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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RUSSELL DEAN NELSON,

Plaintiff and Appellant,

v.

DARRYL LUCIEN et al.,

Defendants and Respondents.

B247723

(Los Angeles County
Super. Ct. No. BC478760)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Amy D. Hogue, Judge. Affirmed.

Russell Dean Nelson, in pro. per., for Plaintiff and Appellant.

Hollins & Levy, Byron S. Hollins, Laura M. Levy and Adam L. Robinson for
Defendants and Respondents.

Russell Dean Nelson appeals a judgment dismissing his complaint against his former attorney Darryl Lucien and Law Offices of Donald S. Lucien and Darryl Lucien (collectively Defendants) after the sustaining of a demurrer without leave to amend. Nelson alleges counts against Defendants for fraud and legal malpractice arising from Darryl Lucien's representation of Nelson in a prior action against Nelson's former employer.

On appeal, Nelson contends (1) Darryl Lucien made fraudulent misrepresentations and committed perjury in representing Nelson, and he failed to comply with the Rules of Professional Conduct, California Rules of Court, civility guidelines, and various statutes; (2) the trial court failed to liberally construe his complaint; (3) the demurrer was untimely; and (4) Defendants deprived him of the full 10 days' leave to file an amended complaint by failing to timely serve a notice of ruling.

We conclude that Nelson has shown no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Prior Action

Darryl Lucien represented Nelson in an employment discrimination action against Nelson's former employer. Darryl Lucien's father, Donald S. Lucien, represented Nelson in a separate workers' compensation claim.

Nelson signed a settlement agreement on January 12, 2012. He received a settlement check from Darryl Lucien on February 10, 2012. A request for dismissal was filed on February 14, 2012, and the court clerk entered a dismissal on that same date.¹

2. Complaint in the Present Action, Demurrer, and Other Events

Nelson, in propria persona, filed a complaint against Law Offices of Donald S. Lucien on February 14, 2012, alleging counts for (1) fraud and (2) intentional infliction of emotional distress. He filed a document entitled "Plaintiff's 1st Amended

¹ We judicially notice the request for dismissal filed on February 14, 2012, in *Nelson v. Renaissance Hollywood Hotel* (Sup. Ct. L.A. County, No. PC043876) and the entry of a dismissal on that same date. (Evid. Code, § 452, subd. (d).)

Complaint” on April 4, 2012, stating that the caption was amended to include Darryl M. Lucien. He attempted to file a Judicial Council form Amendment to Complaint on April 19, 2012, stating that the correct name of Law Offices of Donald S. Lucien was “Darryl Lucien and Law Office of Donald S. Lucien,” together with a caption page stating “Plaintiff’s Second Amended Complaint for Damages” (capitalization omitted). On April 25, 2012, the trial court rejected the Amendment to Complaint, stating that the amendment was an improper way to add a defendant.

Nelson filed a request for entry of default on July 9, 2012. The trial court rejected the request for several reasons.

Defendants filed a demurrer to the complaint on July 13, 2012. The trial court sustained the demurrer with leave to amend on August 30, 2012.²

3. *Third Amended Complaint*

Nelson filed an amended complaint entitled “Plaintiff’s Third Amended Complaint for Damages” (capitalization omitted) against Darryl Lucien and Law Offices of Donald S. Lucien on August 30, 2012, alleging counts for (1) fraud, (2) intentional infliction of emotional distress, and (3) legal malpractice. Defendants filed a demurrer to the complaint on September 27, 2012. Nelson filed no opposition to the demurrer. The trial court filed an order on November 1, 2012, sustaining the demurrer without leave to amend as to intentional infliction of emotional distress and with leave to amend as to the other counts.³

The order stated that Nelson failed to allege any damage resulting from the alleged concealment of a provision in the settlement agreement relieving his former employer from liability for any loss of Medicare or Social Security benefits. It stated that he only alleged a possibility of future harm, which is insufficient. It stated that he

² We judicially notice the minute order filed on August 30, 2012, sustaining the demurrer with leave to amend. (Evid. Code, § 452, subd. (d).) The trial court granted leave to file a “third amended complaint” (capitalization omitted).

³ We judicially notice the order filed on November 1, 2012, sustaining the demurrer. (Evid. Code, § 452, subd. (d).)

also failed to allege any damage resulting from the alleged concealment of a provision stating that he had 21 days to consider the agreement before signing it. The trial court therefore sustained the demurrer to the fraud count with leave to amend.

The order stated that the legal malpractice count was based on the same facts as the fraud count. It stated that Nelson alleged only a possibility of future harm and failed to allege that but for Defendants' alleged misconduct he would have obtained a more favorable result. The trial court therefore sustained the demurrer to the legal malpractice count with leave to amend.

The order stated as to intentional infliction of emotional distress that Nelson failed to allege outrageous conduct and severe emotional distress. It also stated that damages for emotional distress ordinarily are not recoverable for legal malpractice involving financial interests, citing *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 73.

4. *Fourth Amended Complaint*

Nelson filed an amended complaint entitled "Plaintiff's Fourth Amended Complaint" on November 14, 2012. He alleges counts against Darryl Lucien and Law Offices of Donald S. Lucien for (1) fraud and (2) legal malpractice. Nelson alleges the following facts:

Nelson hired Darryl Lucien in January 2009 to represent him in a disability discrimination action against his employer. Nelson's employer terminated his employment in June 2009. Nelson relieved Darryl Lucien as counsel in July 2010 and represented himself after Darryl Lucien refused to amend his complaint to allege racial discrimination, wrongful termination, and other claims and failed to meet and correspond with Nelson. Donald Lucien continued to represent Nelson in his workers' compensation claim.

Counsel for his former employer offered to settle the case for \$75,000 on January 3, 2011, but Nelson declined. Nelson called Donald Lucien to inform him of the settlement offer and spoke with Darryl Lucien because Donald Lucien was out of the office. Darryl Lucien asked to return as counsel. After a second conversation on

January 4, 2011, Nelson agreed to rehire Darryl Lucien as counsel in the discrimination action. Nelson signed a substitution of attorney form on January 5, 2011. On January 6, 2011, Darryl Lucien told Nelson that the substitution of attorney form had been filed with the court.

Nelson then informed Darryl Lucien that opposing counsel had offered to settle the case for \$42,500 and that he had declined. Darryl Lucien hurriedly got off the phone and told Nelson that he would call him right back.

Nelson did not hear from Darryl Lucien again until January 10, 2011, the scheduled trial date. Nelson appeared in court on that date and was told by opposing counsel that the case had been settled. Nelson stated that he had not authorized settlement and that he would speak with the judge. Opposing counsel stated that Nelson could not speak with the judge because he was represented by counsel. When Darryl Lucien arrived, Nelson stated that he had not authorized settlement and that he would speak with the judge. Darryl Lucien also stated that Nelson could not speak with the judge because he was represented by counsel. Darryl Lucien and opposing counsel appeared before the judge and then left the courtroom.

Darryl Lucien faxed a settlement agreement to Nelson on January 11, 2011. Nelson asked to schedule a new trial date, but Darryl Lucien urged Nelson to sign the settlement agreement instead. Nelson signed the settlement agreement in Darryl Lucien's office on January 12, 2011. Nelson later changed his mind. He called Darryl Lucien and opposing counsel and left messages stating that he wanted out of the settlement. Darryl Lucien told Nelson on January 13, 2011, that opposing counsel would not let Nelson out of the settlement. Nelson accepted a settlement check from Darryl Lucien on February 10, 2011.

Nelson alleges that he later learned that the substitution of attorney form was not filed until January 12, 2011, that the settlement agreement filed with the court included an additional page that was not included in the agreement he signed, and that his signature on the agreement was dated January 13, 2011, despite the fact that he signed the agreement on January 12, 2011. He alleges that the settlement agreement filed with

the court included a provision stating that he would hold his former employer harmless from any loss of Medicare and Social Security benefits that he might sustain as a result of the agreement, effectively relieving his former employer of liability for such losses. He alleges that the settlement agreement filed with the court also included a provision stating that he had 21 days to consider the agreement before signing it. He alleges that the settlement agreement he signed did not include those provisions.

Nelson alleges in his fraud count that Lucien falsely represented on January 10, 2011, that the substitution of attorney form had been filed. He alleges that opposing counsel relied on the misrepresentation in proceeding with the settlement and refusing to communicate with him. He alleges that the trial court relied on the same misrepresentation in accepting the settlement agreement and dismissing the case.

Nelson also alleges that but for the misrepresentation he would have continued communicating with opposing counsel, and he could have requested the substitution of attorney form back from Darryl Lucien and torn it up. He alleges that “he had valid claims against [his former employer] which he would have prevailed, if not for the Defendant intentionally causing a trial dismissal on January 10th.” He also alleges that he could have recovered his job, back pay, and other benefits. He alleges further that Darryl Lucien “used false promises to obtain the Plaintiff’s signature.” He also incorporates the prior allegations.

Nelson alleges in his legal malpractice count that Darryl Lucien breached his fiduciary duty to Nelson by misrepresenting to the trial court that the substitution of attorney form had been filed and that Nelson had agreed to settle the case. He alleges that those misrepresentations “caused the Plaintiff’s civil trial to be dismissed.” Nelson also alleges that his “reliance on the defendant’s representation was a substantial factor in causing harm to the Plaintiff.” He also incorporates the prior allegations.

5. Demurrer to Fourth Amended Complaint

Defendants filed a demurrer to the Fourth Amended Complaint in December 2012. They argued that Nelson failed to allege specific facts supporting each element of his fraud count and, in particular, failed to allege actual damages resulting from the

alleged discrepancy between the settlement agreement he signed and the one filed with the court.

Nelson argued in opposition to the demurrer that the complaint adequately alleged counts for fraud and legal malpractice. He requested leave to amend to correct any deficiency.

The trial court sustained the demurrer to both counts without leave to amend in an order filed on January 24, 2013. The order stated as to the fraud count that Nelson “failed to allege any damage caused by his alleged execution of a promise not to sue his former employer” and only alleged a possibility of future harm, which is not actionable. It stated that the Fourth Amended Complaint failed to correct the deficiencies noted in the order sustaining the prior demurrer and failed to adequately allege fraud with specificity. It stated as to the legal malpractice count that Nelson “failed to plead any basis for causation of actual loss or damage arising out of the alleged malpractice,” that a possibility of future harm is insufficient, and that he failed to allege that but for the alleged malpractice he would have obtained a more favorable result.

6. *Dismissal and Appeal*

The trial court filed a signed order dismissing the complaint on February 28, 2013.⁴ Nelson timely appealed.

CONTENTIONS

Nelson contends (1) Darryl Lucien made fraudulent misrepresentations and committed perjury in representing Nelson, and he failed to comply with the Rules of Professional Conduct, California Rules of Court, civility guidelines, and various statutes; (2) the trial court failed to liberally construe his complaint; (3) the demurrer filed on July 13, 2012, was untimely; and (4) Darryl Lucien deprived him of the full

⁴ A signed order of dismissal is an appealable judgment. (Code Civ. Proc., § 581d.)

10 days' leave to file a Fourth Amended Complaint by failing to timely serve a notice of ruling of the sustaining of the demurrer to his Third Amended Complaint.⁵

DISCUSSION

1. Standard of Review

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*McCall v. PacificCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We construe the pleading in a reasonable manner and read the allegations in context. (*Ibid.*) We must affirm the judgment if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court's stated reasons. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

It is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable probability that the defect can be cured by amendment. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.) The plaintiff has the burden to show how the complaint could be amended to cure any defect. (*Ibid.*) The plaintiff can make that showing for the first time on appeal. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.)

⁵ We will disregard any additional points argued for the first time in Nelson's reply brief, including his challenges to the sustaining of the demurrer to his count for intentional infliction of emotional distress, the denial of his request for entry of default, and other rulings. Nelson has shown no reason for us to deviate from the usual rule that a reviewing court will not consider arguments raised for the first time in a reply brief. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 362, fn. 18.)

2. *An Appealed Judgment Is Presumed Correct and the Appellant Must Affirmatively Show both Error and Prejudice*

An appealed judgment is presumed correct, a reviewing court must indulge all intendments and presumptions in favor of the judgment on matters on which the record is silent, and the appellant must affirmatively demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Accordingly, we must presume that the evidence supports the judgment unless the appellant affirmatively demonstrates to the contrary. (*Ibid.*)

An appellant bears the burden to show not only that the trial court erred, but also that the error was prejudicial in that it resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) An error is prejudicial and results in a miscarriage of justice only if the reviewing court concludes, based on its review of the entire record, that it is reasonably probable that the trial court would have reached a result more favorable to the appellant absent the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

3. *The Trial Court Properly Sustained the Demurrer to the Fraud Count*

The essential elements of a cause of action for intentional misrepresentation are (1) the defendant made a false representation of fact; (2) the defendant knew the representation was false at the time it was made; (3) the defendant intended to induce the plaintiff's reliance; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered damages as a result. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.) The essential elements of a cause of action for fraudulent concealment are (1) the defendant concealed or suppressed a material fact; (2) the defendant had a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known the fact; and (5) the plaintiff suffered damages as a result. (*Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862, 870.)

The plaintiff must plead each element of fraud with specificity. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216–217.) “ ‘[G]eneral and conclusory allegations’ ” are insufficient. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.) The policy of liberal construction of the pleadings ordinarily is inapplicable to fraud. (*Ibid.*) This specific pleading requirement helps the court to separate meritorious claims from nonmeritorious claims. (*Ibid.*)

Nelson alleges in his Fourth Amended Complaint that on January 10, 2011, Darryl Lucien falsely represented that the substitution of attorney form was filed on January 6, 2011. Nelson alleges that he relied on that representation in refraining from asserting in court on January 10, 2011, that he did not intend to settle and failing to communicate directly with opposing counsel. Nelson also alleges that he signed the settlement agreement on January 12, 2011, although he later attempted to withdraw his assent. A request for dismissal was filed on February 14, 2011, and the court clerk entered a dismissal on that date.

Nelson fails to adequately allege how the representation on January 10, 2011, that the substitution of attorney form had been filed was a substantial factor in causing him damages. Even if the alleged representation caused him to refrain from informing the court on that date that he did not intend to settle, he later signed the settlement agreement. The subsequent dismissal resulted from his signing the settlement agreement and did not result from the alleged representation that the substitution of attorney form had been filed. Moreover, he fails to allege that but for the settlement he would have obtained a more favorable result than the settlement he received.

Nelson also appears to allege that Darryl Lucien concealed certain provisions in the settlement agreement. He alleges that after signing the agreement he discovered that the settlement agreement filed with the court included an additional provision relieving his former employer of liability for any loss of Medicare and Social Security benefits that he might sustain as a result of the agreement. But he fails to allege that he has suffered a loss of such benefits and that but for the provision in the settlement agreement relieving his former employer from liability for such losses he would have

obtained a more favorable result than the settlement he received. He also alleges that the settlement agreement filed with the court included an additional provision stating that he had 21 days to consider the agreement before signing it, but he fails to allege that but for the alleged concealment of that provision he would have obtained a more favorable result.

We therefore conclude that Nelson fails to adequately allege the essential element of damages resulting from the alleged misrepresentation and concealment. Nelson's first and second contentions fail to address this deficiency, and he has shown no error in the trial court's ruling. The trial court properly sustained the demurrer to Nelson's fraud count. Nelson has not explained how he could amend his complaint to correct this deficiency, so he is not entitled to leave to amend.⁶

4. *The Trial Court Properly Sustained the Demurrer to the Legal Malpractice Count*

The essential elements of a cause of action for legal malpractice arising from civil litigation are (1) the attorney's duty to use a level of skill, prudence, and diligence commonly possessed and exercised by attorneys; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200.) The plaintiff suffered damage only if he or she would have obtained a more favorable result but for the defendant's negligence. (*Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 248.)

Nelson alleges that he lost his day in court as a result of Defendants' conduct, but he does not allege that he would have obtained a more favorable settlement or a better result at trial than the settlement he received but for the settlement. He therefore alleges no cognizable damages. Nelson's first and second contentions fail to address this deficiency, and he has shown no error in the trial court's ruling. The trial court properly

⁶ In light of our conclusion that Nelson fails to adequately allege the essential element of damages resulting from the alleged misconduct, we need not address the other elements.

sustained the demurrer to the legal malpractice count. Nelson does not claim that he could amend his complaint to correct this deficiency, so he is not entitled to leave to amend.⁷

5. *Nelson Has Not Shown that the Prior Demurrer Was Untimely*

Nelson contends the demurrer to the First Amended Complaint was untimely because the demurrer was filed more than 30 days after he filed the First Amended Complaint. According to Nelson, he filed the First Amended Complaint on February 14, 2012, and the defendants filed a demurrer on July 13, 2012.

The appellate record shows that Nelson filed the original complaint, not the First Amended Complaint, on February 14, 2012. The appellate record also includes a file-stamped copy of “Plaintiff’s 1st Amended Complaint” filed on April 4, 2012, although the document is not listed in the register of actions. Nelson filed a proof of service by mail on May 11, 2012. The trial court ordered him to effect proper service. On June 15, 2012, he filed a proof of personal service, according to the register of actions. The proof of personal service itself is not included in the appellate record. The defendants filed a demurrer to the complaint on July 13, 2012, and the trial court sustained the demurrer with leave to amend on August 30, 2012.

The 30-day period to file a demurrer to a complaint runs from the date of service, and not the date of filing. (Code Civ. Proc., § 430.40.) The appellate record does not disclose the exact date of service. We therefore presume in accordance with the presumption in favor of the judgment, discussed *ante*, that the demurrer was timely filed within 30 days after the date of service. Nelson has shown no error.

Moreover, Nelson has not shown that he raised the issue of the timeliness of the demurrer in the trial court by moving to strike the demurrer (see 5 Witkin, Cal. Procedure, Pleading, § 979, pp. 392-393) and fails to explain how he was prejudiced by the sustaining of a demurrer with leave to amend. We therefore conclude

⁷ In light of our conclusion that Nelson fails to adequately allege the essential element of damages resulting from the alleged negligence, we need not address the other elements.

that he forfeited any claim of error based on the purported untimeliness of the demurrer (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1) and that he has shown no prejudice in any event.

6. *Nelson Has Not Shown Error Relating to the Notice of Ruling*

Nelson contends the defendants deprived him of the full 10 days' leave to file an amended complaint by failing to timely serve a notice of ruling of the sustaining of the demurrer to his Third Amended Complaint. According to Nelson, the defendants filed a notice of ruling on November 2, 2012, but he was not served with the notice, they filed an amended notice of ruling on November 7, 2012, and he received the amended notice of ruling on November 9, 2012.

The register of actions shows that the two notices of ruling were filed on the stated dates. The notice of ruling is included in the appellate record, but the amended notice of ruling is not included in the record, and there is no indication in the record of when the amended notice of ruling was served.

When a demurrer is sustained with leave to amend the time to amend runs from the date the notice of ruling is served, unless notice is waived and the waiver is entered in the minutes. (Code Civ. Proc., § 472b.) If, as Nelson argues, he was not served with the original notice of ruling, the time to file an amended complaint began to run on the date of service of the amended notice of ruling, and not before. The failure to serve a notice of ruling sooner did not reduce the time for Nelson to file an amended complaint. Moreover, Nelson filed his Fourth Amended Complaint on November 14, 2012, and he has not shown that the failure to serve a notice of ruling sooner prejudiced him in any manner.

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

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JONES, J.*

WE CONCUR:

EDMON, P. J.

ALDRICH, J.

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