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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

RONNI PAER, Plaintiff and Appellant, v. ROBERT A. KOENIG, et. al., Defendants and Respondents.	B263625 (Los Angeles County Super. Ct. No. BC541846)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Reversed and remanded.

David A. Cordier, for Plaintiff and Appellant.

Robert A. Koenig, in pro. per., for Defendant and Respondent Robert A. Koenig.

Plaintiff and appellant Ronni Paer (Paer) sued defendants and respondents Payman Zargari (Zargari), Robert Koenig (Koenig), Mohammad Seddighi (Seddighi), Traffic Ticket Assist, Inc., Traffic Ticket Justice.Com, Inc., and unidentified "Does" (referred to together as defendants).[1] Paer, an attorney, alleged that defendants, who are attorneys and a paralegal at a law firm, owed her wages for representing their clients at court appearances. The trial court sustained—without leave to amend—Koenig and Zargari's demurrer as to two causes of action in Paer's first amended complaint (FAC). The court overruled the demurrer as to the remaining three causes of action in the FAC. Despite denying leave to amend on the two causes of action for which it sustained the demurrer, the court set a deadline for filing a second amended complaint. Paer did not file a second amended complaint, and the court dismissed the entire action on Koenig's ex parte motion. We consider whether Paer's failure to file another amended complaint warranted dismissal.

BACKGROUND

A. Complaint

Defendants Zargari and Koenig were attorneys and business partners in an entity named Traffic Ticket Justice.Com, Inc. Seddighi worked with Zargari and Koenig, apparently as a paralegal or business manager; he was not a licensed attorney. Paer filed a lawsuit against defendants on April 7, 2014. In it, she alleged defendants hired her in October 2009, pursuant to an oral agreement, to perform legal services for one or more of their law firms. According to Paer's complaint, defendants eventually fell behind in their payments to her and she subsequently quit working for defendants on May 31, 2011. As of that date, Paer claimed defendants owed her $37,100 for work performed. Defendants disputed the amount. Between the date of Paer's termination and May 11, 2012, defendants paid her $15,508.

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[1] Koenig is the sole respondent in this appeal.

Paer's lawsuit asserted five causes of action against defendants: (1) breach of contract; (2) unpaid wages in violation of Labor Code section 203; (3) common counts; (4) unfair competition under Business and Professions Code section 17200, stemming from defendants' alleged Labor Code violation; and (5) another 17200 claim, arising from defendants' alleged violations of (a) Business and Professions Code section 6125, which bars the unlicensed practice of law, and (b) the Rules of Professional Conduct, various of which prohibit attorneys from engaging in certain business and financial arrangements with non-attorneys. Paer alleged, with respect to her fifth cause of action, that Koenig and Zargari had unlawfully allowed Seddighi to provide legal advice to clients and to own equity in and exercise control over Traffic Ticket Assist and/or Traffic Ticket Justice.Com. Seddighi's role allegedly gave defendants an edge over competitors who hired licensed attorneys, presumably at higher cost, to perform the same work as Seddighi.

Paer sought damages of $21,592 plus prejudgment interest for unpaid wages, a $9,000 penalty for the alleged Labor Code violation, restitution, costs, attorneys' fees, and injunctive relief.

Seddighi answered Paer's complaint, asserting multiple affirmative defenses. Koenig demurred to the complaint, contending Paer's claims for breach of contract and Labor Code violations were untenable because she failed to establish the existence of a contract or an employment relationship. According to Koenig, Paer was only an independent contractor hired to make traffic court appearances. Koenig conceded that Paer could potentially state a claim in quantum meruit but argued that Paer had not sufficiently done so in her common counts cause of action. Zargari joined in Koenig's demurrer.

The trial court sustained the demurrer to Paer's original complaint with leave to amend. With respect to Paer's contract and common counts claims, the court instructed her to provide specific facts as to dates, the people with whom she communicated, and the content of those communications, including the nature of her services and

compensation. The court also stated that Paer's unfair competition claims did not appear to be justified by the allegations.

B. First Amended Complaint

In an effort to comply with the court's directions, Paer's FAC changed the date of the alleged oral agreement from October 2009 to "on or before July 1, 2010." The FAC also added a description of the nature of Paer's work for defendants, and it alleged that both the initial agreement and the agreement to modify Paer's compensation were reached between her and Seddighi, "who at such time was acting on behalf of all Defendants. . . . " Otherwise, the FAC was substantively identical to the original complaint, including with respect to Paer's allegations about Seddighi's unlicensed practice of law.

Koenig demurred to the FAC, contending all of Paer's causes of action failed to state a claim upon which relief could be granted. Koenig argued that Paer still could not demonstrate any binding agreement or employment relationship between her and Koenig. He also contended that the statute of limitations barred all of Paer's claims relating to breach of contract. Zargari again joined in Koenig's demurrer.

The trial court held a hearing on the demurrer to Paer's FAC on January 6, 2015. Counsel for Paer, Koenig, and Seddighi were present. The appellate record contains no transcript or settled statement of the proceedings. At the close of the hearing, the court took the matter under submission.

In a minute order issued on January 15, 2015, the trial court partially sustained the demurrer *without* leave to amend as to the second (unpaid wages) and fourth (unfair competition by reason of unpaid wages) causes of action. The court reasoned that the pleadings could not support an inference that Paer was an employee, which was a necessary element for those two causes of action predicated on alleged Labor Code violations. The court's minute order stated the FAC did not fully respond to the court's prior instructions "that specifics be provided as to all material terms of the contract (with details as ordered) and with details as to the time of breach, etc.," but the court overruled

the demurrers on counts one (breach of contract), three (common counts), and five (unfair competition). The court concluded the statute of limitations did not bar Paer's claim for breach of an oral independent contractor agreement because the debt was allegedly reaffirmed, thereby tolling the limitations period until May 2012. The court expressed doubts about the factual basis supporting the claim that Seddighi improperly engaged in the practice of law and suggested sanctions might be appropriate if that claim turned out to be frivolous; nonetheless, the trial court allowed the cause of action to stand.

The court's minute order concluded with the following statement: "The Second Amended complaint is to be filed and served within 15 days. The discovery stay previously imposed is lifted." The order provided no further instructions regarding the second amended complaint.

Paer did not file a second amended complaint by January 30, 2015, which was the last day of the 15-day period set by the court. On February 27, 2015, Koenig filed an ex parte application asking the court to dismiss Paer's FAC in its entirety for failure to comply with the court's direction to file a second amended complaint within 15 days. Koenig argued case law and Code of Civil Procedure section 581, subdivision (f)[2] allowed the trial court to dismiss Paer's action with prejudice because she failed to timely amend her complaint after the court had partially sustained Koenig's demurrer.[3]

That same day, the trial court granted Koenig's ex parte application to dismiss the complaint in its entirety. The minute order issued by the trial court reads: "EX PARTE APPLICATION OF DEFENDANT KORNIG [*sic*] TO DISMISS COMPLAINT FOR PLAINTIFF'S FAILURE TO FILE 2ND AMENDED COMPLAINT AS PER COURT ORDER OF 1/15/15. . . ; [¶] Matter is called for hearing. [¶] Plaintiff [*sic*] Ex Parte

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[2] All undesignated statutory references that follow are to the Code of Civil Procedure.

[3] Paer did not submit a written opposition to Koenig's ex parte application and did not appear at the hearing. The appellate record contains no transcript or settled statement of the hearing proceedings.

Motion is granted. The entire action is ordered dismissed per Code and case law due to plaintiff's failure to file [a] 2nd Amended Complaint."

The judgment of dismissal issued on March 11, 2015, stated in relevant part as follows: "Plaintiff's Complaint was filed April 7, 2014. Following demurrer, Plaintiff's First Amended Complaint was filed October 21, 2014. Defendant Robert Koenig moved Ex Parte for a Motion to Dismiss Plaintiff's Complaint on February 27, 2015. [¶] Based upon the moving papers, California Code of Civil Procedure and applicable case law and good cause appearing therefore: [¶] IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS: [¶] Plaintiff's Complaint is dismissed in its entirety."

DISCUSSION

Paer argues she was under no obligation to file a second amended complaint because the trial court's ruling left nothing to amend: the court overruled demurrers as to three causes of action and denied leave to amend for the two causes of action on which demurrers were sustained. Paer contends that there was therefore no basis to dismiss the entire action under section 581, subdivision (f) or the cases cited by Koenig in support of his request for dismissal. We agree the trial court erred in dismissing the action under the circumstances.

A. Adequacy of the Record

Initially, we address whether Paer's failure to provide a reporter's transcript or suitable substitute of the demurrer and ex parte hearings in the trial court requires us to affirm because the record is inadequate to warrant reversal. (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435 [trial court decision presumed correct and an appellant has an affirmative duty to show error by an adequate record].) Paer argues that rules 8.120(b) and 8.130(a)(4) of the California Rules of Court allow her to proceed without a reporter's transcript because review of the issues on appeal requires no consideration of any oral proceedings in the trial court. Rule 8.130(a)(4) permits a respondent to request

augmentation of the record at the appellant's expense, but Koenig has made no such request.

In many cases, an appellant's failure to provide a reporter's transcript of the proceedings relevant to an alleged error may prove fatal. (See, e.g., *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259 [record inadequate to show abuse of discretion].) Here, however, we conclude that the record is adequate to permit review because the facts on which the appeal turns are undisputed and our resolution of Paer's appeal ultimately depends on issues of law. Furthermore, the written rulings issued by the trial court that are in the record provide a sufficient basis for us to comprehend the reasons for the trial court's ruling.

B. Dismissal Was Not Warranted Under Code of Civil Procedure Section 581

The trial court identified the Code of Civil Procedure, case law, and Koenig's argument as the legal bases for dismissing Paer's case. The court's reference to the Code of Civil Procedure indicates it relied, as Koenig argued it should, on section 581, subdivision (f) and cases decided thereunder. Section 581, subdivision (f)(1) allows a court to dismiss a complaint "after a demurrer to the complaint is sustained without leave to amend and either party moves for dismissal." Section 581, subdivision (f)(2) allows a court to dismiss "after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." Dismissals under section 581, subdivision (f)(1) and (f)(2) are made at the court's discretion. (§ 472c, subd. (a); *Gitmed v. General Motors Corp.* (1994) 26 Cal.App.4th 824, 827; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1381.) However, "[b]ecause the trial court's application of section 581 to undisputed facts is a question of law, we apply the independent standard in reviewing on appeal the trial court's determination." (*Gogri v. Jack In The Box Inc.* (2008) 166 Cal.App.4th 255, 262.)

Neither section 581, subdivision (f)(1) nor (f)(2) authorizes dismissal where a demurrer is partially overruled and partially sustained without leave to amend. Section

581, subdivision (f)(1) authorizes dismissal "after a demurrer to the complaint is sustained without leave to amend." This section applies only where a court sustains a demurrer to all causes of action.[4] (See, e.g., *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667 [complaint dismissed after demurrer sustained without leave to amend as to all causes of action]; *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 589 [same]; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 7:151.1 (hereafter Civil Procedure Before Trial).) After all, if valid claims remain after a court sustains demurrers to some but not all causes of action, the plaintiff is entitled to go forward on the claims that have been found to state a valid cause of action.[5] (See, e.g., *Griffith v. State Farm Mut. Auto. Ins. Co.* (1991) 230 Cal.App.3d 59, 63 [after court sustained demurrers as to three causes of action, case proceeded on plaintiff's fourth and only remaining claim]; see also Civil Procedure Before Trial, *supra*, ¶ 7:144 ["If the demurrer was sustained as to only certain causes of action, and the time to amend has expired, the case moves forward on the remaining causes of action. No motion to dismiss lies; defendant must answer the remaining causes of action"].) Section 581, subdivision (f)(2) applies only "after a

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[4] If the court sustains a demurrer as to all causes of action *with* leave to amend, the plaintiff must amend within 10 days or as otherwise ordered by the court. (Cal. Rules of Court, rule 3.1320(g).) If the plaintiff does not amend by the deadline, the court may dismiss the entire action upon a defendant's motion, which may be made by ex parte application. (§ 581, subd. (f)(2); Cal. Rules of Court, rule 3.1320(h); *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 614-615 (*Leader*).) A plaintiff's decision not to amend is considered a representation that the existing complaint "states as strong a case as is possible [citation]; and the judgment of dismissal must be affirmed if the unamended complaint is objectionable on any ground raised by the demurrer. [Citations.]" (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 457 (*Otworth*).)

[5] The decision not to amend can be a logical one because amending a complaint as to which a demurrer was partially sustained makes the amended complaint subject to additional demurrers, even regarding claims as to which the previous demurrer was overruled. (See *Carlton v. Dr. Pepper Snapple Group, Inc.* (2014) 228 Cal.App.4th 1200, 1210-1211). Paer makes precisely that point on appeal to explain why she did not file another amended complaint.

demurrer to the complaint is sustained *with leave to amend*, [and] the plaintiff fails to amend it within the time allowed by the court." (Emphasis added.) By its own express terms, subdivision (f)(2) does not apply here because the trial court denied leave to amend when sustaining the demurrers to the second and fourth causes of action.

The trial court also ruled "case law" authorized dismissal of the entire action and Koenig's application for dismissal cited three cases in support of his request for dismissal. The cases cited by Koenig—which he again relies on in this court—are inapposite.

In *Sierra Investment Corporation v. County of Sacramento* (1967) 252 Cal.App.2d 339 (*Sierra Investment*), the plaintiff sought to recover taxes it allegedly paid by mistake. The trial court sustained the defendants' demurrers, *with leave to amend*, to the entirety of the plaintiff's first amended complaint. After the plaintiff opted not to amend, thereby "elect[ing] to rest on its complaint," the trial court granted the defendants' motion to dismiss. (*Id*. at p. 341.) On review, the Court of Appeal "assume[d] that [the complaint] pleaded as strong a case as it [could]" (*ibid*.) and affirmed the decision of the trial court. In *Leader*, the trial court sustained demurrers, *with leave to amend*, to the entirety of the plaintiff's third amended complaint. A month after the deadline to amend, the plaintiffs sought to file their fourth amended complaint. The trial court denied leave to file the untimely amended complaint and dismissed their case pursuant to section 581, subdivision (f)(2); the appellate court affirmed. (*Leader*, *supra*, 89 Cal.App.4th 603 at pp. 607, 613-614.) *Otworth* follows the same pattern. The trial court sustained the defendant's demurrer as to all of the plaintiff's claims, *with leave to amend*. The plaintiff did not amend by the deadline, and the court granted the defendant's motion to dismiss. The appellate court affirmed, concluding that the plaintiff's unamended complaint stated no viable causes of action. (*Otworth*, *supra*, 166 Cal.App.3d at p. 455.)

Thus, the cases Koenig relies on are all limited to situations where a plaintiff failed to timely amend a complaint after a demurrer was sustained, with leave to amend, as to all of the plaintiff's causes of action. As the *Otworth* court explained, under those circumstances "the judgment of dismissal must be affirmed if the unamended complaint

is objectionable on any ground raised by the demurrer." (*Otworth, supra*, 166 Cal.App.3d at p. 457.) That statement in *Otworth* does not mean, as Koenig has argued both here and in the trial court, that a partially sustained demurrer subjects the entire complaint to dismissal if the plaintiff fails to amend after being granted leave to do so. Indeed, the language in both *Otworth* and *Sierra Investment* about a plaintiff resting on the strength of an existing complaint implies that where a demurrer is partially sustained, the existing complaint should not be dismissed. By overruling the demurrer as to certain causes of action, the trial court is expressing its view that such claims are strong enough to withstand dismissal at this stage of the proceedings.

In sum, neither the Code of Civil Procedure nor applicable case law supports the trial court's decision to dismiss Paer's action based on the failure to file a second amended complaint that was unnecessary under the circumstances.

Furthermore, reversal would be required even if we were of the view that the trial court's dismissal of the entire action was procedurally proper (or that the record was inadequate to affirmatively establish procedural error). Assuming for the sake of argument that the trial court properly dismissed Paer's FAC, Paer would be entitled to de novo review of the complaint's sufficiency. (§ 472c, subd. (a); *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Levi v. O'Connell* (2006) 144 Cal.App.4th 700, 705). "The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We would conclude—as the trial court in fact found—that counts one (breach of contract) and three (common counts) of Paer's FAC state viable causes of action. To plead breach of contract, the plaintiff must allege facts evidencing the agreement, the plaintiff's performance thereof, the defendant's breach, and resulting damage to the plaintiff. (*Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 Cal.App.3d 887, 913.) The FAC's allegations are sufficient to support a claim for breach of an oral agreement. As to the common counts cause of action, "[t]he only essential allegations . . . are '(1) the statement of indebtedness in a certain sum, (2) the

consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' [Citation.]" (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460.) Paer's allegations are sufficient to state a common counts claim.[6]

C. Dismissal Was Not Appropriate for Failure to Comply with the Order to File a Further Amended Complaint

We have explained why section 581, subdivision (f) and the cases cited by Koenig do not justify dismissal. Dismissal also cannot be justified as an exercise of the court's authority to dismiss the complaint as a sanction for defiance of a court order. (§ 581, subd. (m) ["The provisions of this section shall not be deemed to be an exclusive enumeration of the court's power to dismiss an action. . . . "]; see also § 583.150 [provision governing dismissals for delay in prosecution does not the limit the court's authority to dismiss or otherwise sanction under its inherent authority]; *Lyons v. Wickhorst* (1986) 42 Cal.3d 911 (*Lyons*) [court possesses inherent power to dismiss].)

Dismissal by reason of the plaintiff's failure to comply with a court order is reviewed for abuse of discretion. (See *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 765 (*Slesinger*).) While we view the record in the light most favorable to the court's decision (*ibid.*), "'[t]he scope of discretion always resides in the particular law being applied. . . . Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion.' [Citation.]" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) "If the trial court is mistaken about the scope of its discretion, the mistaken position may be 'reasonable', i.e., one as to which reasonable judges could differ. . . . But if the trial court acts in accord with its mistaken view the

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[6] Although we have described our view of the first and third causes of action for purposes of discussion, our decision rests upon the conclusion that the dismissal of the action was procedurally improper. Thus, nothing we say in our opinion should be interpreted to disturb the trial court's ruling as to Paer's second, fourth, and fifth causes of action. If and when the trial court's determinations as to those causes of action are before us at the appropriate time, we will consider and decide the issues raised.

action is nonetheless error; it is wrong on the law." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298.)

The policy in favor of deciding cases on the merits circumscribes the court's exercise of its inherent authority. (See *Lyons*, 42 Cal.3d at p. 916.) The power to dismiss a case for violation of a court order may only be relied upon in "'extreme circumstances' of deliberate misconduct when no lesser sanction would be effective to cure the harm. [Citation]." (*Slesinger*, 155 Cal.App.4th at p. 760.) In determining whether dismissal—a terminating sanction—is appropriate, the court must consider (1) the nature of the violation, which must be "deliberate and egregious"; (2) the strong policy in favor of deciding cases on the merits; (3) the integrity of the court; (4) the effect of the violation on the matter's fair resolution; (5) whether other sanctions are available to remedy the harm; and (6) any other relevant circumstances. (*Id.* at p. 764).

If the trial court dismissed Paer's FAC as a sanction for not complying with its order to file a second amended complaint, the court's decision was an abuse of discretion. Paer's decision not to amend her FAC was not egregious but reasonable under the circumstances, given applicable principles of law, practice, and logic. The trial court's partial overruling of Koenig's demurrer to the FAC indicates the court found reason for the action to proceed on the merits. Paer's failure to amend the FAC did not preclude a fair resolution of the three causes of action on which the trial court overruled the demurrer. Finally, even if a sanction were warranted in this case, less severe alternatives to dismissal were available. (See, e.g., *Lyons*, 42 Cal.3d at 919 [dismissal too severe a sanction for failure to appear at arbitration given statutory remedies for nonparticipation]; cf. *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280 ["A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, *and the evidence shows that less severe sanctions would not produce compliance with the discovery rules*, the trial court is justified in imposing the ultimate sanction"] (emphasis added).)

DISPOSITION

The judgment of dismissal is reversed and the matter is remanded for further proceedings consistent with this opinion. Appellant is to recover her costs on appeal.

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BAKER, J.

We concur:

TURNER, P.J.

KUMAR, J.*

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