CIVIL PROCEDURE

Playing Russian Roulette With Amended Judgments

by Jon R. Williams, Column Editor

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The rancor about what, precisely, the City of San Diego's recent pension scandal has meant to our community apparently shows no sign of disappearing any time soon. To some, it has represented the lowest point of public governance in an already sordid history of low points. To others, it has been viewed as a chance to vindicate important labor rights for City employees. And still to others, it has been used as an opportunity to seize the spotlight through an overt effort to hold accountable those responsible for alleged lapses in public trust. Whatever your viewpoint may be on the subject, there is no denying that this saga has made for interesting legal discourse, both in criminal and civil arenas. Add to that list the recent decision of *Torres v. City of San Diego* (2007) 2007 *Daily Journal D.A.R.* 12549, in which our local Court of Appeal decided who must pay the attorneys' fees incurred by various Board Members of the San Diego City Employees' Retirement System ("SDCERS") after they were sued in civil court by City Attorney, Mike Aguirre.

While the legalities of that dispute are somewhat esoteric and convoluted, the plot twist implicated by that decision is a practice pointer for the rest of us: *when is a judgment sufficiently amended to create a new time to file a notice of appeal*?

Facts of the *Torres* Decision

As most of you know the basic background of the SDCERS controversy by now, I'll cut to the chase. Suffice it to say that certain SDCERS Board Members had been accused of grossly and perhaps criminally mismanaging City employee pension benefits, by, among other things, violating conflict of interest laws in voting to increase employee pension benefits without providing the required funding, thereby creating an "unfunded liability" for the City. *Torres, supra,* 2007 *Daily Journal D.A.R.* at 12550. Whether those allegations are true and who at the City knew about, approved, or ratified those actions are questions better left for another day.

But when City Attorney Aguirre filed a civil action against those Board Members raising those very allegations, and then subsequently named them as cross-defendants in yet another civil action instituted against the City by SDCERS, those Board Members countered by suing the City in yet a third civil action, seeking reimbursement for their attorneys' fees in defending those two prior actions. *Ibid.* The basis for the Board Members' claims for reimbursement was City resolution R-297335, passed by the City Council in 2002. That resolution essentially extends broad defense and

indemnity rights from the City to Board Members of SDCERS ideally "to protect and encourage individuals who volunteer their time and their talent to serve in the public interest." *Ibid.*

In that reimbursement action before the Hon. Linda Quinn, the Board Members obtained summary judgment on the substantive question of whether they were entitled to recover from the City – under both resolution R-297335 and Government Code §995.2 – all attorneys' fees and costs they might incur in defending against the two civil actions filed against them. *Ibid*. The trial court then determined that, in a later noticed motion, the Board Members could *also* seek reimbursement for their attorneys' fees incurred in that reimbursement action, entering judgment on March 6, 2006 for the Board Members, but leaving blank spaces for the later entry of the amount of those attorneys' fees and costs. *Ibid.*

Notably, the City waited until May 10, 2006 to file a notice of appeal from that judgment. When the Board Members challenged that appeal as untimely, the Court of Appeal agreed and dismissed the appeal. *Ibid.*

The Board Members then moved for recovery of their attorneys' fees incurred in the reimbursement action. The City opposed that motion on the ground that such fees were not authorized by contract statute or law, but did not contest the amount or reasonableness of the fees requested. In reply, the Board Members argued that the plain language of resolution R-297335 entitled them to attorneys' fees incurred in enforcing the City's duty to provide them with a defense in the underlying actions.

After the City was afforded a chance to file a supplemental brief on that issue, the trial court granted the Board Members' motion for attorneys' fees and costs incurred in the reimbursement action based upon resolution R-297335. This time, however, the City timely appealed that post-judgment order. *Id*. at 12551.

Ready, Fire, Aim!

On appeal, the City asserted that the Board Members were not entitled to summary judgment on the substantive issue of whether resolution R-297335 or Government Code §995 provided them with a defense and indemnity in the two civil actions City Attorney Aguirre had filed against them. In response, the Board Members moved to dismiss the City's appeal insofar as it raised issues pertaining to that underlying summary judgment ruling, which the City did not timely appeal. The City then countered that the trial court's subsequent ruling on the Board Members' entitlement to recover their attorneys' fees and costs in the reimbursement action had the effect of "substantially and materially altering" the underlying judgment, thus commencing a new time within which to appeal. *Id*. at 12551-12552.

The Court of Appeal in *Torres,* however, was not persuaded by the City's argument. Beginning with the black letter maxims that "[t]he effect of an amended judgment on the appeal time period depends on whether the amendment substantially changes the judgment or, instead, simply corrects a clerical error," and that only a "substantial modification of a judgment" will supersede the original judgment and commence a new time for appeal, the *Torres* court found no such amendment occurred in this case. *Ibid*. Indeed, in squarely rejecting the City's position, *Torres* clarified that the trial court's subsequent, post-judgment order awarding the Board Members attorneys' fees and costs incurred in the reimbursement action could **not** be used to resurrect a stale appeal of the underlying judgment.

It did so even though both the summary judgment ruling and the subsequent award of attorneys' fees in that action were based upon the trial court's construction and application of resolution R-297335. *Id*. at 12552.

The *Torres* court then concluded with its own review of R-297335 – *not* to analyze whether the trial court decided the underlying defense and indemnity issues correctly on summary judgment – as that decision was never timely challenged on appeal by the City. But only to conclude that the trial court was also correct in subsequently awarding the Board Members' their fees and costs in the reimbursement action based upon that resolution. *Id.* at 12552-12553.

CONCLUSION

The lesson to be learned from *Torres* is really quite simple: a post-judgment order regarding the entitlement of the prevailing party to attorneys' fees does not – *I repeat, does not* – typically modify or alter the underlying judgment so as to allow for a new time for appeal to commence. Indeed, more often than not, judgments which are silent on the award of fees, or which specifically note that the *entitlement* and *amount* of those fees shall be determined after a subsequent noticed motion, must be appealed from *before* that subsequent motion procedure is concluded if it drags on beyond the 60-day period mandated by Rule of Court 8.104, subd. (a). And in those instances in which both *entitlement* and *amount* of fees are separately determined in a post-judgment motion procedure, the subsequent order awarding those fees must also be separately appealed. The City got that part right at least. But try as it might, the City could not use the substantive overlay between the underlying judgment and the post-judgment order to resuscitate a stale appeal from that judgment.

***Bottom line*:** Do not allow the determination of entitlement, amount or both in post-judgment motions for attorneys' fees and costs delay you from filing a timely notice of appeal from any underlying judgment. And don't rely on the fact that a subsequent order by the trial court has the effect of amending an otherwise appealable judgment, *as this happens in only the rarest of circumstances* and is a game of Russian roulette you will likely lose. Better to file a premature appeal (which later can be dismissed) than to take such jurisdictional risks. Or perhaps, put even more succinctly, *60 days means 60 days*, as the City all too painfully found out in *Torres*.