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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

VALI KERMANI, Plaintiff and Appellant, v. THE PEOPLE ex rel. DEPARTMENT OF HEALTH AND HUMAN SERVICES AGENCY et al., Defendants and Respondents.	B237728 (Los Angeles County Super. Ct. No. BC442571)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Law Offices of Motaz M. Gerges and Motaz M. Gerges for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Kathleen Kenealy, Chief Assistant Attorney General, Pamela J. Holmes and Elizabeth G. O'Donnell, Deputy Attorneys General, for Defendants and Respondents.

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The trial court sustained without leave to amend the demurrer of the State of California to Dr. Vali Kermani's second amended complaint for violation of his civil rights in connection with the inspection and re-certification of medical testing laboratories and dismissed the action as to it. The court also sustained without leave to amend the demurrers of Kim Belshe and Donna McCallum to all causes of action in Kermani's second amended complaint naming them as defendants except the fifth (violation of 42 U.S.C. § 1981) as to which it sustained the demurrer with leave to amend. After Kermani failed to file an amended pleading, the court dismissed the entire action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Kermani filed his original complaint on July 28, 2010 against Belshe in her then official capacity as Secretary of the California Health and Human Services Agency,[1] as well as four other state officials in their official capacities with that agency or the California Department of Public Health, alleging causes of action for violation of his due process rights under the United States and California Constitutions, violation of his equal protection rights under the Fourteenth Amendment to the United States Constitution, discrimination in violation of the Medicaid laws (Title VI) and public policy and federal civil rights violations. In brief, the complaint identified Kermani as a respected scientist "whose national origin is Iran and religion is Islam" and the main shareholder and operator of Immuno Biogene Laboratory, Inc. (IBL) and Bio-Trans Laboratory, Inc. (Bio-Trans). Kermani alleged IBL was "forcefully closed" in 2001 after 16 years of laboratory practice as the result of discriminatory and retaliatory actions by the defendants or individuals under their supervision. Bio-Trans was similarly subjected to discriminatory actions in 2008-2009 by inspectors from the Laboratory Field Services (LFS) division of the Department of Public Health who were evaluating its continued eligibility for certification as a clinical testing laboratory. Bio-Trans was closed shortly after the

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[1] Belshe was replaced as Secretary of the Health and Human Services Agency by Diana S. Dooley in December 2010.

inspection. The complaint sought recovery of special and general damages and attorney fees using a lodestar multiplier of 2.5.

Belshe demurred to the complaint. In response Kermani filed a first amended complaint on February 1, 2011, adding IBL and Bio-Trans as plaintiffs; naming McCallum, the chief of LFS, as a defendant "in her individual capacity," but omitting the other officials identified in the original complaint; and including as defendants the State of California, the California Department of Public Health; the California Department of Health Care Services and LFS. The first amended complaint again sought damages for race-, national origin- and religion-based discrimination in connection with the 2001 inspection of IBL and the 2008-2009 inspection of Bio-Trans, but now asserted 23 causes of action including a variety of state statutory and tort theories of recovery.

Belshe again demurred, as did the State, acting by and through the various named agencies and departments, and McCallum. After full briefing and oral argument the court sustained the demurrers as to all causes of action with leave to amend.

On May 31, 2011 Kermani filed a second amended complaint asserting 15 causes of action against the same defendants as had been named in his first amended complaint, but once again identifying only himself as a plaintiff. In addition to special and general damages and attorney fees, the prayer for relief sought punitive damages and injunctive relief.

Belshe and McCallum jointly demurred to the second amended complaint (the first through eleventh and fifteenth causes of action) on June 21, 2011. On the same day the State, acting by and through the various named agencies and departments, also demurred to the second amended complaint (the tenth and twelfth through fifteenth causes of action). Hearing on both demurrers was set for July 14, 2011—16 court days from the date of filing and personal service on Kermani's counsel.

On July 7, 2011 Kermani filed an opposition and request to strike the demurrers, asserting the filings were procedurally defective because they had not been served and

filed in conformity with Code of Civil Procedure section 1005, subdivision (b).[2] This faulty argument, presented in what the trial court accurately described as a "rather snarky" and "unprofessional" manner,[3] was apparently based on both the mistaken belief the demurrers had been served by mail[4] and a miscalculation of the number of court days between June 21 and July 14, 2011.[5] Kermani did not present any substantive legal arguments in opposition to Belshe's, McCallum's and the State's demurrers or suggest

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[2] Code of Civil Procedure section 1005, subdivision (b), provides, "Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing. . . . However, if the notice is served by mail, the required 16-day period of notice before the hearing shall be increased by five calendar days if the place of mailing and the place of address are within the State of California, . . . and if the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the hearing shall be increased by two calendar days."

[3] For example, after asserting that the hearing should not have been scheduled earlier than July 20, 2011, Kermani stated, "Although, it is not cleared [*sic*] by the counting methods, whose fingers and toes Defendants have used to come up with the scheduling date of July 14, 2011, Plaintiffs recommend that in the future, Defendants to use either a calculator or an actual calendar to determine the rule counting days scheduling a hearing for a motion." Kermani also argued the purported miscalendaring was intentional: "Defendants masterminded this desperate and unscrupulous technique while they scheduled the Defective Motion to limit Plaintiffs' abilities to challenge them in a fair and just arena." And he complained the purported failure to provide adequate notice was "another extension of Defendants' dishonest and culpable conducts that are sanctionable in accordance with rule 128.7 of Rules of Civil Procedures. . . . IGNORANCE is not an excuse and Defendants Attorney cannot plead IGNORANCE!"

[4] Kermani's written opposition states the demurrers were served by mail. At the hearing Kermani's counsel explained, "I thought it was mailed—the proof of service said it was mailed, but then, later on, I found out it was done by personal delivery." Contrary to this representation to the court, both sets of demurrers expressly stated they were being personally served.

[5] Although incorrectly insisting he was entitled to the additional notice for service by mail, Kermani also asserted there were only 15 court days between June 21, 2011 and July 14, 2011 in light of the July 4th holiday. In fact, there are 16 court days, whether counting forward from service to the hearing date or back from the hearing date, as counsel for the State demonstrated in her reply papers.

that further amendments could be made to cure any deficiencies the court might perceive in his pleading.

Belshe, McCallum and the State filed replies to the opposition, explaining that the demurrers had been timely filed and served and noting that Kermani's opposition, in addition to failing to substantively address any of the legal or factual defects identified in the demurrers, was itself late.

The court prepared a lengthy tentative ruling, provided to the parties before the hearing, in which it indicated the State's demurrer would be sustained with leave to amend as to the tenth cause of action to assert a claim under title 42 United States Code section 1983 (42 U.S.C. § 1983), rather than directly under the Fourteenth Amendment, if such a claim would not be duplicative of the section 1983 claims against the individual defendants. All other causes of action against the State were to be sustained without leave to amend based on Kermani's failure to comply with the Government Claims Act as a necessary precondition to his state law claims (breach of contract, quantum merit and unjust enrichment) and the absence of an on-going dispute required for his request for declaratory relief. The tentative ruling indicated the demurrers of Belshe and McCallum would be sustained without leave to amend as to the sixth, eighth and fifteenth causes of action; sustained with leave to amend as to the fifth, seventh and tenth causes of action, and overruled as to the first, second, third, fourth, ninth and eleventh causes of action.

At oral argument on July 14, 2011 Deputy Attorney General Elizabeth O'Donnell, counsel for Belshe, McCallum and the State, argued the demurrers should be sustained without leave to amend as to all causes of action. O'Donnell identified inconsistencies between the court's prior ruling sustaining the demurrers to the first amended complaint and its tentative ruling (that is, factual allegations found insufficient in the earlier ruling had not been modified in any substantive manner, yet now tentatively found to be adequate), internal inconsistencies within the tentative ruling itself and an apparent legal error in allowing a state employee to be named in her official capacity in a cause of action based on 42 U.S.C. § 1983.

The court acknowledged it had not had adequate time to analyze all the issues presented by the demurrers and agreed to take the matter under submission to consider the points that had been raised. Before recessing, however, the court asked Motaz Gerges, counsel for Kermani, if he had anything he wanted to say in response to O'Donnell's arguments. Gerges again made no substantive comments in opposition to the demurrers but stated he would like an opportunity to file a third amended complaint: "We can plead a lot more facts based on the argument today."

The court issued its final ruling as to Belshe and McCallum in a minute order on July 18, 2011, reversing in part its tentative ruling and sustaining the demurrer without leave to amend to all but two causes of action. The court found the first, third, fourth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action—all based on title 42 United States Code sections 1983, 1985, 1986—barred by operation of the Eleventh Amendment. It found the second cause of action based on Title VI of the United States Code could not be asserted against individuals who do not receive federal funding. The court ruled the fifth cause of action for violation of title 42 United States Code section 1981 failed to plead facts to support the cause of action but granted Kermani leave to amend.[6]

Kermani did not avail himself of the limited opportunity he was given to file a third amended complaint, a failure noted at the case management conference on August 29, 2011. The court set an order to show cause re dismissal for failure to file an amended complaint for September 20, 2011. Once again, no amended pleading was

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[6] As it had initially with respect to the State of California, the court appeared to grant leave to amend the 10th cause of action for violation of the equal protection clause as to Belshe and McCallum to the extent the claim could properly be pleaded as a violation of 42 U.S.C. § 1983, rather than a direct action based on the Fourteenth Amendment. However, because the court also ruled any section 1983 claim was barred by the Eleventh Amendment, for all practical purposes the demurrer as to this cause of action was sustained without leave to amend—a consequence recognized in the notices of ruling that were subsequently filed without objection.

forthcoming; and the case was dismissed. On September 30, 2011 the court signed a judgment of dismissal as to the entire action. Kermani filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

Generally, on appeal from an order dismissing an action after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We may also consider matters that have been judicially noticed. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; see *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) We give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." (*Aubry*, at p. 967; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; see *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20 [demurrer tests sufficiency of complaint based on facts included in the complaint, those subject to judicial notice and those conceded by plaintiffs].) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

2. *Kermani Has Forfeited Any Claim the Trial Court Erred in Sustaining the Demurrers Without Leave To Amend*

Kermani's opening brief contains a lengthy description of the allegations in the second amended complaint, a summary of the procedural history of the action and a discussion of the standard of review on appeal from an order dismissing a lawsuit after a demurrer has been sustained without leave to amend. Then, in a sparse three lines he asserts in conclusory fashion, "It is clear from the second amended complaint, Appellant has suffered severe discrimination, harassment, violation of his civil rights and ha[s] stated sufficient facts to state each cause of action." The brief does not address the trial court's rulings concerning the Eleventh Amendment, the Government Claims Act, the

limited scope of Title VI in this context or otherwise identify in what way the court's analysis in its written final ruling was incorrect; nor does it provide any factual or legal analysis or citation to relevant case authority to support its argument dismissal of the action should be reversed.

This cursory claim of error is wholly inadequate. Because the trial court's judgment of dismissal is presumptively correct (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133) and Kermani has failed to provide any meaningful argument challenging the court's final ruling, we consider his arguments forfeited or abandoned. (See *In re Sade C.* (1996) 13 Cal.4th 952, 954 [if appellant fails to raise claims of reversible error, supported by argument and authority, he may, in the court's discretion, be deemed to have abandoned his appeal]; *Gunn v. Mariners Church, Inc*. (2008) 167 Cal.App.4th 206, 218 [argument on appeal deemed forfeited by failure to present factual analysis and legal authority on each point raised]; see also *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [appellate court is not required to discuss or consider points that are not supported by citation to authorities or the record]; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546.)

The gross deficiencies in Kermani's opening brief[7] are in no way cured by his attempt to "adopt[] by this reference the Trial Court's tentative ruling." First, the incorporation of material from the trial court in an appellate brief is inappropriate. (See, e.g., *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 294, fn. 20 ["[i]t is well settled that the Court of Appeal does not permit incorporation by reference of documents filed in the trial court"]; *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 455 ["incorporation of trial court arguments in an appellate brief is inappropriate"].) Second, the trial court considered additional arguments at the hearing on the demurrers and modified its ruling in significant part; its earlier, tentative analysis does not address its final evaluation of the merits of the demurrers.

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[7] Kermani filed no reply brief.

Finally, there is no merit to Kermani's complaint he did not have a chance to argue the merits of the demurrers because his opposition was based solely on the mistaken belief the demurrers had not been properly served. Kermani, through his counsel, made a tactical decision to oppose the demurrers on procedural grounds alone. Having unsuccessfully done so, the trial court acted well within its broad discretion in refusing to allow further briefing on the substantive issues presented by the demurrers. Moreover, even when expressly invited by the court during the hearing to present any arguments he may have, Kermani's counsel simply asked for leave to file a third amended complaint without suggesting in what way further pleading could avoid the fatal flaws in his complaint, let alone providing any legal analysis that would justify overruling the demurrers.

DISPOSITION

The judgment is affirmed. The State of California, Belshe and McCallum are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.