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Motion for nonsuit

LICENSE TO KILL IN ARBITRATION?

Sometimes defendants get lucky because fortune shines on them on that one day in arbitration that discounts the days, weeks, and hours of preparation that plaintiff's counsel has invested. The defendant shoots for the win at short range due to the fact that the scarcity of the evidence relating to the required elements of claims are patently absent. When plaintiff's counsel hears the utter of the words "nonsuit," they may act cool and calm, but in reality, it could be the lucky day for the counsel with that dumb Christmas tie. As such, it's time to go to the mattresses and knuckle-up.

A motion for nonsuit, if granted, is in effect a judgment that will call for swift and decisive celebration of a victory. Given that such a powerful tool exists, be ready for it, know the rules and the ways to potentially neutralize the normally disfavored, but sometimes fatally effective dispositive motion.

The prevailing party to a motion for nonsuit will doubtlessly be gleeful that they won their case without the need for a full deliberation of the case by the finder of fact. The motion can also be brought later, after the presentation of evidence, where the result is just as devasting. The power of the motion for nonsuit lies in its finality and its allowance for challenging the sufficiency of the evidence presented at the early stage of an arbitration hearing while preserving the moving party's right to present their case in the event the motion is denied.

What is a motion for nonsuit?

When a case is prepared for arbitration, and evidence shows that any element or cause of action fails as a matter of law, defense counsel will seriously consider the best and most efficient way to dispose of the case or any claim in their favor. Code of Civil Procedure section 581c offers such a vehicle for a decisive victory on the merits. The statute and supporting case law applies to court cases, but it can be intelligently applied in the arbitration setting. If successful, a nonsuit order dismisses a party's action when the party fails to establish a prima facie case. *(Continuing Education of the Bar, Program CP-49957*, citing *Doria v. AFL-CIO (1961)* 196 Cal.App.2d 22, 23.) A motion for nonsuit has been termed a demurrer to the evidence because it concedes the truth of the facts of plaintiff's proposed or admitted evidence, and any inferences reasonably drawn from them, but contends that these facts, as a matter of law, do not sustain the plaintiff's case.

A motion for nonsuit is a way for a party to challenge the sufficiency of an opponent's case on the merits before deliberation by the trier of fact. This can be established at the close of plaintiff's opening statement or after the evidence has been presented in the case in chief. Code of Civil Procedure section 581c provides the authority for motions for nonsuit in California. A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury or court to find in his favor. (Code Civ. Proc., § 581c, subd. (a); *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117.) A motion for nonsuit is also appropriate when there is a variation between pleading and proof, or if the evidence is insufficient to state a claim.

Such a motion may be dispositive as to the entire case, or as to some issues and claims. In the event that the motion is granted as to some, but not all of the issues, the arbitrator "shall grant the motion as to those issues and the action shall proceed only as to the remaining issues." (Code Civ. Proc., § 581(b).) A trial court's ruling on a motion for nonsuit is "reviewed for the existence of substantial evidence." (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845.) It generally does not take much to establish "substantial" evidence, but it requires more than "a mere scintilla of evidence." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) "Substantial evidence" is not synonymous with *any* evidence, but must be "reasonable, credible, and of solid value." (*OCM Principal Opportunities Fund*., *supra*, at p. 845; *Kuhn v. Department of General Counsel Services* (1994) 22 Cal.App.4th 1627, 1633.)

The arbitrator has discretion to determine whether the nonsuit judgment is an adjudication on the merits. Unless the order specifies otherwise, the judgment is deemed to be on the merits. (*Paddleford v. Biscay* (1971) 22 Cal.App.3d 139, 142.) And, while appellate rights are very limited in an arbitration setting, it may be error for the arbitrator to specify whether or not the judgment is on the merits, and a court of appeal may correct the judgment. (*American Broad, Co. v. Walter Reade Sterling, Inc.* (1974) 43 Cal.App.3d 401, 406.)

When to make a motion for nonsuit

A defendant can make a motion for nonsuit if the plaintiff's opening statement fails to state a cause of action or establishes an affirmative defense as a matter of law. Timing is everything, particularly when a party may bring their motion for nonsuit. Code of Civil Procedure section 581(a) states that "[o]nly after, and not before, the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit." In an arbitration scenario, a defendant may elect to submit their motion immediately after plaintiff's opening statement is finished. The motion is generally made orally; however, a party may want to consider preparing and submitting a written motion for nonsuit and submitting it

See Reichman & Macias, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2018 Issue

simultaneously with making such an oral motion. This is common when the issues are complex or very detailed. The motion must state the grounds with precise grounds and requisite particularity so that the plaintiff is offered an opportunity to cure any deficiencies. (*Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, 272.) In an abundance of caution, it is good practice to check with the applicable arbitration rules controlling the case, and the arbitrator's case manager to make sure the motion followed proper form and procedure.

Though courts have traditionally considered a nonsuit to be a disfavored motion, particularly at the close of an opening statement, it can be appropriate, for example when there was nether a showing of causation of an injury nor of a libelous statement. (*Hoff v Vacaville Unified Sch. Dist.* (1998) 19 Cal.App.4th 925, 930.) For example, a judgment of nonsuit was affirmed when plaintiff's cause of action was based on a different set of facts in general scope or meaning from those pleaded and no amendment was made to the complaint. Further, if a plaintiff's theory proposed in their opening statement does not give rise to liability as a matter of law, the defendant is entitled to a judgment of nonsuit. (*Calrow v. Appliance Indus.* (1975) 49 Cal.App.3d 556, 559.) Note that if opposing party's motion to amend the pleadings is granted and they conform their pleadings to proof, a motion for nonsuit may not be granted at all.

Partial nonsuit

In addition to disposing of an entire case and all causes of action, an arbitrator may grant a motion for nonsuit for some issues, claims or particular parties. In the event that the ruling is for a partial nonsuit, a final award would be entered at the end of the full hearing that rules on the matters not otherwise disposed on the motion for nonsuit. (Code Civ. Proc., § 581c , subd.(b).) For example, such a partial ruling can result when the actual claim asserts a host of legal theories, but the evidence supports only one or two causes of action. The arbitrator can grant a motion for nonsuit as to one party but not the other remaining parties. If a partial nonsuit is granted, the moving party should request that the arbitrator state with particularity the details and result of that ruling in the final award.

The tests for granting the motion

California law has established some rules to shield plaintiffs from the potentially draconian effect of granting nonsuit motions. A judgment of nonsuit after the opposition's opening statement can be properly granted only when the court concludes from all the asserted facts and inferences that no evidence of "sufficient substantiality" will support a judgment in favor of the plaintiff. (*Willis v. Gordon* (1978) 20 Cal.3d 629, 633.) Like a ruling on a demurrer, the arbitrator must accept as true all facts that attorneys or parties represent will be proved and must "indulge every legitimate inference in favor of the plaintiff.… The evidence offered in the opening statement … must be substantial evidence, sufficient to support a judgment." (*Hays v. Vanek* (1989) 217 Cal.App.3d 271, 288.) When the motion is made after opening statement, the court must assume the plaintiff will be able to prove all favorable facts alleged. (*Aspen Enter., Inc. v. Bodge* (1995) 37 Cal.App.4th 1811, 1817.) Presumptions (which are not evidence) favoring the defendant (e.g., presuming that defendant obeyed the law) may not be considered. (Evid. Code, § 600; *Engelman v. Consolidated House Movers* (1955) 135 Cal.App.2d 237, 243.)

If the arbitrator hears a motion for nonsuit after the presentation of evidence in the case, a defendant's motion for nonsuit will likely be granted if plaintiff does not present sufficient evidence on any essential element of their case. Some common examples of this occur when, for example, a party's failure to produce expert testimony on issues that require such evidence; a party's expert is not qualified to render an expert opinion on the issues presented; failure to ascertain damages on any claim; failure to show that a legal duty exited between the parties; or when any element of any claim is not proven by evidence.

The arbitrator has very little discretion when considering a motion for nonsuit as they must rely solely on the sufficiency of the promised evidence in the opening statement or on the evidence and lack thereof if the motion is made after a party's case closes. Neither a judge nor an arbitrator may weigh the evidence or consider the credibility of witnesses in determining their ruling. However, inherently improbable testimony need not be ultimately considered. (*Neblett v. Elliott* (1941) 46 Cal.App.2d 294, 305.) To avoid the devastating effect of a nonsuit, plaintiffs must present evidence that is of "substantial substantiality" to support a verdict in their favor and to avoid an unfavorable ruling on a motion for nonsuit. (*O'Keefe v. South End Rowing Club* (1966) 64 Cal.2d 729, 733.)

Opportunities to cure

A defendant's motion for nonsuit does not simply or necessarily cut off a plaintiff's ability to further state their case. At the time a motion for nonsuit is made, a plaintiff may elect to stand on the previously presented opening statement or they can elect to supplement their opening statement by bringing additional facts that they anticipate during the arbitration hearing. (*Cole v. State* (1970) 11 Cal.App.3d 671, 674 [court gave plaintiff "full opportunity to state all facts he expected to prove"]; *Rodin v American Can Co.* (1955) 133 Cal.App.2d 524, 534 [nonsuit reversed when plaintiff was denied opportunity to expand opening statement].)

If a motion for nonsuit is brought after the presentation of evidence, a plaintiff may request to reopen the case or can stand on their presented evidence. It is imperative to request to bring in additional evidence or facts; if not, it will act as a waiver to amend their opening statement or their evidence, and any appeal rights, which are already very limited for arbitrations. (*Carmichael v. Reitz* (1971) 17 Cal.App.3d 958, 968.)

In an appeal from a judgment of nonsuit, the reviewing court is guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff. "The judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant

See Reichman & Macias, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2018 Issue

and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for defendant is required as a matter of law." (*Mason v. Peaslee* (1959) 173 Cal.App.2d 587, 588.)

Results of a granted motion for nonsuit

To the victor belongs the spoils and respect. Absent any language to the contrary in a final award, a judgment of nonsuit serves as a judgment on the merits. (Code Civ. Proc., § 581c, subd. (c).) As such, in addition to winning one's case, if the nonsuit is granted as to the entire case, it acts as a dismissal to the action, thereby entitling a prevailing party in the nonsuit context to recover costs pursuant to sections 1031-1034 of the Code of Civil Procedure. Remember to check the applicable rules and procedures for the ADR agency that controls your arbitration for timing, format, notice, etc. to deal with the motion if it is filed.

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