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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CHAN PARK, Plaintiff and Appellant, v. MILCAH AGUILAR et al., Defendants and Respondents.	B266181 (Los Angeles County Super. Ct. No. EC063130)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Affirmed.

Chan Park, in pro. per., for Plaintiff and Appellant.

Nemecek & Cole, Johnathan B. Cole, Mark Schaeffer and David B. Owen for Defendant and Respondent Andrew Rifkin.

Monroy, Averbuck & Gysler, Clayton C. Averbuck and Jennifer E. Gysler for Defendants and Respondents County of Los Angeles, Jennifer Meister, Maya Hughes, Milcah Aguilar and Phillip L. Browning.

Appellant Chan Park sued respondents the County of Los Angeles, Jennifer Meister, Maya Hughes, Milcah Aguilar, Phillip Browning (the "County defendants"), and Andrew Rifkin for civil rights violations, abuse of process, fraud and intentional infliction of emotional distress arising out of dependency proceedings in which her children were removed from her custody. The trial court sustained respondents' demurrers to the first amended complaint with 25 days leave to amend. Park did not file an amended complaint within the 25-day period. After the time had expired, she filed a motion for leave to file a second amended complaint. Instead, the trial court granted respondents' motion to dismiss the action pursuant to Code of Civil Procedure section 581, subdivision (f)(2) based on Park's failure to file an amended complaint within the allotted time period.[1] The court thereafter dismissed the action as to respondents. Park appeals from the resulting judgment and argues the court abused its discretion in dismissing her case. We affirm.

PROCEDURAL BACKGROUND

1. *The First Amended Complaint*

Park filed her complaint on November 17, 2014 and her first amended complaint (FAC) on February 13, 2015.[2] The FAC alleged that Rifkin was appointed to represent Park in a dependency action involving her children, and the other individual respondents were employees of the Department of Children and Family Services (DCFS) or "the government."

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

[2] The complaint named other defendants who are not parties to this appeal.

Respondents allegedly conspired with DCFS in the removal of Park's children from her custody "without exigent circumstances, . . . adequate notice or an opportunity to be heard[,] and by spreading lies, maliciously refusing to provide exculpatory evidence, and presenting fabricated evidence to the court, during the pendency of the juvenile dependency proceedings . . . ."

2. *Rifkin's Demurrer*

The FAC named Rifkin as a defendant to causes of action for "Violation of Federal Civil Rights (42 U.S.C.§ 1983)," abuse of process, fraud, and intentional infliction of emotional distress. The FAC alleged that Rifkin, an employee of Los Angeles Dependency Lawyers, Inc., was appointed to represent Park in the underlying dependency matter, and "bullied, threatened, withheld crucial information, and lied to [Park] in order to force her to forego a trial." In particular, at the jurisdiction hearing on January 29, 2013, Rifkin did not inform Park of "any trial or need for witnesses or evidence," refused to subpoena witnesses, and falsely told Park that "in order to continue the trial [she] had to put her children on the stand next time which would then look like she was abusing her children . . . ." "[Park] had no knowledge the jurisdiction hearing was a trial until [she] was told the same day of the hearing."

The cause of action for civil rights violation also alleged that Rifkin had acted "under color of state law" in conspiring to remove her children from her custody. The fraud cause of action alleged that Rifkin and the other defendants "lied to [Park] and stated that they would do their best to help [her] get her kids back, but instead, they did virtually nothing, and filed little or NO defense motions which resulted in harm to [her]."

Rifkin demurred, arguing the claims against him were time-barred under the one-year statute of limitations set forth in section 340.6 because the FAC's allegations showed that Park had discovered Rifkin's alleged wrongdoing in January 2013: it was immediately clear that he "bullied [and] threatened" her and, after Rifkin failed to inform her that the jurisdiction hearing was a trial, she "was told the same day of the hearing" that it was a trial. Rifkin further argued he had not acted under color of state law such that he could be held liable for civil rights violations. (See *Simmons v. Sacramento County Superior Court* (9th Cir. 2003) 318 F.3d 1156, 1161 [attorneys in private practice do not act under color of state law and "conclusory allegations that the lawyer was conspiring with state officers" are insufficient to show a private party is a state actor for purposes of 42 U.S.C. § 1983].) Lastly, he argued fraud was insufficiently pled. (See *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73 [fraud's "particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.' "].)

In opposition, Park argued that "the [statute of limitations] bar does not appear on the face of the [FAC]." However, she did not address Rifkin's argument that the FAC alleged facts demonstrating she had discovered Rifkin's alleged wrongdoing in January 2013. Park also did not respond to Rifkin's argument that the FAC failed to allege facts showing he had acted under color of state law. Lastly, Park generally argued the FAC "stated facts sufficient to constitute a cause of action for fraud," but did not identify which allegations supported this argument.

The trial court sustained the demurrer. The court concluded that, according to the FAC's allegations, Park's claims

against Rifkin all arose from Rifkin's performance of legal services in 2013, and were therefore barred by the one-year statute of limitations under section 340.6. The court further concluded no facts were alleged "to support that [Rifkin] was acting under color of state law." Lastly, the court held that fraud had not been adequately alleged and, in particular, there were no alleged facts showing "representations of material facts or detrimental reliance." Furthermore, "[t]o the extent [Park's] fraud claim is based on attorney statements that they would do their best to represent her [], this is not actionable as opinions . . . ." The trial court granted leave to amend.

3. *The County Defendants' Demurrer*

The County defendants demurred to the FAC primarily on the grounds of governmental immunity. (See Gov. Code, §§ 815.2 [public entity is not liable for injury resulting from act where employee is immune from liability], 820.2 [public employees not liable for discretionary actions], 821.6 [public employees acting within scope of employment not liable]; see also *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869 [affirming the sustaining of a demurrer on the ground that civil rights causes of action were barred by the absolute and qualified immunity provided to county-employed social workers in the investigation of child abuse and instigation of child protection proceedings].)

In opposition, Park argued briefly that governmental immunity did not apply because the FAC adequately alleged "an official, acting under color of state law, caused deprivation of a federal right." The trial court sustained the demurrer with leave to amend, citing the legal authorities relied on by the County defendants.

4. *Park's Motion for Leave to Amend*

Park was given 25 days leave to amend. The 25-day period elapsed on May 15, 2015 without Park filing an amended complaint. On May 29, 2015, she filed a Motion for Leave to File Second Amended Complaint attaching a proposed amended complaint (the SAC). Park requested leave to file the SAC on the grounds that she had "added causes of action she is entitled to allege" and had "only supplemented the facts, added necessary defendants, and dismissed others."

The SAC added the State of California and Los Angeles Superior Court as new defendants. These defendants were alleged to have engaged in "invidious gender discrimination" as demonstrated by "the retention of misogynistic judges, custody evaluators, psychologists, and attorneys who all work together against protective mothers and their abused children to insure custody to the abusive fathers . . . ."

With respect to the state law causes of action, abuse of process and intentional infliction of emotional distress were eliminated from the SAC but the fraud cause of action remained as against Rifkin.

The SAC added five causes of action for violations of federal law. There were three new causes of action for civil rights violations against all defendants based on the general allegations that "defendants conspired for the purposes of impeding, hindering, obstructing, or defeating . . . the due course of justice in California Juvenile Court," "[d]efendants hindered and prevented the [] authorities . . . from securing to Park the equal protection of the laws," and "[e]ach and every defendant had an affirmative obligation to prevent the harm coming to Park and her two children . . . ." The SAC also alleged two new causes of

action against the County for "Monell violation" and "gender discrimination" based on allegations the County was liable for "[s]ocial workers['] . . . practice of denying due process and equal protection to female protective parents and their abused children, in favor of the male abusive parent . . . ."

5. *The Dismissal*

On June 1, 2015, at a hearing on a special motion to strike,[3] the court found that Park had not filed an amended complaint within the 25-day period provided. The court indicated it had "read and considered ALL briefing from all sides — original and supplemental — and allow[ed] [Park] to be heard." Pursuant to Rifkin and the County defendants' oral motion to dismiss, the court then dismissed the action pursuant to section 581, subdivision (f)(2). A judgment of dismissal was entered for Rifkin on June 26, 2015, and for the County defendants on June 30, 2015. Park timely appealed.

DISCUSSION

Pursuant to section 581, subdivision (f)(2) the court "may dismiss the complaint" when "after a demurrer to a complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." We review a trial court's dismissal of an action under section 581, subdivision (f)(2) for abuse of discretion. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612 (*Leader*).) "[T]he reviewing court will disturb the ruling only upon a showing of a ' " 'clear case of abuse' " ' and a ' " 'miscarriage of justice.' " ' [Citations.] Discretion is abused

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[3] This motion was brought by a defendant who is not a party to this appeal.

only when, in its exercise, the trial court ' "exceed[ed] the bounds of reason, all of the circumstances before it being considered." ' [Citation.]" (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1282.) The burden is on the appellant to establish an abuse of discretion. (*Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1054.)

Here, Park failed to file an amended complaint within the time specified by the court, therefore, it was within the court's discretion to dismiss the complaint pursuant to respondents' motion for dismissal. (§ 581, subd. (f)(2).) However, Park contends the trial court abused its discretion in dismissing the action when there was a pending motion for leave to amend.

Leader, supra, 89 Cal.App.4th 603 is instructive. In *Leader*, the trial court sustained the defendants' demurrer to the third amended complaint with 20 days leave to amend. (*Id.* at p. 608.) The plaintiffs' counsel obtained defendants' counsel's stipulation to extend that period by several days. (*Ibid.*) That time elapsed and a month later the plaintiffs filed a motion for leave to amend attaching the proposed complaint. (*Ibid.*) The plaintiffs' counsel explained that the delay was due to his search for missing documents he needed to ascertain facts necessary to the amended pleading. (*Id.* at p. 609.) The defendants moved to strike the amended complaint and dismiss the action. (*Id.* at p. 610.) The court struck the amended complaint and dismissed the action under section 581, subdivision (f)(2). (*Id.* at p. 611.)

The court of appeal affirmed, reasoning as follows: "First . . . '[A] litigant does not have a positive right to amend his pleading after a demurrer thereto has been sustained. "His leave to amend afterward is always of grace, not of right. [Citation.]" [Citation.]' . . . [¶] Second, to obtain the court's permission,

plaintiffs were required to file a noticed motion for leave. [Citation.] Under section 473, subdivision (a)(1): 'The court may, in furtherance of justice, and on any terms as may be proper, . . . in its discretion, *after notice to the adverse party*, allow, upon any terms as may be just, an amendment to any pleading or proceeding . . . .' (Italics added.) Assuming proper notice, the trial court has wide discretion in determining whether to allow the amendment, but the appropriate exercise of that discretion requires the trial court to consider a number of factors: '*including the conduct of the moving party and the belated presentation of the amendment.* [Citation.]' [Citation.] . . . [¶] Finally, plaintiffs' failure to file an amended complaint within the time specified subjected their entire action to dismissal in the court's discretion under section 581, subdivision (f)(2)." (*Leader*, *supra*, 89 Cal.App.4th at pp. 612–614.)

The *Leader* court concluded the trial court had not abused its discretion in dismissing the action, noting, *inter alia*, that "[d]emurrers had been sustained to the third amended complaint, and plaintiffs make no claim the trial court erred in that regard. Plaintiffs did not amend within the time allowed by the court, and did not even attempt to do so until more than a month after the deadline had passed. If, as counsel declared, the reason for the failure to timely file was a search for missing documents, there is no apparent reason why plaintiffs did not bring the issue to the court's or opposing counsel's attention or seek any further extension of the time in which to plead." (*Leader*, *supra*, 89 Cal.App.4th at p. 614.)

Here, as in *Leader*, Park's failure to amend within the time provided by the court subjected her action to dismissal in the court's discretion under section 581, subdivision (f)(2). At the

same time, the trial court had "wide discretion" in determining whether to allow a subsequent amendment. (*Leader*, *supra*, 89 Cal. App.4th at p. 613.) As in *Leader*, Park did not seek a further extension of time in which to plead, and did not attempt to amend until weeks after the deadline had passed. Nor did her counsel offer any explanation for failing to amend earlier. [4] As stated in *Leader*, it was within the court's discretion to consider " 'the conduct of the moving party and the belated presentation of the amendment' " in determining whether to exercise its discretion to allow an amendment to the complaint. (*Ibid*.)

Furthermore, as in *Leader*, Park makes no claim the trial court erred in sustaining Rifkin's and the County defendants' demurrers to the FAC. Nor does her motion for leave to amend address how the proposed amendments cured the defects in the FAC or how the new causes of action against the County respondents based on the same core set of facts would survive

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[4] Park has not provided a reporter's transcript or other record of the oral proceedings. (See Cal. Rules of Court, rule 8.120(b) ["If an appellant intends to raise any issue that requires consideration of the oral proceedings in superior court, the record on appeal must include a record of these oral proceedings in the form of one of the following: [¶] (1) A reporter's transcript under rule 8.130; [¶] An agreed statement under rule 8.134; or [¶] A settled statement under rule 8.137."]; see also *Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794 [appellant bears the burden of providing an adequate record on appeal].) Therefore, we cannot determine if her counsel made either an offer of proof or argument at the hearing on the failure to timely amend. In any case, Park does not now, on appeal, claim that her counsel offered any reason for her belated attempt to amend.

their claim of governmental immunity. As Park did not show that her delay in amending the complaint was warranted or that the amendments cured the defects in the FAC that provided the bases for the trial court's ruling sustaining the demurrers, she has not shown an abuse of discretion.

Lastly, Park contends the trial court was without authority to dismiss the action because respondents did not file a written motion to dismiss or strike, but orally moved to dismiss the action. In support of this argument, she cites to California Rules of Court, rule 3.1320(h) and (i). Subdivision (h) provides that "[a] motion to dismiss the entire action and for entry of judgment after expiration of the time to amend following the sustaining of a demurrer may be made by ex parte application to the court under [] section 581(f)(2)." This rule does not stand for the proposition that a *written* application for dismissal is required before the court may dismiss the action under section 581, subdivision (f)(2). Accordingly, the court was not required to wait for a written request for dismissal. In addition, as an amended complaint had not yet been filed, a motion to strike would have been improper. (See Cal. Rules of Court, rule 3.1320(i) ["*If an amended pleading is filed* after the time allowed, an order striking the amended pleading must be obtained by noticed motion under [] section 1010.] (Italics added.).)

On these grounds, Park has not met her burden of showing the trial court abused its discretion in dismissing the action.[5]

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[5] At oral argument, Park cited to *Hardwick v. Cnty. of Orange* (9th Cir. 2017) 844 F.3d 1112. We reviewed the case and conclude it is not relevant to the issue of whether the trial court abused its discretion under section 581, subdivision (f)(2).

DISPOSITION

The judgment of dismissal is affirmed. Respondents shall recover their costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.