LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
TUESDAY, MARCH 10, 2020

PERSPECTIVE

Don't get punished for failing to comply with demurrer rules

Compliance with Section 430.41(a) isn't relevant to sustaining a demurrer

By Susan Roche

On Feb. 18, Division 4 of the 2nd District Court of Appeal affirmed the trial court's sustaining of a demurrer in the case of *Dumas v. Los Angeles County Board of Supervisors*, 2020 DJDAR 1243, over Dumas' objections that the county failed to comply with Code of Civil Procedure Section 430.41(a)(4). Dumas contended that the county failed to meet and confer with him in person or by telephone, but instead simply sent a letter purporting to be a written request for a meet and confer. Writing the opinion, Presiding Justice Nora Manella held that whether or not a party complied with Section 430.41(a) is irrelevant to sustaining or overruling a demurrer.

Code of Civil Procedure Section 430.41 went into effect on Jan. 1, 2016, and was intended to reduce the number of demurrers before the courts by requiring that the parties make a good faith effort to informally resolve disputes. Unlike California's discovery statutes, Section 430.41 does not explicitly allow a court to impose monetary sanctions on a party who does not comply with its provisions. Further, subdivision (a)(4) explicitly states that "any determination that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." Why then, if Section 430.41(a) provides no consequences for non-compliance, should members of the defense bar waste time and effort in trying to meet and confer at all?

Given this question, it should come as no surprise that numerous appellants seeking to overturn demurrers have presented arguments to the courts that either ignore subdivision (a)(4) entirely or at least attempt to imbue it with some ambiguity. In *Olson v. Hornbrook Community Services Dist.*, 33 Cal. App. 5th 502 (2019), plaintiffs attempted to argue that because defendant did not sufficiently meet and confer with them prior to filing for an automatic extension under subdivision (a) (2), the trial court lost jurisdiction to hear defendant's demurrers.

Olson took note of the demurring party's attempts to comply with Section 430.41(a), even as it pointed out that these efforts did not matter for purposes of the legal analysis. The court took time to mention that "the District attempted to meet and confer with plaintiffs; however, both refused to communicate with the District's counsel as he had not been retained for the matter by the Board at a meeting," while still noting that "even if the District did not comply with the meet-and-confer requirements, we do not agree with plaintiffs that the consequence of that failure is for the court to lose jurisdiction over the pleadings."

While *Olson* was the first published opinion to rely on subdivision (a)(4), it followed a number of unreported appellate decisions that similarly upheld trial court orders sustaining demurrers where the parties failed to sufficiently meet and confer, but which nevertheless included some analysis as to why those efforts should be deemed sufficient anyway. In *Richardson v. Taylor*, the court rejected plaintiff's argument that the trial court was required to order continuance of the demurrer hearing only after having earlier noted that the trial court had apparently found this effort would be "futile." 2017 WL 5107647, p 2. In *Powers v. Emerson*, the 2nd District rejected plaintiff's attempts to strike defendant's costs on demurrer, pointing out that "section 430.41 does not contain any penalties for the failure to follow the meet-and-confer process set forth in section 430.41, subdivision (a)(1)" while also noting that "[g]iven their failure to cooperate, plaintiffs cannot complain that [respondents] failed to comply with section 430.41, subdivision (a)(1)." 2017 WL6506592, p. 3.

Even after *Olson*, in *Czternasty v. County of San Diego*, the 4th District Court of Appeal made its determination that "even assuming that Czternasty had established that the County failed to comply with the meet and confer process outlined in section 430.41, such failure would not have constituted a basis for the trial court to overrule the County's demurrer" with an important footnote: "[w]e emphasize that Czternasty did not establish, in either the trial court or this court, that the County failed to comply with the meet and confer process specified in section 430.41." 2019 WL 5851359, p. 4 n.8. Like *Olson*, *Richardson*, *Powers* and *Czternasty* all agreed that the facts surrounding the parties' purported attempts at complying with 430.41(a) were not controlling, yet the inclusion of such dicta reflects the seeming incongruence between subdivision (a)(4) and the purpose of Section 430.41: to incentivize parties to make a good faith attempt to resolve matters prior to demurrer.

The *Dumas* court's reasoning resolves some of this conflict. In *Dumas*, the court did not comment on whether or not the county's "written Meet and Confer request" complied with the requirements of section 430.41(a). It was also not swayed by *Dumas*' attempts to distinguish *Olson*: "Citing no authority, appellant argues section 430.41, subdivision (a)(4), applies only after the demurring party files a declaration of inability to meet and confer by the deadline and obtains the automatic 30-day extension under section 430.41, subdivision (a)(2). He claims that absent this action by the demurring party, the court may not disregard defects in the meet and confer process. We disagree."

Presumably, in arguing that the county was required to avail itself of the 30-day extension in subdivision (a)(2), the plaintiff was attempting to require that the trial court take into account that the county could have made further efforts to meet and confer, but chose not to, i.e. that the county had not made a sufficient attempt to resolve the issues prior to demurrer. In a footnote, the *Dumas* court declined to impose this requirement on the trial court: "Of course, trial courts are not required to ignore defects in the meet and confer process. If, upon review of a declaration under section 430.41, subdivision (a)(3), a court learns no meet and confer has taken place, or concludes further conferences between counsel would likely be productive, it retains discretion to order counsel to meaningfully discuss the pleadings with an eye toward reducing the number of issues or eliminating the need for a demurrer, and to continue the hearing date to facilitate that effort. (*See Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967-968, 67 Cal. Rptr.2d 16, 941 P.2d 1203 [courts have inherent authority to regulate proceedings in ways consistent with statutes]; § 430.41, subd. (c) [addressing meet and confer conferences following grant of demurrer with leave to amend; 'Nothing in this section [§ 430.41] prohibits the court from ordering a conference on its own motion at any time or prevents a party from requesting that the court order a conference to be held' (emphasis added)].)"

Accordingly, members of the defense bar should take note that *Dumas* confirms a court's discretion to punish failures to comply with 430.41(a) by imposing additional requirements — such as meeting and conferring before the hearing, meeting and conferring in person, or continuing the hearing — which might deter fee-conscious parties. On the other hand, if a court feels that such measures are not necessary; for example, because they would reward a party seeking delay, it may choose not to do so. Given its reference to *Rutherford, Dumas* also leaves open the possibility of imposing Section 128.5 sanctions on dilatory parties. It is therefore in the best interests of parties to show a good faith effort to comply with the statute, regardless of its lack of explicit enforcement mechanism. ■

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