

THE EFFECT OF A RECONSIDERATION MOTION ON THE DEADLINE TO APPEAL A DISMISSAL

The Court of Appeal's decision in Payne v. Rader, Case No. C055242 (3d Dist., November 4, 2008), reaffirms that a request for reconsideration of the dismissal of an action must be based on a ground expressly recognized by statute and comply strictly with the statutory requirements governing such a request in order to extend the jurisdictional deadline imposed by Rule of Court 8.104(a) for appealing the dismissal.

Rule 8.104(a) requires that a notice of appeal of a judgment be filed by the earlier of: (a) 60 days after the trial court's mailing of notice of entry of judgment; or (b) 180 days after entry of judgment. Cal. R. Ct. 8.104(a)(1)-(3). Rule of Court 8.108 extends these jurisdictional deadlines by specified periods where a party files a "valid" motion for new trial, motion to vacate judgment, motion for judgment notwithstanding the verdict, or motion to reconsider. Cal. R. Ct. 8.108(b)-(e).

The plaintiff in Payne argued that his filing of a C.C.P. § 663 motion to vacate a judgment of dismissal after the sustaining of a demurrer without leave to amend extended the Rule 8.104(a) deadline for him to appeal the judgment. The Court of Appeal rejected his argument and dismissed the appeal for lack of jurisdiction, holding that the motion was not a "valid" motion to vacate under § 663 because it: (1) asserted simply that the pleadings were insufficient, not that the Superior Court drew incorrect "conclusions of law" based on "evidence" or "findings of fact;" and (2) requested an order vacating the judgment of dismissal, but did not request entry of a "different judgment" instead. Payne Op. at 5-6.

The Court also concluded that the plaintiff could not avoid this result by pursuing a separate appeal from the Superior Court's order denying the motion to vacate the judgment. Id. at 8. As the Court explained, "[i]f the prior judgment or order was appealable, and the grounds on which vacation is sought existed before entry of judgment, the correctness of the judgment should be reviewed on an appeal from the judgment itself." Id. Because the plaintiff's challenge to "the denial of his motion to vacate tender[ed] only issues that could have been raised on appeal from the judgment" of dismissal, the order denying that motion was not separately appealable. Id. at 9.

Significantly, there are at least two other types of post-judgment motions that the plaintiff could have filed in the Superior Court that might have been "valid" under rule 8.108 to extend the Rule 8.104(a) deadline for filing a notice of appeal. However, he did not attempt to bring either type of motion.

First, even though the dismissal was based on the sustaining of a demurrer, the plaintiff could have brought a motion for a new trial based on one of the applicable grounds specified in C.C.P. § 657. *See, e.g., Carney v. Simmonds*, 49 Cal. 2d 84, 88 (1957) (filing of new trial motion is "a proper procedure" in response to judgment of dismissal based on sustaining of demurrer without leave to amend). However, the plaintiff did not bring a new trial motion, and the Court of Appeal declined to treat his

motion to vacate as a new trial motion “for the purposes of extending the time to appeal from the judgment.” Payne Op. at 7. As the Court explained, a “valid” motion that extends the deadline to appeal under Rule 8.108 means a motion that “complies with all procedural requirements.” Id. at 8. The procedural requirements for a new trial motion include specifically “designating the grounds upon which the motion will be made.” C.C.P. § 659. Moreover, those requirements “are mandatory and jurisdictional: strict, literal compliance is required.” Payne Op. at 7.

Because the plaintiff’s “motion bore no resemblance to a motion for new trial” and did not “list any of the statutory grounds for new trial in his notice of motion” to vacate the judgment,” the Court concluded that it could not properly be treated as a new trial motion that would have extended the deadline to appeal the judgment. Id. As the Court emphasized: “Were we to begin saving untimely appeals by allowing procedurally invalid posttrial motions to be deemed entirely different motions, we would be subverting the carefully drawn jurisdictional scheme. Such mischief is strictly forbidden.” Id. at 8.

Second, the plaintiff could have filed a motion for reconsideration under C.C.P. § 1008(a) “based upon new or different facts, circumstances, or law” not already presented in opposition to the demurrer. Such a motion can be based on, among other things, a proposed amended complaint alleging different or additional facts not included in the original complaint. See, e.g., Rains v. Superior Court, 150 Cal. App. 3d 933, 944 (1984); Careau v. Security Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1387 (1990). There is no indication in the Payne opinion that the plaintiff attempted to bring such a motion.

Payne underscores the importance of a party using the statutorily proper type of motion to seek reconsideration of a Superior Court judgment if the party wishes to rely on the filing of that motion to extend the jurisdictional deadline for appealing the judgment. It also is a reminder that, if there is any conceivable doubt or ambiguity about what the jurisdictional deadline is or whether it has been extended by the filing of a post-judgment motion in the Superior Court, appellate counsel should err on the side of filing a notice of appeal by the earliest deadline that the rules could be construed to impose. The consequence of filing a notice of appeal that later is deemed premature is far less severe than the consequence of filing a notice of appeal that is deemed to be late.