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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

PACIFIC BELL TELEPHONE COMPANY, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; STEVEN LEGGINS et al., Real Parties in Interest.	B287439 (Los Angeles County Super. Ct. No. BC587252)

ORIGINAL PROCEEDING; petition for writ of mandate, Ernest M. Hiroshige, Judge. Petition granted.

Paul, Plevin, Sullivan & Connaughton, Michael C. Sullivan, Aaron A. Buckley, and Jeffrey P. Michalowski for Petitioner.

No appearance for Respondent.

Clark Law Group, R. Craig Clark, and Monique R. Rodriguez for Real Parties in Interest.

Petitioner Pacific Bell Telephone Company (Pacific Bell) petitions for a writ of mandate directing the superior court to vacate its November 22, 2017 order denying its motion to strike the first amended complaint in its entirety or, in the alternative, its allegations invoking the relation-back doctrine, and to issue an order granting the motion. We issued a stay on January 17, 2018, pending this court's resolution of the petition, and an alternative writ of mandate. The respondent court declined to vacate its order, so we issued an order to show cause why a writ of mandate should not issue. Because we agree that the superior court should have stricken the relation-back doctrine allegations from the first amended complaint, we grant the petition and direct the superior court to vacate its order denying petitioner's motion and enter a new and different order granting the motion.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2015, real party in interest Steven Leggins (Leggins) filed a Private Attorneys General Act (PAGA) class action against Pacific Bell alleging that it failed to provide a day of rest in each seven-day period in violation of Labor Code sections 551 and 552. In December 2015, while Pacific Bell's demurrer was pending, the parties submitted to the superior court a stipulation to stay the action because the California Supreme Court had accepted a certified question from the Ninth Circuit concerning the Labor Code sections at issue. On January 5, 2016, the superior court stayed the case pending our high court's answer to the certified question presented in *Mendoza v. Nordstrom* (9th Cir. 2015) 778 F.3d 834.

On May 8, 2017, the California Supreme Court issued its decision in *Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074. The Court concluded that "sections 551 and 552, fairly read in light of all the available evidence, are most naturally read to ensure employees at least one day of rest during each week,

rather than one day in every seven on a rolling basis. [¶] . . . [¶] . . . [T]he Legislature intended to ensure employees, as conducive to their health and well-being, a day of rest each week, not to prevent them from ever working more than six consecutive days at any one time." (*Id.* at pp. 1086-1087.)

The superior court lifted the stay in this case on July 24, 2017. On July 28, 2017, Leggins filed a first amended complaint that revised his day of rest claim, added seven additional unrelated alleged Labor Code violations to his PAGA claim, added real party in interest Fernando Lopez (Lopez) as an additional plaintiff, and asserted a new cause of action for unfair business practices. The first amended complaint seeks to relate the new claims back to the date Leggins filed the initial complaint in July 2015 by alleging a "Class Period" "commencing on the date that is within four years prior to the filing of the initial complaint and through the present date," and a "PAGA Period" "commencing on the date that is within one year prior to the filing of the initial complaint and through the present date."

Pacific Bell filed a motion to strike the amended complaint in its entirety, contending that it was "effectively a new case, resting on different facts and theories, including claims by a new plaintiff." In the alternative, Pacific Bell moved to strike real parties' allegation that they worked seven days "in a workweek" and their allegations that the new claims relate back to the filing of the initial complaint.

On November 22, 2017, the superior court issued an order denying Pacific Bell's motion to strike the first amended complaint in its entirety. The court granted the motion to strike from the amended complaint references to "in a workweek" because the allegation contradicted the original complaint and ran afoul of the sham pleading doctrine. The court denied Pacific Bell's motion to strike the relation-back allegations, explaining: "Defendant is correct in asserting that the mere fact that a cause

of action occurred in the context of the employment relationship alone is insufficient to invoke the relation-back doctrine. However, the case at bar is clearly distinguishable. The original complaint alleged a Labor Code violation. The [first amended complaint] alleges additional Labor Code violations. While the new allegations assert new theories, they ultimately rest on the same general set of facts. Plaintiff ultimately alleges that he was underpaid. While [p]laintiff's [first amended complaint] alleges new theories as to *how* he was underpaid, the alleged injury is ultimately the same."

Pacific Bell filed a petition for writ of mandate in this court, contending the superior court erred by denying its motion to strike Leggins's and Lopez's (collectively real parties) amended complaint because it is "an entirely new class action" complaint, which real parties should have brought in a separate action. In the alternative, Pacific Bell contends the superior court erred by refusing to strike the relation-back allegations because the original complaint failed to provide adequate notice of the new claims, which are based on new and different facts and a new plaintiff. We requested opposition, and then issued an alternative writ directing the superior court to vacate that part of its November 22, 2017 order, denying Pacific Bell's motion to strike the relation-back allegations in the first amended complaint or, in the alternative, show cause before this court why a peremptory writ ordering it to do so should not issue. Because the superior court did not respond to the alternative writ, we issued an order to show cause.

In their return, real parties contend they alerted Pacific Bell to the new claims on May 3, 2017, when real parties served upon Pacific Bell an amended PAGA notice alleging the new Labor Code violations. Real parties also contend the first amended complaint merely "expands upon" the original complaint by alleging that Pacific Bell's scheduling and

timekeeping procedures result in the miscalculation and non-payment of wages owed to its employees. Thus, real parties assert, the first amended complaint "is sufficiently grounded on the same general set of facts that arise from the same or substantially similar employer-employee relationship." Real parties also claim that Pacific Bell's counsel agreed in an email to stipulate to the proposed amendments. Lastly, real parties assert that they were unable to amend the complaint any earlier because the case was stayed.

In its traverse, Pacific Bell contends real parties failed to identify any factual similarities between their new claims and the original day of rest claim, and the new claims are "based on different evidence, different data, and different witnesses." Pacific Bell also contends that, contrary to real parties' assertion, the day of rest claim sought only penalties and has nothing to do with the "calculation and payment of wages." Pacific Bell also asserts that real parties could have filed a separate action, or sought to lift the stay—either by stipulation or order of the court—to permit them to amend their complaint earlier. Pacific Bell contends real parties' amended PAGA notice failed to provide adequate notice of the new claims because it was served just two months before real parties filed their amended complaint, and years after the original complaint. Lastly, Pacific Bell disputes real parties' contention that Pacific Bell's counsel agreed to stipulate to the filing of an amended complaint.

DISCUSSION

I. Standard of Review

"Under Code of Civil Procedure section 436, the court 'may . . . at any time in its discretion, and upon terms it deems proper: [¶] . . . [¶] . . . Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.' (Code Civ. Proc., § 436,

subd. (b).) The trial court's ruling on a motion to strike a pleading under Code of Civil Procedure section 436 generally is reviewed for abuse of discretion. [Citations.] However, the proper interpretation of a statute, and its application to undisputed facts, presents a question of law subject to de novo review." (*Cal-Western Business Services, Inc. v. Corning Capital Group* (2013) 221 Cal.App.4th 304, 309–310.)

II. Motion to Strike Entire Amended Complaint

The right to amend is "interpreted very liberally as long as the plaintiff does not attempt 'to state facts which give rise to a wholly distinct and different legal obligation against the defendant.' . . . 'A change of theory as to the basis of recovery or as to the measure of damages is not a change of cause of action or the substitution of a new and different action for the original.' " (*Herrera v. Superior Court* (1984) 158 Cal.App.3d 255, 259.) Any improper claims that are added do not "render[] the entire complaint invalid" but "may be raised by a motion to strike the allegations pertaining thereto or as a defense in the answer to the complaint." (*Saberi v. Bakhtiari* (1985) 169 Cal.App.3d 509, 517.)

Here, rather than move to strike only the new claims and allegations, Pacific Bell moved to strike the entire amended complaint, which it asserted was "effectively a new case, resting on different facts and theories, including claims by a new plaintiff." This goes too far, because the amended complaint is not entirely new. Rather, it retains and restates the day of rest Labor Code violation, asserted as a PAGA claim by real party Leggins, the original plaintiff. Accordingly, the superior court did not abuse its discretion by denying the motion to strike the entire amended complaint.

III. Motion to Strike Relation-Back Allegations

"The relation-back doctrine deems a later-filed pleading to have been filed at the time of an earlier complaint which met the applicable limitations period, thus avoiding the bar. In order for the relation-back doctrine to apply, 'the amended complaint must[:] (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one.' " (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1278.)

" 'Cases applying this relation back rule have made it clear that 'it is the sameness of the facts rather than the rights or obligations arising from those facts that is determinative. [Citations.]' Thus, amendments alleging a new theory of liability against the defendant have been found to relate back to the original complaint, so long as the new cause of action is based on the same set [of] facts previously alleged. [Citations.] Likewise, an amendment seeking new damages relates back to the original complaint if such damages resulted from the same operative facts—i.e., the same misconduct and the same injury—previously complained of." (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1199–1200.)

Claims that allege the same general type of violation do not relate back if they are based on different facts. For example, in *Wiener v. Superior Court* (1976) 58 Cal.App.3d 525, the Court of Appeal held in a defamation case that "a different utterance, alleged to have a different defamatory meaning and made at a different time, for publication in a different newspaper" represented "a distinct set of facts," which did not relate back to the filing of the original complaint for libel. (*Id.* at pp. 528–529.)

In another example, *McCauley v. Howard Jarvis Taxpayers Assn.* (1998) 68 Cal.App.4th 1255 (*McCauley*), the court held that alleged reporting violations on two different ballot propositions were "*not* part of the 'same general set of facts' even though they

may be part of the same 'story.' " (*Id.* at p. 1262.) In *McCauley*, the plaintiff contended the new claim related back "because the first amended complaint relates to the 'same general set of facts' as the original—namely [the defendant's] 'ongoing duty to file campaign reports.' " (*Id.* at pp. 1261–1262.) The Court of Appeal rejected that contention and explained: "The idea that different reporting violations by a single defendant somehow are part of the same general set of facts implicitly rests on a premise which this court explicitly rejected in *Lee*[*v. Bank of America* (1994) 27 Cal.App.4th 197 (*Lee*)]: [T]he 'bad egg' theory of the relation back doctrine. That is, the defendant is assumed to be a bad egg and it is irrelevant that the act sued on wasn't mentioned in the earlier complaint because it is the 'sort of mischief' the defendant was inclined to get up to anyway." (*McCauley*, *supra*, 68 Cal.App.4th at p. 1262.)

Nor does the fact that the violations occurred in the same workplace mean the new claim will relate back. In *Lee*, the plaintiff filed a complaint in March 1989 alleging she was wrongfully demoted a year earlier for complaining about workplace safety issues. She was terminated in April 1989. More than a year later, in April 1991, Lee sought to amend her complaint to add a wrongful termination claim, which would have been time barred unless it related back to the filing of her original complaint. (*Lee*, *supra*, 27 Cal.App.4th at p. 202.) The court concluded that although the motive may have been the same, the demotion and termination claims alleged distinct wrongful conduct. (*Id.* at pp. 211, 214.) And because the termination claim was not "based on substantially the same general set of facts as the original complaint" (*id.* at p. 212), it was "clear that the amended complaint in this case does not relate back to the original. Without relation back there is no question that plaintiff's causes of action in her amended

complaint, i.e., those based on wrongful termination, are barred by the applicable statutes of limitations." (*Id.* at p. 214.)

"In determining whether the amended complaint alleges facts that are sufficiently similar to those alleged in the original complaint, the critical inquiry is whether the defendant had adequate notice of the claim based on the original pleading. 'The policy behind statutes of limitations is to put defendants on notice of the need to defend against a claim in time to prepare a fair defense on the merits.' " (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 277.) Thus, the key " 'criterion of relation back is whether the original complaint gave the defendant enough notice of the nature and scope of the plaintiff's claim that he shouldn't have been surprised by the amplification of the allegations of the original complaint in the amended one.' " (*Id.* at p. 279.)

Pacific Bell contends that the facts alleged in the original complaint were insufficient to place it on notice of the new and different facts and allegations added by the amended complaint. We agree.

The original complaint alleged a specific and narrow set of facts, succinct enough to reproduce here: "Pacific Bell's work[-]week runs from Sunday to Saturday. However, the company requires each hourly employee to work a rolling weekend schedule. Under the rolling weekend schedule, once every two to three months, an employee is scheduled to be off work on Sunday and Monday, then required to work Tuesday, Wednesday, Thursday, Friday, Saturday, Sunday, Monday, Tuesday, Wednesday, and Thursday. [¶] Like all other hourly, non-exempt employees, plaintiff is required to work a rolling weekend schedule. Approximately once every two to three months, plaintiff is scheduled to work, and actually works, seven or more consecutive days. [¶] Plaintiff is informed and

believes and thereon alleges, that working a rolling weekend schedule, including working seven or more consecutive days, is a requirement for all of Pacific Bell's hourly, non-exempt employees. Moreover, Plaintiff alleges that the nature of Pacific Bell's business does not reasonably require employees to work seven or more consecutive days."

The real parties' first amended complaint alleged seven new labor code violations for: (a) failure to pay minimum wage and overtime; (b) failure to provide legally compliant meal periods; (c) failure to provide legally compliant rest periods; (d) failure to provide accurate wage statements; (e) failure to pay all wages owed; (f) failure to reimburse for business expenses (i.e., personal cellular phone use); and (g) failure to maintain records. The new facts alleged to support these claims span 16 paragraphs, each specifically detailing Pacific Bell's various allegedly unlawful labor practices. None of these new allegations has anything to do with Pacific Bell's alleged failure, once every few months, to provide one day off per week. The lack of any connection between the many new facts and claims in the amended complaint and the narrow facts and single day of rest claim in the original complaint amply supports Pacific Bell's contention that it was " 'surprised by the amplification of the allegations of the original complaint in the amended one.' " (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP*, *supra*, 195 Cal.App.4th at p. 279.)

Real parties claim that their amended PAGA notice gave Pacific Bell adequate notice of their new claims. But real parties did not serve their amended PAGA notice until May 2017, a year and a half after the case was stayed and just 11 weeks before the stay was lifted and it filed its amended complaint. Such belated notice did not alleviate Pacific Bell's surprise at the new claims.

Real parties also contend that they could not have amended their complaint any earlier to add their new claims because the

case was stayed. But, as Pacific Bell points out, real parties could have asked the trial court to lift the stay to allow them to amend the complaint to add their new claims. Alternatively, real parties could have avoided any surprise by providing Pacific Bell with timely notice of their new claims by serving an amended PAGA notice as soon as they became aware of them. Real parties did neither.

Lastly, real parties claim, without any citation or support, that on July 25, 2017, Pacific Bell's counsel "wrote an email to counsel for [real parties] indicating that it would stipulate to the amendment." Real parties mischaracterize the July 25, 2017 email, which Pacific Bell has reproduced in its traverse. In that email, Pacific Bell's counsel stated he would "*consider* stipulating to leave to amend" and requested a copy of the proposed first amended complaint. (Italics added.) That does not reflect an agreement to stipulate to the filing of an amended complaint that Pacific Bell's counsel had not yet seen. Indeed, Pacific Bell represents that real parties did not furnish an advance copy of the proposed amended complaint, which they filed three days later.

Accordingly, because real parties' new claims do not relate back to the original complaint, the respondent court abused its discretion by denying Pacific Bell's motion to strike the relation-back allegations.

DISPOSITION

The petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing the trial court to vacate that part of its November 22, 2017 order denying petitioner's motion to strike the relation-back allegations in the first amended complaint and to issue a new and different order granting same. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.