Filed 3/28/12 Shay v. Schauble CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ALLEN SHAY, Plaintiff and Appellant, v. KATRINA SCHAUBLE et al., Defendants and Respondents.	B227335 (Los Angeles County Super. Ct. No. GC042005)

APPEAL from the judgment and orders of the Superior Court of Los Angeles County. Joseph F. De Vanon, Jr., Judge. Affirmed.

Law Offices of Nate G. Kraut and Nate G. Kraut for Plaintiff and Appellant.

Henderson & Borgeson, Daniel E. Henderson III and Millard F. Ingraham for Defendant and Respondent Katrina Schauble.

Law Offices of Peter L. Tripodes and Peter L. Tripodes for Defendant and Respondent Helen Jackson.

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SUMMARY

Plaintiff Allen Shay sued defendants Helen Jackson and Katrina Schauble for falsely telling others he was homosexual. His original verified complaint stated causes of action for slander per se, intentional infliction of emotional distress, and negligent infliction of emotional distress. The trial court sustained defendants' demurrers to the slander claim, finding it was untimely, and the sham pleading doctrine barred further amendment. The remaining claims were tried to the jury. At the conclusion of the evidence, plaintiff asked the trial court to reconsider its order sustaining the demurrer without leave to amend, and to permit the slander claim to be submitted to the jury. The motion was denied. The trial court granted defendant Jackson's motion for a directed verdict (originally filed as a motion for nonsuit). The jury reached a unanimous defense verdict for defendant Schauble. Plaintiff appeals from the judgment, contending the trial court erred when it sustained defendants' demurrers to the slander claim, and the trial court improperly weighed the evidence when it granted Jackson's motion for a directed verdict and abused its discretion when it denied plaintiff's request to amend the pleading to conform to the proof admitted at trial. Finding no error, we affirm.

FACTS

Plaintiff wanted to start a new relationship, with hopes of getting married and having children. Plaintiff's nephew met his wife on an online dating website, and helped plaintiff create a profile at blackpeoplemeet.com. Plaintiff's profile listed his age at 38, when his age was really 48. He met Melody McLeod through the online service in 2005, and they met in person in late 2006 and began dating. McLeod was in her early 30's.

Defendant Schauble had known McLeod since McLeod was born, because Schauble's parents were McLeod's godparents. In 2003, McLeod moved from Alabama to Schauble's home to attend school and help care for Schauble's twins. She also worked at an Armani store.

Plaintiff and Schauble first met when McLeod invited him to attend Thanksgiving dinner at the Schaubles' home in 2006. McLeod was concerned Schauble would disapprove of how she met plaintiff, so she told Schauble she met him at the Armani store where she worked. At dinner, plaintiff mentioned he grew up in Altadena. Schauble told plaintiff that her "aunt," defendant Jackson, lived in Altadena, and plaintiff said he knew Jackson, as well as her husband and children.

The weekend following Thanksgiving, Schauble spoke with Jackson on the phone, mentioning she had spent the holiday with plaintiff. Schauble asked Jackson about plaintiff, and Jackson said he had attended high school with her son, Maurice, and had graduated 30 years prior. From this information, Schauble concluded plaintiff had lied about his age and was not in his 30's. This upset Schauble, and she was concerned plaintiff may have lied about other things as well. The following Monday, Schauble told McLeod about plaintiff's age. When McLeod confronted plaintiff, he admitted he was older than stated on his online profile.

In the weeks following Thanksgiving, Schauble told McLeod that plaintiff was on the "Down Low," meaning he was bisexual, but concealed his sexual relations with men from his female partners. McLeod confronted plaintiff, telling him she heard he was gay, but not revealing who had told her.

In March 2007, McLeod's mother visited from Alabama and stayed with Schauble. Schauble told her that plaintiff lied about his age and that he was gay.

According to McLeod, Schauble said that Jackson was the source of the rumor about plaintiff's sexual orientation. McLeod's mother confirmed that Schauble told her she received her information about plaintiff from Jackson.

According to plaintiff, sometime in December 2007, McLeod finally told him Schauble and Jackson were the source of the rumors.

Defendants denied ever saying plaintiff was homosexual.

DISCUSSION

1. Demurrer

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed, such as a party's earlier pleadings. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491 (*McKell*).) When a demurrer is sustained without leave to amend, as it was here, "we decide 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; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan*, *supra*, at p. 318.) "The plaintiff bears the burden of proving there is a reasonable possibility of amendment." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.)

The original complaint was filed on December 18, 2008. It alleged that "on or about December 18, 2006 [an] acquaintance of plaintiff came to plaintiff's home, distraught and emotionally upset. [¶] . . . Next, the acquaintance conveyed to plaintiff that defendant Schauble telephoned her at work and stated that she (Schauble) had been told by defendant Jackson that plaintiff was gay." Defendants demurred to the slander cause of action, reasoning the claim was time barred by the one year statute of limitations. While their demurrers where pending, plaintiff filed a first amended complaint. The amended pleading alleged that in "late December[] 2007 . . . [¶] . . . [¶] . . . for the first time, plaintiff heard that defendant Schauble told acquaintance 2 that defendant Jackson said that plaintiff was gay."

Defendants again demurred, contending the slander claim was untimely and that the contradictory allegations in the first amended complaint should be disregarded under the sham pleading doctrine. In opposition, plaintiff's counsel submitted a declaration stating: "I am at fault for preparing a complaint that inadvertently states

facts that are not clear and contains a number of errors with respect to dates and parties." Melody McLeod also submitted a declaration that she first disclosed defendants' identities to plaintiff in December 2007. No declaration was submitted by plaintiff. The trial court sustained the demurrers to the slander claim without leave to amend. The court noted that it "put great weight on the fact that it was a verified complaint. That's what is causing the court some trepidation on amending the [slander] cause of action. [¶] I appreciate your declaration, but the client signed these pleadings under penalty of perjury, and now seeks to amend the dates, and I have difficulty with that." "Certainly I give weight to the fact mistakes happen. Mistakes happen every day. To swear under oath that a certain event happens at a certain period of time, it wasn't that period of time, it was a different period of time— [¶] that causes me some pause."

The parties do not dispute that the slander claim would be untimely if discovered on December 18, 2006, as was alleged in the original complaint, or that the statute of limitations defense may properly be raised by demurrer. (See Code Civ. Proc., § 340, subd. (c) [one year statute of limitations for slander claim]; *Geneva Towers Ltd. Partnership v. City and County of San Francisco* (2003) 29 Cal.4th 769, 781 [the bar of the statute of limitations may be raised by demurrer if the defect appears on the face of the complaint].) Instead, plaintiff contends the trial court abused its discretion by denying leave to amend based on its erroneous belief that it lacked discretion to permit amendment to the verified pleading. Plaintiff is correct that "[a] trial court's failure to exercise discretion is itself an abuse of discretion" (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515), but we are satisfied by the court's comments on the record at the hearing that the court exercised its discretion in considering whether the new and different allegation of plaintiff's discovery of the slander in the first amended complaint was a sham.

It is well settled " '[a] plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false.' " (*McKell*,

supra, 142 Cal.App.4th at p. 1491.) "Under the sham pleading doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or motions for summary judgment. [Citations.] . . . 'Allegations in the original pleading that rendered it vulnerable to demurrer or other attack cannot simply be omitted without explanation in the amended pleading. The policy against sham pleadings requires the pleader to explain satisfactorily any such omission.' [Citation.] [¶] . . . The sham pleading doctrine is not ' "intended to prevent honest complainants from correcting erroneous allegations . . . or to prevent correction of ambiguous facts." ' [Citation.] Instead, it is intended to enable courts ' "to prevent an abuse of process." ' [Citation.]" (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425-426, fn. omitted.)

The only explanation that was offered for the December 2006 date in the original complaint was counsel's vague declaration that he made an error, without any explanation for how the error came about. Counsel did not explain specifically why the original complaint alleged discovery of the alleged slander on December 18, 2006, whereas the first amended complaint alleged plaintiff first discovered the source of the statements in "late December[] 2007." Counsel said nothing about those two dates at all, nor did counsel explain why *plaintiff* verified that he learned the source of the statements on December 18, 2006. In any event, it was plaintiff who was required to explain satisfactorily to the court why he verified the original complaint that alleged discovery of the source of the slanderous statements on December 18, 2006, yet plaintiff himself offered no explanation to the court at all.

Plaintiff, in signing the verified pleading under penalty of perjury averred, "I have read the foregoing complaint and know its content. The same is true of my own knowledge and except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true." Counsel's claim that he made a drafting error was not sufficiently explained in light of plaintiff's ratification of the allegations. The trial court clearly understood that innocent mistakes can be corrected

by amendment, but nonetheless found that plaintiff's explanation for any mistake was insufficient. Under these circumstances, we find no abuse of discretion.

2. Directed Verdict

The trial court granted a directed verdict for the claims of negligent and intentional infliction of emotional distress against defendant Jackson. A motion for directed verdict is akin to a demurrer to the evidence. The moving party concedes the truth of the adverse party's evidence, as well as all reasonably deducible inferences. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629-630 (*Howard*); *Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.) A directed verdict against a plaintiff properly may be granted " '. . . "only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, . . . indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given." [Citations.] Unless it can be said as a matter of law. . . no other reasonable conclusion is legally deductible [*sic*] from the evidence . . . the trial court is not justified in taking the case from the jury.' . . . [Citations.]" (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 395, italics omitted.) Both the trial court and this court on appeal have the same function—to determine whether there is sufficient evidence to support a verdict or judgment in favor of plaintiff. (*Ibid*.) Neither court in making this determination may weigh or consider conflicting evidence or judge the credibility of witnesses. (*Ibid*.) Substantial evidence is evidence that is of " ' "ponderable legal significance," ' ' "reasonable in nature, credible, and of solid value." ' " (*Howard*, *supra*, 72 Cal.App.4th at p. 631.)

a. Negligent infliction of emotional distress

A claim of negligent infliction of emotional distress is not an independent tort but rather is the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984; *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072; *Marlene F.*

v. Affiliated Psychiatric Medical Clinic, Inc. (1989) 48 Cal.3d 583, 588.) "[T]here is no duty to avoid negligently causing emotional distress to another." (*Potter v. Firestone Tire & Rubber Co.*, *supra*, at p. 984.) Thus, "unless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty." (*Id.* at p. 985 [duty can arise by virtue of a special relationship between the parties, or may be imposed by law].) " '[T]he existence and scope of a defendant's duty of care is a *legal* question' for the court to decide [citation] . . . . The determination of this issue, however, does not eliminate the role of the trier of fact. 'In an action for negligence the plaintiff has the burden of proving [¶] . . . facts which give rise to a legal duty on the part of the defendant . . . .' [Citations.] . . . [I]t is the function of the jury to determine the[se] facts. [Citation.]" (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162, fn. 4.)

Generally, each person has a duty to exercise ordinary care to avoid causing injury to others. (Civ. Code, § 1714, subd. (a); *Rowland v. Christian* (1968) 69 Cal.2d 108, 112.) A departure from this principle is justified only if public policy clearly supports an exception. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 501-502; *Rowland*, *supra*, at p. 112.) The factors relevant to the existence and scope of duty include "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]" (*Rowland*, *supra*, at p. 113.) The foreseeability of the harm is essential to finding the existence of a duty. (*Ludwig v. City of San Diego* (1998) 65 Cal.App.4th 1105, 1111-1112.) "[A] court's task—in determining 'duty'—is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the

category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, fn. 6.)

We find there is no duty to refrain from sharing one's belief, in a private and personal conversation, that a heterosexual friend or family member is dating a person who is homosexual or bisexual. There was no evidence of any special relationship between Jackson and plaintiff, or any assumption of a duty concerning plaintiff's emotional health by Jackson. On appeal, plaintiff relies on negligent misrepresentation cases to impose a duty upon Jackson to not misrepresent plaintiff's sexual orientation. However, this case was not tried as a negligent misrepresentation case, and plaintiff's evidence did not satisfy the essential elements of a negligent misrepresentation claim, which differs significantly from a claim of simple negligence. (See *Melican v. Regents of University of Cal.* (2007) 151 Cal.App.4th 168, 182; *Randi W. v. Muroc Joint Unified School Dist.* (1977) 14 Cal.4th 1066, 1076-1077.) Under the posture of this case, we cannot find that serious emotional distress is a natural consequence of gossip, and therefore conclude the harm to plaintiff was not foreseeable. Such private conversations are a significant part of our social existence, and the cost of imposing liability would be great, while the harm caused by these exchanges is often trivial and easily remedied. Consequently, the directed verdict was properly granted.

b. Intentional infliction of emotional distress

A claim for intentional infliction of emotional distress requires plaintiff to prove outrageous conduct by defendant which is intentional or reckless, causing severe emotional distress. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1259.) "Conduct, to be ' "outrageous" ' must be so extreme as to exceed all bounds of that [conduct] usually tolerated in a civilized society. [Citation.] While the outrageousness of a defendant's conduct normally presents an issue of fact to be determined by the trier of fact [citation], the court may determine in the first instance, whether the defendant's

conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.)

There was no evidence that Jackson's conduct was extreme and outrageous. Making private comments to her close friend about plaintiff's sexual orientation does not exceed all bounds of conduct "usually tolerated in a civilized society." As discussed above, people expect to be able to speak freely in their personal exchanges, and the resulting harm is often slight and easily rectified. There was also no evidence that Jackson intended to cause plaintiff severe emotional distress, or recklessly disregarded the possibility that severe emotional distress would result. Jackson could not know that Schauble would repeat her comments, what McLeod would do with the comments if told, or what plaintiff's reaction to learning of the comments would be. The connection between Jackson's statements and plaintiff's distress is too attenuated to presume any ill-motive or recklessness by Jackson. Therefore, the directed verdict was proper.

3. Amendment to Conform to Proof at Trial

At trial, plaintiff testified he first discovered that Schauble and Jackson were the source of the rumors about his sexual orientation in December 2007. After the conclusion of the evidence, plaintiff requested "reconsideration of your interim order dismissing the slander action in this case. And in addition a request to allow amendment of the pleading to conform to proof" at trial. The trial court denied the request.

"[T]he allowance of amendments to conform to the proof rests largely in the discretion of the trial court and its determination will not be disturbed on appeal unless it clearly appears that such discretion has been abused." (*Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31.) "Leave to amend a pleading at trial is properly denied . . . if the proposed amendment raises new issues that the opposing party has had no opportunity to defend." (*Singh v. Southland Stone, U.S.A., Inc*. (2010) 186 Cal.App.4th 338, 355.)

The trial court did not abuse its discretion in denying leave to amend after the close of testimony. After the court sustained the demurrer without leave to amend to the slander cause of action, the parties conducted discovery and prepared the case for trial on the remaining causes of action. Plaintiff never asked the court to reconsider its ruling before trial, nor did plaintiff challenge the ruling by seeking writ relief. Defendants were entitled to prepare for trial and defend the case on the assumption the slander cause of action was not at issue. Defendants' trial strategy may have differed greatly if they knew the slander claim might be revived; for example, defendants may have endeavored to establish the truth of the statements. In any event, the proof at trial did not establish the action was timely, where plaintiff vaguely testified that he learned defendants were the source of the rumors about his sexual orientation "in December of '07" and the complaint was filed on December 18, 2008.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

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GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.