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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

PAULINE CLAY, Plaintiff and Appellant, v. SKYLINE OWNERS ASSOCIATION et al., Defendants and Respondents.	B259815 (Los Angeles County Super. Ct. No. BC465483)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel J. Buckley, Judge. Affirmed.

Law Office of Chandler Parker and Chandler A. Parker for Plaintiff and Appellant.

Law Office of Priscilla Slocum, Priscilla Slocum; Adams, Kessler and Aide Ontiveros for Defendant and Respondent Skyline Owners Association.

INTRODUCTION

Plaintiff Pauline Clay is a vexatious litigant subject to a prefiling order issued under Code of Civil Procedure section 391.7[1] barring her from filing in propria persona "any new litigation" in California without leave of the court (*id*., subd. (a)). She appeals from the order of the trial court denying her request for permission to proceed with this lawsuit, which she had filed in propria persona. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Plaintiff is a vexatious litigant subject to a prefiling order*.

Plaintiff, under the name of Pauline Clay-Hunter, was declared a vexatious litigant in 1996 by the trial court in *Hunter v. View Park Estates Homeowners' Association* (case No. BC121678). Her name is on the Judicial Council's Vexatious Litigant List, which list is compiled from prefiling orders. In connection with its motion to declare plaintiff a vexatious litigant, the defendant View Park Estates served plaintiff with notice of its motion for a prefiling order.

Our files show that plaintiff was repeatedly called on to seek prefiling permission. (Evid. Code, § 452, subd. (d).) In 2006, plaintiff's petition for writ of mandate was returned unfiled because she failed to post a bond. (*Clay v. S.C.L.A* (case No. B190117).) In 2008, plaintiff's request for a prefiling order allowing her appeal to proceed was denied by this court and her appeal was dismissed. (*Weshler v. Clay* (case No. B205858).) In May 2013, this court dismissed plaintiff's appeal because she

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[1] All further statutory references are to the Code of Civil Procedure.

failed to establish that it had merit. (*Clay v. Kim* (case No. B246685).)[2]

2. *Plaintiff files the instant lawsuit in propria persona.*

On July 14, 2011, Clay commenced this action by filing her complaint against defendants Skyline Owners Association (Skyline) and, among others, its agent Skyline's onsite manager Lilly Enterprises, Inc., who collects plaintiff's fees for Skyline. The court clerk mistakenly filed the litigation as plaintiff brought it in propria persona without seeking permission. (§ 391.7, subd. (c).) The complaint was based on allegations that plaintiff's condominium unit at Skyline Condominiums had suffered water intrusion, and was designed to stave off the imminent foreclosure of her unit for her failure to pay homeowners' association dues. The complaint pleaded causes of action for (1) declaratory relief; (2) four counts of property damage for sewage backup and water intrusion, and (3) breach of contract. Additional causes of action were listed in the original complaint's caption as (4) gross negligence; (5) "intentional tort;" (6) intentional infliction of emotional distress, and (7) "exemplary damages." Paragraph 30 of the complaint then alleged that the fourth through seventh causes of action would be included "[u]pon amendment of this complaint." Plaintiff amended her complaint in April 2013 to (1) add two defendants; (2) plead all of the causes of action in the original complaint, except for the one for declaratory relief; (3) add two more counts entitled "real property" for water intrusion and mold in her unit; (4) include a cause of action entitled "conspiracy to defraud" rather "intentional tort;" and to (5) move her punitive damages request to the prayer for relief.

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[2] We deny the request to take judicial notice filed by Skyline Owners Association on January 15, 2016.

Unaware of plaintiff's vexatious litigant status, defendants proceeded to litigate. Skyline filed 13 requests for admissions that asked with respect to each of the seven causes of action alleged in the original complaint, and those promised to be included in the first amended complaint: "Admit that defendant is not liable for your cause of action of [fill in the cause of action]." Skyline also requested that plaintiff admit that her unit was not exposed to mold, and that plaintiff never informed any employee or agent of defendant that the subject property contained water intrusion or mold. In May 2013, the trial court ordered that plaintiff's responses to the requests for admissions be deemed admitted as the sanction for plaintiff's failure to respond to discovery. Plaintiff never objected to the requests for admission or asked to have them withdrawn. (§ 2033.300.)

3. *Plaintiff retains counsel*.

Plaintiff retained attorney Morris S. Getzels who filed a second amended complaint on August 12, 2013 against Skyline and others. This version of the complaint listed five causes of action entitled (1) gross negligence, (2) economic duress, (3) money had and received, (4) intentional infliction of emotional distress, and six counts of a cause of action entitled (5) "real property" -- again seeking damages for water intrusion and mold in plaintiff's condominium unit to prevent the foreclosure of plaintiff's unit for nonpayment of homeowners' association dues.

4. *The vexatious litigant proceedings*

Eight months later, in the spring of 2014, defendants learned that plaintiff was a vexatious litigant. Advised of plaintiff's status, the trial court told defendants to bring the necessary motion. Plaintiff's counsel, who was present and also first learned of the prefiling order, immediately moved pursuant

to section 391.7, subdivision (c) for permission to file the pending action.[3] In connection with her motion, plaintiff declared under penalty of perjury that she did not know she was subject to a prefiling order until November 2012, which was after she had filed her original complaint in this case. Her attorney declared that he believed, based on his 38 years of experience in civil litigation, that the lawsuit was meritorious.

Briefing on plaintiff's motion for permission to prosecute the lawsuit focused on whether the action had merit in view of the fact that plaintiff had been deemed to have admitted that defendant was not liable for any of the causes of action alleged in the original and first amended complaints. Plaintiff also withheld from her attorney the fact of the deemed admissions.

After oral argument, the trial court ruled that plaintiff failed to carry her burden under section 391.7, subdivision (b) to establish that the litigation " 'has merit and has not been filed for the purposes of harassment or delay.' " The trial court had already found in connection with plaintiff's request to be removed from the vexatious litigant list (see fn. 2, *ante*) that plaintiff's conduct in failing to seek a prefiling order in this case or to inform her attorney of her status as a vexatious litigant was "highly suspect – especially of an individual that is no stranger to litigation." Such conduct raised questions about plaintiff's honesty, the court remarked. Addressing each admission and each cause of action alleged in the three versions of plaintiff's complaint, the court found that plaintiff failed to present facts or

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[3] Plaintiff also applied for an order to vacate the prefiling order and be removed from the Judicial Council's vexatious litigant list. That request was denied by the trial court in July 2014. Plaintiff does not challenge that ruling on appeal.

argument that her causes of action had merit and could thus proceed. The court dismissed the lawsuit "forthwith." Plaintiff filed her timely appeal.

CONTENTIONS

Plaintiff contends that the prefiling requirement does not apply to her because she was represented by counsel who filed the second amended complaint; if section 391.7 did apply, plaintiff argues the trial court should not have relied on the admissions to determine the merits of her lawsuit.

DISCUSSION

1. *Section 391.7*

"Vexatious litigant statutes were created 'to curb misuse of the court system by those acting in propria persona who repeatedly relitigate the same issues.' [Citation.] These 'persistent and obsessive' litigants would often file groundless actions against judges and other court officers who made adverse decisions against them. [Citation.] 'Their abuse of the system not only wastes court time and resources, but also prejudices other parties waiting their turn before the courts.' [Citation.]" (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 220-221.)

Subdivision (a) of section 391.7 empowers courts to enter a prefiling order prohibiting "a vexatious litigant from filing *any new litigation* in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed." (Italics added.) Courts may only permit a vexatious litigant subject to a prefiling order to file litigation "if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay." (*Id.*, subd. (b).) If the plaintiff does not

obtain an order permitting the filing of the litigation, the court shall dismiss it. (*Id*. subd. (c).)[4]

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[4] Section 391.7 reads in relevant part: "(a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing *any new litigation* in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.

"(b) The presiding justice or presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding justice or presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.

"(c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding justice or presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve, or the presiding justice or presiding judge may direct the clerk to file and serve, on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding justice or presiding judge permitting the filing of the litigation as set forth in subdivision (b). . . ." (Italics added.)

2. *Plaintiff cannot evade the prefiling requirement by obtaining representation after she filed her lawsuit in propria persona.*

Plaintiff is a vexatious litigant subject to a prefiling order who filed this litigation in propria persona without trial court permission. She nonetheless contends that the prefiling requirement of section 391.7 does not apply to her because her second amended complaint was filed by an attorney. Plaintiff is wrong.

Obtaining representation after commencing the litigation in propria persona does not relieve plaintiff of the prefiling requirement. *Kovacevic v. Avalon at Eagles' Crossing Homeowners Assn*. (2010) 189 Cal.App.4th 677 is on point and controlling. Just as here, Kovacevic was a vexatious litigant who sued her homeowners' association in propria persona without first obtaining prefiling permission. She argued against dismissal of the lawsuit on the ground she had corrected the improper in propria persona filing by subsequently obtaining representation. The appellate court affirmed the judgment dismissing her action (*id*. at p. 680), reasoning that to interpret the statute as the plaintiff espoused would require adding into the statute the words " 'or obtains counsel' " in violation of a basic rule of statutory interpretation. (*Id*. at pp. 684-685.) The court stated, "[T]he term 'litigation' in section 391.7(c) clearly encompasses the act of filing a new lawsuit, and it is that act that is at issue in this case." (*Id*. at p. 686.)[5] Pursuant to *Kovacevic*,

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[5] *Flores v. Georgeson* (2011) 191 Cal.App.4th 881, cited by plaintiff here is inapposite because there *counsel* filed the original litigation on behalf of the vexatious plaintiff with the result section 391.7 did not apply. (*Id*. at p. 884.)

section 391.7's prefiling requirement and dismissal provision applied to plaintiff here because she filed this new litigation in propria persona.

Plaintiff observes that an amended pleading "supersedes the original," and contends that her second amended complaint filed by counsel therefore "constitute[s] new litigation within the meaning of Section 391.7." For this argument, she cites cases that stand for the obvious proposition an amended pleading "supersedes" or "supplants" the original, which " 'ceases to perform any function *as a pleading*' " for purposes of the issues to be addressed in the lawsuit. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884, italics added; *Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1307 [third amended complaint "superseded" by fourth and so "all prior complaints ceased to perform any function as pleadings" for purposes of allegations to address in demurrer]; *Lee v. Bank of Am*erica (1994) 27 Cal.App.4th 197, 215 [same].) An "amended complaint furnishes the sole basis for the cause of action, and the original complaint ceases to have any effect either as a pleading or as a basis for judgment." (*State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131 [most recent pleading frames the issues to address in summary adjudication motion].) Although plaintiff's second amended complaint may have "superseded" or "supplanted" the earlier two versions, nothing in these cases stands for the proposition that the second amended complaint constitutes an entirely "*new*" lawsuit.

Looking at the second amended complaint here, it was not "*new* litigation" under section 391.7, subdivision (a). (§ 391.7, subd. (a), italics added.) The pleading names the same core defendants, seeks redress for the same primary rights arising

from the same conduct, and carries the identical civil action number as alleged in the first two versions of the complaint. The gravamen of the lawsuit remained the same notwithstanding the amendments. Plaintiff did not dismiss the action and refile it; she simply made alterations to the existing pleadings. "[T]he statutory term '*filing*' plainly refers to *filing* the lawsuit, not to prosecuting or maintaining it." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1173 (*Shalant*).) Plaintiff's second amended complaint is merely the continuation and refinement of *existing* lawsuit filed as new litigation by plaintiff in propria persona in 2011, and is not "*new* litigation" under section 391.7, subdivision (a). (§ 391.7, subd. (a), italics added.)

Plaintiff argues that *Shalant* strongly supports the view that an amended pleading "constitutes a new filing within the meaning of section 391.7." However, *Shalant* stated, "We have no occasion here to decide whether, or under what circumstances, the filing of an amended complaint constitutes the filing of new litigation within the meaning of section 391.7." (*Shalant*, *supra*, 51 Cal.4th at p. 1172, fn. 2.) It is well settled that " 'cases are not authority for propositions not considered.' " (*City of Bellflower v. Cohen* (2016) 245 Cal.App.4th 438, 452.) To summarize, the trial court did not err in concluding that plaintiff needed permission to file this lawsuit.[6]

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[6] Plaintiff disingenuously argues that any violation of the pre-filing order under section 391.7 was "rendered moot" by the second amended complaint because defendants did not object to the filing of that pleading; rather plaintiff's own attorney "raised the issue first." Defendants did not object to the filing of the second amended complaint because they were not aware at the time that plaintiff was a vexatious litigant. Also, plaintiff only "raised the issue first," because her attorney, who discovered

3. *The trial court did not err in denying plaintiff's request to continue this litigation.*

The trial court found that plaintiff failed to carry her burden under section 391.7, subdivision (b), to establish that the litigation had " 'merit and has not been filed for the purposes of harassment or delay.' " The court explained, in light of plaintiff's admissions, that she failed to prove there was merit to this action as a matter of law. (§ 391.7, subd. (b).) For example, the court found that plaintiff was deemed to have admitted that Skyline was not liable for each of the causes of action, or for any of the counts of property damage; that plaintiff was not exposed to injury-causing levels of mold; and that plaintiff never informed Skyline, its employees or agents, that her property contained a leak or mold. The court also explained that the merit of the second amended complaint's claims for money had and received and economic duress was dependent on the merit of the other causes of action. The court reasoned that plaintiff alleged she did not pay homeowners' association dues because of damage to her property caused by Skyline. Not only were these newer causes of action barred outright by the deemed admissions but as a matter of law plaintiff was not entitled to withhold homeowners' dues on this basis. (*Park Place Estates Homeowners Assn. v. Naber* (1994) 29 Cal.App.4th 427, 432.)

Plaintiff argues that her admissions one through seven ("Admit that defendant is not liable for your cause of action of [insert cause of action]") did not "conclusively establish that the

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plaintiff's vexatious status when defendants informed the trial court, filed her motion for permission to continue the lawsuit before defendants filed their motion to dismiss.

case lacked merit because the vast majority of [plaintiff's] Admissions *only* related to the truth of [plaintiff's] legal opinions rather than the actual facts." She notes that "[t]he words 'liable' and 'cause of action' are both legal terms of art which are not necessarily related to the existence of any fact." However, discovery may include requests that a party admit the "*opinion relating to fact*, *or application of law to fact*." (§ 2033.010, italics added; *Burke v. Superior Court* (1969) 71 Cal.2d 276, 282 [legal questions raised in the pleadings are proper subjects for requests for admissions].) A party may not object to requests for admissions simply by asserting the requests call for a conclusion of law. (*Burke v. Superior Court*, *supra*, at p. 282.) Requests one through seven were proper.

Furthermore, "[a] matter admitted in response to [a request for admission] is 'conclusively established against the party making the admission' unless by noticed motion the party obtains leave of court to withdraw or amend the response. ([Former] Code Civ. Proc., § 2033, subds. (m), (n).)" (*Burch v. Gombos* (2000) 82 Cal.App.4th 352, 359.) Admissions are "dispositive" (*Fredericks v. Kontos Industries, Inc.* (1987) 189 Cal.App.3d 272, 277), although the scope and effect of an admission is determined by the trial court who has " '*broad discretion* in determining the admissibility and relevance of evidence. [Citations.]' [Citation.]" (*Id*. at p. 277, italics added.) The trial court here found that the admissions were dispositive and precluded all of plaintiff's causes of action. Plaintiff has not demonstrated how this determination was an abuse of trial court discretion. Although plaintiff argues that the requests were "too uncertain and ambiguous," she neither objected to, nor moved to withdraw, the admissions on

the grounds of excusable neglect. (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983; § 2033.300, subd. (b).)

Plaintiff next challenges admissions eight through 13. She argues that they did not conclusively establish that she could not recover for the cost of repairing water damage. However, she was deemed to have admitted that her property was *not* exposed to levels of molds that caused her personal injury; that she *never* informed any employee or agent of defendant that the property contained mold or she was suffering physical injuries due to mold exposure, *or that her property contained a leak or uncontrolled release of water from an interior source*. The trial court properly found, based on these admissions, that plaintiff could not show an arguable issue. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 541.) Furthermore, as all defendants are entitled to rely on the admissions propounded by one defendant (*Swedberg v. Christiana Community Builders* (1985) 175 Cal.App.3d 138, 144 ["admissions may be used by all parties to a single action"]), the trial court did not abuse its discretion in concluding that plaintiff's entire lawsuit was meritless.

"An action that was improperly filed in propria persona by a plaintiff subject to a prefiling order remains, under section 391.7, subdivision (c), subject to dismissal at any point in its pendency, not only at the early stages." (*Shalant*, *supra*, 51 Cal.4th at pp. 1172-1173.) The trial court found plaintiff's lawsuit had no merit. On appeal, plaintiff has not demonstrated trial court error. The showing plaintiff must make to obtain permission to file this action is stated in the conjunctive: she must show that the "litigation has merit *and* has not been filed for the purposes of harassment or delay." (§ 391.7, subd. (b), italics added.) Because the court found plaintiff's lawsuit had no

merit, we need not consider whether the action was filed for purposes of harassment or delay.[7] Accordingly, this lawsuit was properly dismissed.

DISPOSITION

The order appealed from is affirmed. Respondent is to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, Acting P. J.

We concur:

LAVIN, J.

GOSWAMI, J.*

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[7] We considered and reject as meritless plaintiff's remaining contentions on appeal.

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