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Court of Appeal, First District, Division 3, California.

Richard SANDER et al., Plaintiffs and Respondents,
v.
The STATE BAR OF CALIFORNIA et al., Defendants and Respondents;
Dwight Aarons et al., Movants and Appellants.

No. A124884. | (City & County of San Francisco Super. Ct. No. CPF-08-508880). | Nov. 30, 2009.

Attorneys and Law Firms

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Opinion

SIGGINS, J.

***1** Appellants are challenging the trial court's denial of their motion to intervene in proceedings on a petition for writ of mandate. Plaintiffs Richard Sander, Joe Hicks and the California First Amendment Coalition (CFAC) filed a writ of mandate in the trial court seeking to obtain records from the State Bar of California and its board of governors that will facilitate plaintiffs' academic research on the discrepancies in passage rates among racial and ethnic candidates for the State Bar examination. Appellants are 23 individuals of primarily Latino and African-American descent, who sought intervention to object to the disclosure of confidential information they provided to the State Bar when they applied to take the examination. The superior court denied appellants' motion to intervene without prejudice to their right to again seek intervention at a later point in the proceedings. The proposed intervenors appealed from that order, and plaintiffs now move to dismiss the appeal. We conclude the order denying intervention is nonfinal and not appealable. Therefore, we dismiss this appeal.

BACKGROUND

The State Bar collects and maintains records regarding individuals who take the California bar examination. In addition to bar exam results and scores, the information collected regarding each applicant often includes the applicant's undergraduate and law school records, standardized test scores, ethnic background and gender.

Plaintiff Sander is an economist and professor of law at the University of California Los Angeles who conducts research on the scale and effects of admissions preferences in higher education. Sander contacted the State Bar to explore the possibility of collaborating on a study regarding what he says is a large and persistent gap in bar passage rates among racial and ethnic groups. The State Bar rejected Sander's proposal due, in part, to its concerns about maintaining the confidentiality of personal information.

Sander then made a request for records that would enable him to independently perform the study. The State Bar rejected this request as well, again citing concerns about the applicants' privacy, and subsequently rejected a revised request by Sander and Hicks. CFAC, a public benefit corporation primarily concerned with the enforcement of open government laws, filed a separate request for the same data. That request was also rejected.

Plaintiffs filed their petition for writ of mandate in the San Francisco Superior Court, seeking to compel the State Bar to disclose the requested records. The appellants moved to intervene in the proceedings on the ground that disclosure of their records would reveal confidential information in violation of their state constitutional right of privacy, the federal Family Educational Rights and Privacy Act, and their contractual entitlement that the information would be kept private.

The court denied them intervention. It ordered: "The denial of the motion is without prejudice to either of the following: (1) A renewed motion by the Proposed Intervenors for leave to intervene if and when the question of the adequacy of the protocols for disclosure of the requested records to protect the privacy interests of the Proposed Intervenors is before the Court for consideration and determination; or (2), in the alternative, a renewed motion by the Proposed Intervenors, at any time, for leave to intervene for the limited purpose of addressing the adequacy of the protocols for disclosure of the requested records to protect the privacy interests of the Proposed Intervenors."

***2** The trial court subsequently bifurcated trial on the petition for writ of mandate into two phases, with Phase One to address whether the State Bar has a legal duty to provide the requested records. The order clarified that "[f]or purposes of analyzing this duty at the Phase One stage only, the parties will not raise any issues concerning the personal privacy of any person. Questions as to whether the provision of the requested records to petitioners would violate the privacy of any person and as to whether the cost or burden of manipulation, reproduction, or disclosure of the requested records that may be entailed by Petitioners' requests provide a basis for denying or limiting disclosure are reserved to Phase Two."[1]

[1] We take judicial notice of the bifurcation order pursuant to Evidence Code sections 452, subdivisions (c) and (d) and 453. Plaintiffs' request for judicial notice is otherwise denied as unnecessary to the resolution of this motion.

DISCUSSION

Plaintiffs move to dismiss the appeal on the ground, inter alia, that it was not taken from a final order. We agree.

"In California, the right to appeal is governed solely by statute and, except as provided by the Legislature, the appellate courts have no jurisdiction to entertain appeals. An appealable judgment or order is essential to appellate jurisdiction, and the court, on its own motion, must dismiss an appeal from a nonappealable order. [Citation.] The primary statutory basis for appealability in civil matters is limited to the judgments and orders described in section 904.1 of the Code of Civil Procedure, which essentially codifies the 'one final judgment rule' and provides that only final judgments are appealable. The one final judgment rule is based on the theory that piecemeal appeals are oppressive and costly, and that optimal appellate review is achieved by allowing appeals only after the entire action is resolved in the trial court." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645; see Code Civ. Proc., § 904.1, subd. (a)(1)(A).)

Generally, a decree is final if it leaves no issue for future consideration except the fact of compliance or noncompliance with its terms, but it is not final when " 'anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties.' " (*Olson v. Cory* (1983) 35 Cal.3d 390, 399; accord, *Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 697; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741; *In re Marriage of Griffin* (1993) 15 Cal.App.4th 685, 687, 689.) The substance and effect of the order, not its form, determine whether or not it constitutes an appealable final judgment. (*Griset v. Fair Political Practices Com'n* (2001) 25 Cal.4th 688, 698, quoting *Lyon v. Goss* (1942) 19 Cal.2d 659, 670; *Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, 244.)

The order denying intervention was not final. It expressly allowed the appellants to renew their motion to intervene in the second phase of trial should Phase One result in a finding that the State Bar has a duty to produce the records, or to otherwise seek intervention at any point in the proceedings for the limited purpose of protecting their privacy rights.[2] The order thus contemplates further judicial action before the appellants' rights are settled. The court made it clear that denial of intervention was interlocutory and that further judicial action would finally determine the rights of the parties. (See *Nimmagadda v. Krishnamurthy* (1992) 3 Cal.App.4th 1505, 1509 [conditional award of attorney fees not final for purposes of appeal].) As this case does not fall into any of the exceptions that allow appeal of an interlocutory order (see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009)[¶][¶] 2:117 to 2:122, pp. 2-66 to 2-67), it must be dismissed.

[2] Of course, if Phase One results in the determination that the State Bar has *no* obligation to release the information, the case is over and the proposed intervenors have no further interest in the matter.

***3** Appellants' arguments against dismissal are not persuasive. They rely on a number of cases for the proposition that an order denying intervention is appealable when it finally terminates the moving party's ability to participate in litigation. (*Dollenmayer v. Pryor* (1906) 150 Cal. 1, 3; *Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 547; *Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1363; see *Bowles v. Superior Court* (1955) 44 Cal.2d 574, 582.) Here, however, the court's order permits appellants to renew their motion when their privacy interests are actually implicated, or at any time in a more limited form addressed specifically to those interests. Appellants correctly observe that an order denying a motion to intervene is appealable "when it finally and adversely determines the right of the moving party to proceed in the action." (*Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838, 841.) But appellants' rights have not been finally determined.

Although appellants (somewhat cryptically) say that their rights to renew their motion are inadequate, they fail to explain any basis for their claim, and neither their opposition to the motion to dismiss nor their opening appellate brief reveals any supporting reasoning or

authority for such an alleged inadequacy.

"[E]xcept as provided by the Legislature, the appellate courts have no jurisdiction to entertain appeals. An appealable judgment or order is essential to appellate jurisdiction, and the court, on its own motion, must dismiss an appeal from a nonappealable order." (*Art Movers, Inc. v. Ni West, Inc., supra,* 3 Cal.App.4th at p. 645.) Because the order challenged here is not appealable, plaintiffs' motion to dismiss the appeal is granted.

DISPOSITION

The appeal is dismissed.

We concur: McGUINESS, P.J., and POLLAK, J.