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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RENEE WALKER, Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant and Respondent.	B156420 (Los Angeles County Super. Ct. No. BC199069)

PURPORTED APPEAL from an order of the Superior Court of Los Angeles County, Morris B. Jones, Judge. Dismissed.

Knickerbocker Law Corporation and Richard L. Knickerbocker for Plaintiff and Appellant.

Franscell, Strickland, Roberts & Lawrence, David D. Lawrence, Paul B. Beach and Adrian J. Barrio for Defendant and Respondent.

Plaintiff and appellant Renee Walker (Walker) purports to appeal an order denying her motion for new trial.

The Supreme Court has spoken on this issue, clearly stating that no appeal lies from an order denying a new trial. (*Rodriguez v. Barnett* (1959) 52 Cal.2d 154, 156.) Further, Walker's notice of appeal, which unambiguously specifies the order denying a new trial, cannot be construed to refer to the judgment. Therefore, the purported appeal must be dismissed. Because there have been some inconsistencies in the case law, we publish in order to lend some clarity to this area.

FACTUAL AND PROCEDURAL BACKGROUND

Walker was employed by defendant and respondent Los Angeles County Metropolitan Transportation Authority (MTA) as a secretary. Walker claimed she was terminated in retaliation for her cooperation with an investigation conducted by the Office of Inspector General. On January 12, 1999, Walker filed the operative first amended complaint against the MTA, alleging causes of action for wrongful termination in violation of public policy and violation of Labor Code section 1102.5, the whistleblower statute.

On October 12, 2001, the matter came on for a jury trial. On October 26, 2001, the jury returned a defense verdict.

Judgment on the verdict was entered on November 13, 2001, and notice of entry of judgment was given the same day.

On December 7, 2001, Walker filed a motion for new trial raising claims of jury misconduct, insufficiency of the evidence to support the verdict, the verdict was against law, and instructional error. Walker also filed a motion for judgment notwithstanding the verdict (JNOV).

On January 3, 2002, the matter was heard. The trial court denied the motion for new trial, ruling it "cannot accept the jurors' affidavits." The trial court also denied Walker's JNOV motion, stating the "trial judge cannot weigh the evidence or judge the credibility of the witnesses."

On February 4, 2002, Walker, represented by counsel, filed notice of appeal. The notice states: "Plaintiff, RENEE WALKER, appeals from the following order made in the above-entitled action: [¶] 1) The order denying plaintiff's Motion for a New Trial, which Motion was heard on January 3, 2002, and which ruling was set forth in a Notice of Ruling, dated January 4, 2002."

CONTENTIONS

Walker contends the trial court committed prejudicial error in refusing to give accurate and complete instructions to the jury; and the subsequent misconduct in the jury room accentuated and compounded the error and itself required reversal of the judgment.

However, the threshold issue is appealability.

DISCUSSION

1. *No appeal lies from an order denying a new trial.*

"In California the right to appeal in civil actions is wholly statutory. [Citation.] In order to exercise that right an appellant must have standing to appeal, and must take an appeal from a statutorily declared appealable judgment or order. . . . With certain exceptions, not germane in this case, appealable judgments and orders are listed in [Code of Civil Procedure] section 904.1." (*Rao v. Campo* (1991) 233 Cal.App.3d 1557, 1564.) A timely and proper notice of appeal is essential to vest the reviewing court with appellate jurisdiction over the judgment. (*Associated Lbr. etc. Co. v. Superior Court* (1947) 79 Cal.App.2d 577, 581.)

An order denying a new trial is nonappealable. (*Rodriguez v. Barnett, supra,* 52 Cal.2d at p. 156; see generally, 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 123, p. 188.) In *Rodriguez*, an appeal from an order denying a motion for new trial "was dismissed from the bench with an admonition from the Chief Justice to counsel and to members of the bar generally to cease appealing from such an obviously nonappealable order." (*Rodriguez v. Barnett, supra,* at p. 156.)

There is abundant additional authority on point. *Hamasaki v. Flotho* (1952) 39 Cal.2d 602, which preceded *Rodriguez*, states: "No appeal lies from the trial court's denial of defendants' motion for new trial; that ruling may be reviewed only through an appeal from the judgment. [Citations.] Defendants have not appealed from the judgment, and, since timely notice of appeal is a jurisdictional requirement [citation], we are without jurisdiction to review the judgment or the denial of defendants' motion." (*Hamasaki, supra*, 39 Cal.2d at p. 608.)

Bresnahan v. Chrysler Corp. (1998) 65 Cal.App.4th 1149 is in accord. There, an appeal from the denial of appellant's motion for new trial was dismissed. (*Id*., at p. 1151, fn. 1; see also *Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 726, fn. 2 (same).) Further, in *Jones v. Sieve* (1988) 203 Cal.App.3d 359, this court, on that basis, dismissed plaintiffs' purported cross-appeal from an order denying their new trial motion. (*Id*., at p. 363, fn. 2.) Therefore, Walker's appeal is subject to dismissal.

2. *Walker's appeal cannot be saved by construing the notice of appeal to refer to the judgment instead of the order denying a new trial.*

The remaining issue is whether Walker's notice of appeal may be construed to refer to the judgment, rather than to the order denying her new trial motion.

California Rules of Court, rule 1(a)(2), provides: "The notice of appeal must be liberally construed. *The notice is sufficient if it identifies the particular judgment or order being appealed*. The notice need not specify the court to which the appeal is taken; the appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located." (Italics added.)

Under the rule of liberal construction, ambiguities will be resolved in favor of validity of the notice. (9 Witkin, Cal. Procedure, *supra*, § 460, p. 507.) However, a " 'notice specifically describing a certain part of the judgment will not bring up the *whole judgment*. This is not a case of misdescription, but rather of a clear intention to appeal from only a part of a judgment.'].)" (*City of Long Beach v. Crocker National Bank*

(1986) 179 Cal.App.3d 1114, 1118, fn. 7; accord *Garcia v. Rehrig Internat., Inc.* (2002) 99 Cal.App.4th 869, 876; 9 Witkin, *supra,* § 460, p. 508.)

Here, the notice of appeal does not contain any ambiguity to be construed. Walker's notice specified the January 3, 2002 order denying the motion for new trial. The notice cannot be construed as an attempt to appeal the judgment on the verdict entered on November 13, 2001.

Rodriguez v. Barnett, supra, 52 Cal.2d 154, is controlling. There, defendant appealed a judgment *as well as* an order denying his motion for new trial. The Supreme Court summarily dismissed the appeal from the order denying the motion for new trial. (*Id*., at p. 156.) The court was able to reach the merits of the appeal only because, *in addition to* appealing the order denying a new trial, the defendant appealed the judgment.

Similarly, in *Fogo v. Cutter Laboratories, Inc*. (1977) 68 Cal.App.3d 744, the appeal was from a judgment entered upon a jury verdict *and* from an order denying appellants' motion for a new trial. (*Id*., at p. 748.) *Fogo* "dismiss[ed] the purported appeal from the order denying the motion for a new trial" but was able to reach appellants' contentions because they also had appealed from the judgment. (*Id*., at p. 749.)

Here, Walker's notice of appeal unambiguously specified the January 3, 2002 order denying the motion for new trial. The notice cannot be construed as an appeal from the November 13, 2001 judgment. That judgment, not having been appealed, is final. The appeal from the order denying a new trial must be dismissed.

3. *Case law cited in treatises is unavailing to Walker.*

a. *Authorities cited in Witkin.*

On this topic, Witkin states: "*Notice Specifying Order Denying New Trial*. An order denying a new trial is nonappealable (see *supra*, § 123), but a notice specifying the order may be deemed to constitute an appeal from the judgment. (*Shonkoff v. Dant Inv. Co.* [(1968]) 258 C.A.2d [101,] 102.) See *Wilbur v. Cull* (1954) 127 C.A.2d 655, 657,

274 P.2d 424, *supra,* § 459 [later notice to prepare transcript treated as notice of appeal].)" (9 Witkin, Cal. Procedure, *supra,* § 463(h), p. 513.)

However, a careful reading of *Wilbur* indicates that court refused to entertain an appeal from an order denying a new trial. There, the appellants filed a notice of appeal from an order denying a new trial entered on May 14, 1954, and *separately* filed a notice and request for reporter's transcript relating to an "order" made March 30, 1954. (*Wilbur v. Cull, supra,* 127 Cal.App.2d at p. 656.) With respect to the notice of appeal referring to the May 14, 1954 order denying a new trial, *Wilbur* ruled: "The document which purported to take an appeal from the order denying a new trial was so specific in its reference to that order and to the date of its entry, that it cannot be given any effect as an appeal from the judgment . . . ." (*Ibid.*)

Wilbur continued: "But a different question is presented by the second document filed wherein the would-be appellants declared that they were about to file a notice of appeal from the order of March 30, 1954, and requested that a transcript supportive of such appeal be made up and prepared. It appears that the only order made by the court upon that day was the *judgment* rendered in the action and so the language must be construed as being a notice that appellants were about to file a notice of appeal from the judgment. [Citation.]" (*Wilbur v. Cull, supra,* 127 Cal.App.2d at pp. 656-657, italics added.)

Wilbur is directly on point. As in that case, we are presented with a notice of appeal from the order denying a new trial which is "so specific in its reference to that order and to the date of its entry, that it cannot be given any effect as an appeal from the judgment . . . ." (*Wilbur v. Cull, supra,* 127 Cal.App.2d at p. 656.) However, unlike in *Wilbur*, here, there is no separate appeal from the judgment which would vest this court with jurisdiction to review the judgment – Walker solely appealed the order denying a new trial.

The other case cited in Witkin is *Shonkoff v. Dant Inv. Co*., *supra*, 258 Cal.App.2d

101, which treated a notice of appeal from an order denying a new trial as an appeal from the judgment. (*Id.,* at p. 103.) However, the decision is an anomaly, is contrary to the weight of authority, and it appears to be at odds with the Supreme Court's decision in *Rodriguez v Barnett, supra*, 52 Cal.2d 154, which summarily dismissed a purported appeal from an order denying a new trial.

Shonkoff acknowledged *Rodriguez*, paying lip service to that decision. (*Shonkoff v. Dant Inv. Co., supra*, 258 Cal.App.3d at pp. 101-102.) *Shonkoff* then relied on other authority which permits an appeal from an order sustaining a demurrer without leave to amend to be construed as an appeal from the ensuing judgment of dismissal. (*Id*., at p. 102.) However, a situation where the appeal is taken from a preliminary order sustaining a demurrer without leave is entirely different from one where the appellant fails to appeal the judgment and instead seeks review of the subsequent order denying a new trial – an appeal from a preliminary order sustaining a demurrer without leave is merely premature and need not be dismissed. (Cal. Rules of Court, rule 2(d).) Accordingly, we decline to follow *Shonkoff.*[1]

b. The authority cited in Rutter Group's Civil Appeals & Writs.

Also pertinent here is the Rutter Group's practice guide, Eisenberg, Horvitz & Wiener, Cal. Prac. Guide: Civil Appeals & Writs (The Rutter Group 2003). In this regard, it states: "[2:143] Order denying new trial: An order *denying* a new trial is not directly appealable. It is reviewable on appeal from the underlying judgment. [Citations.] [¶] However, appellate courts have discretion to 'save' an appeal erroneously taken from an order denying a new trial (rather than from the underlying judgment) by construing it as an appeal from the judgment (¶*2:264*). [*Tillery v. Richland*

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[1] *Shonkoff* was openly result-oriented. It stated: "The time for appeal from the judgment has passed. If the motion to dismiss be granted, plaintiff will be denied all access to the appellate courts." (*Shonkoff v. Dant Inv. Co., supra,* 258 Cal.App.2d at p. 102.)

(1984) 158 CA3d 957, 962, 205 CR 191, 194]." (*Id*., § 2:143, p. 2-65, see also § 2:264, p. 2-121.)

Thus, the lone authority cited in the Rutter Group's discussion of this issue is *Tillery*. However, *Tillery* lacks any analysis of the issue and disposes of it in a single sentence. *Tillery* simply cites *LaCount v. Hensel Phelps Constr. Co*. (1978) 79 Cal.App.3d 754 (*LaCount*), for the proposition that an appeal from an order denying a new trial may be deemed to constitute an appeal from the judgment. (*Tillery v. Richland, supra,* 158 Cal.App.3d at p. 962.)

Working our way backwards, *LaCount* likewise disposes of the issue in a single sentence within a footnote, relying on Witkin. *LaCount* states: "However, a notice of appeal specifying such an order may be deemed to constitute an appeal from the judgment. (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 336, p. 4315.)." (*LaCount, supra,* 79 Cal.App.3d at pp. 761-762, fn. 3.)

Neither *Tillery* nor *LaCount* mention the Supreme Court's binding decision in *Rodriguez v. Barnett, supra,* 52 Cal.2d at p. 156, which summarily dismissed an appeal from an order denying a new trial. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, we do not find either *Tillery* or *LaCount* to be persuasive authority on this point.

CONCLUSION

Adhering to the Supreme Court's directive in *Rodriguez v. Barnett*, *supra,* 52 Cal.2d 154, and in accordance with the numerous other cases discussed above which dismissed appeals taken from orders denying a new trial, we conclude Walker's appeal from the order denying her motion for new trial must be dismissed.

Walker's appeal from the order denying a new trial cannot be saved through the fiction of deeming it to be an appeal from the judgment. Her notice of appeal, "which purported to take an appeal from the order denying a new trial was so specific in its reference to that order and to the date of its entry, that it cannot be given any effect as an

appeal from the judgment . . . ." (*Wilbur v. Cull, supra,* 127 Cal.App.2d at p. 656.)

DISPOSITION

Walker's purported appeal from the order denying her motion for new trial is dismissed. The parties shall bear their respective costs on appeal.

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KLEIN, P.J.

We concur:

CROSKEY, J.

KITCHING, J.