NOS. 11-35914 & 11-35931

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE MIDEAST AWARENESS CAMPAIGN,

Appellant,

v.

KING COUNTY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
CASE NO. 11-CV-00094- RAJ (HONORABLE RICHARD A. JONES)

FOURTH BRIEF ON CROSS-APPEAL: APPELLEE'S REPLY BRIEF

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ISSUES PRESENTED

1. Whether this Court has jurisdiction over King County's contingent cross-appeal of the District Court's ruling that granted SeaMAC's untimely jury trial demand?

2. Whether the District Court erred in granting SeaMAC's untimely jury trial demand in the absence of an adequate showing regarding the reason for the delay?

ARGUMENT IN REPLY

I. THE DISTRICT COURT IMPROPERLY GRANTED PLAINTIFF'S UNTIMELY JURY TRIAL DEMAND

A. This Court Has Jurisdiction Over King County's Cross-Appeal

This Court acquired jurisdiction of this case when SeaMAC filed its timely notice of appeal of the District Court's final order granting King County's motion for summary judgment. 28 U.S.C. § 1291. Although King County prevailed in the District Court, it filed a timely cross-appeal to protect interests that would be adversely affected if the award of summary judgment were to be reversed on appeal.

Plaintiff contends this Court lacks jurisdiction to review the jury demand ruling and relies on a decision from the Eleventh Circuit to support its claim. Dkt. #21 at 37-38. But the Ninth Circuit has consistently held that "a protective cross-appeal is permissible once an initial appeal is filed, raising the possibility of

reversal." *Warfield v. Alaniz*, 569 F.3d 1015, 1019 (9th Cir. 2009) (*citing Bryant v. Technical Research Co*., 654 F.2d 1337, 1341-42 (9th Cir. 1981). In *Bryant*, the Court explicitly rejected the argument that a cross-appeal is a jurisdictional prerequisite after an initial appeal has been filed. 654 F.2d at 1341; *see also Koch v. City of Del City,* 660 F.3d 1228, 1236-37 (10th Cir. 2011) (on appeal from a grant of summary judgment, appellate court has jurisdiction to review district court order denying motion to continue).

The Ninth Circuit characterizes the cross-appeal requirement as a rule of practice and not as a jurisdictional bar. *Bryant*, 654 F.2d at 1342. Thus, appellate review of an issue that would expand a party's rights under the judgment is permissible as long as the otherwise prevailing party files a timely notice of cross-appeal. In this case, it is undisputed that King County timely filed its cross-appeal within 14 days of the filing of SeaMAC's notice of appeal. SER 266-69.

Similarly, King County has standing to cross-appeal. Although the party prevailing in district court is generally not aggrieved by the judgment, federal decisions recognize that a prevailing party has standing to conditionally cross-appeal in order to protect its interests if the appellate court were to reverse the judgment on grounds raised by the appellant. *Port of Seattle v. Federal Energy Regulatory Commission*, 499 F.3d 1016, 1028 (9th Cir. 2007); *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975); *see also* 15A Charles A. Wright et al., Federal

Practice and Procedure § 3902 (1992). In the interest of judicial economy, if this Court were to reverse the summary judgment for King County and remand the case for trial, the propriety of the District Court's jury demand ruling should be reviewed. It would be an unnecessary and costly waste of resources to remand the case for a jury trial and then determine in a subsequent appeal that the case should have been tried by the court.

B. The District Court erred in granting SeaMAC's untimely jury trial demand in the absence of an adequate showing regarding the reason for the delay

Mischaracterizing clear Ninth Circuit precedent, SeaMAC incorrectly asserts that it did not waive its right to a jury trial because it chose to request only equitable relief in its original complaint and should therefore get a second bite at the apple when it sought to add a new damages theory in an amended complaint. Dkt. #21 at 39-41. But this Circuit has repeatedly held that an amended complaint adding only new theories of recovery that are based on the same matrix of facts, does not revive the right to request a jury trial. *Lutz v. Glendale,* 403 F.3d 1061, 1066 (9th Cir. 2005) (citing *Las Vegas Sun., Inc. v. Summa Corp.,* 610 F.2d 614, 620 (9th Cir. 1979), *cert. denied,* 447 U.S. 906 (1980)).

The thinness of SeaMAC's argument is underscored by its reliance on obsolete authorities. *See* Dkt. #21 at 40. *Bereslavsky v. Caffey,* 161 F.2d 499, 499-500 (2d Cir. 1947), has effectively been overtaken by the modern era of cases that

sound in both common law and equity. *See American Home Products Corp. v. Johnson & Johnson,* 111 F.R.D. 448, 452-53 (S.D.N.Y. 1986) (noting that "[w]hen *Bereslavsky* was decided it was thought that a combined claim for an injunction and damages was a demand wholly in equity[.]").

As one influential treatise has noted:

> There are some comparatively early cases holding that if the original complaint stated a complaint that was wholly equitable and an amended complaint instead sought legal relief a demand for jury trial at the time of the amended complaint was timely [citing *Bereslavsky* and other cases] ...
>
> *[I]t now is certain that merely recasting an issue in either "legal" or "equitable" terms does not constitute a "new issue" for purposes of Fed.R.Civ.P. 38(b) ...*
>
> [I]t now is clear that a claim for damages... is legal even though it is joined with the claim for injunction. This means that today an action of the type described would have issues triable of right to a jury from the beginning, and failure to demand jury trial at the outset would be an irrevocable waiver.
>
> 9 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure §2320, at 253-57 (2008) (emphasis added).

Similarly, SeaMAC's reliance on *Allied Indus. Workers v. Gen. Elec. Co.,* 471 F.2d 751, 755 (6th Cir. 1973) is misplaced. *Allied* cites to *Bereslavsky,* and adopts a view that is both outdated and in sharp contrast to the precedents of this Circuit and other contemporary authorities. *See Lutz,* 403 F.3d at 1066 ("Our

caselaw is clear, though, that 'the presentation of a new *theory* does not constitute the presentation of a new *issue* on which a jury trial should granted [as of right] under ... Rule 38(b)." *See also* 9 Wright & Miller at 245 ("[I]f the amended or supplemental pleading does not raise a new issue, but merely changes the theory of the case or the relief requested, then a jury trial right previously waived by a failure to make a demand in connection with the original pleading is not revived.").

There is no basis in Ninth Circuit precedent for making the distinction SeaMAC offers to the Court and in this day of suits that sound in both law and equity, there is no reason to revive distinctions that were cast off in the middle of the last century.

Given SeaMAC's admission in its Motion for Leave to Amend that its new claims for damages were "premised on the same core facts that [gave] rise to SeaMAC's claims for declaratory and injunctive relief[,]" there is no dispute that the amended complaint raised only new theories based on the same matrix of facts. SER 447. SeaMAC had ample opportunity to amend its complaint earlier or demand a jury after the District Court denied its preliminary injunction. *See* Dkt. #17 at 57-58.

Whatever the reasons for SeaMAC's untimely demand, it has not made an adequate showing justifying the delay or supporting the District Court's ruling in its favor. Fed.R.Civ.P 39(b) "does not permit a court to grant relief when the

failure to make a timely demand results from an oversight or inadvertence" such as a good faith mistake of law or fact regarding the applicable deadline. *Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins. LTD.,* 239 F.3d 1000, 1002 (9th Cir.), *cert. denied,* 534 U.S. 944 (2001). "An untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown." *Id.*

Here SeaMAC justifies its actions based on its original choice to request only equitable relief in its original complaint. SeaMAC does not directly address King County's argument that both the legal and equitable claims arise out of the same matrix of facts. Moreover, even if SeaMAC had wanted to present only equitable claims at the preliminary injunction stage, SeaMAC does not explain why it did not amend its complaint and demand a jury after the Court ruled on the preliminary injunction, but before the deadline to demand a jury had run. King County served its Answer well after the District Court denied the preliminary injunction and SeaMAC had another 14 days to timely demand a jury trial. Dkt. #17 at 57; ER 139, SER 442-46, 452-57.

In the absence of a rational justification, one is left with mere inadvertence and that is insufficient. As a result, if this case is remanded for trial, it should be tried to the court and not to a jury.

CONCLUSION

King County respectfully requests that this Court affirm the District Court's summary judgment order and, thereby, the balance of interests that Metro's advertising policy has successfully struck for the last twenty five years. In the alternative, King County requests that the Court reverse the District Court's June 6, 2011 ruling, which granted Plaintiff's untimely request for a jury trial.

RESPECTFULLY SUBMITTED this 25th day of April, 2012.

s/*Cynthia S.C. Gannett*
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CERTIFICATION OF COMPLIANCE TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER NO. 11-35592

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Fourth Brief on Cross-Appeal: Appellee's Reply Brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 1,511 words.

RESPECTFULLY SUBMITTED this 25th day of April, 2012.

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CERTIFICATE OF SERVICE

I, JENNY CHEN, hereby certify under penalty of perjury that on April 25, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signed and dated this 25th day of April, 2012 at Seattle, Washington.

s/Jenny Chen