

June 18, 2008

**Guerrero v Rodan Termite Control, Inc.** (First DCA, Division Three)

6/16

**CCP section 998; Realistic and reasonable offer; “More favorable judgment or award”**

Plaintiff bought a home from Gonsalves, and both were represented by Help-U-Sell. Prior to close of escrow, defendant Rodan Termite Control inspected the premises. After the close of escrow, dry rot and other defects were discovered by plaintiff. Suit was then filed against Gonsalves, Help-U-Sell and Rodan, in February, 2003.

In December 2003, Rodan served a [Code of Civil Procedure section 998](#) offer to compromise for \$5,000, each side to bear its own costs. Plaintiff did not accept the offer. Three years later, in November 2006, just before trial, plaintiff entered a judicially approved good faith settlement with Help-U-Sell for \$34,000. The case went to trial against Rodan and the jury returned a verdict of \$15,600. Rodan moved the court pursuant to [CCP section 877](#) to offset the settlement proceeds against the verdict and reduce the judgment to zero. Judgment was entered accordingly.

After trial, both sides filed cost memoranda. Rodan also moved to tax plaintiff's post offer costs on the basis the zero judgment was not more favorable than the \$5,000 offer. Plaintiff moved to strike Rodan's cost bill and opposed the motion to tax. The trial court agreed with plaintiff, striking Rodan's cost bill and denying its motion. Rodan then filed notice of appeal.

The right to recover costs is dependent on [sections 1032 and 998 of the CCP](#). Section 1032(b) provides the general rule that the prevailing party is entitled to costs. [Prevailing party](#) is defined as: “the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the “prevailing party” shall be as determined by the court....”

Section 998 modifies the general rule of section 1032 that only the prevailing party recover its costs. (*Scott Co. v Blount, Inc.* (1999) 20 Cal.4th 1103) The costs allowed under sections 1031 and 1032 shall be **withheld or augmented** as provided in this section. (998(a)) The parties here disagree whether for the purpose of **allocating costs under section 998**, a plaintiff whose judgment is reduced to zero by operation of section 877 can be deemed to have **obtained a more favorable judgment or award** than a rejected section 998 offer to pay \$5,000.

Section 998 is a cost shifting statute which encourages the settlement of actions by penalizing parties who fail to accept reasonable pretrial settlement offers. A plaintiff who refuses a reasonable pretrial settlement offer and subsequently fails to obtain a “more favorable judgment” is penalized by a loss of prevailing party costs and an award of costs in the defendant's favor. (*Heritage Engineering Construction, Inc. v City of Industry* (1998) 65 Cal.App.4th 1435)

The First DCA noted the cost shifting must be dependent on the defendant having submitted a **reasonable offer** that the plaintiff could **realistically** have been expected to accept. The pretrial offer of settlement required under section 998 must be **realistically reasonable** under the circumstances of the particular case. (*Wear v Calderon* (1981) 121 Cal.App.3d 318) Similarly, **in determining whether a plaintiff obtained a “more favorable judgment or award” than a section 998 offer, the objective of encouraging settlement requires consideration of the status of the litigation when the section 998 offer was submitted.**

Here, Rodan submitted its \$5,000 offer early in the litigation, long before plaintiff had recovered anything by way of settlement, and plaintiff had a valid claim against Rodan a jury later determined to be worth \$15,600. **Plaintiff thus did not reject an offer that the outcome of trial indicates should have been accepted.** Even if Rodan's offer was not in bad faith, there is no reason Rodan should be rewarded

for having submitted the offer, nor any reason to penalize plaintiff for having rejected it.

Regardless of the offset of later settlements with other parties, plaintiff was **justified** in rejecting the offer when he rejected it. Since plaintiff did in fact recover more than the amount of the offer by way of **verdict** against Rodan, there is no reason to give Rodan a windfall benefit because other defendants later decided to settle for an amount that offset plaintiff's verdict against it. **Section 998 contemplates a comparison of the 998 offer with the circumstances as they existed when plaintiff had the opportunity to accept the section 998 offer.**

Until recently, the California Courts of Appeal had been unanimous that a plaintiff who obtains a positive verdict against a defendant but whose judgment is reduced to zero by operation of section 877 is nonetheless the "prevailing party for the purpose of awarding costs under section 1032. (See, *Wakefield v Bohlin* (2006)145 Cal.App.4th 963) Very recently, the Fourth DCA disagreed with *Wakefield* and the line of authority on which it rests, holding a plaintiff whose judgment has been reduced to zero by operation of section 877 is not the "party with a net monetary recovery " within the meaning of the first sentence of section 1032. (*Goodman v Lozano* (2008) 159 Cal. App.4th 1313)

In the present case, the First DCA took the position it did not need to comment upon this **split of authority** since the issue in this case requires the application of section 998. It noted, nevertheless, that *Goodman* does not necessarily produce the equitable results envisioned by the opinion in that case. It stated the conflict between *Wakefield* and *Goodman* can only be eliminated by an amendment of the statute. The current language of section 1032(a)(4) does not allow consideration of *when* in the course of the litigation the plaintiff settled with other defendants and *what* portion of the costs were incurred before and after the settlement and before or after other offers from the non-settling defendant that the plaintiff may have rejected.

**Section 998** allows consideration of these additional factors. **The statute focuses on those costs incurred subsequent to the rejection of a settlement offer.** The cost burden in effect is placed on the party who is responsible for those costs being incurred.

Section 998 permits what will normally be a more equitable allocation of the cost burden and provides an incentive for the defendant to make and the plaintiff to accept settlement offers that are reasonable at the time they are made. The trial court properly determined Rodan was not entitled to shift the cost burden to plaintiff under section 998 because plaintiff did not fail to obtain a judgment or award more favorable than what he would have received at the time Rodan's offer was outstanding, if he had accepted the offer. The judgment is affirmed.

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