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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TROY A. STEWART,

Plaintiff and Appellant,

v.

EXTENDED STAY AMERICA et al.,

Defendants and Respondents.

B278661

(Los Angeles County
Super. Ct. No. BC606346)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Robert Leslie Hess, Judge. Affirmed.

Troy Stewart in pro. per., for Plaintiff and Appellant.

LeClair Ryan, Christiane E. Cargill Kinney and Ellie
Saadat for Defendant and Respondent.

INTRODUCTION

Plaintiff Troy A. Stewart occupied a room at an Extended Stay America hotel for more than a year. Hotel staff eventually asked Stewart to leave, Stewart refused, and the hotel evicted Stewart through an unlawful detainer action. Stewart sued Extended Stay America, Inc. and ESA Management, LLC (collectively, ESA), as well as two ESA employees, respondents Ashe Ajmera and Sophia Nguyen. Against Ajmera and Nguyen, Stewart alleged causes of action for fraudulent concealment; violation of the Unfair Competition Law, Business and Professions Code section 17200, et seq. (section 17200 or UCL); and invasion of privacy.

Ajmera and Nguyen demurred, asserting that Stewart's complaint failed to alleged facts sufficient to state any of the alleged causes of action.¹ The trial court sustained the demurrer with leave to amend. Stewart did not amend his complaint, and Ajmera and Nguyen moved to dismiss the action against them. The court granted the motion. Stewart appealed, asserting that the trial court erred in sustaining the demurrer. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Stewart's first amended complaint

The following facts are summarized from Stewart's first amended complaint, filed March 1, 2016. ESA ran a chain of

¹ ESA filed a special motion to strike pursuant to Code of Civil Procedure section 425.16, which we addressed in *Stewart v. Extended Stay America, et al.* (Sept. 18, 2017, B272333 [nonpub opn.]). All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Extended Stay America hotels, including an Extended Stay America hotel in Burbank, California (ESA Burbank). Ajmera was the general manager of ESA Burbank, and Nguyen was the assistant general manager.

Stewart reserved a room at ESA Burbank from October 1 to November 19, 2014. Thereafter, Stewart and ESA Burbank orally agreed several times to extend Stewart's occupancy, and Stewart paid for his room at either a daily rate or a discounted, prepaid 30-day rate. In October 2015, front desk employees informed Stewart that Ajmera had instructed them not to accept any further payments from Stewart.

Stewart alleged that the furnishings in his room, including the furniture, television, refrigerator, microwave, cooktop burners, and telephone belonged to ESA. ESA employed a maintenance worker who maintained, repaired, and replaced these furnishings and appliances. ESA also employed housekeeping services that cleaned guest rooms once a week. Stewart alleged that ESA asserted rights to access and control guest rooms, including prohibiting smoking in rooms, prohibiting the removal of furniture, and maintaining telephone services to rooms.

Stewart alleged that the entire time he stayed at ESA Burbank, the property "was maintained in a wholly unsanitary and filthy condition." Ajmera and Nguyen permitted smokers to congregate at building entryways and did not require guests to clean up after their pets. They also allowed housekeepers to use vacuum cleaners to clean guest rooms occupied by guests with pets, and use those same vacuum cleaners in Stewart's room, thus leaving pet hair in Stewart's room. Stewart alleged that he

complained to Ajmera and Nguyen about the condition of the property from July to September 2015.

Stewart alleged that Ajmera's refusal to accept further payment in October 2015 was in retaliation for Stewart's complaints about the property. Stewart told Ajmera and Nguyen that if they continued to refuse payment from him, he would sue. Stewart made a new reservation online, but Ajmera cancelled it due to the eviction process.

On October 19, 2015, Stewart filed a complaint against ESA and Ajmera in Los Angeles Superior Court case number BC598157. On October 20, 2015, ESA filed an unlawful detainer action against Stewart; Ajmera verified the complaint. Stewart alleged that the allegations in the unlawful detainer complaint were false. The first amended complaint in this action details communications and discovery efforts in the unlawful detainer action. On January 4, 2016, ESA obtained a judgment against Stewart in the unlawful detainer action. On January 6, 2016, Stewart dismissed case BC598157. Stewart filed the instant action the following day, January 7, 2016.

Of the six causes of action in the first amended complaint, only three named Ajmera and Nguyen: The first cause of action for fraudulent concealment against all defendants, the fourth cause of action for violations of the UCL against ESA and Ajmera, and the sixth cause of action for invasion of privacy against all defendants. Because the focus of this appeal is Ajmera and Nguyen's demurrer, we focus on the allegations against them.

In the first cause of action for fraudulent concealment against Ajmera and Nguyen, Stewart alleged that based on the "allegations of the unlawful detainer complaint verified by

Ajmera,” Stewart discovered that ESA Burbank was a rental property, Stewart was a tenant, and his occupancy was a periodic tenancy. Ajmera and Nguyen did not disclose the purported periodic tenancy to Stewart before the unlawful detainer action, and they intended to deceive him. Stewart reasonably relied on their intentional failure to disclose the nature of the tenancy by agreeing to the terms of the the hotel reservation and the various extensions of that reservation. Stewart alleged that he suffered damages by making payments to ESA, spending money defending the unlawful detainer action, and through “monetary loss caused by the public record of the unlawful detainer action and unlawful detainer judgment.”

In his fourth cause of action for violations of the UCL against Ajmera, Stewart alleged that “Ajmera, acting independently or on behalf of [ESA] attempted to terminate plaintiff’s stay at” Burbank ESA in retaliation for Stewart’s complaints. Stewart also alleged that the unlawful detainer complaint was verified by Ajmera “acting independently or on behalf of ESA,” and the allegations were “completely false.” Ajmera “caused the baseless unlawful detainer action to be filed solely to coerce plaintiff to agree to leave” Burbank ESA. Stewart alleged he was damaged in that he “lost the value of his contract rights as a hotel guest,” “suffered irreparable monetary damage to his legally protected interest in obtaining housing” and credit as a result of the unlawful detainer judgment.

In his sixth cause of action for invasion of privacy against Ajmera and Nguyen, Stewart alleged that the unlawful detainer complaint stated that the room Stewart occupied at ESA Burbank was occupied by Stewart as a tenant. However, “contrary to the allegations of the UD complaint,” Ajmera and

Nguyen “asserted an unconditional right of access to and control of” the room for maintenance and cleaning. Because Stewart had a periodic tenancy, as asserted in the unlawful detainer complaint, he had a reasonable expectation of privacy as a tenant, which Ajmera and Nguyen breached. Stewart alleged he was harmed in that he was unable to possess and control the room as he desired, he was unable to assert his rights as a tenant, and he was precluded from “protecting his right to privacy, specifically including the privacy of his personal information such as his Guest registration records.”

B. Defendants’ demurrer

Ajmera and Nguyen (collectively, defendants) demurred to Stewart’s first amended complaint. They asserted that the first cause of action for fraudulent concealment failed to allege facts sufficient to state a cause of action (§ 430.10, subd. (e)), and that it was uncertain because it failed to allege that defendants owed a duty of disclosure to Stewart (*id.*, subd. (f)). Defendants also contended that the fourth cause of action for violation of the UCL failed to failed to allege facts sufficient to state a cause of action (*id.*, subd. (e)), and it was uncertain because it was “predicated on vicarious liability and pleads alternative inconsistent facts” (*Id.*, subd. (f).) Defendants asserted that the sixth cause of action also failed to allege facts sufficient to state a cause of action (*id.*, subd. (e)), and it was uncertain because it failed to describe any conduct with specificity. (*Id.*, subd. (f).)

Defendants argued that the fraudulent concealment cause of action also failed because it was not alleged with the required specificity. Defendants also contended that the cause of action must fail because a periodic tenancy exists as a matter of law based on the situation—it is not created or determined by the

parties. Defendant was aware of the facts that rendered his tenancy periodic—that it had no fixed term and continued for successive periods until terminated by the parties. Defendants asserted that plaintiff’s allegation that he was ignorant that his tenancy constituted a periodic tenancy could not support a claim against defendants for fraud. Defendants argued that to the extent Stewart’s invasion of privacy claim was also based on allegations that he was unaware of the periodic tenancy, that claim failed for the same reasons.

Defendants also contended that the unlawful detainer judgment barred the UCL claim based on collateral estoppel principles. Defendants asserted that Stewart received notice of the unlawful detainer trial, but did not appear and judgment was entered against him. The judgment in the unlawful detainer action established that the notice served on Stewart was valid, the amount of past rent due was valid, and ESA was entitled to possession of the premises. In addition, defendants argued that the UCL cause of action was barred because it was predicated on vicarious liability and it failed to allege damages.

As for the cause of action for invasion of privacy, defendants argued that Stewart failed to allege any actions relating to Ajmera or Nguyen, because he only alleged that ESA asserted a right to access his room. They also argued that prohibiting smoking in rooms and prohibiting removal of furniture was not “highly offensive to a reasonable person,” and therefore failed to state a cause of action for invasion of privacy.

Stewart opposed the demurrer, arguing that the demurrer was time-barred because it was served one day late and defendants failed to meet and confer before filing it. Stewart also argued that the claims asserted against Ajmera and Nguyen

alleged sufficient facts to adequately state causes of action against them.

In their reply, defendants refuted Stewart's substantive arguments. They also disagreed that the demurrer was filed late, but asserted that even if it had been late, the court had discretion to consider it. Defendants also asserted that they complied with the meet-and-confer requirement by sending Stewart a letter before filing their demurrer; Stewart had not responded.

C. Court ruling

There is no transcript of the hearing in the record on appeal. The minute order for the demurrer hearing states, "The demurrer to the First Cause of Action [is] sustained for failure to state a claim for fraudulent concealment as to the indiv[i]dual defendants. The demurrer to the Fourth Cause of Action is sustained because it is barred by the litigation privilege, and because plaintiff has not alleged injury in fact and loss of money or property within the meaning of Business and Professions Code Section 17200 with respect to those two individuals. As to the Sixth Cause of Action, sustained for failure to state a claim against the individual defendants."

The court's order, dated May 4, 2016, gave Stewart ten days' leave to amend. Stewart did not amend his complaint. On September 2, 2016, defendants moved ex parte to dismiss the case based on Stewart's failure to amend. The court dismissed the case as to defendants the same day, September 2, 2016. Stewart timely filed a notice of appeal.²

² The court's demurrer ruling is appealable, even though Stewart did not amend his complaint. "When a demurrer is sustained with leave to amend, and the plaintiff chooses not to amend but to stand on the complaint, an appeal from the ensuing

DISCUSSION

A. Lateness and failure to meet and confer

Stewart asserts that the demurrer suffered from procedural errors. He argues on appeal, as he did below, that the demurrer was time-barred because it was filed one day late, and because defendants' counsel failed to meet and confer as required by the Code of Civil Procedure. Neither of these procedural issues warrants reversal.

According to the proof of service, Stewart served the first amended complaint on defendants' counsel by mail on March 1, 2016. "A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (§ 430.40, subd. (a).) This time period is extended for five calendar days if served by mail within California. (§ 1013, subd. (a).)

Defendants assert that because the first amended complaint was served on March 1, 2016, their deadline to respond would have been March 31, a court holiday. This deadline was therefore pushed to April 1, plus five days for mailing, therefore their due date was April 6, the day the demurrer was filed. Defendants cite California Rules of Court, rule 1.10(b), which states, "if the last day for the performance of any act that is required by these rules to be performed within a specific period of time falls on a Saturday, Sunday, or other legal holiday, the period is extended to and includes the next day that is not a holiday."

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.)

Defendants' assertion that the demurrer was timely is not persuasive. The "last day" for them to file the demurrer was not March 31, the court holiday. Instead, the last day for defendants to file their demurrer was April 5—30 days after service of the first amended complaint, plus five days for mail service. California Rules of Court, rule 1.10(b) therefore does not extend their deadline by one day.

Nevertheless, defendants are correct that the trial court had discretion to consider the untimely demurrer. The 30-day deadline in section 430.40, subdivision (a) is not mandatory. (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 280.) A court therefore has discretion to consider an untimely demurrer. (*Jackson v. Doe* (2011) 192 Cal.App.4th 742, 749.) We review a trial court's exercise of discretion for abuse of that discretion. "The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted in accordance with the governing rules of law." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.) "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice." (*Ibid.*)

Stewart argued in his opposition below that the demurrer was untimely. The court presumably read Stewart's opposition papers, and decided to consider the merits of the demurrer nonetheless. Stewart does not assert that the court abused its discretion by considering the late-filed demurrer (on appeal, he argues only that the demurrer was "time-barred"), and the record does not support a finding that the trial court abused its discretion in hearing the demurrer.

Stewart also contends that defendants failed to meet and confer before filing their demurrer, as required by section 430.41, subdivision (a).³ Defendants sent a letter to Stewart regarding the first amended complaint rather than meeting and conferring in person or by phone. Although a letter does not meet the standard that a demurring party “meet and confer in person or by telephone” as required by section 430.41, subdivision (a), that is not a basis for reversing the trial court’s ruling. Section 430.41, subdivision (a)(4) states, “Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer.” Thus, it was not error for the trial court to decline to overrule the demurrer because defendants’ meet-and-confer efforts did not meet the specific requirements of section 430.41, subdivision (a).

B. First cause of action for fraudulent concealment

We therefore turn to the substantive issues in the demurrer. “We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense.” (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1271.) “We treat the demurrer as admitting all material facts properly pleaded, but not contentions,

³ “Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. If an amended complaint, cross-complaint, or answer is filed, the responding party shall meet and confer again with the party who filed the amended pleading before filing a demurrer to the amended pleading.” (§ 430.41, subd. (a).)

deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591, [96 Cal.Rptr. 601, 487 P.2d 1241].)” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Regarding the first cause of action, the trial court held that the first amended complaint failed to allege facts sufficient to state a claim for fraudulent concealment against Amjera and Nguyen. “The required elements for fraudulent concealment are: (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact.” (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606.)

The parties disagree about whether Stewart’s cause of action involves allegations of “fact.” Stewart contends he has alleged concealment or suppression of a material fact because the first amended complaint asserts that Stewart occupied a hotel room on the basis of a “purported periodic tenancy,” but Ajmera and Nguyen “intentionally failed to disclose the purported periodic tenancy” to him. Stewart also alleged that he was not aware of the purported periodic tenancy until he was served with the unlawful detainer complaint.

Defendants counter that whether Stewart’s stay at ESA Burbank qualified under the law as a periodic tenancy is not a fact at all. Instead, whether a rental qualifies as a periodic tenancy depends only on the legal definition of “periodic tenancy.”

Here, “Stewart was aware of all pertinent facts underlying the creation of a periodic tenancy” at ESA—a tenancy with no fixed term that was extended multiple times, which could be terminated by either party. Defendants argue that because Stewart was aware of these facts, and because “periodic tenancy” is a legal definition that applies to facts known to Stewart, whether his stay qualified as a periodic tenancy was not a “fact” they could have concealed from Stewart.

In his reply brief, Stewart counters that he alleged he was ignorant of the periodic tenancy, and that fact must be assumed to be true for purposes of a demurrer. Indeed, in reviewing a demurrer “we treat the demurrer as admitting all material facts properly pleaded.” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) However, we “do not assume the truth of contentions, deductions or conclusions of law.” (*Ibid.*)

Stewart has not alleged that he was unaware of any of the facts relating to his stay at ESA Burbank. Instead, he has challenged whether he was properly afforded the rights of a tenant during his stay. Although such allegations may present a viable legal question in relation to the rights of a tenant, they cannot serve as an adequate basis for a fraudulent concealment cause of action against Ajmera and Nguyen. According to the allegations in the first amended complaint, Stewart was aware of his agreements with ESA to stay at ESA Burbank for certain periods of time, as well as the extensions of those agreements. How the law may have characterized the parties’ agreements—as a periodic tenancy or something else—is not a “material fact” that Ajmera and Nguyen concealed from Stewart.

In addition, Stewart also has not alleged facts to support the second element, that Amjera and Nguyen personally had a

duty to disclose the legal nature of Stewart's tenancy to Stewart. For fraudulent concealment purposes, a duty to disclose "arises only from fiduciary or fiduciary-like relationships," which typically does not arise from commercial transactions. (*Los Angeles Memorial Coliseum Commission v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 832.) Moreover, "a landlord and tenant do not generally stand in a fiduciary relationship." (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513.) Because Stewart has failed to allege concealment of a material fact or a duty to disclose, the demurrer was properly sustained.

C. Fourth cause of action for UCL violations

Stewart asserted his fourth cause of action under the UCL against ESA and Ajmera, but not Nguyen. He alleged that Ajmera "committed multiple unfair and/or unlawful and/or fraudulent business acts or practices" by terminating Stewart's stay at ESA Burbank in retaliation for his complaints, and by filing the unlawful detainer action based on "completely false" allegations. He alleged that as a result, he "lost the value of his contract rights as a hotel guest under the original hotel reservation, EPP reservation, and four oral extended stay reservations."⁴ He also alleges that he "suffered irreparable monetary damage to his legally protected interest in obtaining housing caused by the publicly recorded unlawful detainer action and unlawful detainer judgment."

The court sustained the demurrer as to this cause of action "because it is barred by the litigation privilege, and because plaintiff has not alleged injury in fact and loss of money and

⁴ The "EPP reservation" was one of the reservations Stewart made as part of ESA's "Extended Plus Program" involving a discounted, prepaid rate.

property.” In his opening brief, Stewart argues that Ajmera “may be individually liable under the UCL” for participating in unlawful practices. He does not assert in his opening brief that the litigation privilege does not apply, nor does he assert that he adequately alleged damages. In his reply brief, Stewart argues that he sufficiently has alleged damages, in that he alleged Ajmera’s actions caused him to lose the value of his hotel reservations.

To have standing under the UCL, a plaintiff “must demonstrate some form of economic injury.” (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 323.) For example, a plaintiff may “(1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary.” (*Ibid.*)

Here, the facts alleged in the first amended complaint do not support Stewart’s contention that he was damaged. Stewart alleged that he made a hotel reservation, that he orally extended it several times, and that ESA eventually refused to extend Stewart’s occupancy further. In essence, Stewart has alleged that he got what he paid for—he stayed at ESA Burbank for nearly a year in exchange for the money he paid to ESA. These fact allegations do not demonstrate that Stewart has been economically damaged by “los[ing] the value of his contract rights” under the hotel reservations.

Moreover, Stewart has not challenged the court’s finding that this cause of action is barred by the litigation privilege. Most of the allegations in the UCL cause of action focus on the

accuracy of the allegations in the unlawful detainer action. The litigation privilege is an “absolute” privilege, which “bars all tort causes of action except a claim for malicious prosecution.” (*Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 360; see also Civ. Code, § 47.) The privilege extends to communications made in any judicial proceeding, including “statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit.” (*Hagberg*, 32 Cal.4th at p. 361.) All communications by Ajmera relating to the unlawful detainer action, including communications in anticipation of that action, are therefore privileged. Stewart has not addressed the application of this affirmative defense to his UCL allegations, and therefore any challenge to the demurrer on this basis has been waived. (See, e.g., *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [failure to brief an issue on appeal “constitutes a waiver or abandonment of the issue on appeal.”].) Stewart has not demonstrated that the trial court erred by sustaining the demurrer on the UCL cause of action.⁵

D. Sixth cause of action for invasion of privacy

In his first amended complaint, Stewart alleged that ESA, Ajmera, and Nguyen invaded his privacy expectations in his hotel room through the use of cleaning and maintenance services, and by the maintenance of a “guest services” file. He alleged that the intrusion “would be highly offensive to a reasonable person

⁵ In his opening brief, Stuart argues that “whether Ajmera acted in an agency capacity raises a question of fact that cannot be decided by a demurrer.” Because we have found the UCL claim fails to assert sufficient facts to constitute a cause of action, we do not address this argument.

because [ESA], Ajmera, and Nguyen . . . did not disclose the purported periodic tenancy and plaintiff's alleged exclusive possession of room 317 to plaintiff until plaintiff was served with the unlawful detainer complaint." The trial court sustained defendants' demurrer on the basis that this cause of action failed to state a cause of action against Ajmera and Nguyen.

An intrusion-based claim of invasion of privacy has two elements: "(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." (*Sanders v. American Broadcasting Companies, Inc.* (1999) 20 Cal.4th 907, 914.) To meet the first element, "the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 232.)

In Stewart's first amended complaint, there are no allegations that Ajmera or Nguyen intruded into a private place or obtained private information about Stewart. The allegations about intrusions into Stewart's hotel room relate only to cleaning and maintenance crews employed by ESA. Stewart also mentions that ESA maintained a "guest services" file for every guest, but he does not allege that private information was included in his file or that Ajmera or Nguyen invaded his privacy with respect to the file. Stewart asserts on appeal that he alleged facts to support this element, but he only repeats the allegations in the complaint. Because Stewart has not alleged facts sufficient to state a cause of action against Ajmera and Nguyen

as to invasion of privacy, the demurrer to this cause of action was properly sustained.⁶

DISPOSITION

The judgment of dismissal is affirmed. Ajmera and Nguyen are entitled to costs on appeal.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

⁶ Defendants also argued below that Stewart's dismissal of his original lawsuit barred the current action. Defendants argued that the prior dismissal should be treated as one with prejudice, thus barring the complaint in this case. They renew this argument on appeal. Because we have found that Stewart has not alleged facts sufficient to state a cause of action against defendants, we do not address this argument.