settlement contract without the need for a new lawsuit**. The trial court may receive evidence and determine disputed facts, but is not authorized to create material terms of a

settlement. The court is merely to decide what terms the parties themselves have previously agreed upon. (*Weddington Productions, Inc. v Flick* (1998) 60 Cal.App.4th 793)

Plaintiff argued that in addition to monetary terms, the parties had yet to agree to a stipulation for an injunction concerning the rights and duties of the parties regarding the trees on plaintiff's property in the future. Plaintiff alleged that his counsel told him just before trial that another mediation session was going to occur, but plaintiff refused to attend. Plaintiff averred that his lawyer told him that if he did not attend the mediation, the lawyer would withdraw and he would be self represented at trial. Plaintiff then attended the mediation but refused to negotiate. Plaintiff claimed his lawyer then sought to induce his agreement to settle by agreeing to discount his fee by \$10,000, if plaintiff would agree to the offered terms.

Plaintiff declared that because he was afraid his attorney would not represent him at trial, and because he was ignorant of the rules regarding an attorney having a business transaction with his or her client, he signed the agreement, "against his will and better judgment." Plaintiff thus claimed the motion to enforce the settlement should not have been granted because the agreement was **void and unenforceable**. He claimed his attorney's conduct amounted to economic duress, undue influence, fraud, and an invalid business transaction between an attorney and his client. He claimed he could rescind the contract. Plaintiff also argued that his rights to due process were denied by the statutes prohibiting the compelling of a mediator's testimony, and that such testimony here would have corroborated his story.

Plaintiff argued that since his consent to settle was procured by (1) economic duress, (2) undue influence, and (3) fraud, he was entitled to rescind the agreement. He contends that his attorney's threat to withdraw and failure to take steps to avoid prejudice to his client from such withdrawal amounted to **economic duress**. *Where the wrongful act of another is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure, economic duress is implicated.* (*Rich & Whillock, Inc v Ashton Development, Inc.* (1984) 15 Cal.App.3d 1154)

A party whose consent to a contract has been obtained by economic duress may rescind the contract under circumstances of duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

(Civil Code section 1689(b)) Thus, a party who enters into a contract under duress may obtain rescission against another contracting party, who, although not responsible for the duress, knows that it has taken place and takes advantage of it by enforcing the contract. (*Leeper v Beltrami* (1959) 53 Cal.2d 195)

The Justices noted, however, that plaintiff's attorney was not a party to the action, nor jointly interested with a contracting party. There is no evidence to suggest defendants in any way connived with plaintiff's counsel in allegedly exerting such pressure. Even assuming duress was exercised by his counsel, no grounds for rescission are presented. In general, duress must emanate from the opposing party to an agreement, not one's own attorney, unless the opposing party knows of the duress. (*Bistany v PNC Bank* (D. Mass. 2008) 585 F. Supp.2d 179)

Here the defendants were not responsible for any alleged acts of economic duress and were not aware of Chan's allegation that his consent to the Settlement was coerced until after the contract was entered into. The party responsible for the alleged duress, plaintiff's attorney, was not a party to the agreement. Plaintiff also argues that his attorney's offer to discount his fees as an inducement to settle constituted undue influence because the act violated rule 3-300, thus entitling him to rescission because his consent was obtained through undue influence. Rule 3-300 prohibits an attorney from entering into a business transaction with his or her client unless (1) the terms of the transaction are fair and reasonable to the client and are fully disclosed in writing, (2) the client is given written notice of the right to seek the advice of independent counsel and is afforded a reasonable opportunity to do so, and (3) the client consents in writing to the transaction.

The Justices pointed out that although the rule does not define "business transaction" the comments to the rule make it clear that the restrictions against business transactions do not encompass retainer agreements between attorney and client. The rule does apply to an arrangement where the attorney "wishes to obtain an interest in the client's property in order to secure the amount of the attorney's past due or future fees." Here, there was no business transaction between the attorney and client that plaintiff's counsel allegedly sought to enter into. He merely offered to discount the amount of fees he would charge, and did so as an inducement to plaintiff. The attorney neither entered into a business transaction, nor acquired an interest in the settlement proceeds.

Plaintiff further asserts that notwithstanding the fiduciary role of his lawyer, his counsel's tactics amounted to undue influence under Civil Code section 1575. That statute provides that **undue influence includes taking a grossly oppressive and unfair advantage of another's necessities or distress**. The DCA returned to its earlier point that because his counsel neither connived with the opposing party nor had a joint interest in the settlement contract, there would be no basis for rescinding.

With regard to the claim of fraud, there is no authority for the proposition that an attorney's threatened withdrawal, along with the failure to advise the client the withdrawal must be court approved, constitutes fraud. Even if it is fraud, again, plaintiff fails to show counsel worked with the defendants or that his attorney was jointly interested in the settlement.

Finally, plaintiff argues that under the circumstances, application of mediation confidentiality constitutes a denial of plaintiff's due process rights under the federal and state constitutions. A review of the record discloses that no ruling was made on the basis of mediation confidentiality, and no evidence was actually excluded from the hearing on the motion to enforce the settlement or the reconsideration motions. Plaintiff's argument is based on a theoretical issue that the evidence would have been rejected if it had been offered. There is no need to address the issue any further.

The judgment on the order granting the motion to enforce the settlement pursuant to CCP 664.6 is affirmed.

////

This case study is provided in the hope it may prove useful in your practice or in the handling of litigated cases. If you receive a forwarded copy of this message and would like to be added to the mailing list, let me know.

Mediation and Binding Arbitration are economical, private and final. Alternative dispute resolution will allow you to dispose of cases without the undue time consumption, costs and risks of the courtroom. Your inquiries regarding an alternative means to resolve your case are welcome.