LIU, J.

CASE NO. S201619

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

IN THE
SUPREME COURT OF CALIFORNIA

BADRUDIN KURWA,

Plaintiff and Appellant,

v.

MARK B. KISLINGER, et al.,

Defendant and Respondent.

After a Decision By The Court of Appeal
Second Appellate District, Division 5
Case Number: B228078

Superior Court of Los Angeles
The Honorable Dan Thomas Oki
Case Number: KC 045 216

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

ANSWER TO PETITION FOR REVIEW 1

THIS COURT SHOULD ALLOW THE COURT OF APPEALS' DECISION ON THE MERITS TO STAND SO THAT THIS 2004 CASE CAN AT LAST GO TO TRIAL 1

CONCLUSION 5

CERTIFICATE OF WORD COUNT 6

TABLE OF AUTHORITIES

Kurwa v. Harrington, Foxx, Dubrow & Canter
(2007) 146 Cal.App.4th 841 ..... 1, 2

Don Jose's Restaurant v. Truck Insurance Exchange
(1997) 53 Cal.App.4th 115 4

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ANSWER TO PETITION FOR REVIEW

THIS COURT SHOULD ALLOW THE COURT OF APPEAL'S DECISION ON THE MERITS TO STAND SO THAT THIS 2004 CASE CAN AT LAST GO TO TRIAL.

Kurwa filed this action in 2004. There have been two prior appeals involving defendants other than Dr. Kislinger. One, resulting in a published opinion, *Kurwa v. Harrington, Foxx, Dubrow & Canter* (2007) 146 Cal.App.4th 841, involved an anti-SLAPP motion.

The other, unpublished, involved the grant of summary judgment to those parties (Petition, p. 9).

Then, when the case came to trial, the trial court granted Dr. Kislinger's motion *in limine* denying Dr. Kurwa standing to proceed with the claims at the heart of his case against Dr. Kislinger: his causes of action for breach of fiduciary duty and accounting. With no standing to proceed on the claims which constituted the "gravamen" of his action, Dr. Kurwa could not go forward with the trial (Petition, pp. 9-10).

All that remained of the case was the parties' respective causes of action for defamation against each other, which appear to be entirely independent of the fiduciary duty and accounting claims at the center of the case (JA 26-27). After the parties mutually agreed to dismiss those defamation claims without prejudice, judgment was entered against Kurwa (Petition, p. 10).

Dr. Kurwa sought a decision on the appealability issue before briefing on appeal was completed (Petition, p. 11), in order to save the parties and court the time and expense of full briefing and oral argument in case the court should find that the judgment was not

appealable. The Court of Appeal declined that invitation. Briefing was completed, oral argument held, and the Court of Appeal decided the case. Having first decided that the judgment was appealable (Opn., pp. 6-9), the court proceeded to decide the merits of the case, holding for Dr. Kurwa on every issue.

The Court of Appeal's reversal of the judgment of dismissal at last cleared the way for Dr. Kurwa to go to trial against Dr. Kislinger, and Dr. Kislinger does not now challenge the soundness of any aspect of that decision on the merits. Having earlier agreed to the mutual dismissals of the defamation claims in order to expedite the decision of the matter on appeal, however, he now seeks further delay in the resolution of this case by his Petition to this Court.

For, if this Court grants review in this case, it will not change, but only delay, its final resolution. Even if this Court were to reverse the Court of Appeal decision on appealability, it would require only that the defamation claims be disposed of in the trial court, whether by agreement to dismiss *with* prejudice or otherwise, to put the case into a posture for an incontestably *appealable* final judgment. Assuming that the trial court then stands by its rulings on the motions

in limine, it will again enter judgment against Kurwa, and Kurwa will renew his appeal, with no reason to believe that the Court of Appeal will not decide as it already has, only two or more years in the future.

This Court can cut the process short, and allow this case finally to go to trial now, after nearly eight years of proceedings and three trips to the Court of Appeal, by denying review. If this Court wishes to remove the conflict in Court of Appeal authorities created by the appealability section of the opinion, it can do so by depublishing that portion of the opinion.

The portion of the opinion dealing with appealability is the first published challenge ever to the reasoning of *Don Jose's Restaurant v. Truck Insurance Exchange* (1997) 53 Cal.App.4th 115, and its progeny. If the opinion's reasoning on that point is compelling, there will surely be new opinions taking that position in future, and this Court can choose to deal with the issue at that time. If not, then there will be no further conflict to concern this Court.

Meanwhile, this case will be allowed to go to trial at last, without the need for further appellate proceedings, at least until after the trial is concluded and final judgment is entered.

CONCLUSION

For the reasons stated above, the Petition for Review should be denied.

DATED: April 23, 2012

Respectfully submitted,
ROBERT S. GERSTEIN
LAW OFFICES OF ROBERT S. GERSTEIN

By:
ROBERT S. GERSTEIN
Attorney for Appellant
Badrudin Kurwa

CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the **ANSWER TO PETITION FOR REVIEW** is proportionately spaced, has a typeface of 14 points or more, and contains 1,200 words.

DATED: April 23, 2012

Respectfully submitted,
ROBERT S. GERSTEIN
LAW OFFICES OF ROBERT S. GERSTEIN

By: _____
ROBERT S. GERSTEIN
Attorney for Appellant
Badrudin Kurwa

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 12400 Wilshire Boulevard, Suite 1300, Los Angeles, California 90025.

On April 23, 2012, I served the foregoing document described as **ANSWER TO PETITION FOR REVIEW** on the parties interested in this action by enclosing true copies thereof in sealed envelopes with postage thereon fully prepaid, and by providing for their deposit in the United States Mail at Los Angeles, California, addressed as follows:

Dale Goldfarb
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1055 W. 7th St., 29th Fl.
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(Attorney for Defendant and Respondent)

Court of Appeal
Second Appellate District
300 S. Spring St. Div. 5
Los Angeles, CA 90013

Honorable Dan Thomas Oki
Los Angeles Superior Court
400 Civic Center Plaza
Pomona, CA 91766

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 23, 2012, at Los Angeles, California.

Nanci VeSota

Nanci VeSota