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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

TOM MCVEIGH,

Plaintiff and Appellant,

v.

RYKER AMUSEMENTS, INC.

Defendant and Respondent.

A129337

(San Mateo County  
Super. Ct. No. CIV 492020)

Appellant Tom McVeigh and Ryker Amusements, Inc. (Ryker) are competitors, each selling prepaid phone cards. McVeigh sued Ryker<sup>1</sup> alleging unfair business practices (Bus. & Prof. Code, § 17200 et seq.). He contended that Ryker's phone cards were "punchboard" sweepstakes game pieces in violation of Penal Code section 330c, and that Ryker was in violation of Penal Code section 319, which prohibits lotteries. The trial court sustained Ryker's demurrer, with leave to amend. After initially advising the court that he would amend his complaint, McVeigh elected not to do so, and instead filed this appeal. He subsequently filed a voluntary dismissal of his complaint with prejudice.

We find that there is no appealable order or judgment before us, and that consequently this appeal must be dismissed.

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<sup>1</sup> McVeigh proceeded in the trial court in propria persona, as he does here. Generally, while a party may choose to act as his or her own attorney, " '[s]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]' [Citations.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247.)

## I. BACKGROUND<sup>2</sup>

McVeigh is the sole owner of Dollar Productions and installs vending machines selling phone cards in retail establishments. Ryker is a competitor, also using vending machines to dispense phone cards. McVeigh's complaint alleged that Ryker's phone cards were promoted by an illegal sweepstakes in violation of Penal Code sections 319 and 330c,<sup>3</sup> and that Ryker was therefore engaging in unlawful business practices under California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.). McVeigh sought injunctive relief and damages.

Ryker demurred to the complaint, contending that the allegations of McVeigh's complaint failed to state facts sufficient to support his support his cause of action. McVeigh filed opposition. The motion was calendared for May 11, 2010, and submitted without argument. On July 19, 2010, the court entered a written order sustaining the demurrer with leave to amend, stating that "[t]he allegations of the Complaint fail to show that consideration is required to obtain the opportunity for a prize as part of [Ryker's] alleged promotion." (Citing *Cal. Gas. Retailers v. Regal Petroleum Corp.* (1958) 50 Cal.2d 844, 851.) The court observed that McVeigh provided additional facts in his opposition to the demurrer, but that it was considering only those facts set forth in the complaint. McVeigh was allowed 10 days from service of the order to amend.

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<sup>2</sup> A demurrer admits the truth of all material facts properly pled. (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439–440.) We set forth the facts as alleged in McVeigh's complaint.

<sup>3</sup> Penal Code section 319 defines a "lottery" as "any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known."

Penal Code section 330c defines a "punchboard" as "a slot machine or device within the meaning of Section 330b of this code and shall be subject to the provisions thereof. For the purposes of this section, a punchboard is any card, board or other device which may be played or operated by pulling, pressing, punching out or otherwise removing any slip, tab, paper or other substance therefrom to disclose any concealed number, name or symbol."

Rather than amend his pleadings, McVeigh filed a notice of appeal on August 10, 2010. On September 21, 2010, McVeigh filed a request on Judicial Council Forms, form CIV-110, asking the clerk of the court to dismiss his complaint with prejudice. The dismissal was entered by the clerk on the same date.

## II. DISCUSSION

Before we can address the merits of this appeal, we must first address whether McVeigh's appeal is properly before us at all. Ryker argues that no appealable order was issued in this case. McVeigh elected to file no reply brief to respond to this issue. We agree with Ryker.

The trial court signed the order sustaining Ryker's demurrer, with leave to amend, on July 8, 2010 (filed July 19, 2010). On August 10, 2010, McVeigh filed his notice of appeal, purportedly from a "judgment of dismissal after an order sustaining a demurrer." "Orders sustaining demurrers are not appealable. [Citations.]" (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695; Code Civ. Proc., § 904.1.) "An appeal can be taken after entry of such an order only after the court enters an order of dismissal. [Citation.]" (*Hill*, at p. 1695.) When the plaintiff chooses not to amend but to stand on the complaint, an appeal from the ensuing dismissal order may challenge the validity of the intermediate ruling sustaining the demurrer. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.) Had the court entered a judgment of dismissal based on McVeigh's failure to amend, we would nevertheless have discretion to treat his premature appeal notice as one from the subsequently entered judgment. (*Jackson v. Fitzgibbons* (2005) 127 Cal.App.4th 329, 333 & fn. 3; *Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 Cal.App.4th 435, 437, fn. 1; Cal. Rules of Court, rule 8.104(d)(2).) However, the only dismissal entered here was on McVeigh's *voluntary* request for dismissal with prejudice on September 21, 2010.

"A voluntary dismissal is a ministerial act, not a judicial act, and is not appealable. [Citations.]" (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1364–1365.) Since no appealable judgment is before us, we lack jurisdiction to address

the merits of McVeigh's claim. (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297.)

### **III. DISPOSITION**

The appeal is dismissed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Simons, J.