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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

ALEX AGUILAR, Plaintiff and Appellant, v. PACIFIC CRANE MAINTENANCE COMPANY, LP, et al., Defendants and Respondents.	B281840 (Los Angeles County Super. Ct. No. BC555400)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael P. Vicencia, Judge. Affirmed.

Law Office of Richard Devirian and Richard C. Devirian; Esner, Chang & Boyer and Stuart B. Esner for Plaintiff and Appellant.

Keesal, Young & Logan, Glen R. Piper and Joshua Norton for Defendants and Respondents.

Plaintiff Alex Aguilar was injured when the crane he was operating malfunctioned. He sued Pacific Crane Maintenance Company (Maintenance Company) and Does 1 through 20 for negligence and strict liability. Almost two years later, he filed an amendment naming Shanghai Zhenhua Port Machinery Co., Ltd. (ZPMC or defendant) as a Doe defendant. ZPMC demurred, arguing that plaintiff improperly invoked the Doe defendant procedure to avoid the statute of limitations. The trial court sustained the demurrer and dismissed the action as against ZPMC. Plaintiff appeals, arguing that his complaint does not establish that he was aware of the facts giving rise to claims against ZPMC at a time that would bar his claims. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was a crane operator at Ports America in Long Beach. On May 13, 2013, he was injured while operating a crane. On August 21, 2014, he timely filed a complaint for negligence and strict liability against the Maintenance Company and 20 Doe defendants. The complaint alleged that defendants manufactured and assembled the "ZPMC crane" which was "defective." The complaint also alleged that the crane's "dangerous and/or defective and/or unsafe" characteristics were "a hazard to the health, safety and property of people exposed to its operation . . . ."

On April 25, 2016, almost two years later (and nearly three years after his injuries), plaintiff filed a form amendment under Code of Civil Procedure section 474 (section 474) adding ZPMC as a Doe defendant.[1] ZPMC demurred, arguing that the

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1 Section 474 provides that, "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint

amendment was improper because plaintiff knew of ZPMC's identity and the facts giving rise to its liability when the complaint was filed. ZPMC contended that plaintiff's claims against it were time-barred.

In opposition, plaintiff argued that because "the precise cause of his accident was unknown" when he filed his complaint, he "did not possess nor allege specific facts that would indicate legal fault on the part of the crane designer, manufacturer, and/or seller." Plaintiff also argued that he "was unaware" that ZPMC was the manufacturer of the alleged defective crane.

The trial court sustained ZPMC's demurrer without leave to amend, concluding that "the complaint indicates that the crane [was] manufactured by the defendant . . . that there was a defect in the crane, in the design of the crane. . . . Since it's clear from the filing of the complaint that there was far more than a suspicion not only as to this defendant but as to the facts that gave rise, I think it's pretty clear that the Doe amendment does not relate back . . . ." Plaintiff timely appealed.

DISCUSSION

1. *Applicable Law*

"Section 474 allows a plaintiff who is ignorant of a defendant's identity to designate the defendant in a complaint by a fictitious name (typically, as a 'Doe'), and to amend the pleading to state the defendant's true name when the plaintiff subsequently discovers it." (*McClatchy v. Coblentz, Patch, Duffy & Bass, LLP* (2016) 247 Cal.App.4th 368, 371.) "The purpose of the statute is to enable a plaintiff to commence an action before it

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. . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly . . . ."

has become barred by the statute of limitations due to plaintiff's ignorance of the identity of the defendant . . . . [Citation.]" (*Wallis v. Southern Pac. Transportation Co.* (1976) 61 Cal.App.3d 782, 786 (*Wallis*).)

When " 'a lawsuit is initiated within the applicable period of limitations against someone . . . and the plaintiff has complied with section 474 by alleging the existence of unknown additional defendants, the relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is *what facts the plaintiff actually knew* at the time the original complaint was filed.' [Citation.]" (*McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942 (*McOwen*).) " 'Section 474 allows a plaintiff in good faith to delay suing particular persons as named defendants until he has knowledge of *sufficient facts* to cause a reasonable person to believe liability is probable.' [Citation.]" (*Id.* at p. 943, italics added.)

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) "We [] review the complaint de novo to determine . . . whether the trial court erroneously sustained the demurrer as a matter of law. [Citation.]" (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) Determining whether a plaintiff was ignorant of a Doe defendant's identity under Code of Civil Procedure section 474 may or may not involve a factual determination. To the extent the trial court made factual findings, we will affirm if they are supported by substantial evidence. Here the question is whether the complaint discloses

on its face that the plaintiff had legally sufficient knowledge of the Doe defendant at the time of the original complaint. The trial court's conclusions on that point are subject to de novo review. (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1169.)

2. *Plaintiff Was Aware of ZPMC's Identity and Sufficient Facts That Would Cause a Reasonable Person to Believe Liability Was Probable at the Time He Filed the Complaint*

The sole issue on appeal is whether plaintiff's amendment of the complaint adding ZPMC as a Doe defendant avoided the statute of limitations by relating back to the date of the filing of the original complaint. Plaintiff argues that the complaint did not "establish" "that he was aware that the crane was manufactured by [ZPMC]" or "of the facts giving rise to a cause of action against [ZPMC] when the original action was filed." We disagree.

Plaintiff was injured in a crane accident on May 13, 2013. The statute of limitations for his personal injury action expired on May 13, 2015. (Code Civ. Proc., § 335.1.) He timely filed his complaint on August 21, 2014. The amendment naming ZPMC was not filed until April 2016, almost a year after the statute of limitations had run. Accordingly, if the amendment does not relate back, plaintiff's claims against ZPMC are time-barred.

Plaintiff's original complaint alleged that the crane that caused plaintiff's accident was "known as the ZPMC crane" and was "defective." Plaintiff therefore knew defendant's acronym, that the crane was known under defendant's acronym, and that the crane was defective. According to the complaint, plaintiff was also aware that the crane's "dangerous and/or defective and/or unsafe" characteristics were "a hazard to the health, safety and property of people exposed to its operation . . . ." These were

"sufficient facts to cause a reasonable person to believe liability is probable." (*McOwen*, *supra*, 153 Cal.App.4th at p. 943.) Therefore, we conclude that plaintiff could not use a Doe amendment to add ZPMC to the complaint to toll the statute of limitations.

3. *Leave to Amend*

Plaintiff requests leave to amend to allege that his counsel "first learned of a potential product liability theory against [ZPMC]" in April 2016.

It is "an abuse of discretion to sustain demurrers without leave to amend if there is a reasonable possibility that the plaintiff can amend the complaint to cure its defects. [Citations.] To meet the plaintiff's burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court. [Citations.]" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.) When seeking leave to amend for the first time on appeal, it remains the plaintiff's burden to demonstrate that "an amendment would cure the legal defect." (*Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1132.)

Plaintiff cites to a declaration his counsel filed in the trial court which stated that "plaintiff's counsel ha[d] had a bad experience" trying to enforce a judgment against a different "Chinese defendant" in a separate action; "no execution has been possible because the Chinese Courts will only enforce a Judgment if by a Trial not by a Default!" "Once the declarant [plaintiff's counsel] learned of a viable product liability theory," and that a

local firm was representing ZPMC in a different case in which they were "going to provide an answer on behalf of [ZPMC]," counsel "promptly filed a Doe Amendment on April 25, 2016."

Plaintiff argues he could amend the complaint to incorporate these allegations. Plaintiff says this declaration shows he "was ignorant of [ZPMC] and its role in causing plaintiff's injuries until shortly before the Doe Amendment was filed . . . ." The declaration does nothing of the sort. The declaration does not state that plaintiff was unaware until 2016 that ZPMC manufactured the crane at issue or that the crane was defective. Rather, the declaration indicates that plaintiff's counsel was discouraged from filing suit against ZPMC because of his "bad experience" in being unable to collect a judgment against a different Chinese entity. Once plaintiff's counsel discovered that ZPMC had local counsel, *and* once he learned of a potential legal theory against ZPMC, *then* he filed the Doe Amendment.

That plaintiff's counsel learned a new theory under which ZPMC could be liable, and that counsel gained confidence in his ability to enforce a judgment against ZPMC, is irrelevant to whether plaintiff was aware of sufficient *facts* to alert him to believe that ZPMC was liable. Plaintiff does not explain what this "new theory" is. Nor does he inform us how the synergy of knowledge of ZPMC's identity, ZPMC's role as manufacturer of a defective crane, and that the crane's defects "were 'a hazard to the health, safety and property of people exposed to its operation' . . ." were not sufficient to put him on notice of ZPMC's probable

liability. Thus, plaintiff has not shown that he could cure the defects of the complaint if leave to amend were granted.[2]

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

GOODMAN, J.*

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[2] ZPMC's request for judicial notice of plaintiff's discovery requests and responses is denied.

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