NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JUST A FLUKE, INC., Plaintiff and Appellant, v. JACQUES LITALIEN, et al., Defendants and Respondents;	G058381 (Super. Ct. No. 30-2017-00917590) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass and James Di Cesare, Judges. Dismissed as moot. Request for judicial notice denied. Motion to augment record denied.

Cooksey, Toolen, Gage, Duffy & Woog, Phil Woog and Matthew R. Pahl; Law Offices of Christopher P. Ruiz and Christopher P. Ruiz for Plaintiff and Appellant.

Stuart Kane, Donald J. Hamman, and Eve A. Brackmann for Defendants and Respondents.

Plaintiff Just a Fluke, Inc. appeals from a judgment of dismissal of its declaratory relief action, which sought a judicial declaration that an arbitration between plaintiff and defendants Jacques and Anita Litalien[1] was not a "consumer" arbitration. Plaintiff contends the trial court abused its discretion by dismissing the action. Defendants moved to dismiss this appeal for mootness after the arbitrator accepted plaintiff's contention that the arbitration was not a "consumer" arbitration. We grant the motion and dismiss the appeal.

FACTS

The underlying facts are set forth in our related decision, (*Just a Fluke, Inc. v. Litalien* (Mar. 23, 2021, G058381) [nonpub.opn.]). In this appeal, plaintiff challenges the trial court's order of dismissal.

DISCUSSION

While this appeal was pending, the arbitrator sustained plaintiff's objection to the characterization of the arbitration as a "consumer" proceeding, converting it to an ordinary arbitration.[2] Defendants argue this decision renders plaintiff's entire declaratory relief action and this appeal are moot. We agree.

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[1] Jacques died after the filing of the action, and Anita became incapacitated. Their son, Geatan Joseph Litalien presently acts in their stead in this litigation as beneficiary successor in interest to Jacques and guardian ad litem for Anita. (*Just a Fluke, Inc. v. Litalien* (Dec. 27, 2018, G055958) [nonpub.opn.].) For clarity, we refer to the Litaliens, whether or not acting through Geatan, as "defendants" throughout.

[2] The arbitrator's ruling is not a part of the record on appeal before us, but defendants rely on it to argue this case is moot, and plaintiff, in its reply brief, acknowledges it occurred. Defendants filed a request for judicial notice, asking us to take judicial notice of the arbitrator's ruling and a number of other documents. Given the parties' agreement as to the nature of the ruling, we need not take judicial notice of it. We conclude the rest of the documents for which judicial notice was requested are either already part of the record or irrelevant to our determination, and therefore deny the request. Similarly, we deny the motion to augment the record because the documents sought to be added to the record do not bear on our determination.

"[M]oot cases 'are "[t]hose in which an actual controversy did exist but, by the passage of time or a change in circumstances, ceased to exist." [Citation.]'" (*Parkford Owners for a Better Community v. County of Placer* (2020) 54 Cal.App.5th 714, 722.) "'The pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief. [Citations.] If events have made such relief impracticable, the controversy has become "overripe" and is therefore moot. [Citations.] [¶] . . . When events render a case moot, the court, whether trial or appellate, should generally dismiss it.'" (*Ibid.*)

Here, plaintiff's lawsuit asks for two judicial declarations: one determining the arbitration was not a "consumer arbitration," and another declaring the controversy unarbitrable because of JAMS's refusal to request fees from defendants. By virtue of the arbitrator's decision, the arbitration is no longer a "consumer" arbitration, and there is no remaining dispute over arbitration fees or arbitrability. Plaintiff has nothing left to request from the court, and there is no practical relief the court can grant. Therefore, the action and this appeal are moot and should be dismissed.

Plaintiff argues its appeal should survive because of the trial court's award of costs and fees to defendants. Plaintiff cites *Cinnamon Square Shopping Center v. Meadowlark Enterprises* (1994) 24 Cal.App.4th 1837, 1843, fn. 2 (*Cinnamon Square*), arguing it is our policy to review even otherwise moot cases when a "substantial" cost award is at stake. There are two problems with this argument. First, our footnote in *Cinnamon Square* suggested we had *discretion* to decide otherwise moot cases where a sizable cost award remained in dispute, not that it is our policy to do so in every case. And that footnote (which was, in any event, dictum) arguably conflicts with old but apparently still-binding precedent from the Supreme Court in *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134, which states, "it is settled that an appeal will not be retained solely to decide the question of liability for costs." Second, plaintiff is pursuing two separate appeals in this action—one from the judgment and the other from the attorney

fee award. Thus, the only costs being reviewed in this appeal (the appeal from the judgment) are the $4,414.62 in costs, not the $66,375 in attorney fees. This relatively modest sum does not persuade us to exercise whatever discretion we may have to decide moot issues in this appeal.

DISPOSITION

Plaintiff's appeal is dismissed. The requests for judicial notice and motion to augment the record are denied. Defendants shall recover costs on appeal.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.