

AFTIM K. SABA, Plaintiff and Respondent, v. JOHN CRATER, Defendant and Appellant.

No. G018933.

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION THREE**

62 Cal. App. 4th 150; 72 Cal. Rptr. 2d 401; 1998 Cal. App. LEXIS 207; 98 Cal. Daily Op. Service 1895; 98 Daily Journal DAR 2628

March 16, 1998, Decided

PRIOR HISTORY: [***1] Appeal from a judgment of the Superior Court of Orange County. Super. Ct. No. 713263. David H. Brickner, Judge.

DISPOSITION: The judgment is reversed, appellant to recover his costs on appeal.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant business partner challenged the order of the Superior Court of Orange County (California), which entered judgment based on a settlement offer purportedly made pursuant to *Cal. Civ. Proc. Code* § 998 despite the fact that this offer was never reduced to writing.

OVERVIEW: Respondent, plaintiff below, sued his business partners for fraud and the parties commenced discovery. During a break in a deposition, counsel for appellant, defendant below, made what he characterized as a "998 offer" to compromise the dispute, and then put this offer on the deposition record. The deposition transcript demonstrated that counsel for both sides understood that a settlement offer made pursuant to *Cal. Civ. Proc. Code* § 998 was required to be in writing. Appellant never followed up with a written offer. Respondent ultimately sent appellant's counsel a letter purporting to accept the offer memorialized in the deposition transcript and to waive the requirement of a writing. The trial court entered judgment based on the offer made on the deposition record after first adjudicating a dispute as to terms. On appeal the court reversed. The court held that § 998 required a written offer to compromise a lawsuit. The entry of judgment pursuant to § 998 was merely a ministerial act, depriving the trial court of any power to adjudicate terms, and making the existence of a written offer essential.

OUTCOME: The court reversed the trial court's judgment based on a settlement offer which was never reduced to writing because the applicable statute, which made entry of a judgment based on a settlement offer a ministerial act, made the existence of a written offer essential.

LexisNexis(R) Headnotes

Civil Procedure > Settlements > Settlement Agreements > General Overview

[HN1] *Cal. Civ. Proc. Code* § 998 requires a written offer to compromise a lawsuit, and the section does not authorize the trial court summarily to resolve a dispute concerning the terms of the offer unless the offer and acceptance meet the requirements of *Cal. Civ. Proc. Code* § 664.6.

Civil Procedure > Settlements > Settlement Agreements > General Overview

[HN2] See *Cal. Civ. Proc. Code* § 998(b).

Civil Procedure > Settlements > Settlement Agreements > General Overview

[HN3] See *Cal. Civ. Proc. Code* § 664.6.

***Civil Procedure > Settlements > General Overview
Contracts Law > Types of Contracts > Settlement Agreements***

Governments > Courts > Authority to Adjudicate

[HN4] *Cal. Civ. Proc. Code* § 998 does not grant a court the authority to adjudicate a dispute concerning the

62 Cal. App. 4th 150, *; 72 Cal. Rptr. 2d 401, **;
1998 Cal. App. LEXIS 207, ***; 98 Cal. Daily Op. Service 1895

terms of a settlement agreement. The entry of judgment pursuant to § 998 is merely a ministerial act which may be performed by the clerk of the court.

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

In a fraud action between partners, defendant's lawyer purported to make an oral offer to compromise, pursuant to Code Civ. Proc., § 998, on the record of a deposition. Plaintiff attempted to accept the offer in writing and have it enforced. The trial court then resolved a dispute between the parties over whether the offer included attorney fees, found that the offer and acceptance were valid, and entered judgment. (Superior Court of Orange County, No. 713263, David H. Brickner, Judge.)

The Court of Appeal reversed. The court held that the trial court erred in finding the offer and acceptance valid and in entering judgment. In the context of a Code Civ. Proc., § 664.6, stipulation for settlement, oral stipulations made on the record at a deposition and transcribed by a court reporter do not qualify as a writing. There is no reason to interpret the writing requirement under Code Civ. Proc., § 998, differently from the same requirement under Code Civ. Proc., § 664.6, and therefore, the oral statement by defendant's lawyer was not valid under Code Civ. Proc., § 998. Moreover, while the trial court purported to adjudicate the dispute as to whether the offer included attorney fees, Code Civ. Proc., § 998, does not grant the trial court authority to adjudicate such a dispute; entry of judgment under the statute is merely a ministerial act that may be performed by the trial court clerk. Before courts may resolve disputes concerning the terms of a settlement under Code Civ. Proc., § 664.6, the settlement must have been entered "orally before the court" or be in writing. Since neither condition was satisfied in this case, the trial court lacked the authority under Code Civ. Proc., § 998, to resolve the parties' dispute in the summary fashion contemplated by Code Civ. Proc., § 664.6. (Opinion by Rylaarsdam, J., with Sonenshine, Acting P. J., and Bedsworth, J., concurring.)

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Compromise, Settlement, and Release § 8--Compromise--Requisites and Validity--Requirement of Written Offer--Improper Summary Resolution of Disputes by Trial Court. --In a fraud action in which defendant's lawyer made an oral offer to compromise pursuant to *Code Civ. Proc.*, § 998, on the record of a

deposition, and in which plaintiff attempted to accept the offer in writing and have it enforced, the trial court erred in finding the offer and acceptance valid and in entering judgment. In the context of a *Code Civ. Proc.*, § 664.6, stipulation for settlement, oral stipulations made on the record at a deposition and transcribed by a court reporter do not qualify as a writing. There is no reason to interpret the writing requirement under *Code Civ. Proc.*, § 998, differently from the same requirement under *Code Civ. Proc.*, § 664.6, and therefore, the oral statement by defendant's lawyer was not valid under *Code Civ. Proc.*, § 998. The judgment also suffered from another defect, in that the trial court purported to adjudicate a dispute as to whether the offer included attorney fees. *Code Civ. Proc.*, § 998, does not grant the court authority to adjudicate such a dispute; entry of judgment under the statute is merely a ministerial act that may be performed by the court clerk. Before courts may resolve disputes concerning the terms of a settlement under *Code Civ. Proc.*, § 664.6, the settlement must have been entered "orally before the court" or be in writing. Since neither condition was satisfied in this case, the court lacked the authority under *Code Civ. Proc.*, § 998, to resolve the parties' dispute in the summary fashion contemplated by *Code Civ. Proc.*, § 664.6.

[See 6 *Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial*, § 78.]

COUNSEL: Robert S. Lewin for Defendant and Appellant.

Daehnke & Cruz, Kevin J. Daehnke, William J. Moran and J. Craig Williams for Plaintiff and Respondent.

JUDGES: Opinion by Rylaarsdam, J., with Sonenshine, Acting P. J., and Bedsworth, J., concurring.

OPINIONBY: RYLAARSDAM

OPINION: [*151]

[**402] **RYLAARSDAM, J.**

Defendant's lawyer purported to make an oral offer to compromise pursuant to *Code of Civil Procedure section 998* (all further statutory references are to the Code of Civil Procedure) on the record of a deposition. The offer was never reduced to writing; nonetheless, plaintiff attempted to accept the offer in writing and sought to have it enforced by the [*152] court. The trial court resolved a dispute concerning the terms of the offer, held that the offer and acceptance were valid and entered judgment. We reverse, holding that [HN1] section 998 requires a written offer, and the section does not authorize the trial court summarily to resolve a dispute con-

cerning the terms of the offer unless the [***2] offer and acceptance meet the requirements of section 664.6.

FACTS

John Crater and Jerry Lehman contracted to acquire their partner Aftim K. Saba's interest in the partnership. Subsequently, a dispute arose and Saba sued Crater and Lehman for fraud; Crater and Lehman cross-complained. The parties agreed certain issues in Saba's complaint should be resolved by an accounting. The referee who conducted the accounting found that approximately \$ 11,000 was owed to Saba under the contract.

Later, during a break in a deposition, Crater's lawyer stated he intended to make a "998 offer" for the amount the referee had determined was owed under the contract. Saba's lawyer stated he thought a "998 offer" must be in writing. The lawyers discussed the terms of the offer off the record and then, on the record, Crater's lawyer stated: "First of all, I will follow-up with a formal written letter to you, but I want to make an offer under *CCP section 998*. And I'm intending by putting it on the record that that will qualify for the code requirements. [P] But in any event the offer is for full payment of the principal amount determined by [the referee], which would be 10 percent of the amount [***3] that he found and that would be \$ 11,000 and change, plus legal interest from the date of filing of your complaint, whatever that calculates out to be."

After the deposition, Saba's lawyer unsuccessfully attempted to obtain a formal written offer. He then served a written acceptance, stating he waived "any purported deficiencies in the *CCP section 998* offer . . . placed on the record at Mr. Lehman's deposition" Crater's lawyer objected, in writing, to the purported acceptance.

[**403] Saba thereafter made a motion to have judgment entered pursuant to section 998. The parties disagreed about the terms of the proposed settlement agreement, disputing whether the offer included attorney fees. After considering evidence as to the intent of the parties, the court ruled a valid section 998 offer had been made and accepted, that the offer did not include attorney fees and ordered judgment entered in favor of Saba in the amount of the offer plus approximately \$ 16,800 in attorney fees and costs. Crater appeals.

DISCUSSION

(1) [HN2] Section 998, subdivision (b) provides: "Not less than 10 days prior to commencement of trial, . . . any party may serve an offer in writing upon [*153] any other [***4] party to the action to allow judgment to be taken . . . in accordance with the terms and conditions stated at that time. [P] (1) If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk

or the judge shall enter judgment accordingly." Crater contends the offer made orally at the deposition did not constitute a writing and is therefore unenforceable under section 998. Saba argues the trial court was correct in determining Crater had waived any deficiencies.

Our courts have not addressed whether an oral recorded statement satisfies the requirement of a writing under section 998. They have, however, addressed a similar issue in the context of a [HN3] section 664.6 stipulation for settlement. Under that section, "[i]f parties to a pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. . . ." Oral statements made on the record at a deposition subsequently transcribed by a certified court reporter do not qualify as such a writing. (See *City of Fresno v. Maroot* [***5] (1987) 189 Cal. App. 3d 755, 761 [234 Cal. Rptr. 353]; *Datatron Systems Corp. v. Speron, Inc.* (1986) 176 Cal. App. 3d 1168, 1172 [222 Cal. Rptr. 658].) We fail to find a reason to interpret the requirement there be a writing under section 998 differently from the same requirement under section 664.6 and therefore hold the statement placed orally on the record does not satisfy the requirement that a section 998 demand be in writing.

The judgment suffers from another defect. The parties disagreed on the terms of the settlement, specifically whether the offer included attorney fees. The trial court purported to adjudicate this dispute, heard evidence as to the intent of the parties and found the offer did not include such fees. [HN4] Section 998 does not grant the court the authority to adjudicate such a dispute. The entry of judgment pursuant to section 998 is merely a ministerial act which may be performed by the clerk of the court. This is another reason a formal written offer and acceptance are required; the clerk could hardly resolve the kind of dispute which confronted the court here.

The trial court apparently applied procedures available under section 664.6 to a motion [***6] under section 998. Section 664.6 provides, "[t]he court, upon motion, may enter judgment pursuant to the terms of the settlement." This allows the court to resolve disputes regarding the terms of the settlement. (*Malouf Bros. v. Dixon* (1991) 230 Cal. App. 3d 280, 284 [281 Cal. Rptr. 235].) There is no such provision in section 998. Under that section, the clerk or judge merely enters judgment following the filing of a written acceptance of the offer. Before courts may resolve disputes concerning the [*154] terms of a settlement under section 664.6, the settlement must have been entered "orally before the court" or be in writing. Since neither condition was satisfied here, the court lacked the authority to resolve the

62 Cal. App. 4th 150, *; 72 Cal. Rptr. 2d 401, **;
1998 Cal. App. LEXIS 207, ***; 98 Cal. Daily Op. Service 1895

parties' dispute concerning the terms of the settlement in the summary fashion contemplated by section 664.6.

Sonenshine, Acting P. J., and Bedsworth, J., concurred.

The judgment is reversed, appellant to recover his costs on appeal.