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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

DARK HALL PRODUCTIONS, LLC et al.,

Plaintiffs and Appellants,

v.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

B235831

(Los Angeles County
Super. Ct. No. BC395825)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Kevin C. Brazile, Judge. Affirmed.

The Law Office of Jason B. Cruz and Jason Cruz; Lynch Cox Gilman & Goodman
and Donald L. Cox for Plaintiffs and Appellants.

Reed Smith, Margaret M. Grignon, Scott H. Jacobs, and Brandon W. Corbridge
for Defendant and Respondent.

Plaintiffs and appellants Dark Hall Productions, LLC (Dark Hall) and Matthew Arnold (Arnold) (collectively plaintiffs) appeal from the judgment entered in favor of defendant and respondent Bank of America, N.A. (BOA) after the trial court granted BOA's motion to strike, without leave to amend, certain causes of action in plaintiffs' fourth amended complaint (4AC) and sustained, without leave to amend, BOA's demurrer as to the remaining causes of action. We affirm the judgment.

BACKGROUND

1. The original complaint and first amended complaint

Plaintiffs filed their original complaint on August 5, 2008, alleging a single cause of action for negligence based on BOA's alleged improper transfer of \$1,945,000 to Sun Jee Yoo (Yoo) from a joint account Arnold had opened with Yoo at BOA. Before BOA filed its answer, plaintiffs filed a first amended complaint, which, like the original complaint, alleged a single negligence claim based on Yoo's unauthorized withdrawal of funds.

2. The second amended complaint

Plaintiffs filed a second amended complaint on October 14, 2008. The second amended complaint, like its predecessors, alleged a single cause of action for negligence. It set forth the following factual allegations: On July 31, 2007, Arnold and Yoo visited a BOA branch to open a bank account "for business purposes" related to a venture involving Dark Hall. Arnold and Yoo asked that the account be established to require the approval of both of them before any funds could be withdrawn from the account. The BOA agent opened a joint savings account for Arnold and Yoo and input instructions in the account notes stating that "[t]wo signers *must* be present [in order] to make any withdrawals" and "[c]hecks *must* have two signatures in order to negotiate them." The account was opened with a cashier's check, issued by Dark Horse, in the amount of \$1,945,000. On August 22, 2007, Yoo transferred the entire sum of \$1,945,000 from the joint account to another BOA account without Arnold's approval or signature.

3. BOA's motion for judgment on the pleadings and motion for summary judgment

BOA filed a motion for judgment on the pleadings, arguing that the second amended complaint failed to state a claim for negligence because that claim was displaced by the California Uniform Commercial Code (hereafter Commercial Code). In addition, BOA filed a motion for summary judgment, in which it argued that the deposit agreement and signature card signed by Arnold and Yoo expressly excluded any obligation on BOA's part to require two signatures for a withdrawal or a funds transfer. BOA accordingly argued that it had not acted negligently by permitting Yoo to transfer funds without Arnold's signature.

4. Hearing on BOA's motion for judgment on the pleadings

At the January 18, 2011 hearing on the motion for judgment on the pleadings, the trial court issued a tentative ruling in BOA's favor, on the ground that plaintiffs' sole cause of action for negligence was displaced by the Commercial Code. In response, plaintiffs argued that the tentative ruling addressed only one of three relevant time periods pertaining to the subject bank account, namely operation of the account. Plaintiffs maintained that two additional time periods were at issue—opening the account and closing the account, and that the Commercial Code did not displace their claims with respect to these two time periods. Plaintiffs claimed to have recently obtained a document in discovery concerning BOA's account closing procedures and that they intended “to amend the complaint based on this third portion of time.”

The trial court responded by stating it could not consider documents outside of the pleadings. The court, however, asked plaintiffs: “Do you think you can amend the complaint? Is that what you are arguing?” Plaintiffs affirmed that they wished “to file a motion to amend” based on “this third period of time,” arguing that the Commercial Code “deals with transferring negotiable instruments” and not “closing an account.”

When the trial court asked BOA to address plaintiffs' request for leave to amend, BOA's counsel responded: “I don't have a problem with that. We'll meet whatever issues they want to raise.” The trial court then granted BOA's motion for judgment on the pleadings but accorded plaintiffs 20 days leave to amend.

5. Third amended complaint

Plaintiffs filed a third amended complaint concurrently with their opposition to BOA's motion for summary judgment. The third amended complaint asserted 15 causes of action: (1) Negligence in opening the account; (2) negligence in operating the account; (3) negligence in closing the account; (4) negligence under the Commercial Code; (5) breach of contract; (6) negligent misrepresentation under the Commercial Code; (7) intentional misrepresentation; (8) misrepresentation pursuant to section 552c of the Restatement Second of Torts; (9) bad faith under the Commercial Code; (10) promissory estoppel; (11) negligent supervision/negligent training; (12) aiding and abetting breach of fiduciary duties; (13) violation of section 11-203 of the Commercial Code; (14) bad faith denial of the existence of contract; and (15) breach of the duty of good faith and fair dealing. Plaintiffs opposed BOA's summary judgment motion, in part, on the ground that the third amended complaint rendered the motion moot.

At the February 16, 2011 hearing on BOA's motion for summary judgment, the trial court took the motion "off calendar" in light of the third amended complaint. The trial court noted that the third amended complaint "went beyond what the court allowed in terms of the amendment" and told plaintiffs "you were granted leave to amend as to the one cause of action and then there were all these additional cause[s] of action brought in You exceeded the scope of what my order was in terms of what you can do." The court then advised plaintiffs to "[f]ile a motion to amend the complaint to bring in those new causes of action and establish, under the rules, why . . . you hadn't brought them before."

6. Plaintiffs' motion for leave to file the third amended complaint and BOA's motion to strike

Plaintiffs brought a motion for leave to file the third amended complaint on March 9, 2011. In support of their motion, plaintiffs relied on BOA's late production of its account closing policies, as well as deposition testimony, elicited in January 2011, that at the time the BOA agent entered instructions into the account notes requiring both

Arnold's and Yoo's signatures for account withdrawals, BOA knew it would not enforce that requirement.

BOA opposed plaintiffs' motion for leave to file the third amended complaint and filed a motion to strike the third amended complaint. In its opposition, BOA argued that the allegedly late disclosure of its account closing procedures could explain plaintiffs' delay in asserting only the first three causes of action in the third amended complaint—negligence in opening, operating, and closing the account. BOA further argued that plaintiffs had presented no justification for their delay in asserting 12 new causes of action. BOA pointed out that the January 2011 deposition testimony cited by plaintiffs as justification for their intentional misrepresentation claim was simply a reiteration of testimony given by the same witness at a prior deposition in October 2009. Finally, BOA argued that allowing plaintiffs to file the third amended complaint would result in significant prejudice. BOA noted that the only damages plaintiffs had sought to recover in all previous iterations of their complaint were the costs incurred in a related action against Yoo. In their third amended complaint, plaintiffs were seeking by their new causes of action to recover punitive damages and interest on the allegedly unauthorized \$1,945,000 funds transfer. BOA argued that it would suffer prejudice if plaintiffs were allowed to file the third amended complaint because BOA's entire defense strategy had been premised on a single cause of action for negligence, and for which the only relief sought was recovery of costs incurred in the action against Yoo.

Plaintiffs' motion for leave to file the third amended complaint and BOA's motion to strike were both heard on April 13, 2011. The trial court granted BOA's motion to strike, noting that "the added causes of action exceed the scope of the leave contemplated by this Court when it granted that leave. Although Plaintiff does add new causes of action to clarify the negligence cause of action, the additional causes of action concerning misrepresentations, breach of contract, bad faith, and aiding and abetting the breach of fiduciary duties cannot be considered to be within the purview of the leave to amend a single cause of action for negligence."

With regard to the motion for leave to amend, the trial court concluded that plaintiffs had failed to demonstrate when the facts giving rise to the amended allegations were discovered and why their request to add the new causes of action had not been made earlier. The court rejected plaintiffs' argument that recent deposition testimony supported the new allegations, based on the court's review of that testimony and its determination that it was duplicative of testimony given by the same witness in October 2009. The trial court further determined that the BOA account closing procedures plaintiffs had recently obtained "would not support the addition of the numerous other causes of action, including allegations of fraud, aiding and abetting, etc." The trial court denied plaintiffs' motion, without prejudice, and noted that "[p]laintiffs may still file a third amended complaint that complies with the leave granted by this Court, and the allegations of negligence are within the scope of that leave."

7. Fourth amended complaint

Plaintiffs filed a fourth amended complaint on May 10, 2011. The fourth amended complaint set forth the following factual allegations: Arnold and Yoo opened the subject account with instructions that no withdrawals could be made without both providing their authorizations. Notes were placed on the account stating that Arnold and Yoo must be present in order to make any withdrawals and both their signatures must be on checks in order to negotiate them. After the account was opened, Yoo, without Arnold's signature or authorization, withdrew the entire amount and transferred the funds to another account. BOA's procedures required a review of the "notations/instruction/warnings" on the account before completing any transaction, including a withdrawal or the closing of the account, and BOA failed to properly train and supervise its employees with respect to these policies. BOA had a duty under the Commercial Code to properly process transactions on the account, and BOA violated this duty by processing an account transfer that it knew was not authorized.

Based on these allegations, the fourth amended complaint asserted six causes of action: (1) negligence in opening the account; (2) negligence in operating the account; (3) negligence in closing the account; (4) negligence under the Commercial Code;

(5) negligent misrepresentation; and (6) negligent supervision/negligent training. As to each cause of action, plaintiffs alleged they were forced to incur attorney fees in their efforts to recover the \$1,945,000 withdrawn by Yoo. Plaintiffs also prayed for interest on the \$1,945,000 at the maximum legal rate for the period of time the funds were improperly withheld.

8. BOA's demurrer and motion to strike

BOA filed a demurrer and motion to strike the fourth amended complaint. The demurrer challenged all six causes of action on the ground that all were displaced by division 11 of the Commercial Code, as the gravamen of each claim was that BOA had acted negligently in executing the unauthorized funds transfer requested by Yoo. BOA's motion to strike challenged the causes of action for negligent misrepresentation, negligent violation of the Commercial Code, and negligent supervision/training on the ground that addition of these claims exceeded the scope of the amendment allowed by the trial court.

The trial court granted BOA's motion to strike, noting that it had expressly excluded any claim for "misrepresentations" when it had granted the previous motion to strike the third amended complaint. The court determined that the cause of action for negligence under the Commercial Code was not an allegation of negligence, but an attempt to plead a statutory violation. The trial court further determined that allegations concerning negligent hiring and supervision were an "attempt to allege negligence of an entirely different character and scope than were originally contained within the complaint and that were contemplated when leave [to amend] was granted."

The trial court also sustained BOA's demurrer to the causes of action for negligence in opening, operating, and closing the account on the ground that each claim was preempted by division 11 of the Commercial Code.

The trial court granted the motion to strike and sustained the demurrer without leave to amend, reasoning that plaintiffs had failed to show how the negligence causes of action could be amended so that they would not be preempted by the Commercial Code. An order of dismissal and judgment in favor of BOA were subsequently entered, and this appeal followed.

DISCUSSION

I. Standard of review

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’ [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

We review the trial court’s decision to strike an improper pleading under Code of Civil Procedure section 436 and its denial of leave to amend under the abuse of discretion standard. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612 [order striking pleading]; *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242 [denial of leave to amend].)

II. Motion to strike and denial of leave to file third amended complaint

“Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court’s order. [Citation.]” (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023 (*Harris*).) Under these circumstances, “such granting of leave to amend must be construed as permission to the pleader to amend the cause of action which he pleaded in the pleading to which the demurrer has been sustained.” (*People ex rel. Dept. of Pub. Wks. v. Clausen* (1967) 248 Cal.App.2d 770, 785–786.) A “plaintiff may not amend the complaint to add a new cause of action without having

obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend. [Citation.]” (*Harris, supra*, at p. 1023.) An amended complaint that exceeds the scope of an order granting leave to amend may be stricken by a trial court in its own discretion or upon a motion to strike by the opposing party. (Code Civ. Proc., §§ 435, 436.)

To obtain leave of court to add new causes of action, a noticed motion is generally required. (Code Civ. Proc., § 473, subd. (a)(1).) A motion for leave to amend must be supported by a declaration specifying the effect of the amendment, why the amendment is necessary and proper, when the facts giving rise to the amended allegations were discovered, and reasons why the request for amendment was not made earlier. (Cal. Rules of Court, rule 3.1324.) “[A] long unexcused delay is sufficient to uphold a trial judge’s decision to deny the opportunity to amend pleadings, particularly where the new amendment would interject a new issue which requires further discovery. [Citation.]” (*Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 692; *Rainer v. Community Memorial Hosp.* (1971) 18 Cal.App.3d 240, 258.) “Unwarranted delay, without more can be a valid reason for denying a motion to amend [citation].” (*Englert v. IVAC Corp.* (1979) 92 Cal.App.3d 178, 190.) Delay coupled with prejudice to the opposing party may compel such denial. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487.)

Plaintiffs contend the 14 new causes of action in their third amended complaint came within the scope of the order granting them leave to amend because the trial court’s ruling on BOA’s motion for judgment on the pleadings did not limit the scope of the leave to amend. They maintain that “[o]nly later did the Trial Court limit that scope to negligence claims.” The record does not support plaintiffs’ version of events.

At the January 11, 2011 hearing on BOA’s motion for judgment on the pleadings, plaintiffs did not request leave to amend their second amended complaint to add new causes of action or theories of recovery, and the trial court did not accord them such unlimited leave to amend. Discussion at that hearing concerning leave to amend was limited to BOA’s alleged negligence in opening and closing the subject bank account and

why such a negligence claim was not barred by the Commercial Code. It is evident from the context of those discussions that the parties and the trial court understood that the scope of leave to amend encompassed only plaintiffs' existing negligence claim. Plaintiffs' argument that BOA waived any objection to the third amended complaint is therefore unsupported by the record. Because plaintiffs exceeded the scope of the leave to amend, the trial court did not abuse its discretion by granting BOA's motion to strike the third amended complaint. (Code Civ. Proc., § 435, subd. (b).)

The trial court's denial of leave to file the third amended complaint was also not an abuse of discretion. There is ample support in the record for the trial court's determination that plaintiffs failed to justify the two and one-half year delay in seeking leave to assert 14 new causes of action. Plaintiffs' explanation for the delay—BOA's late disclosure of its account closure policy "revealing [three] separate time periods" applies only to the three causes of action for negligence in opening, operating, and closing the subject account. The BOA account closure policy did not support the addition of plaintiffs' numerous other claims for fraud, intentional misrepresentation, aiding and abetting breach of fiduciary duty, and breach of the duty of good faith and fair dealing. As support for these claims, plaintiffs relied on the January 2011 deposition testimony of a BOA witness, but that testimony was duplicative of testimony given by the same witness nearly two years earlier in October 2009. Plaintiffs' proffered reasons did not explain their belated assertion of 11 of the 14 additional causes of action.

The record also supports the trial court's finding that allowing plaintiffs such an expansive and extensive revision of the allegations in the case would prejudice BOA. BOA adopted a defense strategy premised on plaintiffs' assertion of a single cause of action for negligence and for which the sole remedy sought was the recovery of attorney fees in a related action against Yoo. Plaintiffs sought to add new causes of action which sought to substantially expand BOA's potential liability to include punitive damages.

The trial court's denial of the motion for leave to file the third amended complaint was not abuse of discretion.

III. Demurrer and motion to strike fourth amended complaint

A. Motion to strike

When granting the motion to strike the third amended complaint, the trial court made clear that it had accorded plaintiffs leave to amend only the single cause of action for negligence they had initially asserted. The trial court expressly found that additional causes of action “concerning misrepresentations, breach of contract, bad faith, and aiding and abetting the breach of fiduciary duties cannot be considered to be within the purview of the leave to amend a single cause of action for negligence.” The trial court reiterated the limited scope of plaintiffs’ leave to amend in the ruling denying, without prejudice, plaintiffs’ motion for leave to file the third amended complaint: “Plaintiffs may still file a third amended complaint that complies with the leave granted by this Court, and the allegations of negligence are within the scope of that leave.”

Despite these admonitions, plaintiffs filed a fourth amended complaint that exceeded the scope of the trial court’s orders by purporting to assert claims for violation of the Commercial Code, misrepresentation, and negligent hiring and supervision. The trial court struck the first two claims as outside the scope of its previously granted leave to amend, and struck the third claim for negligent hiring and supervision as an “attempt to allege negligence of an entirely different character and scope than were originally contained within the complaint” and thus outside the scope contemplated when leave to amend was granted. The trial court did not abuse its discretion by granting BOA’s motion to strike these causes of action.

B. Demurrer

The issue presented in the demurrer to the fourth amended complaint is whether the Commercial Code displaces plaintiffs’ remaining causes of action for negligence. The Commercial Code displaces common law claims when the code provisions are intended to be the exclusive means for determining the rights, duties and liabilities of the affected parties in a given transaction. (*Zengen, Inc. v. Comerica Bank* (2007) 41 Cal.4th 239, 252 (*Zengen*).)

In *Zengen*, the California Supreme Court addressed the displacement of common law claims based on an allegedly unauthorized funds transfer under division 11 of the Commercial Code. In that case, a company's chief financial officer (CFO) embezzled \$4.6 million by directing fraudulent funds transfers from the company's bank accounts to an account he controlled. (*Zengen, supra*, 41 Cal.4th at p. 243.) The company sued the bank under various common law theories, including negligence in permitting the CFO to make the funds transfers without proper authorization. The company alleged that when it opened the accounts, its chief executive officer (CEO) and CFO executed a business signature card and a funds transfer authorization agreement requiring the authorization of both the CEO and CFO for any funds transfer greater than \$50,000. (*Id.* at p. 244.) During the ensuing two years, the bank processed four payment orders to transfer funds from the company's accounts to an account controlled solely by the CFO. (*Id.* at p. 245.) Although the payment orders appeared to have been signed by the CEO, they had been fraudulently executed by the CFO alone. (*Ibid.*) After the CFO absconded with the embezzled funds, the company sued the bank, claiming it was liable for the \$4.6 million loss because it should not have accepted the unauthorized payment orders. (*Id.* at p. 246.)

The Supreme Court framed as the issue "whether a cause of action under the California Uniform Commercial Code displaces other common law causes of action such that the company must recover from the bank under the [Commercial] Code or not at all." The court concluded: "Because the [Commercial] Code provides detailed rules and procedures concerning funds transfers that squarely cover the transactions at issue, we conclude that the [Commercial] Code does displace common law causes of action." (*Zengen, supra*, 41 Cal.4th at p. 244.) In support of its conclusion, the Supreme Court noted that division 11 of the Commercial Code provides "'a detailed scheme for analyzing the rights, duties and liabilities of banks and their customers in connection with the authorization and verification of payment orders. Analysis of a funds transfer under these sections results in a determination of whether or not the funds transfer was 'authorized,' and provides a very specific scheme for allocation of loss.'" (*Zengen*,

supra, at pp. 251–252.)¹ The court also quoted the Code Comment to division 11 of the Commercial Code, which provides in part as follows:

“Funds transfers involve competing interests—those of the banks that provide funds transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process and they were thoroughly considered. *The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A [i.e., division 11] is not appropriate to create rights, duties, and liabilities inconsistent with those stated in this Article.*” (Code Com., reprinted at 23D West’s Ann. Cal. U. Com. Code (2002) foll. §§ 11102, pp. 27–28, italics added.)”

(*Zengen, supra*, 41 Cal.4th at p. 252.)

The court further noted that “this Code Comment is persuasive in interpreting” division 11 because “in enacting division 11, the Legislature adopted article 4A of the Uniform Commercial Code exactly as written.” (*Zengen, supra*, 41 Cal.4th at p. 248.)

In light of the Legislature’s express intent to fully occupy the field, the Supreme Court held that “division 11 provides that common law causes of action based on allegedly unauthorized funds transfers are preempted in two specific areas: (1) where the common law claims would create rights, duties, or liabilities inconsistent with

¹ For example, as relevant here, section 11202, subdivision (b) of the Commercial Code provides: “If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.”

division 11; and (2) where the circumstances giving rise to the common law claims are specifically covered by the provisions of division 11.” (*Zengen, supra*, 41 Cal.4th at p. 253.) The Supreme Court concluded that because the gravamen of each of the company’s causes of action in *Zengen* was the bank’s acceptance and execution of an unauthorized funds transfer, those causes of action were preempted by division 11 of the Commercial Code. (*Zengen, supra*, at p. 250.)

Here, as in *Zengen*, the gravamen of each of plaintiffs’ causes of action against BOA is the execution of an unauthorized funds transfer. In their first cause of action for common law negligence in opening the account, plaintiffs allege that BOA “knew or should have known that failure to exercise their duty of care would allow funds to be withdrawn contrary to the terms of the parties’ specifications, i.e., on less than the required number of authorizations.”

Plaintiffs similarly allege in their second cause of action for common law negligence in operating the account that BOA “negligently and in violation of their duties permitted [Yoo] to withdraw the entire \$1,945,000 amount when [BOA] had actual notice not to permit any withdrawal on less than the required number of signatures. [BOA] also failed to observe and exercise ordinary care in operating, managing, and controlling the Account’s withdrawal procedures as to permit and facilitate [Yoo’s] misappropriation.”

In their third cause of action for common law negligence in closing the account, plaintiffs allege that “[t]he actions of BOA . . . in closing the account as they allowed the withdrawal of all the funds in the account despite the fact that no Account activity was permitted without the presence of both [Arnold] and [Yoo], constitute common law negligence.”

In all three causes of action, plaintiffs’ claimed damages are the result of the allegedly unauthorized funds transfer, causing them to incur attorney fees in efforts to recover the \$1,945,000 withdrawn by Yoo. Because the gravamen of each cause of action is an unauthorized funds transfer, each cause of action is displaced by the Commercial Code as a matter of law. (*Zengen, supra*, 41 Cal.4th at p. 250.)

Plaintiffs' attempt to distinguish the Supreme Court's holding in *Zengen* by relying on case authority from other jurisdictions or on cases that predate *Zengen* is not persuasive. (See, e.g., *Danning v. Bank of America* (1984) 151 Cal.App.3d 961; *E. F. Hutton & Co. v. City National Bank* (1983) 149 Cal.App.3d 60; *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801; *Eisenberg v. Wachovia Bank, N.A.* (4th Cir. 2002) 301 F.3d 220.) The gravamen of each of plaintiffs' causes of action is BOA's allegedly unauthorized transfer of funds, and *Zengen* is controlling authority in this case.

Plaintiffs' argument that the trial court's ruling should be reversed because it was based on facts outside the pleadings is equally unpersuasive. As support for this argument, plaintiffs cite certain comments made by the trial court at the January 18, 2011 hearing on BOA's motion for judgment on the pleadings as to the second amended complaint. The reporter's transcript of those proceedings indicates that the trial court (who also presided over plaintiffs' related action against Yoo) remembered some of the underlying facts from that related action. There is no indication, however, that the trial court relied on its recollection of facts from the related action in ruling on BOA's motion for judgment on the pleadings. To the contrary, the trial court expressly stated at the January 18, 2011 hearing that it would not consider matters outside the pleadings when ruling on BOA's motion. Moreover, although the trial court granted BOA's motion for judgment on the pleadings, it did so without prejudice and accorded plaintiffs 20 days leave to amend. Nothing in the record indicates that the trial court relied on its recollection of facts from the previous related case in ruling on BOA's demurrer to the fourth amended complaint.

The trial court did not err by sustaining the demurrer to the fourth amended complaint.

DISPOSITION

The judgment is affirmed. BOA is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD