Filed 6/12/17 Martello v. Ca. Dept. of Managed Health Care CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

JEANNETTE MARTELLO, Plaintiff and Appellant, v. CALIFORNIA DEPARTMENT OF MANAGED HEALTH CARE et al., Defendants and Respondents.	B260911 (Los Angeles County Super. Ct. No. BS144854)

APPEAL from a judgment of the Superior Court of Los Angeles County, Luis A. Lavin, Judge. Affirmed in part, reversed in part, and remanded.

Jeannette Martello, in pro. per., for Plaintiff and Appellant.

Carol L. Ventura, Deputy Director and Chief Counsel, Drew Brereton, Assistant Chief Counsel, and Christopher B. Lee, for Defendants and Respondents California Department of Managed Health Care and Michelle Rouillard.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gloria L. Castro, Senior Assistant Attorney General, E. A. Jones III and Cindy M. Lopez, Deputy Attorneys General, for Defendants and Respondents Kimberly Kirchmeyer and Medical Board of California.

INTRODUCTION

Dr. Jeannette Martello filed this action against the California Department of Managed Health Care and its director, Shelley (Michelle) Rouillard, (collectively, the Department) and the Medical Board of California and its director, Kimberly Kirchmeyer, (collectively, the Board) in a long-running dispute over Martello's practice of balance billing patients. After the trial court sustained demurrers by the Department and the Board without leave to amend, Martello appealed. We reverse the trial court's order sustaining the Board's demurrer to Martello's cause of action for discriminatory enforcement, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *The Department's Civil Action Against Martello*

Martello is a plastic surgeon who treats emergency room patients. In May 2010 the Department, which enforces the comprehensive system of licensing and regulation provided for by the Knox-Keene Health Care Service Plan Act of 1975 (Health &

---

[1] The facts in this background section are from Martello's petition and complaint and from matters of which we take judicial notice. (See *In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1402 ["[o]n appeal of a judgment of dismissal entered after the sustaining of a demurrer without leave to amend, we accept as true all the material allegations of the complaint, reasonable inferences that can be drawn from those allegations, and facts that may properly be judicially noticed"].)

Saf. Code, § 1340 et seq.) (Knox-Keene),[2] contacted Martello about its concern she was illegally balance billing patients. "Balance billing," according to Martello, "is when a provider or institution bills the patient for the difference between what was charged and what was paid by the insurance company on the claim." More specifically, the Department advised Martello she was violating its regulation prohibiting balance billing for emergency services provided to an enrollee of a health care service plan,[3] as well as the California Supreme Court's decision in *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group, supra,* 45 Cal.4th 497 (*Prospect*). In *Prospect*, the Supreme Court held that under Knox-Keene doctors cannot balance bill patients for emergency services a health care service plan was obligated to pay. (*Id.* at p. 507.)

In July 2011 the Department filed a civil action against Martello (*People v. Martello* (Super. Ct. L.A. County, 2011, No. GC047718)) (*People v. Martello*), seeking civil penalties and injunctive relief based on her violations of the Department's regulation and *Prospect*. After a court trial in June 2013, the trial court found Martello illegally balance billed several patients to whom she had provided emergency medical services, enjoined

---

[2] See *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 504.

[3] The regulation defines "unfair billing pattern" to include "the practice, by a provider of emergency services, including but not limited to hospitals and hospital-based physicians such as radiologists, pathologists, anesthesiologists, and on-call specialists, of billing an enrollee of a health care service plan for amounts owed to the provider by the health care service plan or its capitated provider for the provision of emergency services." (Cal. Code Regs., tit. 28, § 1300.71.39, subd. (a).)

her from continuing to balance bill emergency department patients, and imposed $562,500 in civil penalties. On appeal, Division One of this court affirmed.

B. *Martello's Action Against the Board*

While the Department's civil action was pending, the Executive Director of the Board filed a disciplinary proceeding against Martello accusing her of balance billing for emergency services in violation of the Department's regulation and *Prospect*.[4] In August 2013 the Board issued a decision, finding Martello had illegally balance billed several patients and placing her on probation for five years.[5]

On October 16, 2013 Martello filed a petition for writ of mandate and complaint for declaratory and injunctive relief against the Board in superior court.[6] Martello alleged the Board,

---

[4] The Board, an administrative agency within the Department of Consumer Affairs, has "statutory responsibility for, among other things, 'enforcement of the disciplinary and criminal provisions of the Medical Practice Act [Bus. & Prof. Code, § 2000 et seq.]' and '[r]eviewing the quality of medical practice carried out by physician and surgeon certificate holders under the jurisdiction of the [B]oard.'" (*Stiger v. Flippin* (2011) 201 Cal.App.4th 646, 651-652.)

[5] We take judicial notice of that decision pursuant to Evidence Code sections 452, subdivision (c), and 459, subdivision (a). (See *Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1223 ["we may take judicial notice of . . . official acts of state agencies"].)

[6] We grant the Board's request for judicial notice of certain documents filed in that proceeding and take judicial notice of the

in violation of the Equal Protection Clause, initiated its disciplinary proceeding against her because of her race and sex. She also alleged the Department's regulation prohibiting balance billing for emergency services conflicted with, and therefore was preempted by, federal law. Among other relief, Martello asked the court to declare the Department's regulation invalid and direct the Board to set aside its decision placing her on probation.

In March 2015 the court held a hearing on the petition and denied it. Martello appealed that decision, but on May 25, 2017 this court dismissed that appeal pursuant to California Rules of Court, rule 8.220(a)(1).

C. *This Action*

On September 3, 2013 Martello initiated this action by filing a petition for writ of mandate and complaint for injunctive and declaratory relief that initially sought relief against only the Department. In February 2014 Martello filed the operative second amended petition and complaint, which added the Board as a defendant.

Martello's petition and complaint asserted two causes of action. The first, for "discriminatory enforcement," alleged the Department and the Board enforced the prohibition against balance billing for emergency services against her because she is Hispanic and female, thus violating the Equal Protection Clause. The second cause of action, for "abuse of discretion and not proceeding in a manner in accordance with the law" (capitalization omitted), in essence alleged the Department's civil action and the Board's disciplinary proceeding against her were

---

rest of the record of that proceeding. (See Evid. Code, §§ 452, subds. (c), (d), 459.)

unlawful because the regulation they enforced conflicts with federal law, in particular the Patient Protection and Affordable Care Act (42 U.S.C. § 18001 et seq.) (the Affordable Care Act). The petition and complaint sought a declaration invalidating the Department's regulation prohibiting balance billing for emergency services; an injunction prohibiting the Department, the Board, and the Attorney General from engaging in any enforcement action against balance billing based on Knox-Keene, the Department regulation, or the holding in *Prospect*; and dismissal of *People v. Martello* and the Board's disciplinary proceeding against Martello.

The Department and the Board demurred. The Department argued the court lacked jurisdiction to rule on Martello's causes of action because both issues were before the court in *People v. Martello*, which was then on appeal. The Department also argued the central premise of Martello's second cause of action—that the prohibition on balance billing for emergency services conflicted with federal law—was incorrect. The Board made similar arguments, contending Martello had already filed the same claims against it in her October 2013 action, which was still pending in the superior court.

Martello did not file oppositions to the demurrers. After hearing oral argument, the court sustained the demurrers "pursuant to Code of Civil Procedure section 430.10, subsections (a), (c), (d) and/or (e), because [Martello] has raised the same issues and sued the same parties in two other pending cases." The court entered judgment, dismissing the petition and complaint with prejudice, and Martello timely appealed.

DISCUSSION

A. *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.'" (*Jacobs v. Locatelli* (2017) 8 Cal.App.5th 317, 323; accord, *Keffeler v. Partnership Healthplan of California* (2014) 224 Cal.App.4th 322, 335, fn. 10 [appeal following the sustaining of a demurrer to a petition for writ of mandate without leave to amend].) "When the trial court has sustained the demurrer without leave to amend, this court must determine 'whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse.'" (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1122.) Finally, "[t]he fact that we examine the complaint de novo does not mean that plaintiffs need only tender the complaint and hope we can discern a cause of action. It is plaintiffs' burden to show either that the demurrer was sustained erroneously or that the trial court's denial of leave to amend was an abuse of discretion." (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655.)

B. *Martello's First Cause of Action for Discriminatory Enforcement*

"'[I]n order to establish a claim of discriminatory enforcement [one] must demonstrate that [he or she] has been deliberately singled out for prosecution on the basis of some invidious criterion.' [Citation.] 'Unequal treatment which results simply from laxity of enforcement or which reflects a nonarbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement.'" (*People v. Tuck* (2012) 204 Cal.App.4th 724, 737, fn. 4; see *Cilderman v. City of Los Angeles* (1998) 67 Cal.App.4th 1466, 1470 ["[w]hat the equal protection guarantee prohibits is state officials 'purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis'"].)

1. *The Trial Court Erred in Sustaining the Board's Demurrer to the First Cause of Action*

Martello alleged the Department and the Board singled her out for prosecution, among the many health care providers violating California's restrictions on balance billing, because she is Hispanic and female. These allegations, which on demurrer we assume are true and liberally construe with a view to substantial justice (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230; *Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 190), stated a cause of action for discriminatory enforcement. (See *People v. Montes* (2014) 58 Cal.4th 809, 829 ["a state that bases enforcement of its criminal laws on an unjustifiable standard such as race would violate the equal protection clause"]; *People v. Superior Court* (1977) 19 Cal.3d 338, 348 [same rule where

enforcement is based on the defendant's gender]; cf. *Great-West Life Assurance Co. v. State Bd. of Equalization* (1993) 19 Cal.App.4th 1553, 1561 [""[t]he unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination""].)

The Board presents three grounds for affirming the trial court's order sustaining the Board's demurrer to this cause of action. First, the Board contends Martello failed to state a claim against it because her allegations of discriminatory enforcement "focused" on the Department, not on the Board. But the allegations to which the Board points concern merely the Department's acknowledgment of the many balance billing violations it has not prosecuted. Martello repeatedly alleged the Board "singled [her] out for prosecution," by filing its disciplinary proceeding against her, because of her race and gender. She also alleged the Board and the Department worked together in prosecuting her for balance billing violations.

Second, the Board contends Martello improperly joined it as a defendant. (See Code of Civ. Proc., § 430.10, subd. (d) [misjoinder of parties is a ground for demurrer].) But "[d]emurrers on the ground of misjoinder lie only when the defect appears on the face of the complaint or matters judicially noticed" (*Royal Surplus Lines Ins. Co. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193, 198), and the Board has not identified any such defect. The Board's only attempt is a passing assertion that this action "initially arose out of" *People v. Martello*, a proceeding to which the Board was not a party. That assertion, however, is belied by the face of the petition and complaint in this action,

which requests relief arising out of the Board's treatment of Martello. Moreover, the Board cites no authority in support of its misjoinder contention, failing even to mention, let alone address, the applicable joinder rules. (See Code of Civ. Proc., § 379 [permissive joinder of defendants]; *Farmers Ins. Exchange v. Adams* (1985) 170 Cal.App.3d 712, 722 ["[p]ermissive joinder of defendants in a civil action is proper where the complaint asserts against them any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all defendants will arise in the action"], disapproved on another ground in *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 415; *Service Employees International Union v. Hollywood Park, Inc.* (1983) 149 Cal.App.3d 745, 758 [trial court erred in sustaining a demurrer on misjoinder grounds because joinder was proper under the rule governing permissive joinder of defendants].)

Finally, the Board contends Martello failed to allege the Board owed her any relevant duty. Code of Civil Procedure section 1085[7] authorizes a court to "issue a writ of mandate to

---

[7] The Code of Civil Procedure provides for two types of judicial review by mandate: ordinary mandate (Code Civ. Proc., § 1085) and administrative mandate (*id.*, § 1094.5). (*Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848; see *ibid.* ["[t]he nature of the administrative action or decision to be reviewed determines the applicable type of mandate"].) Although Martello's petition did not specify which type of review it sought, the parties treat the petition as one for review by ordinary mandate. This treatment is consistent with the nature of the administrative acts it challenged, namely, the agencies' decisions to prosecute her. (See *Environmental Protection Information Center v. California Dept. of Forestry &*

compel a public agency or officer to perform a mandatory duty. [Citations.] '[T]he writ will not lie to control discretion conferred upon a public officer or agency. [Citations.] Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty.'" (*Ellena v. Department of Ins.* (2014) 230 Cal.App.4th 198, 205; see Code Civ. Proc., § 1085; *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593 ["[a] ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment"].) The Board argues the only performance Martello seeks from it is dismissal of the Board's disciplinary proceeding against her, which it had no ministerial duty to do. Rather, the Board maintains, its proceeding against Martello was an exercise of its discretion.

Mandamus under Code of Civil Procedure section 1085, however, is "appropriate for challenging the constitutionality or validity of statutes or official acts." (*Jolicoeur v. Mihaly* (1971) 5 Cal.3d 565, 570, fn. 2; accord, *Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 305; see *Ellena v. Department of Ins.*, *supra*, 230 Cal.App.4th at p. 205 [where the law """clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion"""].) Martello's cause of

---

Fire Protection (2008) 44 Cal.4th 459, 521 [an administrative decision that does not require a hearing or response to public input is generally reviewable by ordinary mandate, not administrative mandate].)

action for discriminatory enforcement alleged the Board initiated disciplinary proceedings against her because of her race and gender in violation of the Equal Protection Clause. Ordinary mandamus is an appropriate means of challenging that allegedly unconstitutional act. (See *Jolicoeur v. Mihaly*, *supra,* Cal.App.4th at pp. 570-571, 582 [mandamus is appropriate to challenge voting registrars' practice of specially questioning some affiants over the age of 18 as a violation of the Twenty-sixth Amendment]; *California Hospital Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 570 ["that an agency's decision is subject to its broad discretion does not mean mandate is unavailable to aggrieved parties as a matter of law" because mandamus may issue to compel an official to exercise that discretion "under a proper interpretation of the applicable law"].) Therefore, the trial court erred in sustaining the Board's demurrer to Martello's first cause of action for discriminatory enforcement.[8]

2. *The Trial Court Did Not Err in Sustaining the Department's Demurrer to the First Cause of Action Without Leave To Amend*

We agree with the Department that the trial court properly sustained its demurrer to Martello's first cause of action for discriminatory enforcement because the court lacked jurisdiction to adjudicate the claim. The only relief Martello requested in connection with that claim against the Department was dismissal of *People v. Martello*, a case assigned to and tried in a different

---

[8] The Board does not argue that Martello could only have brought her discriminatory enforcement cause of action in her June 2013 petition against the Board, or that the result of that action has any collateral effect on this action.

department of the Los Angeles Superior Court. By the time Martello filed the operative petition and complaint in this case, however, the trial court in *People v. Martello* had entered judgment, and Martello had filed (on January 14, 2014) a notice of appeal, which deprived the trial court in that case of jurisdiction.

Even if the trial court in *People v. Martello* had jurisdiction over that action when Martello asked the trial court in this case to dismiss that action, the trial court in this case would not have had jurisdiction to do so. (See *Williams v. Superior Court of Los Angeles* (1939) 14 Cal.2d 656, 662 ["where a proceeding has been duly assigned for hearing and determination to one department of the superior court by the presiding judge of said court in conformity with the rules thereof, and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned"]; accord, *Crawford v. JPMorgan Chase Bank, N.A.* (2015) 242 Cal.App.4th 1265, 1273.) A fortiori, the trial court in this case lacked jurisdiction to dismiss *People v. Martello* when it was on appeal: "It is fundamental that an appeal of a civil judgment stays trial court proceedings and divests the trial court of jurisdiction over matters embraced in or affected by the appeal." (*In re Keith C.* (2015) 236 Cal.App.4th 151, 156, fn. 3; see Code Civ. Proc., § 916, subd. (a); *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 197 ["'[t]he effect of the appeal is to remove the subject matter of the order from the jurisdiction of the lower court'"].)

Because the trial court here lacked authority to grant Martello the relief she requested, it lacked subject matter jurisdiction to hear her cause of action against the Department. (See *Varian Medical Systems, Inc. v. Delfino, supra*, 35 Cal.4th 180 at p. 196 [""[t]he principle of "subject matter jurisdiction" relates to the inherent authority of the court involved to deal with the case or matter before it""]; *Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 42 ["[s]ubject matter jurisdiction . . . is the power of the court over a cause of action or to act in a particular way"]; see also *In re A.R.* (2012) 203 Cal.App.4th 1160, 1170 [a court lacks jurisdiction when it grants "'relief which [it] has no power to grant'"].) Therefore, the trial court properly sustained the Department's demurrer. (See Code Civ. Proc., § 430.10, subd. (a).)

"The burden is on the plaintiff to demonstrate how the complaint can be amended to state a valid cause of action." (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 226; accord, *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Martello has made no attempt to do so here.[9] The trial court did not err in sustaining the Department's demurrer to Martello's first cause of action for discriminatory enforcement without leave to amend.

---

[9] In her opening brief, Martello stated she was separately submitting a proposed pleading demonstrating how she would amend her second amended petition and complaint if granted leave to amend. She did not submit such a proposed pleading, even after the Board and the Department noted that fact in their briefs.

C. *The Trial Court Did Not Err in Sustaining the Demurrers to Martello's Second Cause of Action Without Leave To Amend*

Martello's second cause of action essentially challenged the validity of the Department's regulation (and perhaps the Supreme Court's holding in *Prospect*) prohibiting balance billing for emergency medical services. She contends that prohibition conflicts with and is preempted by federal law. We agree with the Department and the Board that this contention is incorrect and therefore the trial court properly sustained their demurrers to this cause of action.

Martello alleged the prohibition on balance billing for emergency services conflicts with the Affordable Care Act because, according to her, the latter "legalize[s] balance billing by all health care providers nationally." But there is no legal support for that legal contention. Neither in her petition and complaint nor in her brief does Martello point to any provision of the Affordable Care Act that suggests this. It is true that, addressing emergency services, federal regulations implementing the Act provide: "Because the [Affordable Care Act] neither requires plans or issuers to cover balance billing amounts, nor prohibits balance billing, even where the protections in the statute apply, patients may still be subject to balance billing." (80 Fed.Reg. 72192, 72213 (Nov. 18, 2015).) But those regulations go on to clarify that, while the Affordable Care Act does not prohibit balance billing for emergency services, "[s]tates may . . . consider ways to prevent balance billing in these circumstances." (*Ibid.*) The regulations then flatly state: "The regulations do not preempt existing State consumer protection laws and do not prohibit States from enacting new laws with

respect to balance billing that would provide consumer protections at least as strong as the [Affordable Care Act]." (*Ibid.*)

Martello also alleged the Department's regulation prohibiting balance billing for emergency services conflicts with the federal Emergency Medical Treatment and Active Labor Act (42 U.S.C. § 1395dd) (EMTALA).[10] This contention, too, is meritless. Martello cites no authority for it beyond simply quoting the EMTALA's definition of an "emergency medical condition." Nor does she explain how that definition supposedly conflicts with the Department's regulation. In fact, the regulation does not address the subject of an emergency medical *condition*; it addresses and defines "emergency services." (Cal. Code Regs., tit. 28, § 1300.71.39, subds. (a), (b)(1).)

Again, Martello makes no attempt to demonstrate how she would amend her petition and complaint to cure these defects. Therefore, the trial court did not err in sustaining the demurrers to Martello's second cause of action without leave to amend.

---

[10] "EMTALA was enacted as part of the Comprehensive Omnibus Budget Reconciliation Act of 1986 (COBRA). It provides that hospitals that have entered into Medicare provider agreements are prohibited from inappropriately transferring or refusing to provide medical care to 'any individual' with an emergency medical condition." (*Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 108-109.)

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order sustaining the demurrers by the Department and the Board to the petition and complaint without leave to amend, and to enter a new order sustaining the Department's demurrer to the petition and complaint without leave to amend, sustaining the Board's demurrer to the petition and complaint's second cause of action for "abuse of discretion and not proceeding in a manner in accordance with the law" without leave to amend, and overruling the Board's demurrer to the petition and complaint's first cause of action for discriminatory enforcement. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J. SMALL, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.