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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KATHERINE BLOWERS, Plaintiff and Appellant, v. SALVADOR PIMENTEL, Defendant and Respondent.	B242261 (Los Angeles County Super. Ct. No. PC048669)

APPEAL from an order of the Superior Court of Los Angeles County, Stephen P. Pfahler and Barbara M. Scheper, Judges. Reversed and remanded.

The Traut Firm and Eric V. Traut for Plaintiff and Appellant.

Clasen, Raffalow & Rhoads and R. Denyse Greer for Defendant and Respondent.

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Katherine Blowers appeals from the order dismissing her personal injury action against Salvador Pimentel on the ground it was improperly filed in Los Angeles County Superior Court rather than the Ventura County Superior Court. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Blowers and Pimentel were involved in an automobile accident on August 12, 2008 on Santa Rosa Road in the city of Camarillo in Ventura County. Pimentel lives in Ventura County. Blowers was involved in another automobile accident with Christopher Garcia approximately six months later, on March 2, 2009, on Balboa Boulevard in the city of Granada Hills in Los Angeles County. Garcia lives in Los Angeles County.

On July 8, 2010 Blowers filed a complaint for personal injuries on Judicial Council form PLD-PI-001 against both Pimentel and Garcia in the North Valley District of the Los Angeles Superior Court. The form complaint included the Cause of Action—Motor Vehicle attachment, alleging a single cause of action against both named defendants and identifying Pimentel as the owner and operator of the vehicle involved in the August 12, 2008 accident and Garcia as the owner and operator of the vehicle involved in the March 2, 2009 accident.

The summons and complaint were served on the defendants on January 9 and 10, 2011; proofs of service were filed with the court on January 19, 2011. Pimentel filed his answer to the unverified complaint on February 14, 2011. The answer included a general denial and 10 affirmative defenses but did not challenge jurisdiction, question venue or assert misjoinder of parties. At the same time Pimentel also filed a cross-complaint against Garcia, using Judicial Council form PLD-PI-002, alleging causes of action for indemnification, apportionment of fault, declaratory relief and property damage.[1] The

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[1] Pimentel's fourth cause of action for property damage alleged, "Cross-Defendants and each[] of them, negligently owned and operated a motor vehicle causing it to collide with Cross-Complainant's vehicle"—that is, Pimentel asserted Garcia's car, which collided with Blowers's vehicle in the March 2009 Granada Hills accident, also hit his car, which was only involved in the August 2008 Camarillo incident.

cross-complaint was served in early March 2011 but was ultimately dismissed by Pimentel. Garcia answered the complaint on February 18, 2011.[2]

In early March 2011 Blowers served and filed her case management statement and a "Notice of Case Management Conference, OSC re: Proper Jurisdiction and OSC re: Proof of Service of Complaint and Cross-complaint," informing the parties a hearing on those matters was scheduled for March 17, 2011.[3] Blowers's attorney, Eric Traut, also filed a seven-sentence declaration in response to the order to show cause re jurisdiction, which simply stated two collisions at different locations "were filed together since they were approximately six months apart"; asserted the case involving the Granada Hills accident was properly filed in the North Valley District of the Los Angeles County Superior Court; and "respectfully requested that the lawsuit remain assigned to the Chatsworth Courthouse."

At the March 17, 2011 hearing the court indicated the case involving the August 12, 2008 accident in Camarillo should be dismissed and refiled in Ventura County. However, the court continued the matter to April 19, 2011 to allow Blowers to file a supplemental declaration. In his supplemental declaration filed April 14, 2011, attorney Traut explained, "The two separate incidents in this lawsuit involve injuries to the same areas of the Plaintiff's body. That is why they were filed together." Responding to the court's suggestion regarding refiling the Ventura County claim, Traut stated, "The problem is that the statute of limitations has expired." Finally, Traut requested, if the court believed it was appropriate to sever the two cases, that the Pimentel action be transferred to the Ventura County Superior Court. Pimentel did not file any papers in connection with the order to show cause.

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[2] Blowers settled her claim against Garcia at some point prior to entry of the order dismissing her action against Pimentel.

[3] The case management conference had previously been scheduled for February 15, 2011. Pimentel filed his case management statement with his answer and cross-complaint on February 14, 2011. The case management statement did not identify any issue regarding jurisdiction, venue or misjoinder of parties.

At the hearing on April 19, 2011 the court explained to the lawyer appearing for Blowers, "Ms. Levun, I don't know if you are briefed on this issue, but my understanding is the Pimentel matter was going to be dismissed because the court does not have jurisdiction because that is the Ventura accident." Counsel referred the court to the supplemental Traut declaration, but the court responded, "The fact that similar body parts were involved, I don't think makes it proper." The court then rejected a request to transfer that portion of the case to Ventura.[4] The minute order filed April 19, 2011 reads, "On the Court's own motion, defendant Salvador Pimentel is dismissed as having been filed in the wrong jurisdiction."

Seven months later, on November 28, 2011, Blowers moved pursuant to Code of Civil Procedure section 473, subdivision (d),[5] to set aside the 'void judgment of dismissal" and to transfer the Pimentel action to the Ventura County Superior Court or, in the alternative, to allow her to proceed against Pimentel in the North Valley District of the Los Angeles County Superior Court. Blowers asserted under section 396b, subdivision (a), if a defendant does not object to venue at the time he or she answers, demurs or moves to strike the complaint, any defect as to venue is waived. In addition, she argued the proper remedy for filing an action in the wrong county is transfer, not dismissal. In a declaration in support of the motion, attorney Traut offered to pay all costs associated with reinstatement and transfer of the action to Ventura.

The motion was scheduled for hearing on February 22, 2012. Pimentel opposed the motion to set aside; no copy of his opposition has been included in the appellate record.

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[4] "Ms. Levun: Is there any way we can transfer this to Ventura?

"The court: Not that I know of. . . . I think it has to be dismissed here, refiled in Ventura, and then it will be up to plaintiff's counsel, if an argument is raised that it is time barred to argue that the statute was preserved because it was filed timely in this court, it was just filed in the wrong place."

[5] Statutory references are to the Code of Civil Procedure.

At the hearing the court (Judge Stephen P. Pfahler, who had not issued the dismissal order), while acknowledging the possible mistake in application of the venue rules, explained under governing Supreme Court authority any such error did not render a judgment void, merely voidable.[6] Accordingly, relief under section 473, subdivision (d), was not available. However, before issuing a final ruling on the matter the court gave counsel for both Blowers and Pimentel leave to file supplemental reply papers.

On March 23, 2012, after receiving the additional filings, the court denied the motion. Because no signed order of dismissal had been entered as to Pimentel, the court directed Blowers to prepare a proposed order. On May 1, 2012 the Order of Dismissal was signed and filed by the court. Blowers filed a timely notice of appeal challenging the dismissal of her action against Pimentel.

DISCUSSION

1. *Joinder of Pimentel and Venue in Los Angeles County Superior Court Were Proper If There Was Reasonable Uncertainty Concerning the Relative Extent of Pimentel's and Garcia's Responsibility for Blowers's Cumulative Injuries*

Pursuant to section 395, subdivision (a), except as otherwise provided by law and subject to the power of the court to transfer actions or proceedings under specified circumstances, in a personal injury action "the superior court in either the county where the injury occurs or the county . . . where the defendants, or some of them reside at the commencement of the action, is a proper court for the trial of the action." Accordingly, if Garcia and Pimentel were properly joined as defendants in this lawsuit, venue was proper in Los Angeles County Superior Court even though the Pimentel accident occurred in Ventura County where Pimentel resided.

Section 379, subdivision (a)(1), allows a plaintiff to join in one action several defendants if there is asserted against them "[a]ny right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series

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[6] A judgment is void only if the court rendering it lacked subject matter jurisdiction or jurisdiction over the parties. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288; *Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1269.)

of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Section 379, subdivision (c), additionally provides, "Where the plaintiff is in doubt as to the person from whom he or she is entitled to redress, he or she may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties." In *Landau v. Salam* (1971) 4 Cal.3d 901 the Supreme Court interpreted the prior version of section 379, former sections 379a, 379b and 379c (Stats. 1927, ch. 59, § 1, p. 100), which was substantively identical to the current statute, to permit a plaintiff to join two independent and successive tortfeasors in a single action "if he pleads facts showing that he entertains a reasonable doubt as to which defendant is liable for his injuries, or the extent to which each may be liable." (*Landau,* at p. 903.)

The *Landau* Court specifically rejected the argument there must be some sort of factual nexus connecting or associating the claim pleaded against the several defendants: "Section 379c does not permit the unlimited joinder of defendants; it provides for joinder only when plaintiff pleads a specific relationship between the defendants, namely, a single or cumulative injury, giving rise to doubt as to the respective liability of defendants for that injury. In other words, when a plaintiff states facts showing a reasonable uncertainty as to the respective liability of the defendants, these same facts constitute the connection that links the acts of the defendants and fulfills any claimed requisite of 'factual nexus.'" (*Landau v. Salam*, *supra,* 4 Cal.3d at p. 907; see also *Kraft v. Smith* (1944) 24 Cal.2d 124, 129-131 [plaintiff believed both doctors who had successively treated her medical condition were negligent in some respect but did not know which doctor's conduct was the proximate cause of her injuries; joinder of both doctors in single lawsuit was permissible].)

Blowers's counsel explained to the trial court the two accidents were combined in a single lawsuit because they each injured "the same areas of the Plaintiff's body"—her "neck, back and knee" according to her case management statement. We can reasonably infer Blowers was uncertain after the second accident the extent to which each defendant

was responsible for her cumulative injuries.[7] However, like the plaintiff in *Landau v. Salam*, *supra*, 4 Cal.3d 901, who had failed to plead with the requisite specificity the basis for his uncertainty concerning the defendants' respective liability,[8] Blowers's minimalist form pleading does not adequately describe the basis for her doubt, if any, as to the relative liability of Pimentel and Garcia for her injuries. Accordingly, a demurrer for misjoinder would have been entirely proper; but Blowers would have been entitled to an opportunity to amend her complaint before an order dismissing the action as to Pimentel could have entered.

Any objection asserting misjoinder of parties must be raised at the outset of the case: Failure to raise the issue by demurrer or answer waives any defect. (§ 430.80, subd. (a); *Cline v. Haines* (1961) 192 Cal.App.2d 560, 563-564.) Because Pimentel failed to object to his inclusion in Blowers's lawsuit on this ground in a timely manner, his joinder in the litigation with Garcia was permissible under California's liberal rules on joinder of parties; and venue in Los Angeles County Superior County was, therefore, proper.

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[7] The inference there was some uncertainty concerning the relative legal responsibilities of Pimentel and Garcia for cumulative injuries to Blowers is reinforced by Pimentel's cross-complaint, which alleged Garcia should be required to pay a share of any judgment in proportion to his comparative negligence in causing her damages. (Cf. *Newhall Land & Farming Co. v. McCarthy Construction* (2001) 88 Cal.App.4th 769, 773 ["joint tortfeasor includes joint, concurrent, and successive tortfeasors whose actions combine to cause the plaintiff's injury"]; *Willdan v. Sialic Contractors Corp*. (2007) 158 Cal.App.4th 47, 56 [action for partial equitable indemnity based on principles of comparative fault is not dependent on the existence of "'joint tortfeasors' in the classic sense of that term"].)

[8] As described by the Supreme Court, "plaintiff merely alleges an undescribed injury, arising from two accidents, separated by an interval of three and one-half months, both such injuries being set forth in the most general terms." (*Landau v. Salam, supra*, 4 Cal.3d at p. 909.) The Court held, although this allegation was "clearly deficient," the trial court erred in failing to give the plaintiff an opportunity to "set forth more specific information concerning the facts of the two accidents, the nature of the injuries, and the interrelationship of the injuries, if any." (*Ibid*.)

2. *Any Objection to Venue in Los Angeles County Superior Court Was Forfeited by Pimentel's Failure To Timely Raise the Issue*

If, contrary to the assumption underlying the preceding discussion, Blowers did not entertain a reasonable uncertainty or fair doubt as to the respective responsibility of the two defendants and thus did not properly join them as defendants under section 379, subdivisions (a) and (c), then venue as to Pimentel was improper in Los Angeles County Superior Court. However, a defect in venue, like misjoinder of parties, is not jurisdictional in the fundamental sense (*Barquis v. Merchants Collection Assn*. (1972) 7 Cal.3d 94, 119; *Newman v. County of Sonoma* (1961) 56 Cal.2d 625, 627) and must be raised at the outset of the litigation, or it is waived. (§ 396b, subd. (a); *Barquis*, at p. 115 ["a party's failure to raise a timely objection to venue has traditionally been considered a waiver of any 'right' to a proper venue"]; *Forster v. Superior Court* (1992) 11 Cal.App.4th 782, 787 ["unless the defendant makes a timely motion for change of venue, the action may generally be tried where commenced"].)

Pimentel did not timely object to venue. To the contrary, in addition to answering Blowers's complaint without questioning whether it had been filed in the proper court, Pimentel filed his own cross-complaint against Garcia seeking to resolve any question of indemnity or apportionment of liability between the two defendants in a single action. The trial court erred in raising the question of venue on its own motion and compounded the error by mischaracterizing the issue as one affecting the jurisdiction of the court to hear the claim involving the Ventura accident. (See generally *K.R.L. Partnership v. Superior Court* (2004) 120 Cal.App.4th 490, 496 ["[t]he term 'venue' denotes the particular county within the state where a case is to be heard"].) Any defect in venue was waived by Pimentel.

3. *The Remedy for Improper Venue Is Transfer, Not Dismissal*

Finally, as Blowers's counsel indicated to the trial court on several occasions, even if venue were improper and the issue not forfeited, the proper remedy for filing a lawsuit in the wrong county is transfer, not dismissal. (See § 396b, subd. (a) ["the court shall, if it appears that the action or proceeding was not commenced in the proper court, order the

action or proceeding transferred to the proper court"]; *K.R.L. Partnership v. Superior Court, supra,* 120 Cal.App.4th at p. 497 ["[i]f a case is filed in a county that is not the proper venue under section 395, the defendant may move to transfer the case to a proper venue"]; *Fontaine v. Superior Court* (2009) 175 Cal.App.4th 830, 836 [same].)

To be sure, Blowers's form complaint purported to plead a single cause of action against both Pimentel and Garcia. However, Blowers's allegations in fact asserted the violation of two primary rights, one by Pimentel and one by Garcia. Accordingly, notwithstanding the caption, she had pleaded two separate causes of action for negligence. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681 ["The primary right theory is a theory of code pleading that has long been followed in California. It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty."]; *Boeken v. Philip Morris USA, Inc*. (2010) 48 Cal.4th 788, 792 ["the primary right and the breach together constitute the cause of action"]; see *Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1364 [plaintiff who alleges defendant's wrongful act invaded two different rights has stated two causes of action even though pleaded in a single count of the complaint]; see also *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854-1855 [same].) Under these circumstances, if the trial court had concluded joinder of Pimentel and Garcia was improper and the issue of proper venue for the claim against Pimentel appropriately presented, the court was authorized on its own motion to sever the two causes of action under section 1048, subdivision (b), and transfer the Pimentel action to the proper court—the Ventura County Superior Court. What was not authorized was dismissal of Blowers's cause of action against Pimentel.

DISPOSITION

The order of dismissal is reversed and the cause remanded for further proceedings not inconsistent with this opinion. Blowers is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.