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Preserving Your Attorney's Fee Appeal

Earlier this year, this column discussed some of the special considerations in California state court appeals involving attorney's fee orders. A recent decision from the Second Appellate District, Division Five, provides a harsh reminder that counsel must be vigilant to ensure that the litigant's right to appeal a fee order is not waived. *See Silver v. Pacific American Fish Co.*, 2010 Cal. App. LEXIS 2014 (November 30, 2010).

General Principles For Attorney's Fee Appeals

In many actions in state court where one party has a right to recover attorney's fees, the litigation over attorney's fees is by post-judgment motion. California Rules of Court, Rule 3.1702(b)(1) provides that a motion for attorney's fees for services up to and including the rendition of judgment in the trial court must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108. This means that in most cases, the time to file a motion for attorney's fees is 60 days after a party's notice of entry of judgment or 60 days after the clerk's notice of entry of judgment or 180 days after judgment – whichever is earliest. *See* Cal. Rules of Court, Rule 8.104(a). As a practical matter, the time to appeal the judgment often will expire before a motion for attorney's fees has been litigated and decided.

Under California Civil Procedure Code section 904.1(a)(2), a post-judgment order awarding attorney's fees is a separately appealable order. A party who seeks to challenge both the judgment and a post-judgment attorney's fee order should file two separate notices of appeal: one from the final judgment and a second from the attorney's fee order. *See Torres v. City of San Diego*, 154 Cal. App. 4th 214, 222 (2007). The two appeals can be consolidated for purposes of briefing and argument. As discussed below, the failure to appeal the fee order will deprive the appellate court of jurisdiction to consider the trial court's ruling on attorney's fees.

Silver v. Pacific American Fish Co.

In *Silver v. Pacific American Fish Co.*, the court dismissed for lack of jurisdiction appellant's purported appeal from an order awarding attorney's fees to respondent. The court held that appellant's "purported notice of appeal from the postjudgment order awarding Pacific attorney fees is untimely, and that his notice of appeal from the judgment does not encompass the separately appealable postjudgment order awarding attorneys fees."

In *Silver*, the respondent filed a motion for attorney's fees on February 3, 2009. The hearing on the motion was held on March 26, 2009. On February 29, 2009, appellant filed a notice of appeal that specified, among other things, that he was appealing from the trial court's order on the motion for attorney's fees – a motion that the trial court had not yet heard or decided. One month later, the trial court heard and granted, in part, respondent's motion for attorney's fees.

On appeal, respondent argued that the appeal from the trial court's order granting attorney's fees was untimely and should be dismissed. The appellate court agreed. The court reviewed the general rules regarding premature notices of appeal. Under California Rules of Court, Rule 8.104(e)(1) and (2), a premature notice of appeal filed after rendition of judgment or statement of intended ruling but before entry of judgment may be treated as timely. The *Silver* court concluded that under these applicable rules, the notice could not be treated as premature (but yet timely) because the notice of appeal was filed before any statement of intended ruling on the fee motion.

The *Silver* court also rejected appellant's arguments that his appeal from the judgment included the trial court's subsequent order awarding fees and costs to respondent. The judgment provided that respondent "shall recover . . . attorney fees and costs of suit," but left a blank space for the amount. The trial court's statement of decision, on which the judgment is based, provided that respondent "as prevailing party, may make an application for attorney's fees and costs by post judgment motion for allowance of attorney's fees as an element of costs."

The *Silver* court explained that under these circumstances the judgment did not award attorney's fees to respondent. Instead, the judgment left the issues of entitlement and the amount of fees for later proceedings. The *Silver* court further explained that the issue is not whether fees were ultimately recovered as costs, but whether the entitlement to fees was adjudicated by the original judgment, leaving only the issue of amount for further adjudication.

The appellate court pointed out that in the trial court appellant argued that respondent was not entitled to fees in opposition to the fee motion. Similarly, the trial court's minute order for the hearing on the fee motion reflected that the trial court adjudicated both respondent's entitlement to fees and the reasonableness of the amounts claimed. The *Silver* court recognized that under these circumstances appellant "was not misled into believing that the trial court had adjudicated prior to or in the judgment the issue of entitlement to attorney fees." The court concluded that the postjudgment order awarding attorney's fees was separately appealable and therefore required appellant to file a separate, timely notice of appeal. The failure to file a second notice of appeal deprived the court of jurisdiction and thus, it dismissed the appeal of the attorney's fee order.

Conclusion

The mistake made by counsel in *Silver* is an easy mistake to make and, yet, it could have devastating consequences for the client, particularly when the fee award is quite large. No practitioner wants to find out that their appeal is being dismissed for lack of jurisdiction. Although *Silver* is not new law, it is an important case. It is a reminder that close analysis must be given to whether there are separately appealable orders and whether there is a need to file more than one notice of appeal.

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