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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 SEVEN

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| NATASHA MOGLEY,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>PHILIP LANDSMAN,<br><br>Defendant and Respondent. | B262768<br><br>(Los Angeles County<br>Super. Ct. No. BC495764) |

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Reversed and remanded with directions.

Natasha Mogley, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Defendant Philip Landsman failed to respond to a malicious prosecution complaint filed by Natasha Mogley, and the trial court entered a default against him. At the subsequent default prove-up hearing, the trial court identified a pleading defect in Mogley's complaint and dismissed the action without prejudice. This dismissal conclusively terminated the action because the statute of limitations had already expired at the time the dismissal was entered. Mogley argues on appeal that the court abused its discretion in dismissing the action rather than granting her leave to amend her complaint. We reverse the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Nasrin Ahmadi, represented by attorney Landsman, sued attorney Mogley in 2011 for an accounting. After that action was dismissed with prejudice on April 26, 2012, Mogley sued Ahmadi and Landsman for malicious prosecution.[1] In her complaint, filed November 15, 2012, Mogley sought general, compensatory, and punitive damages in amounts according to proof. She demanded no specific damage amounts.

In March 2013, Mogley served and filed a statement of damages in which she alleged that she had suffered special damages of pain, suffering, and inconvenience in the amount of $100,000 and compensatory damages of $20,000; and she reserved the right to seek punitive damages in the amount of $250,000. The trial court entered a default against Landsman on March 13, 2013.

In July 2014, Mogley filed a declaration in conjunction with a default prove-up hearing against Landsman. In this document, Mogley requested damages in the amount of $29,574.80 for the cost of hiring counsel to defend in the underlying lawsuit for an accounting; general damages in the amount of $20,425.20 for mental and emotional suffering; and court costs of $760 in the malicious prosecution action, for a total requested damage award of $50,760.00. She submitted documentation of her payments to her attorney and his billing records in support of her request for damages.

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1 Mogley later voluntarily dismissed the action without prejudice as to Ahmadi.

The record includes a minute order dated October 16, 2014, for a hearing entitled, "Order to Show Cause re: Default Judgment." The minute order, which is stamped with the judge's name, reads, "Matter is called for hearing. [¶] Plaintiff's request for default judgment is denied. [¶] The complaint fails to provide any dollar amount and instead seeks damages in an amount according to proof. [¶] The case is dismissed without prejudice."

Mogley moved for reconsideration of this order on October 23, 2014. She requested that the court vacate the dismissal of the action on the grounds that the trial court had "failed to consider that Plaintiff's claim, if re-filed would be effectively barred by the Statute of Limitations"[2] and that the court had failed to consider as an alternative to dismissal that her complaint could easily have been amended. The trial court denied the motion for reconsideration on February 5, 2015. Mogley appeals.[3]

## DISCUSSION

Code of Civil Procedure[4] section 425.10(a) requires that in all cases other than personal injury cases and wrongful death claims, a plaintiff must include in the complaint

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[2] We are unable to determine on the record before us exactly when the statute of limitations ran in this action. The question of whether the statute of limitations applicable to malicious prosecution actions filed against attorneys who represented the plaintiff's adversary in the underlying litigation is one year, under Code of Civil Procedure section 340.6, or two years, pursuant to Code of Civil Procedure section 335.1, is currently under consideration by the California Supreme Court in *Parrish v. Latham & Watkins, LLP*, review granted October 14, 2015, S228277. We need not attempt to resolve that question, for regardless of which statute of limitations applies, it appears that it would have run out before the trial court dismissed Mogley's action. For purposes of this appeal, we accept Mogley's representation that the two-year statute of limitations expired on July 13, 2014.

[3] After our initial review of the record, we requested that Mogley submit supplemental briefing concerning the timeliness of her appeal. It appears that the appeal was timely filed under California Rules of Court, Rules 8.104 and 8.108.

[4] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

a demand for judgment that specifies the amount sought. Section 580, subdivision (a) limits default judgments to the amount demanded in the complaint, with an exception for wrongful death cases, personal injury claims, or cases involving a request for punitive damages; in those cases recovery on a default judgment is limited to the amounts sought in the statutorily-required statement of damages. Mogley does not dispute the trial court's conclusion that her complaint was defective because she alleged that she had suffered damages according to proof and failed to demand specific amounts of damages. Her appeal is limited to a single contention: that the trial court abused its discretion at the default prove-up hearing by dismissing the action without prejudice rather than permitting her to amend her complaint to cure this defect by stating the amount of damages sought. We agree.

"It is well established that 'California courts have "a policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others." [Citation.]'" (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163 (*Trustees*); see also *Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188 ["It is a basic rule of pleading in this state that amendments shall be liberally allowed so that all issues material to the just and complete disposition of a cause may be expeditiously litigated"]; *Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 352 ["liberal interpretation and amendment of pleadings is strongly favored in this state to allow resolution of actions on the merits in furtherance of substantial justice between the parties"].) Accordingly, "statutes are to be construed strictly to avoid forfeitures upon technical defects in pleading that do not prejudice opposing parties." (*Dieckmann*, at p. 352.) This longstanding policy is expressed in section 473, subdivision (a)(1) and section 576, both of which permit the court to allow the amendment of any pleading in furtherance of justice.

The decision whether to permit a party to amend a pleading is reviewed for an abuse of discretion. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) "'"When a request to amend has been denied, an appellate court is confronted by two conflicting

policies. On the one hand, the trial court's discretion should not be disturbed unless it has been clearly abused; on the other, there is a strong policy in favor of liberal allowance of amendments. This conflict 'is often resolved in favor of the privilege of amending, and reversals are common where the appellant makes a reasonable showing of prejudice from the ruling.'" [Citation.] If the original pleading has not framed the issues in an articulate and precise manner, a plaintiff should not be precluded from having a trial on the merits.' [Citation.] '[I]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment. [Citation.] . . . Moreover, . . . new legal theories [may be] introduced as long as the proposed amendments "relate to the same general set of facts."' [Citation.] Thus, under this state's liberal rules of pleading, 'the right of a party to amend to correct inadvertent misstatements of facts or erroneous allegations of terms cannot be denied.' [Citation.])" (*Ibid*.) "'Indeed, "it is a rare case in which 'a court will be justified in refusing a party leave to amend his [or her] pleading so that he [or she] may properly present his [or her] case.'" [Citation.]' [Citation.] Thus, absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. [Citation.]" (*Trustees*, *supra*, 149 Cal.App.4th at p. 1163.)

Here, although the amounts of damages had not been pleaded in the complaint, Mogley had filed and served a statement of damages that specified the nature and amount of the damages sought well before the default prove-up hearing, and she further delineated her damages in the declaration she submitted months before the court dismissed the case. How Mogley would have amended her complaint was therefore evident, as she would only have had to replace her generic assertions of general and compensatory damages in the complaint with the specific items she had later identified to the court and to the parties. Her amendment to change the "damages according to proof" language to specific items of damages would not have changed the general set of facts upon which the complaint relied. (*Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 777 ["Even an amendment which gives rise to a separate cause of action is permitted if recovery is being sought '"on the same general set of facts,"' and if the amendment is not

prejudicial to the party against whom it is offered"].) Nor can we identify any respect in which Landsman would have been prejudiced by the amendment. Landsman had defaulted in this action; upon the filing and service of an amended complaint he could have chosen either to litigate or to default again. (§ 471.5.) Because there had been no response or litigation, permitting an amendment to the complaint and vacating the default would not have placed defendant in a different position than he had been at the outset of the litigation.

Most compellingly, under the circumstances of this case, the trial court's decision to dismiss the action without prejudice rather than permitting Mogley to amend the complaint substantially prejudiced Mogley: it had the practical effect of conclusively ending the litigation without ever giving her an opportunity to restate her claim properly. Although the trial court designated the dismissal as without prejudice, because the statute of limitations had run on her malicious prosecution claim by the time of the dismissal, it was for all intents and purposes a dismissal with prejudice. (*Nolan v. Workers' Comp. Appeals Bd.* (1977) 70 Cal.App.3d 122, 129 [where a dismissal without prejudice was entered after the statute of limitations had run out, "in reality the dismissal was with prejudice"].) The trial court's minute order dismissing the complaint and its order denying the motion for reconsideration offer no insight into why the court found it appropriate to dismiss the action rather than permitting amendment of the complaint, and the record is devoid of any evident justification for conclusively terminating Mogley's action without a chance to cure the simple pleading defect it had identified.[5]

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[5] As no reporter was present for the default prove-up hearing where the trial court dismissed the complaint without prejudice, we do not know from the record on appeal whether Mogley requested leave to amend at that hearing or whether she advised the court that the statute of limitations would bar the refiling of the action if it was dismissed without prejudice. Mogley asserted at oral argument that she had, and the fact that she did not describe the operation of the statute of limitations as a new fact in her motion for reconsideration supports that assertion. To avoid forfeiture of an appellant's right to appeal because of the absence of reporters at civil proceedings, we will accept her representation as an officer of the court in the absence of any indication it is incorrect.

Because the dismissal without prejudice was tantamount to a dismissal with prejudice, and because permitting amendment of the complaint would neither have prejudiced Landsman nor changed the set of facts on which Mogley's causes of action relied, it was an abuse of discretion to dismiss the case without prejudice rather than to give Mogley leave to amend her complaint and cure the pleading defect.

## DISPOSITION

The judgment is reversed. The trial court is ordered to vacate the dismissal without prejudice and enter an order granting the appellant leave to amend her complaint. Appellant shall recover her costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.