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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GREGG M. LOSONSKY,

Plaintiff and Appellant,

v.

TEKTRONIX, INC.,

Defendant and Respondent.

B256221

(Los Angeles County
Super. Ct. No. BC442120)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Robert L. Hess, Judge. Affirmed.

Gregg M. Losonsky, in pro. per., Plaintiff and Appellant.

Stoel Rives, Anthony J. DeCristoforo and Bao M. Vu for Defendant and
Respondent.

Gregg M. Losonsky appeals the trial court's dismissal of his action for civil rights violation and wrongful termination after the trial court sustained respondent's demurrer to his third amended complaint (TAC). We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Prior Appeal: Appellant's First Amended Complaint (FAC)

Appellant's Judicial Council form complaint filed July 22, 2010 in propria persona alleged claims against Davis Instruments, Inc.¹ for civil rights violation and wrongful discharge. Appellant worked as a calibration technician for respondent (initially sued as Davis Instruments) for seven months. During this time, appellant requested a leave of absence because his wife was pregnant. He did not qualify for leave under the Family Medical Leave Act (29 U.S.C. § 2601 et seq.) (Family Leave Act), but respondent gave him an unpaid leave of absence. On April 16, 2009, about two weeks before appellant's leave was to begin, he was involved in an automobile accident. Appellant's doctor certified that he could work with restrictions, and respondent approved an extension of his leave of absence. Appellant filed a state disability claim on May 9, 2009.

Although appellant was scheduled to return to work on July 20, 2009, his doctor had not released him by that date. On July 23, 2009, appellant provided documentation from his lawyer and doctor stating that appellant could not return to work until August 14, 2009 because he was disabled. On October 8, 2009, appellant's doctor released him to return to work. However, respondent had terminated appellant effective July 24, 2009.

Appellant sought unemployment benefits. On June 2, 2010, the Unemployment Insurance Appeals Board (Board) found appellant entitled to benefits because he had not willfully breached an obligation to his employer, and appellant had been discharged for reasons other than misconduct related to his work. The Board ruled that appellant was

¹ On December 22, 2010, appellant filed an amendment to his complaint in order to amend the name of defendant Davis Instruments to Tektronix Service Solution. On February 17, 2011, appellant filed an amendment to his complaint to correct the name of Tektronix Service Solution to Tektronix, Inc. (Tektronix).

entitled to benefits from August 2, 2009 until the disqualifying condition no longer existed.

On April 29, 2011, respondent demurred to the complaint. Respondent contended that appellant did not, as required by the judicial council form, attach any pages to his complaint supporting his causes of action, and did not allege any facts supporting a claim against any person or entity. At the July 25, 2011 hearing, the trial court gave appellant 30 days leave to amend.

On September 27, 2011, appellant filed his (FAC) alleging claims for civil rights violation and wrongful discharge. The FAC alleged that appellant was involved in an automobile accident on April 16, 2009 on his way to a customer, but respondent did not have him file an accident report; further, respondent denied him worker's compensation and ignored state and federal laws protecting appellant's rights while on disability.

On November 7, 2011, respondent moved to strike appellant's FAC under Code of Civil Procedure section 436² because the FAC was not timely filed within 30 days of July 25, 2011. The trial court granted the motion.

On January 23, 2013, this court reversed the trial court's dismissal of appellant's FAC. (*Losonsky v. Tektronix, Inc.* (Jan. 23, 2013, B239696) [nonpub. opn.].) Remittitur issued on March 27, 2013.

2. Current Appeal: Appellant's Third Amended Complaint (TAC)

On April 26, 2013, appellant filed another "First Amended Complaint" that alleged claims for wrongful discharge and civil rights violation, asserting substantially the same facts as the FAC filed September 27, 2011.

On August 19, 2013, appellant filed a Second Amended Complaint, alleging claims for (1) violation of public policy, (2) intentional misrepresentation, (3) breach of the covenant of good faith and fair dealing, (4) breach of employment contract, (5) failure to indemnify, (6) failure to report, (7) fraudulent concealment, (8) intentional infliction of

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

emotional distress, (9) unfair business practices, (10) economic losses, (11) violation of Fair Employment and Housing Act, (12) violation of California Family Rights Act, (13) retaliation, and (14) discrimination. In support of his first, third, and fourth causes of action, appellant asserted that he was involved in an automobile accident on April 16, 2009 and that he “disagrees with defendants [about defendant’s] duty [to] fil[e an] accident report and recalibration reports on equipment [appellant was carrying] in [his] vehicle [because] [g]overnmental regulation[s] require filing reports involving metrology related transport incidents pursuant to statutes.” Appellant also asserted he was required to pick up furniture at work although he had been placed on light duty by his physician, and that he was terminated after returning from leave and being placed on disability by his physician.

The trial court sustained respondent’s demurrer with leave to amend on the first, third, and fourth causes of action, and sustained it without leave to amend on the remaining causes of action, finding that the “Second Amended Complaint is largely unintelligible.” The court stated that this would be appellant’s last opportunity to state a claim.

On December 16, 2013, appellant filed a TAC stating a claim for wrongful discharge (violation of public policy, breach of employment contract, and breach of covenant of good faith and fair dealing). The TAC alleged that appellant had reported to the National Institute of Standards and Technology that respondent failed to report and recalibrate the equipment that appellant had been carrying in his car that appellant used in his employment when it was involved in an automobile accident; appellant was hired as a field service calibration technician and was required to travel and provide his own vehicle and was provided with an employee handbook; and appellant was involved in an automobile accident for which respondent had failed to indemnify him. Appellant also alleged an oral contract for respondent to provide him with an automobile to use in his employment, that respondent provided appellant with an employee handbook at the time of his employment and such handbook provided for at-will termination without good

cause, and that plaintiff asserted a *Tameny*³ claim for wrongful termination in violation of public policy.

Respondent demurred, arguing appellant's claims were barred by the two-year statute of limitations, appellant failed to allege any employment contract, or allege that he engaged in any protected activity with a causal link between such activity and his termination.

Appellant asserted in his opposition that his TAC referred to facts asserted in his FAC and was therefore timely under the relation-back doctrine; and he sufficiently alleged he engaged in protected activity and that such protected activity was causally related to respondent's adverse employment action.

In reply, respondent pointed out that appellant did not dispute his claims were governed by a two-year statute of limitations, and that such statute commenced running on July 23, 2009, and none of the claims of the TAC related back to the original complaint because they were based upon new facts (namely, the obligation to report that uncalibrated equipment was in appellant's vehicle at the time of the car accident and the existence of an employment contract). Further, appellant's causes of action failed because appellant failed to identify any public policy supporting his claims; appellant failed to allege the existence of a contract or the employment conditions respondent violated; and without a contract, there could be no violation of the implied covenant.

Appellant failed to appear for the hearing, asserting that an emergency with his 78-year-old mother precluded him from attending, and the court sustained the demurrer without leave to amend.

DISCUSSION

Appellant asserts that the relation-back doctrine applies to save his claims from the bar of the statute of limitations, and that the trial court erred in finding his claims failed to state a cause of action.

I. Standard of Review

³ *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 176.

“The function of a demurrer is to test the sufficiency of a pleading as a matter of law,” and we apply the de novo standard of review in an appeal following the sustaining of a demurrer without leave to amend. (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A complaint “is sufficient if it alleges ultimate rather than evidentiary facts,” but the plaintiff must set forth the essential facts of his or her case “““with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source, and extent””” of the plaintiff’s claim. Legal conclusions are insufficient. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 & 551, fn. 5.) “We assume the truth of the allegations in the complaint, but do not assume the truth of contentions, deductions, or conclusions of law.” The trial court errs in sustaining a demurrer “if the plaintiff has stated a cause of action under any possible legal theory, and it is an abuse of discretion for the court to sustain a demurrer without leave to amend if the plaintiff has shown there is a reasonable possibility a defect can be cured by amendment.” (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

II. The Statute of Limitations Bars Plaintiff’s Claims Based on Oral Contract and Civil Rights Violations

With respect to breach of an employment contract, the two-year statute governing oral contracts and the four-year statute governing written contracts applies. (§ 337.) A tort action for wrongful discharge in violation of public policy is subject to the two-year statute governing personal injury actions generally. (§ 339.) The statutes of limitations applicable to civil rights claims arising under California law depend on whether the liability is created by statute or common law. If the action arises from common law, the action is subject to a two-year statute of limitations; if a statute creates a new liability that did not exist at common law, the action is subject to the three-year statute of limitations applicable to “liability created by statute.” (§ 338, subd. (a); *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 759.)

An amended complaint supersedes the original complaint. (*Foreman & Clark Co. v. Fallon* (1971) 3 Cal.3d 875, 884.) The amendment has the effect of a waiver because when the trial court sustains a demurrer with leave to amend, the plaintiff has two options: the plaintiff can stand on the complaint and appeal the judgment sustaining the demurrer, or amend the complaint. Amendment constitutes an admission the original pleading was deficient and thereby waives review of any claimed error. Thus, an amended complaint is considered a new action for purposes of the statute of limitations only if the claims do not relate back to an earlier, timely-filed complaint. Under the relation-back doctrine, an amendment relates back to the original complaint if the amendment: “(1) rest[s] on the same general set of facts, (2) involve[s] the same injury, and (3) refer[s] to the same instrumentality” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408–409, italics omitted.)

The relation-back doctrine “focuses on factual similarity rather than rights or obligations arising from the facts.” (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 266.) In determining whether an amended complaint alleges facts sufficiently similar to those in the original complaint, the issue is whether the original complaint gives defendant adequate notice of plaintiff’s claims. (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 277.) However, the plaintiff may change the legal theory underlying his or her cause of action as long as the “operative facts” (charging allegations) are the same in both pleadings. A change in legal theories includes a change from a common law to a statutory cause of action. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1199–1200.) An amendment seeking new damages “relates back” to the original complaint if those damages resulted from the same operative facts previously alleged—i.e., the same misconduct and same injury. (*Id.* at p. 1200.) Where the original complaint fails to meet minimal fact-pleading requirements, an amended complaint may not relate back because it is impossible to conclude they are based on the “same general set of facts.” (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 417.)

Appellant's injury occurred at the latest on July 24, 2009, when he was terminated. Initially, he sought recovery based upon the Family Leave Act and his disability, but dropped those allegations from his TAC filed December 16, 2013. Instead, appellant's TAC asserted claims based upon the April 2009 accident during his employment that caused his instruments to lack the proper calibration necessary for appellant to perform his work. As we consider only the superseding allegations of the TAC, and appellant's current claims do not involve his disability and Family Leave Act, they therefore do not relate back to the filing of the original complaint. As such, his claims filed more than four years after the incidents at issue are untimely under any theory of recovery: two years for oral contract and certain civil rights violations; three years for other civil rights violations, and four years for any alleged written contract based upon the employee handbook.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.*

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