

In the

SUPREME COURT OF CALIFORNIA

After A Decision By The Court Of Appeal
First Appellate District, Division Two

A133177

Superior Court of the County of Marin CIV 060796
Hon. James R. Ritchie

DANIELLE BOURHIS et al.

Plaintiffs and Appellants

v.

JOHN LORD et al

Defendants and Respondents

SUPREME COURT
FILED

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REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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1989 TRUST

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I. INTRODUCTION

The Answer to Petition for Review of Appellant BROWN EYED GIRL, INC., a California corporation (“Appellant” or “BEG”), completely ignores the statute authorizing reinstatement of corporate status which expressly states that “such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture.” (Rev. & Tax. Code §23305a). Once the appeal period expired without a valid notice of appeal having been filed, the Judgment for Respondents below became final and *res judicata*. Reinstatement could not negate that substantive defense.

Appellant never addresses the jurisdictional aspect of the running of the time for filing a valid appeal, and never explains why the running of the statute of limitations creates a substantive defense but the running of the jurisdictional time for appeal does not. Two Courts of Appeal, including the court below, have in effect called upon this Court to resolve the apparent inconsistency in the application of the revival statute to the running of the statute of limitations and to the running of the period for appeal. This Court should grant review to clarify that revival of corporate status cannot extend the period for filing a valid notice of appeal by retroactively validating an invalid notice of appeal after the appeal period has run.

II. ARGUMENT

A. REINSTATEMENT AFTER THE APPEAL PERIOD HAS RUN DOES NOT VALIDATE AN IMPROPER NOTICE OF APPEAL

Appellant does not dispute the longstanding authority that a suspended corporation cannot appeal from an adverse judgment, and if it

does its appeal should be dismissed. (*Boyle v. Lakeview Creamery Co.* (1937) 9 Cal.2d 16, 20 (“the appellant corporation has lost the right to defend the suit in question, and since it has no right to defend, it has no right to appeal from an adverse decision”); *Ocean Park Bath House & Amusement Company v. Pacific Auto Park Co.* (1940) 37 Cal. App. 2d 158; and *Gar-Lo, Inc. v. Prudential Sav. & Loan Assn.* (1974) 41 Cal.App.3d 242, 245 (“Taking an appeal from an adverse judgment of the superior court is one of the privileges which the law denies to a domestic corporation suspended under section 23301”); *Reed v. Norman* (1957) 48 Cal. 2d 338, 343); *Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 371).

Instead, Appellant argues that reinstatement validates prior procedural acts during the period of suspension, and asserts that filing a notice of appeal is procedural. This facile approach, however, ignores the difference between reinstatement during the period for timely filing a valid notice of appeal and reinstatement after the period for filing a valid notice of appeal has expired.

Appellant acknowledges, as it must, the settled rule that the running of the statute of limitations creates a substantive defense, such that reinstatement after that time cannot validate the prior filing of a complaint. (*ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 724). Accord: *Sade Shoe Co. v. Oschin & Snyder* (1990) 217 Cal.App.3d 1509, 1513 n.2; *Welco Construction, Inc. v. Modulux, Inc.* (1975) 47 Cal.App.3d 69, 73-74); *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (Nov. 22, 2011) 200 Cal. App. 4th 1470 (“If the statute runs out prior to revival of a corporation’s powers, the corporation’s actions will be time barred even if the complaint would otherwise have been timely.”).

Yet, Appellant offers no insight as to why a different rule should apply to the running of the jurisdictional time to appeal. That is because there is no justification for a different rule. Both the filing of a complaint and the filing of a notice of appeal while suspended are procedural actions which can be validated if corporate reinstatement is timely. But the failure to validate those actions within the time permitted by law creates substantive defenses. The statute of limitations is not tolled during the period of corporate incapacity, so the filing of the complaint during incapacity cannot be validated after the statute of limitations has expired. Similarly, the running of the period for appeal is not tolled during the period of corporate incapacity, so the filing of the notice of appeal during incapacity cannot be validated after that appeal period has expired. The expiration of these periods creates substantive defenses, not pleas in abatement.

This result is compelled by the statutory provisions regarding corporate reinstatement, which Appellant completely ignores:

Upon the issuance of the certificate by the Franchise Tax Board the taxpayer therein named shall become reinstated *but the reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture*, except that contracts which were voidable pursuant to Section 23304.1, but which have not been rescinded pursuant to Section 23304.5, may have that voidability cured in accordance with Section 23305.1.

(Rev. & Tax. Code § 23305a) (emphasis added).

Just as the failure to file a valid complaint prior to the expiration of the statute of limitations creates substantive rights and defenses, so too does the failure to file a valid notice of appeal prior to the expiration of the appeal period. In fact, application of this rule to appeals is even more compelling. It is beyond dispute that the notice of appeal period is jurisdictional and no relief from the failure to appeal is available. It is also beyond dispute that a suspended corporation has no standing to appeal (also a jurisdictional requirement) and cannot be retroactively infused with such standing.

Appellant's failure to file a timely and proper notice of appeal rendered the judgment final and binding. (*Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119). The issues decided in that judgment were *res judicata* as of the date the appeal period expired. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393 ("If an order is appealable, however, and no timely appeal is taken therefrom, the issues determined by the order are *res judicata*.")).

Reinstatement cannot prejudice those rights.

Appellant's other arguments bear no weight. Cases which allow reinstatement to validate prior procedural acts do not involve substantive defenses that have arisen during the period of incapacity. For example, *Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, involved a suspension after a complaint was filed but before rendition of judgment. The Court held that the suspension did not render the judgment subject to collateral attack once it became final. No substantive defense arose by reason of the suspension.¹

¹ In fact, *Traub* reaffirms the principle that suspended corporations cannot appeal adverse judgments. (*Id.* at 371).

Diverco Constructors, Inc. v. Wilstein (1970) 4 Cal.App.3d 6, involved a suspension after the complaint was filed, and reinstatement occurred before the motion to dismiss based on the suspension was filed. Therefore, the corporation was entitled to proceed, as no substantive defenses had accrued. It should also be noted that the period of suspension did not toll the five year period for bringing the case to trial. (*Id.* at 13-14). Had reinstatement not been until after the five year period had expired, a different result would have obtained.

In *Duncan v. Sunset Agr. Minerals* (1969) 273 Cal.App.2d 489, the defendant's suspension was raised during the trial and deferred by the judge until after trial. By that time defendant had been reinstated. Thus, the judge's entry of judgment against defendant on the basis of its suspension was reversed. Again, no substantive rights of the opposing party accrued by reason of the suspension.

Thus, the general statement that reinstatement can validate prior procedural acts either before or after judgment, does not address the circumstances here. Suspension does not toll time limits, and reinstatement cannot prejudice substantive rights and defenses that have accrued during the suspension. An invalid notice of appeal cannot be retroactively validated after the period to appeal has expired and the judgment has become *res judicata*.

Appellant's reliance on *Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, is also of no consequence here. The case does not involve the running of a jurisdictional time limit during a corporation's suspension. While the case does set forth the general principles surrounding corporate suspension (which is why Petitioners' cited it in the Petition), these principles cannot cure the failure to file a

timely and proper notice of appeal. Allowing a suspended corporation to cure its default in properly initiating an appeal, when no other party can do so if it fails to file a timely and proper notice of appeal, makes no sense and actually provides suspended corporations with rights others do not enjoy.

B. PEACOCK HILL AND ROONEY DO NOT SPECIFICALLY ADDRESS WHETHER AN INVALID NOTICE OF APPEAL CAN BE VALIDATED AFTER THE APPEAL PERIOD HAS EXPIRED

Appellant principally relies on two cases discussed in the Petition, *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, and *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351. Those cases do not specifically state the rule Appellant wants to apply, and the Court should take this opportunity to clarify their holdings.

In *Peacock*, the opinion does not state whether the corporate reinstatement was within the time for filing an appeal.² If the Court had specifically considered the issue here – whether an invalid notice of appeal is retroactively validated by revival of corporate status *after the appeal period has expired* – it surely would have highlighted the facts relevant to that consideration. Instead, the Court’s discussion and holding is directed at the general rule that revival of corporate status can “ordinarily” validate prior procedural actions (see *id.* at 373), and not at the situation here where substantive rights and defenses have accrued. Indeed, as noted in the Petition, the Court distinguished *Ransome-Crummey Co. v. Superior Court* (1922) 188 Cal. 393, 398, as involving a jurisdictional problem, a similar problem to that presented here. (8 Cal.3d at 373-74). The Court also

² The notice of appeal was apparently filed during the period of suspension, according to the dissent. (*Id.* at 374 (Mosk, J. dissenting)). Our Petition was inaccurate on this point.

quoted with approval from *A. E. Cook Co. v. K S Racing Enterprises, Inc.* (1969) 274 Cal.App.2d 499, 500, which stated: “provided, of course, that in the meantime substantive defenses have not accrued nor third party rights intervened.” (*Id.* at 373). Thus, the Court recognized there are situations where reinstatement can not validate prior acts.

In *Rooney*, as well, the Court does not set out facts which show its intent to rule on the specific situation presented here. Its brief discussion (10 Cal.3d at 359) and sole cite to *Peacock* suggest it was only affirming the general principle that revival of corporate powers can validate procedural steps taken on appeal during the period of suspension. It does not appear that either party presented it with the issue of whether that revival of corporate status after an appeal period has run would retroactively validate an invalid notice of appeal and negate the *res judicata* effect of the final judgment. It certainly does not address or overtly decide that issue.

Neither of these cases specifically addresses the issues raised here. They can be interpreted, however, to allow appeals to proceed for which there is no jurisdiction. Raising jurisdictional issues is not a plea in abatement. The primary purpose of the Revenue and Taxation Code sections may be to encourage delinquent corporations to pay their taxes, but the consequences of their failure to do so can be much more far reaching. Appellant intentionally failed to pay its taxes and file its tax returns before trial and was given the opportunity to cure its purposeful default. Its repeated violation of the Revenue and Taxation Code thereafter had greater consequences since it failed to file a valid notice of appeal during the appeal period. Like any other litigant who fails to file a proper notice of appeal, it should be held to suffer the consequences.

III. CONCLUSION

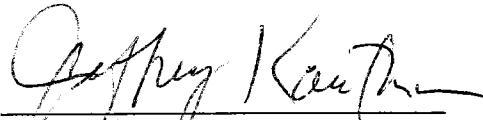
The failure to file a proper notice of appeal during the appeal period rendered the judgment against Appellant final, and vested Petitioners with rights of *res judicata*. Appellant's failure to maintain its good standing did not toll the appeal period. The revival of corporate status after the appeal period had expired could not retroactively validate the notice of appeal and divest Petitioners of their rights.

For all of the foregoing reasons, and those stated in the Petition, Petitioners respectfully request that the Court grant review and reverse the decision of the Court of Appeal denying the motion to dismiss BEG's appeal.

Dated: February 29, 2012

BRYDON HUGO & PARKER

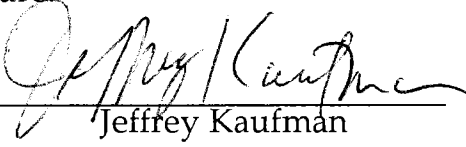
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