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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

ERIK WOLVES, Plaintiff and Appellant, v. ALEX BUZNIKOV, D.D.S. (DBA) RODEO DENTAL STUDIOS, Defendant and Respondent.	B275501 (Los Angeles County Super. Ct. No. BC607567)

APPEAL from a judgment of the Superior Court of Los Angeles County, Howard L. Halm, Judge. Affirmed.

Erik Wolves, in pro. per., for Plaintiff and Appellant.

Brian P. Kamel & Associates, Brian P. Kamel, Casey B. Nathan, and Yee Lam for Defendant and Respondent.

Plaintiff Erik Wolves appeals from a judgment of dismissal after the trial court sustained a demurrer without leave to amend his complaint against defendant Alex Buznikov, D.D.S. (dba) Rodeo Dental Studios. We agree with the trial court that the complaint, which contained no allegations other than the date and location of an unidentified injury, was insufficient to state a cause of action. Plaintiff has failed to show how the defect may be cured by amendment; the facts set forth in his appellate briefing indicate that his claims are barred by the doctrine of res judicata because they arise from the same injury alleged in a small claims action previously resolved in plaintiff's favor. Accordingly, we affirm the judgment.

PROCEDURAL BACKGROUND

A. The Complaint

On January 19, 2016, plaintiff in propria persona filed a Judicial Council form complaint against defendant in superior court. Plaintiff checked the boxes next to causes of action for general negligence, intentional tort, and products liability, and indicated damages based on wage loss, loss of use of property, hospital and medical expenses, general damage, and loss of earning capacity. The complaint prayed for compensatory and punitive damages; the box was checked indicating the amount of damages would be "according to proof," but the complaint also indicated damages in the amount of $30,000.

The complaint attached a Judicial Council form entitled "Cause of Action—General Negligence." (Boldface and some capitalization omitted.) The form alleged that defendant "was the legal (proximate) cause of damages to plaintiff" on

July 26, 2011, at Rodeo Dental Studios. The space providing for a description of the reasons for liability was blank.

Also attached was a handwritten sheet with various statutory and case citations purportedly related to an "action against unprofessional conduct." The sheet contained no allegations.

Plaintiff's civil case cover sheet, filed the same day, had boxes checked for medical malpractice and "Other Professional Health Care Malpractice."

B. Defendant's Demurrer And Request For Judicial Notice Of Plaintiff's Previous Small Claims Actions

Defendant demurred to the complaint on the basis of the statute of limitations, failure to set forth facts sufficient to constitute a cause of action, and res judicata. Defendant also moved to strike the prayer for punitive damages.

Defendant simultaneously filed a request that the court take judicial notice of documents pertaining to actions plaintiff previously filed against defendant in small claims court. The documents established the following: On July 6, 2015, plaintiff filed a claim seeking $10,000 from defendant for breach "of ongoing written, verbal, and all specified contracts" between 2011 and 2014. An attached handwritten declaration stated that defendant "in 2011 estimated price and time of teeth straightening in 12 month[s]" but there had been "no results." The declaration further asserted that defendant was "not a certified orthodontist." Plaintiff stated that he was seeking a "refun[d of] all payments for overextended ongoing unnecessary practices of unfinished work," as well as damages for loss of wages stemming from plaintiff's "inability to perform and meet

work details due to the professional negligence" of defendant.[1] The documents indicated that the small claims court entered judgment in plaintiff's favor on September 9, 2015, awarding him $2,000 as well as $115 in costs. Defendant appealed the judgment to the superior court; on January 7, 2016, the trial court ruled that the judgment would remain as ordered. This was 12 days before the complaint was filed in the instant matter.[2]

Plaintiff did not file an opposition to the demurrer. On the date originally scheduled for the hearing on the demurrer, plaintiff submitted a 208-page collection of documents entitled "court case evidence." Presumably, plaintiff intended to use the collection, which included photocopies, pages downloaded from the internet, and photographs, to prove his case.

C. The Trial Court Sustains The Demurrer

In ruling on the demurrer, the trial court granted the request for judicial notice and declined to consider plaintiff 's "court case evidence" because it was outside the pleadings. The trial court found the allegations insufficient to state a cause of action because plaintiff had not pleaded any facts other than the

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[1] Plaintiff previously had filed a materially identical complaint and declaration in small claims court on December 15, 2014. The record contains a court order dismissing that case without prejudice on July 6, 2015, the day the complaint described above was filed.

[2] We granted a request for judicial notice of several other documents pertaining to these small claims actions, indicating that defendant paid the judgment in full, after which the court vacated the judgment at defendant's request.

date and location of the alleged injury. The trial court further found the complaint was barred by the two-year statute of limitations for personal injury. Finally, noting that plaintiff was alleging negligence against the same party at the same location and around the same time as the injury alleged in his small claims action, the trial court found that plaintiff was attempting to relitigate that prior action, and was barred from doing so under the principle of res judicata.

The trial court sustained the demurrer without leave to amend, and denied the motion to strike as moot. The trial court entered judgment dismissing the complaint with prejudice. Plaintiff timely appealed.

STANDARD OF REVIEW

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) "If the complaint does not state facts sufficient to constitute a cause of action, the appellate court must determine whether there is a reasonable possibility that the defect can be cured by amendment." (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 847.) The plaintiff bears the burden on appeal of showing how the complaint may be amended to state a cause of action. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 36.) The plaintiff may make that showing in the reviewing court even if not made below. (*Ibid.*)

DISCUSSION

The trial court properly sustained the demurrer. A complaint must contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language." (Code Civ. Proc., § 425.10, subd. (a)(1).) A plaintiff " 'may not recover upon the bare statement that the defendant's negligence has caused him injury,' " but must " 'indicate the acts or omissions which are said to have been negligently performed.' " (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 527.) Plaintiff's complaint did not satisfy this standard. As the trial court noted, the complaint only identified the place and time of injury, with no indication of what defendant negligently did or failed to do. The complaint indicated a cause of action for products liability, but did not identify the product at issue, nor did it provide any facts alleging an intentional tort. This was insufficient, and plaintiff does not contend otherwise on appeal.[3]

Having determined the complaint does not state a cause of action, we must determine if that defect may be cured by amendment. The record does not indicate that plaintiff asked the trial court to allow amendment, nor does he request it on appeal. In his appellate brief, however, he provides a more detailed account of the facts underlying his claims. Plaintiff explains that he learned of defendant while looking for a dentist to provide Invisalign treatment, a teeth-straightening process.[4] When

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[3] We discuss the issue of res judicata *infra*. We decline to reach the statute of limitations issue.

[4] See "What is Invisalign treatment?" at *https://www.invisalign.com/frequently-asked-questions* (last visited May 15, 2018).

plaintiff came to defendant's office, defendant quoted him a price for Invisalign, but then "steer[ed]" plaintiff via "coercion and twisting" towards an "in-house office product" called "Clear Correct." Defendant told plaintiff that Clear Correct was "the same thing" as Invisalign but half the cost and more convenient because it was made in the office. Plaintiff agreed to the product after defendant warned him the "negotiated offer was expiring."

Plaintiff further explains that his contract with defendant stated that the treatment would take 10 months, but in fact it took years. After plaintiff complained, defendant offered to complete the treatment using Invisalign. Defendant apparently never followed through, with his office instructing plaintiff that he would be contacted when the product arrived, and otherwise not to call or come to the office. Plaintiff requested that his records be returned to him, but defendant did not comply. Plaintiff contends he had to seek treatment from another orthodontist. Plaintiff claims that because of the prolonged treatment, he was unable to fulfill his job duties, and "[a]ll efforts from education . . . [,] job submission for work gains . . . [,] and advancement for lifelong schedule have [s]everely been damaged and compromise[d]."

Amending the complaint to add these facts would not save plaintiff's claims because these facts confirm the trial court's conclusion that the instant action is barred by the doctrine of res judicata.[5] The "claim preclusion" aspect of res judicata

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[5] Plaintiff has forfeited any challenge to the court's res judicata ruling by failing to raise the issue in his opening brief. (See *Goonewardene v. ADP, LLC* (2016) 5 Cal.App.5th 154, 163.) Even had plaintiff preserved the challenge, however, the proposed facts in his brief establish that his claims are barred.

" ' "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action" ' " assuming the first suit resulted in a final judgment on the merits. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) California applies the "primary rights" theory to determine "whether two proceedings involve identical causes of action for purposes of claim preclusion." (*Ibid.*) Under this theory, "the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Id.* at p. 798.) This is so "regardless of the specific remedy sought or the legal theory . . . advanced." (*Ibid.*) "It is well established that the claim preclusion aspect of the doctrine of res judicata applies to small claims judgments." (*Pitzen v. Superior Court* (2004) 120 Cal.App.4th 1374, 1381.)

Here, plaintiff's appellate brief makes clear that the case arises from damages allegedly sustained by plaintiff as a result of the teeth-straightening treatment provided by defendant. This was also the basis of his small claims complaint. Both cases arise from the same harm, and involve the same primary right. Because plaintiff's small claims action resulted in a final judgment in plaintiff's favor, a judgment affirmed by the superior court just 12 days before plaintiff filed the complaint in the instant case, plaintiff is barred from litigating his claims a second time.

DISPOSTION

The judgment is affirmed. Defendant is awarded his costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.