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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

GREGG M. LOSONSKY, Plaintiff and Appellant, v. TEKTRONIX, INC., Defendant and Respondent.	B239696 (Los Angeles County Super. Ct. No. BC442120)

APPEAL from an order of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Reversed.

Gregg M. Losonsky, in pro. per, Plaintiff and Appellant.

Stoel Rives and Anthony J. DeCristoforo for Defendant and Respondent.

Gregg M. Losonsky appeals from an order striking his first amended complaint (FAC) against his former employer Davis Instruments[1] because it was filed late. He contends the trial court abused its discretion because his FAC stated facts sufficient to support his claims for wrongful discharge and civil rights. Respondent contends that although the order striking appellant's FAC is not an appealable order, we should nonetheless treat the order as a judgment of dismissal and reach the merits of appellant's appeal. On the merits, respondent argues that the court did not abuse its discretion in refusing to permit appellant to file his FAC late because the defect here—tardiness—could not be cured. While we agree that the order on respondent's motion to strike should be treated as a final judgment and thus subject to our appellate review, we conclude the trial court abused its discretion in dismissing the action solely on the basis it was late filed.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Appellant worked as a calibration technician for Davis Instruments for seven months. During this time, appellant requested a leave of absence because his wife was pregnant. He did not qualify for leave under the Family Medical Leave Act (29 U.S.C. § 2601 et seq.), but Davis Instruments gave him an unpaid leave of absence. On April 16, 2009, about two weeks before appellant's leave was to begin, he was involved in an automobile accident. Appellant's doctor certified that he could work with restrictions, and Davis Instruments approved an extension of his leave of absence. Appellant filed a state disability claim on May 9, 2009.

Although appellant was scheduled to return to work on July 20, 2009, his doctor had not released him by that date. On July 23, 2009, appellant provided documentation from his lawyer and doctor stating that appellant could not return to work until August 14, 2009 because he was disabled. On October 8, 2009, appellant's doctor released him to return to work. However, respondent had terminated appellant effective July 24, 2009.

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[1] As explained below, the proper respondent in this action is Tektronix, Inc.

Appellant sought unemployment benefits. On June 2, 2010, the Unemployment Insurance Appeals Board (Board) found appellant entitled to benefits because he had not willfully breached an obligation to his employer, and appellant had been discharged for reasons other than misconduct related to his work. The Board ruled that appellant was entitled to benefits from August 2, 2009 until the disqualifying condition no longer existed.

On July 22, 2010, acting in propria persona and using a judicial council form complaint, appellant filed this action for civil rights violation and wrongful discharge against Davis Instruments. On December 22, 2010, appellant filed an amendment to his complaint in order to amend the name of defendant Davis Instruments to Tektronix Service Solution. On February 17, 2011, appellant filed an amendment to his complaint to correct the name of Tektronix Service Solution to Tektronix, Inc. (Tektronix).

On April 29, 2011, Tektronix demurred to the complaint; Tektronix contended, that appellant did not, as required by the judicial council form, attach any pages to his complaint supporting his causes of action, and did not allege any facts supporting a claim against any person or entity.

At the July 25, 2011 hearing on the demurrer, the court explained to appellant that he needed to attach sheets to his form complaint to explain the facts. The court gave appellant 30 days leave to amend "from today." The court asked appellant if he understood what he needed to do and when it needed to be done, and appellant responded, "yes, I do . . . have to amend my complaint and make sure I serve it within 30 days." The court explained that if appellant did not amend in a timely fashion, the respondent could move to dismiss the case.

On September 27, 2011, appellant filed his FAC alleging claims for civil rights violation and wrongful discharge. The FAC alleged that he was involved in an accident on his way to a customer, but respondent did not have him file an accident report; further, respondent denied him worker's compensation and ignored state and federal laws protecting appellant's rights while on disability.

On November 7, 2011, respondent moved to strike appellant's FAC under Code of Civil Procedure[2] section 436 because the FAC was not timely filed within 30 days of July 25, 2011. Further, although the court had discretion to allow appellant to cure the defect, in this case the defect—untimeliness—could not be cured.

At the January 31, 2012, hearing, appellant advised the court he was overwhelmed with numerous other personal matters and hence unable to get the FAC on file. The court advised appellant that although appellant was representing himself, he was still required to follow the rules. The court granted the motion to strike, but did not enter an order of dismissal. Appellant appeals from the order granting the motion to strike.

DISCUSSION

Appellant argues that reversible error is committed where a demurrer is sustained without leave to amend when the facts alleged show entitlement to relief, and further contends the trial court was biased in favor of respondent. Respondent, acknowledging that the trial court did not enter an order of dismissal after granting respondent's motion to strike, urges us to consider this appeal although it is taken from a non-appealable order. On the merits, respondent argues that the trial court did not abuse its discretion in granting the motion to strike, and did not display bias toward appellant as evidenced by its efforts to explain procedure to appellant and the granting of additional time to amend beyond the usual 10 day period.

I. Motion to Strike and Appealability

Pursuant to section 436, subdivision (b), the court may strike any pleading not filed in conformity with the laws of the state, a court rule, or an order of the court. Section 436 permits the striking of a pleading due to improprieties in its form or in the procedures pursuant to which it was filed. "This provision is commonly invoked to challenge pleadings filed in violation of a deadline, court order, or requirement of prior leave of court." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 528.) As with

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

demurrers, motions to strike are disfavored; consistent with the liberal policy of amendments of pleadings, if the defect is correctable, the amended pleading should be allowed. (*Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 768–769.) We review an order striking all or part of a pleading for abuse of discretion, and will reverse only upon a showing of abuse of that discretion and a miscarriage of justice. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1282.)

California Rules of Court, rule 3.1320(i) provides that "[i]f an amended pleading is filed after the time allowed, an order striking the amended pleading must be obtained by noticed motion under . . . section 1010." If the court grants a motion to strike the whole of a complaint without leave to amend, it may dismiss the action on motion of either party. (§ 581, subd. (f)(3).) Where, as here, the amended complaint is filed late, the offending pleading must be stricken before the matter can be dismissed. (*Gitmed v. General Motors Corp.* (1994) 26 Cal.App.4th 824, 827–828.) However, the record here contains no such dismissal entered after the order granting the motion to strike, and hence there is no final judgment. Nonetheless, although a motion to strike is not an appealable order (§ 472c, subds. (b)(3), (c)), we will entertain the appeal because "it is clear from the record that the court intended to entirely dispose of the [matter]" and "[n]o purpose would be served by dismissing the appeal." (*Estate of Dito* (2011) 198 Cal.App.4th 791, 799–800.) Thus, we amend the court's order granting the motion to strike "to specify that it is a judgment of dismissal." (*Id.* at p. 800.)

We conclude the trial court abused its discretion in striking appellant's FAC because striking the pleading, which effectively disposed of appellant's claims on a procedural ground, resulted in a miscarriage of justice. Thus, although the court was well within the dictates of section 436, subdivision (b) in striking appellant's amended complaint as untimely filed, appellant here was acting in propria persona, had been on medical disability, was having difficulty with the judicial council form pleading, and at the time the amended pleading was due had been coping with several other matters. While strictly speaking the timeliness issue could not be cured, the pleading was filed one

month after the specified due date of 30 days from July 25, 2011 hearing, and was therefore not so grossly tardy as to result in extreme prejudice to respondent. On other hand, depriving appellant of his day in court on this purely procedural ground would be manifestly unfair. However, in holding that the trial court erred in striking appellant's FAC as late filed, we make no ruling on the merits of appellant's claims.

II. No Evidence of Bias

In his brief, appellant suggests the court was biased, but points to no concrete facts in support of this contention. Respondent contends there is no evidence of bias, as the trial court explained the relevant procedures to appellant in detail and emphasized the need to file an amended pleading in a timely matter.

A. Factual Background

At the hearing on the demurrer, the court explained to appellant the function of a demurrer, and told appellant that a demurrer was to test the legal sufficiency of his complaint. The court told appellant that ordinarily leave to amend would be granted. However, the court explained that appellant's initial complaint lacked the necessary attachments explaining the facts supporting his claims. The court advised appellant that he needed to set forth these facts, and the court would permit appellant to do so. In addition, the court gave appellant more than the normal 10 days to amend (Cal. Rules of Court, rule 3.1320(g)); rather, the court granted appellant 30 days. The court asked if appellant understood, to which appellant responded that he did.

At the hearing on the motion to strike, the court told appellant that the demurrer was well taken, and that as appellant, appellant had an obligation to prosecute his case and file his papers in a timely fashion.

B. Discussion

"When reviewing a charge of bias, ' . . . the litigants' necessarily partisan views should not provide the applicable frame of reference. [Citations.]' [Citation.] Potential bias and prejudice must clearly be established [citation] . . . . 'Bias or prejudice consists of a "mental attitude or disposition of the judge towards [or against] a party to the

litigation. . . .”’ [Citations.] Neither strained relations between a judge and an attorney for a party nor ‘[e]xpressions of opinion uttered by a judge, in what he conceived to be a discharge of his official duties, are . . . evidence of bias or prejudice. [Citation.]’” (*Roitz v. Coldwell Banker Residential Brokerage Co*. (1998) 62 Cal.App.4th 716, 724.) Thus, a party cannot premise a claim of bias on a judge’s statements made in his official capacity (*Jack Farenbaugh & Son v. Belmont Construction, Inc*. (1987) 194 Cal.App.3d 1023, 1031), or a judge’s substantive opinion on the evidence (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312) or the judge’s ruling (even erroneously) against the party (*McEwen v. Occidental Life Ins. Co*. (1916) 172 Cal. 6, 11).

Here, there is no evidence the trial judge was predisposed against appellant. Instead, the trial judge spent extra time explaining to appellant the function of a demurrer and appellant’s obligations in filing an amended pleading. Further, the fact that the trial court ultimately struck appellant’s late filed FAC, without more, is not evidence of bias, but rather what the trial court warned appellant it would do if the amended pleading was not filed within 30 days.

DISPOSITION

The order is reversed. Appellant is to recover his costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.